

public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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 publicly available. All submissions should refer to File Number SR-NYSEMKT-2014-02 and should be submitted on or before February 14, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

Kevin M. O'Neill, Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71351; File No. SR-NASDAQ-2014-006]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change With Respect to NASDAQ Last Sale

January 17, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 9, 2014, 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

NASDAQ is filing with the Commission a proposal to make permanent the fee pilot program pursuant to which NASDAQ distributes

the NASDAQ Last Sale ("NLS") market data products. NLS allows data distributors to have access to real-time market data for a capped fee, enabling those distributors to provide free access to the data to millions of individual investors via the internet and television. Specifically, NASDAQ offers the "NASDAQ Last Sale for NASDAQ" and "NASDAQ Last Sale for NYSE/NYSE MKT" data feeds containing last sale activity in U.S. equities within the NASDAQ Market Center and reported to the FINRA/NASDAQ Trade Reporting Facility ("FINRA/NASDAQ TRF"), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority ("FINRA").

The pilot program has supported the aspiration of Regulation NMS to increase the availability of proprietary data by allowing market forces to determine the amount of proprietary market data information that is made available to the public and at what price. During 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 Web sites operated by Google, Interactive Data, and Dow Jones, among others. Accordingly, NASDAQ believes that it would be consistent with the protection of investors and the public interest to make the product permanent.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.

\* \* \* \* \*

7039. NASDAQ Last Sale Data Feeds

(a) [For a three month pilot period commencing on January 1, 2014.] NASDAQ [shall] offers two proprietary data feeds containing real-time last sale information for trades executed on NASDAQ or reported to the NASDAQ/FINRA Trade Reporting Facility.

(1)-(2) No change.

(b)-(c) No change.

\* \* \* \* \*

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

Prior to the launch of NLS, public investors that wished to view market data to monitor their portfolios generally had two choices: (1) pay for real-time market data or (2) use free data that is 15 to 20 minutes delayed. To increase consumer choice, NASDAQ proposed a pilot to offer access to real-time market data to data distributors for a capped fee, enabling those distributors to disseminate the data at no cost to millions of internet users and television viewers. NASDAQ now proposes to make the existing pilot program permanent, subject to the same fee structure as is applicable today.

NLS consists of two separate "Level 1" products containing last sale activity within the NASDAQ market and reported to the jointly-operated FINRA/NASDAQ TRF. First, the "NASDAQ Last Sale for NASDAQ" data product is a real-time data feed that provides real-time last sale information including execution price, volume, and time for executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. Second, the "NASDAQ Last Sale for NYSE/NYSE MKT" data product provides real-time last sale information including execution price, volume, and time for NYSE- and NYSE MKT-securities executions occurring within the NASDAQ system as well as those reported to the FINRA/NASDAQ TRF. By contrast, the securities information processors ("SIPs") that provide "core" data consolidate last sale information from all exchanges and trade reporting facilities ("TRFs"). Thus, NLS replicates a subset of the information provided by the SIPs.

In the pilot programs, NASDAQ established two different pricing models, one for clients that are able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage, and a second for those that are not. NASDAQ is proposing to maintain this existing structure for the permanent version of the product. Specifically, firms with the ability to maintain username/password entitlement systems that enable them to track the number of entitled users and/or quote counting

<sup>22</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.

mechanisms that enable them to track the number of queries made for data are eligible for a specified fee schedule for the NASDAQ Last Sale for NASDAQ Product and a separate fee schedule for the NASDAQ Last Sale for NYSE/NYSE MKT Product.

The per query model is well suited to subscribers that expect to access the product on a sporadic basis, while the per user model allows unlimited usage by a fixed number of users, at a per month cost that is less than the daily price of a major newspaper. Moreover,

a per query user may cap its fees such that they would not exceed the applicable per user charge. The per user and per query fee schedules are as follows:

**NASDAQ LAST SALE FOR NASDAQ**

Users/month	Price	Query	Price
1–9,999 .....	\$0.60/usermonth .....	0–10M .....	\$0.003/query.
10,000–49,999 .....	\$0.48/usermonth .....	10M–20M .....	\$0.0024/query.
50,000–99,999 .....	\$0.36/usermonth .....	20M–30M .....	\$0.0018/query.
100,000+ .....	\$0.30/usermonth .....	30M+ .....	\$0.0015/query.

**NASDAQ LAST SALE FOR NYSE/NYSE MKT**

Users/month	Price	Query	Price
1–9,999 .....	\$0.30/usermonth .....	0–10M .....	\$0.0015/query.
10,000–49,999 .....	\$0.24/usermonth .....	10M–20M .....	\$0.0012/query.
50,000–99,999 .....	\$0.18/usermonth .....	20M–30M .....	\$0.0009/query.
100,000+ .....	\$0.15/usermonth .....	30M+ .....	\$0.000725/query.

The higher price for NLS for NASDAQ, in comparison to NLS for NYSE/NYSE MKT, reflects NASDAQ’s higher market share in the securities that it lists and the correspondingly larger amount of data made available through the product.

