

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-82723; File No. SR-NASDAQ-2018-010]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 7039 To Modify Pricing for the Nasdaq Last Sale Data Product and To Make Other Related Changes to Nasdaq Rules

February 15, 2018.

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 February 2, 2018, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Rule 7039 (Nasdaq Last Sale and Nasdaq Last Sale Plus Data Feeds)<sup>3</sup> to modify pricing for the Nasdaq Last Sale (“NLS”) data product and to make other related changes to Nasdaq rules.

The text of the proposed rule change is available on the Exchange’s website at <http://nasdaq.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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

##### 1. Purpose

The purpose of this proposal is to amend Rule 7039 to modify the pricing framework for the NLS data product. NLS is a market data product that comprises two proprietary data feeds containing real-time last sale Information<sup>4</sup> for trades executed on the Exchange or reported to the FINRA/Nasdaq Trade Reporting Facility (the “FINRA/Nasdaq TRF”).<sup>5</sup> As such, NLS is a “non-core” product that provides a subset of the “core” last-sale data provided by securities information processors (“SIPs”) under the CTA Plan and the Nasdaq UTP Plan.

As reflected in the filing that originally established it,<sup>6</sup> NLS was designed to enable market-data “distributors to provide free access to the data [contained in NLS] to millions of individual investors via the internet and television” and was expected to “increase[] the availability of NASDAQ proprietary market data to individual investors.”<sup>7</sup> Similarly, in its filing to offer NLS on a permanent, rather than

<sup>4</sup> In this filing, Nasdaq is proposing, among other things, to adopt new defined terms for use in Rule 7039. At a later date, Nasdaq intends to submit an additional proposed rule change to move these definitions into a new rule and propose to expand its applicability to all market data fee rules in the 7000 rule series. The term “Information” is a broad generic term designed to encompass the full range of information or data transmitted by Nasdaq, and as such will be defined to mean “any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) Eligible securities or other financial instruments, markets, products, vehicles, indicators or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.” The term is not currently defined in Exchange rules. Of note, “Derived Data” is excluded from the definition of “Information,” and as discussed below, is defined separately. The term “Information” will be proposed for wider use in a future rule filing concerning definitions.

<sup>5</sup> See Nasdaq Rule 7039(a)–(c). See also Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006) (notice of filing and immediate effectiveness regarding permanent approval of NLS).

<sup>6</sup> See SR-NASDAQ-2006-060 (Amendment No. 2, June 10, 2008) (available at [http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060\\_Amendment\\_2.pdf](http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060_Amendment_2.pdf)). See also Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approving SR-NASDAQ-2006-060, as amended by Amendment Nos. 1 and 2, to implement NLS on a pilot basis).

<sup>7</sup> SR-NASDAQ-2006-060 (Amendment No. 2, June 10, 2008), at 3.

a pilot, basis, Nasdaq stated that “[d]uring the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS Distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by millions of investors on websites operated by Google, Interactive Data, and Dow Jones, among others.”<sup>8</sup>

The fee schedule for NLS currently offers Distributors<sup>9</sup> several different pricing models from which they may select in determining the fees applicable to distribution of the product. Specifically, in keeping with the goal of NLS to promote the accessibility of data to individual investors, Distributors may choose to distribute NLS in an uncontrolled fashion via television or the internet and pay under pricing models that require them to estimate the number of households or website visitors to which the data is provided. Alternatively, a Distributor may opt for a pricing model that requires it to count its customers based on a username and password system, or a model under which data is supplied on an ad hoc basis in response to customer queries. In both these cases, the pricing model assumes distribution through a website, such as might be provided by a broker-dealer (“BD”) to customers who log in using a username and password, or who enter ticker symbols into a website to

<sup>8</sup> Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006).

<sup>9</sup> Nasdaq is proposing to define a “Distributor” as “an entity, as identified in the Nasdaq Global Data Agreement (or any successor agreement), that executes such an Agreement and has access to Exchange Information, together with its affiliates having such access.” The Nasdaq Global Data Agreement is the standardized agreement that entities receiving Information sign to establish a contractual relationship with the Exchange. The word is currently defined in several Exchange rules—e.g., Rules 7047 (Nasdaq Basic), 7019 (Market Data Distributor Fees), and 7023 (Nasdaq Depth-of-Book Data)—in terms that focus on (i) receipt of Exchange information, and (ii) the provision of the information to internal or external Subscribers. Thus, “Distributor” broadly covers any person that receives Information and makes it available. Since such persons are required to sign the Nasdaq Global Data Agreement to establish a contractual right to distribute Information, the new definition is intended to simplify the definition through reference to the objective fact of a contract, but is not intended to narrow or broaden the scope of the term from the manner in which it is defined in existing rules. In fact, Rule 7019 similarly refers to the requirement that distributors execute an agreement with the Exchange. The new definition further specifies that the term Distributor includes both an entity and its affiliates that have access to Information; the inclusion of affiliates and the reference to having access are both consistent with the manner in which current definitions are interpreted. The new definition also eliminates superfluous references to internal and external receipt and distribution.

