

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Kevin O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66724; File No. SR-NASDAQ-2012-044]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify the Fees Applicable to Non-Display Usage of Certain NASDAQ Depth-of-Book Market Data

April 3, 2012.

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 March 26, 2012, The NASDAQ Stock Market LLC (“NASDAQ”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by NASDAQ. 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 filing this proposed change to modify the fees applicable to Non-Display Usage of certain NASDAQ Depth-of-Book market data. The text of the proposed rule change is available at [nasdaq.cchwallstreet.com](http://nasdaq.cchwallstreet.com), at NASDAQ’s principal office, and at the Commission’s Public Reference Room.

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

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

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

##### 1. Purpose

*Growth in Use of Non-Displayed Data.* The implementation of Regulation NMS in 2006 and 2007 triggered a dramatic change in the composition, speed, and consumption of market data products in U.S. equities trading. Regulation NMS spurred the development and proliferation of proprietary data products by liberalizing SEC Rule 603, allowing self-regulatory organizations to offer on a proprietary basis data that previously was confined to national market system plans, and permit investors to use this proprietary data in circumstances where consolidated data previously was required. Regulation NMS also drove market participants to increase trading speed and, by necessity, the speed of market data feeds by requiring in Rule 611 that all market participants compete to access a limited set of protected quotations. As a result, some market participants and exchanges have used Depth-of-Book data to identify liquidity in fragmented markets.

Technological advancements and their use by increasingly sophisticated market participants have intensified the changes brought about by Regulation NMS. For example, the prevalence and importance of co-location has grown rapidly as market participants seek to access protected quotes faster than their competitors. Also, markets and market participants continually seek expanded bandwidth options to communicate an ever-increasing number of trading messages without significant latencies and improvement of determinism. Connectivity offerings have multiplied as new networks and technologies come on line.

As technology, automation, speed, and other aspects of trading have evolved, so too has market data consumption. No longer is trading and investing dominated by individuals responding to market data displayed on trading screens by manually entering quotes and trades into the markets. Instead, the vast majority of trading is done by firms leveraging powerful servers running sophisticated algorithms and consuming massive quantities of data without displaying that data to individual traders. While certain groups of investors, including retail investors, continue to view traditional market data displays, their orders are generally processed, delivered, and executed by firm servers using non-displayed data. Non-Display

Usage is used not only for automated order generation and program trading, but also to provide reference prices for algorithmic trading and order routing; and for various back office processes, including surveillance, order verification, and risk management functions.

*NASDAQ Market Data Pricing.* NASDAQ’s pricing model for market data products must keep pace with changes in data consumption patterns in order to allocate fees and charges fairly among Subscribers. NASDAQ’s pricing has evolved over time in response to previous changes in market data consumption, and it now includes numerous factors for setting fees. Generally, NASDAQ allocates market data fees among Subscribers based on the data elements consumed, including top-of-book,<sup>3</sup> Depth-of-Book,<sup>4</sup> and other, more sophisticated data products.<sup>5</sup> NASDAQ also distinguishes between different sets of securities, NASDAQ-listed securities versus securities listed on other markets for which NASDAQ’s data plays a different, often more limited, role. Moreover, NASDAQ has long followed industry practice by distinguishing between real-time and delayed data, allocating higher fees to real-time usage and lower or no fees to delayed data usage. Also, since 1999 NASDAQ has distinguished between Professional and Non-Professional Subscribers, offering lower fees to Non-Professional Subscribers in order to encourage use by average investors and also recognizing that Professional Subscribers make heavier use of the same data feeds.<sup>6</sup> These four distinctions have existed in tandem for many years.

Since the mid-2000s, in response to changes driven by Regulation NMS, NASDAQ has added new considerations to its pricing. Thus, in 2005, NASDAQ amended its Distributor fee schedule to distinguish between distributions [sic] that is Internal (redistribution within an entity that receives NASDAQ market data) versus External (redistribution outside that entity) to the Distributor.<sup>7</sup> Also, in 2005 NASDAQ began differentiating between Direct Access and Indirect Access, charging more for firms that access data directly from NASDAQ based on the enhanced speed and simplicity for Subscribers and the

<sup>3</sup> Compare NASDAQ Rule 7011 (top-of-book consolidated data) and NASDAQ Rule 7047 (top-of-book NASDAQ-only data).