Firms that are unable to maintain username/password entitlement systems and/or quote counting mechanisms also have multiple options for purchasing the NASDAQ Last Sale data. These firms choose between a “Unique Visitor” model for internet delivery or a “Household” model for television delivery. Unique Visitor and Household populations must be reported monthly and must be validated by a third-party vendor or ratings agency approved by NASDAQ at NASDAQ’s sole discretion. In addition, to reflect the growing confluence between these media outlets, NASDAQ offers a reduction in television fees when a single distributor distributes NASDAQ Last Sale Data Products via multiple distribution mechanisms. The applicable fee schedules are as follows:

**NASDAQ LAST SALE FOR NASDAQ**

Unique visitors	Monthly fee
1–100,000 .....	\$0.036/Unique Visitor.
100,000–1M .....	\$0.03/Unique Visitor.
1M+ .....	\$0.024/Unique Visitor.

**NASDAQ LAST SALE FOR NYSE/ NYSE MKT**

Unique visitors	Monthly fee
1–100,000 .....	\$0.018/Unique Visitor.
100,000–1M .....	\$0.015/Unique Visitor.
1M+ .....	\$0.012/Unique Visitor.

**NASDAQ LAST SALE FOR NASDAQ**

Household	Monthly fee
1–1M .....	\$0.00096/Household.
1M–5M .....	\$0.00084/Household.
5M–10M .....	\$0.00072/Household.
10M+ .....	\$0.0006/Household.

**NASDAQ LAST SALE FOR NYSE/ NYSE MKT**

Household	Monthly fee
1–1M .....	\$0.00048/Household.
1M–5M .....	\$0.00042/Household.
5M–10M .....	\$0.00036/Household.
10M+ .....	\$0.0003/Household.

NASDAQ also established a cap on the monthly fee, currently set at \$50,000 per month, for all NASDAQ Last Sale products. The fee cap enables NASDAQ to compete effectively against other exchanges that also offer last sale data for purchase or at no charge. The fee cap also ensures that users with large numbers of users or viewers can make the product available at a per user/viewer fee measured in fractions of a penny per month, with the per user/viewer fee dropping as the number of persons receiving the data increases.

As with the distribution of other NASDAQ proprietary products, all distributors of the NASDAQ Last Sale for NASDAQ and/or NASDAQ Last Sale for NYSE/NYSE MKT products pay a single \$1,500/month NASDAQ Last Sale Distributor Fee in addition to any applicable usage fees. The \$1,500 monthly fee applies to all distributors and does not vary based on whether the distributor distributes the data internally or externally or distributes the data via both the internet and television.

**2. Statutory Basis**

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>3</sup> in general, and with Section 6(b)(5) of the Act,<sup>4</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. The purpose of the proposed rule change is to make permanent the pilot program under which NASDAQ has distributed the NASDAQ Last Sale product. NLS provides a subset of the data that is also

<sup>3</sup> 15 U.S.C. 78f.

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

provided by the core data feeds available through the SIPs. NASDAQ believes that the proposal facilitates transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by making permanent the availability of an additional means by which investors may access information about securities transactions, thereby providing investors with additional options for accessing information that may help to inform their trading decisions. Given that Section 11A the Act<sup>5</sup> requires the dissemination of last sale reports in core data, NASDAQ believes that the inclusion of the same data in NLS is also consistent with the Act.

NASDAQ further notes that the pilot program fees for NLS have been previously established, and that the Commission has either specifically determined them to be consistent with the Act or has permitted them to become effective on an immediately effective basis.<sup>6</sup> Thus, this proposed rule change does not establish or change a fee of the Exchange, except to the extent that it provides that the fees charged during the current pilot period for NLS may continue to be charged on a going-forward basis. However, in this

<sup>5</sup> 15 U.S.C. 78k-1.