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

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

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

query for last sale information.<sup>10</sup> Thus, consistent with the stated purpose of NLS, the fee structure under which NLS is made available reflects a model of widespread distribution to individual investors. The fees for these different pricing models are tiered based on volume, with the fees for marginal usage reduced as a Distributor achieves certain volume levels. Moreover, the maximum monthly fee for NLS, regardless of usage levels, under these distribution models is \$41,500.

Many data products sold by Nasdaq and others distinguish between data usage based on whether the data is being used by “Professionals” or “Non-Professionals,” with different prices charged for each category.<sup>11</sup> A “Non-Professional” is defined as “a natural person who is not: (A) Registered or qualified in any capacity with the Securities and Exchange Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (B) engaged as an ‘investment adviser’ as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (C) 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.”<sup>12</sup> A “Professional” is defined as “any natural person, proprietorship, corporation, partnership, or other entity whatever other than a Non-

Professional.”<sup>13</sup> The fee structure for NLS does not, however, currently contain provisions that make these distinctions or that clearly contemplate internal distribution of the product to BD employees or other Professionals. Rather, the fee structures and distribution models of NLS reflect Nasdaq’s assumption that it is a product of interest to a broad range of individual investors, to be distributed in a relatively uncontrolled manner through websites (either password protected or not) or television.<sup>14</sup>

Nasdaq is proposing changes to the current NLS fee structure in order to more clearly reflect the use cases under which NLS is currently made available and to establish pricing for additional use cases. First, Nasdaq is proposing to categorize existing fee distribution models as “distribution models for the general investing public,” while also specifically identifying the terms and conditions applicable to each of these pricing categories. Thus, distribution via a username/password entitlement system is being defined as a “Per User” distribution model. In order to adopt the Per User model, (i) a Distributor must distribute NLS solely to “Users” for “Display Usage,”<sup>15</sup> (ii) all such Users

<sup>13</sup> Nasdaq is proposing to adopt these definitions as part of Rule 7039, but will propose to move them, along with similar definitions appearing elsewhere in the Exchange’s rules, into a single definition rule in a subsequent filing. “Professional Subscriber” is currently defined at Rules 7023(a)(3)(B) and 7047(d)(3)(B). The definitions proposed to be included in Rule 7039 are substantively the same as definitions found in existing Exchange rules, with the clarification that either a natural person or an entity may be a Professional.

<sup>14</sup> Regardless of the fee structure selected, NLS Distributors pay a monthly Distributor fee, as provided in Rule 7039(c) (which is being redesignated, with certain modifications described below, as Rule 7039(d)). In addition, as provided in Rule 7035, all market data distributors pay a monthly administrative fee (formerly a higher annual fee) of \$50 (for delayed distribution) or \$100 (for real-time, or real-time and delayed distribution). The administrative fee is paid on a per distributor basis; thus, if a distributor is already paying the fee with respect to a product other than NLS, it would not incur an additional administrative fee if it also began to distribute NLS.

<sup>15</sup> “User” is being defined as “a natural person who has access to Exchange Information.” The term is not currently defined in Exchange rules so the definition will provide a convenient nomenclature for distinguishing natural persons with access to Exchange Information from other instances of access to Exchange Information. The term is currently used, but not defined, in Rule 7039, and the new definition is intended to be consistent with the manner in which the term is currently construed. The Exchange proposes introducing a definition here to prevent any potential confusion between a User (a natural person who has access to Exchange Information), a Recipient (a natural person or entity that has access to Exchange Information), and a Subscriber (a method of accessing Exchange Information). “Display Usage” is being defined as “any method of accessing

must be either Non-Professionals or Professionals whom the Distributor has no reason to believe are using NLS in their professional capacity, and (iii) the Distributor must restrict and track access to NLS using a username/password logon or comparable method of regulating access approved by Nasdaq.

Thus, a Per User model might be used by a BD to distribute NLS to customers through on-line brokerage accounts accessible after the customer logs in using a username and password. While many of the Recipients of data under such a model would be Non-Professionals, the model does not require a Distributor to limit distribution to Non-Professionals. Rather, the model would allow a Distributor to provide the data to Professionals, as long as it has no reason to believe that they are using the data in a professional capacity. Thus, for example, if a BD makes the data available to all of its on-line customers, it would not have any basis to believe that customers who happen to be Professionals would be using the data in a Professional capacity. By contrast, the Per User model would not allow a BD to distribute the data to a set of Users consisting solely of its own employees, since it would be reasonable to expect that the employees would use the data in connection with their employment. Similarly, if a Distributor provided the data through terminals generally made available to Professionals in their place of employment, or marketed the product to persons known to be Professionals, it would be unreasonable for the Distributor to believe that the data was not being used for professional purposes.