<sup>4</sup> See NASDAQ Rule 7023.

<sup>5</sup> See NASDAQ Rules 7044 (Market Pathfinders), 7048 (Custom Data Feeds), and 7057 (NASDAQ MatchView).

<sup>6</sup> See NASDAQ Rule 7023(a)(3)(A).

<sup>7</sup> See NASDAQ Rule 7023(a)(4).

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

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

increased burden on NASDAQ of administering individual Distributor relationships.<sup>8</sup> Later, in 2007, NASDAQ began offering enterprise licenses that allocate fees by volume of usage, differentiating among heavy consumers and lighter consumers by capping fees.<sup>9</sup>

In March 2010, NASDAQ introduced an enterprise license for Non-Display Usage of market data.<sup>10</sup> Currently, NASDAQ offers two options for measuring Non-Display Usage of Depth-of-Book equities data. First, a firm can count and report each server or other Subscriber or device that uses data, whether displayed or non-displayed, and pay the Professional fee for each Subscriber. Second, NASDAQ offers an optional \$30,000 per month Non-Display TotalView and OpenView fee cap for Internal Distribution.<sup>11</sup> For firms reporting over 400 Subscribers, the optional fee cap offers a cost savings per Subscriber, as well as relief from the administrative costs of identifying, tracking, and reporting each covered Subscriber. NASDAQ is proposing to remove this enterprise license for Non-Display Usage, as described in detail below.

*Current Proposal.* NASDAQ is amending NASDAQ Rule 7023 to create a new Subscriber fee and tiered pricing structure for Direct Access to Depth-of-Book data that Professional Subscribers use in a Non-Display manner. This further refinement to NASDAQ's fees for Non-Display Usage of Depth-of-Book data leverages existing distinctions between Professional and Non-Professional Subscribers and between Direct and Indirect Access to data. Specifically, the proposed fee schedule for Direct Access is as follows:

Subscribers	Monthly fee
1–10 .....	\$ 300 per
11–29 .....	3,300.00
30–49 .....	9,000.00
50–99 .....	15,000.00
100–249 .....	30,000.00
250+ .....	75,000.00

The fee for Professional Subscribers for Non-Display Usage that is accessed directly from NASDAQ shall apply to any Subscriber that accesses any data elements included in the TotalView entitlement, including the TotalView,

OpenView, or Level 2 data elements. Professional Subscribers that access Depth-of-Book data indirectly and then use it in a Non-Display fashion will pay the same Subscriber fees as Professional Subscribers that use comparable Display data.

NASDAQ has determined to apply the proposed Non-Display Usage fee to a finite group of Subscribers that consume high quantities of market data but that have, due to NASDAQ's current pricing structure, paid disproportionately low fees. The new fee will apply to (1) Professional Subscribers; (2) that are Internal Distributors; (3) via Direct Access; and (4) via Non-Display Usage. The historical rationales supporting these four existing distinctions apply with equal force to the current proposal.

*Empirical Data and Analysis.*

NASDAQ considered numerous factors in determining the proper level of non-display fees to assess. Based on NASDAQ's knowledge and experience with firm trading behavior and data usage reporting, NASDAQ hypothesized that these trading characteristics correlate highly with intense Non-Display Usage, and that firms not exhibiting those characteristics correlate highly with higher Display Usage. To test this hypothesis, NASDAQ analyzed one month's data regarding order intensity, liquidity removal, and time at the inside among firms that are co-located and those that are not and among firms that connect to NASDAQ via a high number of ports versus a lower number of ports.<sup>12</sup> NASDAQ then compared overall market data costs for firms with high usage of non-displayed data versus firms with high usage of displayed market data.