The proposed standard for the applicability of the Per User model is similar to, but less strict than, the standard adopted by Nasdaq with respect to the availability of an enterprise license for a BD to distribute Nasdaq Basic<sup>16</sup> to an unlimited number of Professionals and Non-Professionals who are natural persons and with whom it has a brokerage relationship.<sup>17</sup> With

Exchange Information that involves the display of such data on a screen or other mechanism designed for access or use by a natural person or persons.” This definition is consistent with current definitions of the term in, for example, Rule 7023 (Nasdaq Depth-of-Book Data). The effect of these definitions together is to limit the availability of this pricing model to visual access by natural persons, thus excluding access by automated processes such as trading algorithms.

<sup>16</sup> Nasdaq Basic (Rule 7047) comprises best bid and offer and last sale information from the Exchange and the FINRA/Nasdaq TRF.

<sup>17</sup> Securities Exchange Act Release No. 65526 (October 11, 2011), 76 FR 64137 (October 17, 2011)

<sup>10</sup> Nasdaq notes that BDs may provide NLS data to customers in circumstances where they are not required to provide a consolidated display by SEC Rule 603(c), 17 CFR 242.603(c). See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 35569 [sic] –37570 (June 29, 2005) (File No. S7–10–04) (“Reg NMS Adopting Release”).

<sup>11</sup> See, e.g., Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileged Basis (“Nasdaq UTP Plan”) (available at [http://www.utpplan.com/utp\\_plan](http://www.utpplan.com/utp_plan)); Rule 7023 (Nasdaq Depth-of-Book Data); Rule 7026 (Distribution Models); Rule 7047 (Nasdaq Basic).

<sup>12</sup> The term “Non-Professional” is currently defined at Rules 7023(a)(3)(A) and 7047(d)(3)(A). The definition of Non-Professional is well-established in the securities industry, and has been part of the Nasdaq rule book since at least 2002. See Securities Exchange Act Release No. 46521 (September 20, 2002), 67 FR 61179 at n.10 (September 27, 2002) (SR-NASD-2002-33). The Exchange proposes to maintain that definition, correcting the citation to the definition of investment adviser as defined in the Investment Advisers Act of 1940.

respect to that license, a Professional may not use an instance of Nasdaq Basic obtained under the license in its professional capacity; moreover, the BD Distributor would be expected to enforce this limitation or jeopardize its eligibility for the reduced fee provided by the license. The proposed standard with respect to Nasdaq Last Sale is less stringent, because occasional incidental use by a Professional in connection with its professional activities would not affect the Distributor's eligibility for the Per User fee, as long as the Distributor, in establishing the connection to the Professional User, did not have reason to believe that professional usage would occur. Nasdaq believes that a different standard that might occasionally result in incidental Professional use is reasonable because NLS contains less information and does not provide pre-trade transparency, and is therefore likely to be of less consistent use to a Professional than Nasdaq Basic or other products that provide greater pre-trade information. Accordingly, Nasdaq proposes to adopt a more permissive standard that will impose lower administrative burdens on Distributors.

A Distributor selecting the Per User model is charged based on the number of Users with the potential to access NLS during a month. However, if the Distributor is able to track the number of Users that actually accessed NLS during a month, the Distributor will be charged based on the number of such Users. This latter provision represents a change from current methodology, and will provide an incentive for Distributors to implement systems to track actual data usage, since this will allow them to reduce the fees that they pay. Apart from this change, the fees applicable to this model are not being modified.

The "Per Query" model will be available if: (i) A Distributor distributes NLS solely to Users for Display Usage, and (ii) the Distributor tracks queries using a method approved by Nasdaq. Thus, in contrast to a Per User model, which makes all data available in a streaming or montage format, the Per Query model supplies only as much data as the User requests on an ad hoc basis. Because a Per Query model is unlikely to be of significant use to Professionals acting in a professional capacity, the model does not place limitations on the persons to whom it is offered (as long as they are natural

persons viewing the data through Display Usage). The model also does not require the Distributor to limit access through any sort of entitlement system; thus, Per Query data may be made available through a publicly accessible website. However, if a Distributor selecting the Per Query model does restrict access using a username/password system, the Distributor may opt to be charged under the Per User model in a particular month if the applicable Per Query charges that month would exceed the applicable Per User charges.<sup>18</sup> The applicable fees for the per query model are not being changed.

Unrestricted distribution via the internet is being defined as a "Per Device" model, and is available to a Distributor that: (i) Distributes NLS for Display Usage in a manner that does not restrict access, and (ii) tracks the number of unique Devices that access NLS during each month using a method approved by Nasdaq.<sup>19</sup> Thus, this distribution method does not require the Distributor to distinguish among Non-Professionals or Professionals receiving the data, since the data is made freely available to internet users. The method would generally be used by internet news sites, but might also be used by a BD if it wished to place freely available content on its website. A Distributor using this method would be charged for each unique Device accessing the data, regardless of whether it is controlled by a Recipient.<sup>20</sup> Thus, for example, if a

<sup>18</sup> This is not a change from the current rule, although Nasdaq is clarifying the language that describes this fee cap.

<sup>19</sup> As reflected in the definition adopted as part of this filing, the term "Device" has the same meaning as "Subscriber." A Subscriber, in turn, is not a person, but rather means "a device, computer terminal, automated service, or unique user identification and password combination that is not shared and prohibits simultaneous access, and which is capable of receiving Exchange Information; 'Interrogation Device', 'Device' or 'Access' have the same meaning as 'Subscriber'. For any device, computer terminal, automated service, or unique user identification and password combination that is shared or allows simultaneous access, Subscriber shall mean the number of such simultaneous accesses." The definitions of these terms are consistent with the definitions found in IM-7023-1 (U.S. Non-Display Information) and are intended to be construed in a similar manner, while specifying, in accordance with current interpretations, that the term covers the capability to receive Information as well as the actual receipt. Thus, a single Recipient with two devices constitutes two Subscribers.

<sup>20</sup> The term "Recipient" is defined to mean "any natural person, proprietorship, corporation, partnership, or other entity whatever that has access to Exchange Information." This term, which is not currently defined in Exchange Rules, simply provides a convenient method for referring to both natural and legal persons that have access to Exchange Information, and is defined to prevent any confusion among the terms Subscriber (a

single person owned a laptop, a smartphone, and a tablet and used all three to access the data, the Distributor would be charged for each Device. This is the case because the Distributor would track usage based on the unique characteristics of the Device (including, but not limited to, IP address, host name, and cookie data), but would likely not have data that would allow it to associate the Devices with a single user.<sup>21</sup>

Rule 7039 currently uses the term "Unique Visitors" and requires the number of Unique Visitors to be validated by a Nasdaq-approved vendor, but does not define the term. The new term "Device" is intended to clarify that the fee is to be assessed based on the number of Devices that visit a site to get data, rather than the number of persons. While this term does not reflect a change from the manner in which the term "unique visitor" has been interpreted by the Exchange, Nasdaq believes that the change will make the application of the rule clearer. Moreover, the fees associated with particular levels of distribution under this model are not changing. Nasdaq is also replacing the requirement that the number be validated by a third party with a requirement that the Distributor's tracking method be approved by Nasdaq. This change reflects the fact that methods of tracking web traffic have become more developed since the time Rule 7039 was first adopted and therefore do not require third-party validation.

As is currently the case, the maximum fee that any Distributor would be required to pay for NLS under any combination of these distribution models would be \$41,500. However, Nasdaq is proposing to eliminate the existing fee schedule for television distribution and is instead proposing that a Distributor that wishes to distribute Nasdaq Last Sale via television must pay the maximum fee and may then distribute Nasdaq Last Sale either solely via television or in

technical term describing how Information is received from the Exchange), Recipient (a natural person or entity that receives Information), and, as discussed above, a User (a natural person who receives Information).

<sup>21</sup> The definition of Subscriber is also proposed to be used with respect to proposed Rule 7039(c), as described below, and Nasdaq expects to propose to apply the definition to other market data rules in the future. However, the portion of the definition pertaining to "simultaneous accesses" is not relevant to the "Per Device" model. Accordingly, Nasdaq is proposing to add language to Rule 7039(b)(3) to provide that a Distributor under the Per Device model will be charged based on the number of unique Devices without regard to the number of simultaneous accesses by a single Device.

(SR-NASDAQ-2011-130) (adopting enterprise license for non-professional brokerage customers); Securities Exchange Act Release No. 72620 (July 16, 2014), 79 FR 42572 (July 22, 2014) (expanding enterprise license to include professional brokerage customers).

combination with unlimited use of the Per User, Per Query, and/or Per Device model. This is the case because all current television Distributors also distribute NLS via the internet and pay the maximum fee. Thus, no current Distributors would be affected by the elimination of the specific television schedule. Moreover, in light of the confluence of television and internet content, and the extent to which television broadcasters use both media to reach their audience, Nasdaq believes that providing a license for multiple means of distribution in tandem is reasonable. Nasdaq further believes that the maximum fee of \$41,500 per month is a reasonable charge to assess a Distributor that wishes to engage in unlimited distribution of the product through either television or television in combination with web-based media.

The current fee and distribution framework for NLS is not structured in a manner that contemplates distribution to a base of Professionals, such as might occur if a BD made the data available to its registered representatives through an employer-provided workstation or software application. For this reason, Nasdaq believes that it is appropriate to adopt a fee schedule that covers use cases that are not contemplated by the current fee schedule. Under the proposal, if a Distributor is not able to use any of the distribution models for the general investing public but still wishes to distribute NLS, it will be required to pay fees applicable to a model for "specialized usage." In general, the model would require a Distributor to track either the number of Subscribers to which the data is made available or the number of queries made for the data, and would impose either a per Subscriber fee or a per query fee. The per Subscriber fee will be \$13 for NLS for Nasdaq and \$13 for NLS for NYSE/NYSE American or any Derived Data therefrom.<sup>22</sup> The per query fee will be \$0.0025 for NLS for Nasdaq and \$0.0015 for NLS for NYSE/NYSE American. The per query fees assessed to Subscribers will be capped on a monthly basis at the level of the monthly per Subscriber fee. Thus, a particular Subscriber would not be charged more than \$13 for NLS for Nasdaq or \$13 for NLS for NYSE/NYSE

American, regardless of the number of queries submitted by it.