NASDAQ found that the group of firms with high order intensity is comprised disproportionately of firms with Non-Display Usage. NASDAQ analyzed maximum order entry rates for 370 firms for the month of January 2012. As shown on Slide 1, of 370 firms, only 38 firms had maximum order entry rates exceeding 5,000 orders per second. NASDAQ believes that 23 of those 38 firms utilize exclusively non-displayed data, thereby paying less for market data than the 15 other firms with high order intensity rates that utilize displayed data. Further analysis revealed that firms with high order intensity often paid lower market data fees than firms with lower, often substantially lower, order intensity.

NASDAQ also found that firms removing high levels of liquidity and also utilizing high numbers of OUCH connectivity ports are disproportionately likely to engage in exclusively Non-Display Usage. As shown on Slide 2, NASDAQ determined that of the 272 firms that remove an average of over 100,000 shares of liquidity per day, the top 18 liquidity takers all rely exclusively on Non-Display data.<sup>13</sup> Again, further analysis revealed that firms removing high levels of liquidity, using high numbers of connectivity ports, and relying on non-displayed data paid disproportionately lower market data fees than firms removing comparable or greater liquidity and using comparable numbers of ports but using displayed market data.

Additionally, NASDAQ found that firms quoting most often at the inside and also removing high levels of liquidity are disproportionately likely to use exclusively Non-Display data. As shown on Slide 3, NASDAQ observed 351 firms for the month of January 2012, measuring time at the inside and liquidity taking. High rates of quoting at the inside require continual quote updates and generates substantial message traffic. Likewise, high rates of liquidity taking require high levels of order submission, also generating high message traffic. Again, of the 351 firms covered, 27 firms that rely exclusively on non-displayed market data were over-represented among firms with high levels of both studied behaviors. Additionally, those 27 firms were under-billed relative to firms experiencing comparable or lower-intensity behavior and that consumed displayed market data.

NASDAQ found that firms that are co-located within NASDAQ's Carteret facility and that rely exclusively on Non-Display Usage account for a disproportionate percentage of overall message traffic. Based on data for January 2012, 23 co-located, non-display firms account for 70 percent of NASDAQ's overall message traffic whereas 359 other firms that are not co-located and/or that rely on displayed data account for 26 percent of NASDAQ's overall message traffic. As shown on Slide 4, Subscribers of non-displayed data, both co-located and not, account for 74 percent of NASDAQ's overall message traffic. These firms not only consume high quantities of market data, they also create significant

<sup>8</sup> See NASDAQ Rule 7023(a)(5)

<sup>9</sup> See NASDAQ Rule 7023(c).

<sup>10</sup> See NASDAQ Rule 7023(a)(1)(D). See also Securities Exchange Act Release No. 34-61700 (Mar. 12, 2010), 75 F.R. 13172 (Mar. 18, 2010). See also NASDAQ Options Rules, Chapter XV, Section 4(a).

<sup>11</sup> The TotalView and OpenView fee cap does not currently include Distributor fees. See NASDAQ Rule 7023(c)(4).

<sup>12</sup> January 2012 represents the most recent full-month of data available. As such, it best represents current trading and data usage patterns and the best prediction of the actual application of the proposed fees.

<sup>13</sup> NASDAQ's findings are set forth in Exhibit 3B, pages 111 through 114 of this proposed rule change. This excludes one exchange that removes over 100,000 average shares of liquidity daily.

quantities of market data that then must be processed, disseminated, and consumed by numerous industry participants.

Finally, NASDAQ studied the market data fees paid by non-display firms isolated by the data in Slides 1 through 4, comparing them with the market fees paid by otherwise comparable firms that rely on Display Usage. Based on this analysis, NASDAQ concluded that firms engaged in quoting and trading behavior based on Display Usage of market data paid on average eight times more in total market data fees compared with firms that engaged in comparable or higher-intensity behavior based on Non-Display Usage. NASDAQ designed the current [sic] to rectify this disparity by applying [sic] only to firms that use exclusively non-displayed data and by using Subscriber tiers that correlate to the trading behaviors observed.