For Distributors under the specialized usage model that provides "Display Usage," a net reporting option would be available to reduce the overall number of Subscribers for which a fee will be assessed.<sup>23</sup> Under the proposed netting rules:

- A Subscriber that receives access to NLS through multiple products controlled by an internal Distributor will be considered one Subscriber. Thus, if a BD acts as a Distributor of NLS in multiple forms through terminals provided to its employees, each terminal would be considered one Subscriber.

- A Subscriber that receives access to NLS through multiple products controlled by one external Distributor will be considered one Subscriber. Thus, if a BD arranges for its employees to receive access to multiple NLS products through a terminal provided by a single vendor on a terminal, each terminal would be considered one Subscriber.

- A Subscriber that receives access to NLS 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 BD provides employees with access through its own product(s) and through products from a single vendor on a terminal, each employee's terminal would still be considered one Subscriber.

- A Subscriber that receives access to NLS 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 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 netting may not occur beyond one external Distributor.

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.

As an alternative to per Subscriber or per query fees, a Distributor that is a BD may purchase an enterprise license for internal Subscribers to receive NLS or Derived Data therefrom. The fee is \$365,000 per month; provided, however, that if the BD obtains the license with respect to usage of NLS 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 Subscribers, plus \$2 for each additional internal Subscriber over 16,000; and provided further that the BD must obtain a separate enterprise license for each external Distributor that controls display of the product if it wishes such external Distributor to be covered by an enterprise license rather than per-Subscriber fees. The enterprise license is in addition to the applicable Distributor Fee provided in Rule 7039(d).

#### Nasdaq Last Sale Plus

NLS Plus combines information available through NLS with information available through similar products—BX Last Sale and PSX Last Sale—offered by Nasdaq's affiliates, Nasdaq BX, Inc. ("BX") and Nasdaq PHLX LLC ("Phlx"). Moreover, as provided in that Rule, NLS Plus may be received either by itself or in combination with Nasdaq Basic. The fees charged for NLS Plus, however, incorporate the underlying fees for the data elements combined through NLS Plus, together with an additional data consolidation fee of \$350 per month. Thus, a Distributor receiving NLS Plus by itself would need to select a fee model under Rule 7039 to determine the applicable charges for the NLS component of NLS Plus (including the Distributor fee provided for by Rule 7039(d)). In addition, because a Distributor of NLS Plus is distributing each of the underlying components of NLS Plus, it also pays the administrative fees charged for distribution of Nasdaq, BX, and PSX data feeds.<sup>24</sup> On the other hand, a Distributor receiving NLS Plus with Nasdaq Basic would select a fee model for Nasdaq Basic and pay the fees (including Distributor fees) applicable to that product, as well as the NLS Plus data consolidation fee and applicable

<sup>22</sup> "Derived Data" is defined to mean "any information generated in whole or in part from Exchange Information such that the information generated cannot be reverse engineered to recreate Exchange Information, or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information." This definition is substantially the same as the definition currently found in Rule 7047 (Nasdaq Basic) and the differences in wording are intended merely to make the language clearer.

<sup>23</sup> Netting does not apply to uses other than Display Usage, but the same rules are used for Nasdaq Basic under Rule 7047.

<sup>24</sup> See Nasdaq Rule 7035; BX Rule 7035; and Phlx Pricing Schedule § VIII. All administrative fees are charged on a per Distributor, rather than a per product, basis. Currently, there are no user or Distributor fees applicable to BX Last Sale or PSX Last Sale. However, if BX or Phlx were to adopt user fees for these products in the future, the fees would also apply to persons receiving these products by means of NLS Plus.

administrative fees for each NLS Plus component.

Since the fees for NLS Plus sold without Nasdaq Basic incorporate the fees for NLS, the various pricing model options available under Rule 7039, including the new pricing for specialized usage, would also be incorporated into the pricing for NLS Plus. No change to rule language is needed to effectuate this, since the rule language already incorporates NLS fees. However, Nasdaq is proposing to amend the rule to reflect the recent change in the assessment period for administrative fees under Nasdaq Rule 7035, BX Rule 7035, and the Phlx Pricing Schedule from annual to monthly, and to use the new defined term “Information.”

In addition, Nasdaq is amending the description of NLS contained in Rule 7039(a). As described therein, NLS contains real-time last sale information for trades executed on Nasdaq or reported to the FINRA/Nasdaq TRF for stocks listed on Nasdaq and on other markets. At the time of adoption of Rule 7039, however, it appears that the drafters of the rule used a reference to “NYSE/Amex” (subsequently amended to refer to “NYSE/NYSE MKT”) as a short-hand term for stocks listed on venues other than Nasdaq, since NYSE and the American Stock Exchange were, together with Nasdaq, the primary listing venues at that time.<sup>25</sup> In fact, NLS has always disseminated transaction reports associated with all three national market system plan tapes—Tape A for NYSE, Tape C for Nasdaq, and Tape B for other exchanges, including the American Stock Exchange (later known as NYSE MKT and now as NYSE American). Thus, as new listing venues such as the BATS Exchange emerged, information for transactions in securities listed on those exchanges were also included. Accordingly, Nasdaq is clarifying the language of Rule 7039(a) to include “transaction reports for NYSE-listed stocks and stocks listed on NYSE American and other Tape B listing venues.” Nasdaq is also making additional housekeeping changes to the rule to: (i) Use the defined term “Information”, (ii) streamline the wording of the rule’s preamble, and (iii) clarify the language of certain pricing tiers to eliminate instances where the same number of Devices or queries is listed as part of two different pricing tiers.

Nasdaq is amending Rule 7039(d) (formerly 7039(c)) to provide that the

monthly Distributor fee for a Distributor under subsection (c) (Distribution Models for Specialized Usage) providing external, or external and internal, distribution, is \$2,000; in all other cases, the Distributor fee for NLS remains \$1,500. However, Nasdaq is also adding language to provide that a Distributor of two or more products containing NLS data (*i.e.*, NLS, NLS Plus, or Nasdaq Basic) is required to pay a Distributor fee with respect to only one of the products. Thus, a Distributor of both NLS and Nasdaq Basic would not be required to pay both the fee provided for in Rule 7039 and the comparable fee provided for in Rule 7047; however, it would be required to pay the highest fee (\$2,000 or \$1,500) otherwise applicable to any of the products that it distributes. Finally, Nasdaq is making amendments to Rule 7047(b)(5) to: (i) Clarify that BDs distributing Nasdaq Basic thereunder also have the right to distribute Nasdaq Last Sale data to an unlimited number of Professionals and Non-Professionals who are natural persons and with whom the broker-dealer has a brokerage relationship (similar to the scope of Nasdaq Basic distribution), (ii) provide that such BDs would not be required to pay fees under Rule 7039(b) or (c); and (iii) provide that the elimination of duplicative Distributor fees provided under Rule 7039(d) would also apply under Rule 7047(b)(5), such that the BD would pay a Distributor fee with respect to only one product thereunder.

## 2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>26</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>27</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

Rule 7039 and the fees established thereunder reflect Nasdaq’s expectation, in creating NLS, that it would be used by market data Distributors (including retail BDs) to provide widespread distribution of last-sale information to individual investors by means of websites and television. The fee structure also reflects Nasdaq’s assumption that BDs and others seeking proprietary data for Professional usage would purchase data with more content than NLS or NLS Plus, such as Nasdaq Basic or Nasdaq TotalView.

Nevertheless, because there is a small

amount of demand for use of NLS for purely Professional purposes, Nasdaq believes that it is appropriate to specifically define the circumstances to which the current fee schedule applies, while also establishing a set of fees for other circumstances [*sic*], including usage other than Display Usage and purely Professional use.

The statutory basis for Nasdaq’s current fees for NLS has already been described in prior filings,<sup>28</sup> and Nasdaq is not modifying these long-established fees except to the extent discussed below. The overall structure for distribution of NLS contemplates widespread distribution of NLS data through the internet and television, and, in general, does not require a Distributor to categorize data Recipients as either Professionals or Non-Professionals. Thus, neither the fees nor the distribution parameters for “Per Query” usage are changing, although Nasdaq is adding language to specify that Per Query usage contemplates distribution to Users through Display Usage. The change is reasonable because it conforms to the natural parameters under which Per Query usage would occur: the submission of a request followed by a display of the response. In making the change, however, Nasdaq makes it clear that Per Query usage would not allow submission of automated requests to obtain data for use by an algorithm or other automated process. The change also makes it clear, however, that a Distributor using the Per Query model would not be required to ascertain the identity of Recipients; thus, the change makes it clear that Per Query usage may be made available to both Professionals and Non-Professionals. For this reason, the change is not unfairly discriminatory. Moreover, the change is equitable because it will not limit access by any current Distributors.

With respect to Per User fees (formerly username/password fees), Nasdaq is likewise proposing only minimal changes to state that the existing fee schedule requires distribution to “Users” (*i.e.*, natural persons) for Display Usage, and all such Users must be either Non-Professionals or Professionals whom the Distributor has no reason to believe are using NLS in their professional capacity. This change is reasonable because the level of fees associated with this use case is not changing. Moreover, the change is not inequitable because it will not limit access by any current Distributors paying under this model. Likewise, the change is not unfairly discriminatory

<sup>25</sup> Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060). See also Securities Exchange Act Release No. 68568 (January 3, 2013), 78 FR 1910 (January 9, 2013) (SR-NASDAQ-2012-145).