If, after further observation, NASDAQ determines that the proposed fees are either over-inclusive or under-inclusive in reaching the desired equalization, NASDAQ will modify the fees accordingly via a future proposed rule change.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>14</sup> in general, and with Section 6(b)(4) of the Act,<sup>15</sup> in particular, in that it provides an equitable allocation of reasonable fees among Subscribers and recipients of NASDAQ data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers 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.

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>16</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 broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well. Level 2, TotalView and OpenView are precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS.

On July 21, 2010, President Barack Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Exchange Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, No. 09–1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, 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*, at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323). The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

For the reasons stated above, NASDAQ believes that the proposed fees are fair and equitable, and not unreasonably discriminatory. As described above, the proposed fees are based on pricing conventions and distinctions that exist in NASDAQ's current fee schedule, and the fee schedules of other exchanges. These distinctions (top-of-book versus Depth-of-Book, Professional versus Non-Professional Usage, Direct versus Indirect Access, Internal versus External Distribution) are each based on principles of fairness and equity that have helped for many years to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with equal or greater force to the current proposal. Thus, although the proposal results in a fee increase of \$224 per Subscriber (from \$76 to \$300) or, at the top tier, \$45,000 per enterprise (from \$30,000 to \$75,000), these increases are based on careful analysis of empirical data and the application of time-tested pricing principles already accepted by the Commission for many years.

As described in greater detail below, if NASDAQ has calculated improperly and the market deems the proposed fees to be unfair, inequitable, or unreasonably discriminatory, firms can diminish or discontinue the use of their data because the proposed fee is entirely optional to all parties. Firms are not required to purchase Depth-of-Book data or to utilize any specific pricing alternative if they do choose to purchase

<sup>14</sup> 15 U.S.C. 78f.

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

<sup>16</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

Depth-of-Book data. NASDAQ is not required to make Depth-of-Book data available or to offer specific pricing alternatives for potential purchases. NASDAQ can discontinue offering a pricing alternative (as it has in the past) and firms can discontinue their use at any time and for any reason (as they often do), including due to their assessment of the reasonableness of fees charged. NASDAQ continues to create new pricing policies aimed at increasing fairness and equitable allocation of fees among Subscribers, and NASDAQ believes this is another useful step in that direction.

#### *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. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the *NetCoalition* court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. NASDAQ believes that a record may readily be established to demonstrate the competitive nature of the market in question.

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. 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 the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without trade executions, exchange data products cannot exist. Data products are valuable to many end Subscribers only insofar as they provide information that end Subscribers 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, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer 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 broker-dealer 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 broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable.

Thus, 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* at 24. However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer 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. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening [sic] the need for the more expensive data.

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 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.

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. For example, some platform may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. 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. This would be akin to strictly regulating the price that an automobile manufacturer can charge for car sound systems despite the existence of a highly competitive market for cars and the availability of after-market alternatives to the manufacturer-supplied system.

The market for market data products is 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.

Broker-dealers currently have numerous alternative venues for their order flow, including ten self-regulatory organization (“SRO”) markets, as well as internalizing broker-dealers (“BDs”) and various forms of alternative trading systems (“ATSs”), including dark pools and electronic communication networks (“ECNs”). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. 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 ATSs 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 Amex, NYSEArca, and BATS.

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 broker-dealers’ production of proprietary data products. The potential sources of proprietary products are virtually limitless.

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 an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end Subscribers. 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 Subscribers 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 broker-dealers, such as 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. NASDAQ 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.

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 broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson Reuters.

The court in *NetCoalition* concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission’s *NetCoalition* order because, in the court’s view, the Commission had not adequately demonstrated that the Depth-of-Book data at issue in the case is used to attract order flow. NASDAQ believes, however, that evidence not before the court clearly demonstrates that availability of data attracts order flow. For example, as of July 2010, 92 of the top 100 broker-dealers by shares executed on NASDAQ consumed NASDAQ Level 2 and 80 of the top 100 broker-dealers consumed TotalView. During that month, the NASDAQ Level 2 Subscribers were responsible for 94.44% of the orders entered into

NASDAQ and TotalView Subscribers were responsible for 92.98%.