<sup>26</sup> 15 U.S.C. 78f.

<sup>27</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>28</sup> See *supra* nn. 6, 7, and 9 [*sic*].

because it does not require a Distributor to conduct an exhaustive and costly inquiry into the nature of each of its Users, nor does it prevent distribution to Professionals, as long as the Distributor has no reason to believe that Professionals are using NLS in their professional capacity. Similarly, the change to allow a Distributor to track actual usage by a particular User and pay only if actual usage occurs during the month (as opposed to paying for all potential Users) is reasonable because it creates an incentive for a Distributor to reduce its fees by more carefully monitoring usage by its customers. The change is equitable and not unfairly discriminatory because Nasdaq believes that all Distributors are capable of implementing the change with minimal difficulty.

The changes to the “Per Device” (formerly, unique visitor) use case are reasonable because they allow a Distributor to track usage based on readily available means of tracking unique Devices. Because Distributors have already adopted this methodology, the change in rule language makes it clear that this is the appropriate method to measure usage and that verification by a third-party is not required. Accordingly, the change imposes no additional administrative burdens on Distributors. The change is equitable and not unfairly discriminatory because all Distributors adopting this use case may readily use this methodology.

The elimination of a specific model for television distribution, in favor of a model under which a Distributor engaging in television distribution pays the maximum NLS fee of \$41,500 per month and may then distribute Nasdaq Last Sale via television to an unlimited number of households, either solely via television or in combination with unlimited use of the Per User, Per Query, and/or Per Device model, is reasonable because the fee allows the Distributor to engage in unlimited distribution of NLS via either television alone or television in combination with another distribution model for the general investing public, without the need to monitor usage or track the identity of Recipients. Moreover, the change is equitable and not unfairly discriminatory because all current television Distributors already pay this maximum fee. Accordingly, the change will have no impact on any current Distributors. Moreover, it is unlikely that under the current fee schedule for television, distribution by a particular broadcaster would occur at a level that would allow it to pay less than the maximum fee. As a result, the per viewer cost of television distribution is,

and will continue to be, extremely small when expressed as the ratio between \$41,500 and the total number of viewers.

The introduction of a fee schedule for other use cases, including targeted use by Professionals and usage other than Display Usage, is not unfairly discriminatory because it is consistent with the fee schedules for numerous other data products that impose higher fees on Professionals in recognition of their more intensive usage of data feeds and the greater value they derive from such usage. Moreover, the proposed new fee schedule is consistent with an equitable allocation of fees because it recognizes the administrative costs and burdens associated with tracking Professional usage of the product, especially given the low demand for exclusively Professional use. Finally, the change is reasonable because the fees are geared to the actual level of usage, with options for either per Subscriber or per query fees. Moreover, Nasdaq is offering alternative pricing features that may allow some Distributors to reduce their level of fees, including a method for netting Subscribers and an enterprise license to allow unlimited usage by broker-dealer employees.

Nasdaq further believes that the proposed change regarding a higher monthly Distributor fee for external distribution for use by Professionals and usage other than Display Usage (*i.e.*, specialized usage) is not unreasonable because a higher fee for external, as opposed to solely internal, distribution is based on the observation that external distributors typically charge fees for external distribution, while internal distributors usually do not. As such, external distributors have the opportunity to derive greater value from such distribution, and that greater value is reflected in higher external distribution fees. The differential between external and internal distribution fees is well-recognized in the financial services industry as a reasonable distinction, and has been repeatedly accepted by the Commission as an equitable allocation of reasonable dues, fees and other charges.<sup>29</sup> The Act does not prohibit all distinctions among customers, but rather discrimination that is unfair. As the Commission has recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work

powerfully to constrain unreasonable or unfair behavior.”<sup>30</sup> Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”<sup>31</sup> The further change with regard to monthly Distributor fees is reasonable, equitable, and not unfairly discriminatory because it addresses a use case in which a Distributor is receiving two or three products that contain last sale information—NLS, NLS Plus and/or Nasdaq Basic—and will specify that the Distributor is not required to pay a duplicative Distributor fee in that circumstance.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and 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. 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>32</sup>

The Commission was speaking to the question of whether BDs should be subject to a regulatory requirement to purchase data, such as depth-of-book data, that is *in excess of* the data provided through the consolidated tape feeds, and the Commission concluded that the choice should be left to them. Accordingly, Regulation NMS removed unnecessary regulatory restrictions on the ability of exchanges to sell their own data, thereby advancing the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to BDs at all, it follows that

<sup>29</sup> See, e.g., Rules 7019 (Market Data Distributor Fees); 7022(c) (Short Interest Report); 7023(c) (Enterprise License Fees for Depth-of-Book Data); 7047(c) (Nasdaq Basic); and 7052(c) (Distributor Fees for Nasdaq Daily Short Volume and Monthly Short Sale Transaction Files).