Competition among platforms has driven NASDAQ continually to improve its platform data offerings and to cater to customers’ data needs. For example, NASDAQ has developed and maintained multiple delivery mechanisms (IP, multi-cast, and compression) that enable customers to receive data in the form and manner they prefer and at the lowest cost to them. NASDAQ offers front end applications such as its “Bookviewer” to help customers utilize data. NASDAQ has created new products like TotalView Aggregate to complement TotalView ITCH and/Level 2, because offering data in multiple formatting allows NASDAQ to better fit customer needs. NASDAQ offers data via multiple extranet providers, thereby helping to reduce network and total cost for its data products. NASDAQ has developed an online administrative system to provide customers transparency into their data feed requests and streamline data usage reporting. NASDAQ has also expanded its Enterprise License options that reduce the administrative burden and costs to firms that purchase market data.

Despite these enhancements and a dramatic increase in message traffic, NASDAQ’s fees for market data have remained flat. In fact, as a percent of total Subscriber costs, NASDAQ data fees have fallen relative to other data usage costs—including bandwidth, programming, and infrastructure—that have risen. The same holds true for execution services; despite numerous enhancements to NASDAQ’s trading platform, absolute and relative trading costs have declined. Platform competition has intensified as new entrants have emerged, constraining prices for both executions and for data.

The vigor of competition for Depth-of-Book information is significant and the Exchange believes that this proposal clearly evidences such competition. NASDAQ is offering a new pricing model in order to keep pace with changes in the industry and evolving customer needs. It is entirely optional and is geared towards attracting new customers, as well as retaining existing customers.

The Exchange has witnessed competitors creating new products and innovative pricing in this space over the course of the past year. NASDAQ continues to see firms challenge its pricing on the basis of the Exchange’s explicit fees being higher than the zero-priced fees from other competitors such as BATS. In all cases, firms make decisions on how much and what types

of data to consume on the basis of the total cost of interacting with NASDAQ or other exchanges. Of course, the explicit data fees are but one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for this Depth-of-Book information is highly competitive and continually evolves as products develop and change.

Additional evidence cited by NYSE Arca in SR-NYSE Arca-2010-097<sup>17</sup> which was not before the *NetCoalition* court also demonstrates that availability of Depth-of-Book data attracts order flow and that competition for order flow can constrain the price of market data:

1. Terrence Hendershott & Charles M. Jones, *Island Goes Dark: Transparency, Fragmentation, and Regulation*, 18 *Review of Financial Studies* 743 (2005);
2. Charts and Tables referenced in Exhibit 3B to that filing;
3. PHB Hagler Bailly, Inc., "Issues Surrounding Cost-Based Regulation of Market Data Prices;" and
4. PHB Hagler Bailly, Inc., "The Economic Perspective on Regulation of Market Data."

*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

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>18</sup> NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

<sup>17</sup> See Securities Exchange Act Release No. 63291 (Nov. 9, 2010).

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

### IV. Solicitation of Comments

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

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2012-044 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-2012-044. 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 a.m. and 3 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-2012-044 and should be submitted on or before April 30, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. 2012-8462 Filed 4-6-12; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66719; File No. SR-NASDAQ-2012-046]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Customer Routing Fees

April 3, 2012

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 March 28, 2012, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. 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 proposes to modify Chapter XV, Options Pricing, Section 2, of the Options Rules portion of the NASDAQ Rulebook governing pricing for NASDAQ members using The NASDAQ Options Market ("NOM"), NASDAQ's facility for executing and routing standardized equity and index options. The proposed rule change amends certain Customer Routing Fees to recoup costs incurred by the Exchange in routing to away markets. While changes proposed herein are effective upon filing, the Exchange has designated these changes to be operative on April 2, 2012.

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.

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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

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