<sup>30</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

<sup>31</sup> *Id.*

<sup>32</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

the price at which such data is sold should be set by the market as well.

Products such as NLS provide additional choices to BDs and other data consumers, in that they provide *less than* the quantum of data provided through the consolidated tape feeds but at a lower price. Thus, they provide BDs and others with an option to use a lesser amount of data in circumstances where SEC Rule 603(c) does not require a BD to provide a consolidated display.<sup>33</sup> They are all, however, voluntary products for which market participants can readily substitute the consolidated data feeds. Accordingly, Nasdaq is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. Moreover, the fees for these products, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow.

Nasdaq believes that the defined terms being adopted in this proposed rule change are consistent with the provisions of Section 6 of the Act,<sup>34</sup> in general, and with Section 6(b)(5) of the Act,<sup>35</sup> in particular, in that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. Specifically, the defined terms are designed to promote the clear and consistent interpretation of Rule 7039, and are intended to serve as the model for a future filing that will propose consistent terminology throughout the rules governing the Exchange's Information products. As detailed above, the terms "Derived Data", "Display Usage", "Distributor", "Non-Professional", "Professional", "Subscriber", and "Device" are either substantively identical to, or are intended to be construed in a manner consistent with, terms already existing in the Exchange's rules, but are intended to be drafted in a clearer manner. Similarly, the terms "Information", "Recipient", and "User" are new, but are designed to provide convenient means of referring to concepts relevant to the application of Rule 7039 that are currently covered by undefined terms.

Finally, the Exchange notes that the housekeeping changes made by this filing—clarifying the scope of Tape B data included in NLS and the monthly nature of the administrative fee—are non-substantive in nature and do not

affect the equitable allocation of reasonable dues, fees, and other charges. Rather, these changes will make affected rules clearer, more succinct, and easier to use. Accordingly, the Exchange believes that these changes are consistent with Section 6(b)(5) of the Act,<sup>36</sup> in that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms. In particular, the proposal with respect to existing fees and associated standards for Per User, Per Query, and Per Device fee models, as well as the fee for television distribution, are designed to promote wide distribution to investors by placing less emphasis on the distinction between Professionals and Non-Professionals than is the case with respect to other data products. Nasdaq believes that this approach will promote competition by reducing administrative burdens on Distributors. The addition of a fee schedule for targeted Professional or Non-Display usage will not place a burden on competition because Nasdaq believes that the demand for such usage is limited, but adopting the applicable fee schedule will ensure that the product is available in cases where such demand exists.<sup>37</sup> The other proposed changes are designed to keep industry professionals and investors better informed about NLS and NLS Plus and associated fees through changes that will provide greater clarity and precision in affected rules. These changes include the adoption of definitions that are not intended to vary

<sup>36</sup> 15 U.S.C. 78f(b)(5).

<sup>37</sup> Similarly, the external Distributor fee applicable to usage under that model will not impose any burden on competition because external Distributors typically charge fees for external distribution, and thereby usually derive greater value from such distribution than internal Distributors, which typically do not charge fees, and that greater value supports higher external distribution fees. The distinction between external and internal distribution fees is common in the financial services industry, and has been applied to other products without any anti-competitive effect.

substantively from definitions and concepts already reflected in Exchange rules, but are intended to promote the reader's understanding of the principles used to construe these rules.

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

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

<sup>33</sup> 17 CFR 242.603(c).

<sup>34</sup> 15 U.S.C. 78f.

<sup>35</sup> 15 U.S.C. 78f(b)(5).

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>38</sup>

In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Nasdaq would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating,<sup>39</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 disfavor a particular exchange if the expected

revenues from executing trades on the exchange do not 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 more orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS that may be distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and 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 Schwab and Fidelity, offer their retail 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 NLS 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 internet or television. Conversely, the value of such products to Distributors and investors decreases if order flow

falls, because the products contain less content.

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 increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.<sup>40</sup>

<sup>40</sup> Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing BDs and various forms of alternative trading systems ("ATs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATs, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE American, NYSE Arca, IEX, and BATS/Direct Edge.

<sup>38</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>39</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.

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

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

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>41</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>42</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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**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-2018-010 on the subject line.

<sup>41</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>42</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

*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-NASDAQ-2018-010. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2018-010 and should be submitted on or before March 15, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>43</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2018-03568 Filed 2-21-18; 8:45 am]

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<sup>43</sup> 17 CFR 200.30-3(a)(12).

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-82720; File No. SR-PEARL-2018-03]

**Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Expand the Short Term Option Series Program**

February 15, 2018.

Pursuant to the provisions of 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 February 12, 2018, MIAX PEARL, LLC ("MIAX PEARL" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change ("proposed rule change") a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing a proposal to expand the Short Term Option Series Program to allow Monday expirations for options listed pursuant to the Short Term Option Series Program, including options on the SPDR S&P 500 ETF Trust ("SPY").

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/pearl> at MIAX PEARL'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, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

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