<sup>6</sup> See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approving initial fees for NLS on a pilot basis). See also Securities Exchange Act Release Nos. 58894 (October 31, 2008), 73 FR 66953 (November 12, 2008) (SR-NASDAQ-2008-086); 59186 (December 30, 2008), 74 FR 743 (January 7, 2009) (SR-NASDAQ-2008-103); 59652 (March 30, 2009), 74 FR 15533 (April 6, 2009) (SR-NASDAQ-2009-027); 60201 (June 30, 2009), 74 FR 32670 (July 8, 2009) (SR-NASDAQ-2009-062); 60990 (November 12, 2009), 74 FR 60002 (November 19, 2009) (SR-NASDAQ-2009-095); 61872 (April 8, 2010), 75 FR 19444 (April 14, 2010) (SR-NASDAQ-2010-045); 62428 (July 1, 2010), 75 FR 39315 (July 8, 2010) (SR-NASDAQ-2010-081); 63092 (October 13, 2010), 75 FR 64375 (October 19, 2010) (SR-NASDAQ-2010-129); 63641 (January 4, 2011), 76 FR 2164 (January 12, 2011) (SR-NASDAQ-2010-172); 64188 (April 5, 2011), 76 FR 20054 (April 11, 2011) (SR-NASDAQ-2011-044); 64856 (July 12, 2011), 76 FR 41845 (July 15, 2011) (SR-NASDAQ-2011-092); 65488 (October 5, 2011), 76 FR 63334 (October 12, 2011) (SR-NASDAQ-2011-132); 66095 (January 4, 2012), 77 FR 1537 (January 10, 2012) (SR-NASDAQ-2011-174); 66706 (March 30, 2012), 77 FR 20666 (April 5, 2012) (SR-NASDAQ-2012-045); 67376 (July 9, 2012), 77 FR 41467 (July 13, 2012) (SR-NASDAQ-2012-078); 67979 (October 4, 2012), 77 FR 61810 (October 11, 2012) (SR-NASDAQ-2012-108); 68568 (January 3, 2013), 78 FR 1910 (January 9, 2013) (SR-NASDAQ-2012-145); 69245 (March 27, 2013), 78 FR 19722 (April 2, 2013) (SR-NASDAQ-2013-053); 69908 (July 2, 2013), 78 FR 41178 (July 9, 2013) (SR-NASDAQ-2013-089); 70575 (September 30, 2013), 78 FR 62820 (October 22, 2013) (SR-NASDAQ-2013-126); 71217 (December 31, 2013), 79 FR 875 (January 7, 2014) (SR-NASDAQ-2013-162).

filing, NASDAQ reiterates its bases for concluding that the fees for NLS provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>7</sup>

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

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>8</sup>

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

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) (“*NetCoalition I*”), upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its

<sup>7</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>8</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’ *NetCoalition I*, at 535 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323). The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”<sup>9</sup>

The Court in *NetCoalition I*, while upholding the Commission’s conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record in *that case* did not adequately support the Commission’s conclusions as to the competitive nature of the market for NYSE Arca’s data product at issue in that case. As explained below in NASDAQ’s Statement on Burden on Competition, however, NASDAQ believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the *NetCoalition I* case, and that the Commission is entitled to rely upon such evidence in concluding fees are the product of competition, and therefore in accordance with the relevant statutory standards.<sup>10</sup> Moreover, NASDAQ further notes that the product at issue in this filing—a NASDAQ last sale data product that replicates a subset of the information available through “core” data products whose fees have been reviewed and approved by the SEC—is quite different from the NYSE Arca depth-of-book data product at issue in *NetCoalition I*. Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing.

All of the information made available through NLS is also included in the core data feeds made available pursuant to the joint-SRO plans, the fees for which have been approved by the Commission. As the Commission determined in approving the initial pilot program for NASDAQ Basic, another product that offers a subset of information also made available through the joint-SRO plans,

<sup>9</sup> *NetCoalition I*, at 535.

<sup>10</sup> It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. See also *NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) (“*NetCoalition II*”) (finding no jurisdiction to review Commission’s non-suspension of immediately effective fee changes).

“the availability of alternatives to NASDAQ Basic significantly affect the terms on which NASDAQ can distribute this market data. In setting the fees for its NASDAQ Basic service, NASDAQ must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange’s data.”<sup>11</sup> Analogously, it follows that the fees for NLS are reasonable, since charging unreasonably high fees would cause market participants to rely solely on core data rather than purchasing NLS.

Moreover, as further discussed below in NASDAQ’s Statement on Burden on Competition, data products such as NLS are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.

The fees for NLS also continue to reflect an equitable allocation and continue not to be unfairly discriminatory, because NLS is a voluntary product for which market participants can readily substitute core data feeds that provide additional last sale information not available through NLS. Accordingly, NASDAQ is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. Moreover, the fee schedule for NLS is designed to ensure that the fees charged are tailored to the specific usage patterns of a range of potential customers, in a manner designed to avoid charging fees that are inequitably allocated or unfairly discriminatory. Thus, customers that intend to distribute data through the internet or television can avail themselves of a pricing model under which per “unique visitor” or “household” charges drop as the number of persons receiving the data through these media increases. Likewise, subscribers distributing data through both television and the internet receive a discount for their use of both media. Similarly, for users that limit usage to a finite number of users, or that wish to avail themselves of the data on a limited per query basis, pricing

models are available to ensure that fees bear an equitable relation to the volume of usage, with per user and per query fees dropping as the volume of usage increases and with per query fees subject to a cap to ensure that users opting for this method do not exceed corresponding per user fees in a month of high usage. In all instances, charges for NASDAQ Last Sale for NYSE/NYSE MKT are lower than charges for NASDAQ Last Sale for NASDAQ to reflect the lower volume of data available through the former product and to provide users with a choice of receiving all NASDAQ Last Sale data or only a portion of it. Finally, all fees are subject to a monthly cap. Thus, the range of fee options ensures that customers are not charged a fee that is inequitably disproportionate to the use that they make of the product; rather, depending on the use that they intend to make of the product, they may select the fee model that will best minimize their costs.

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

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

The market for proprietary last sale data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/NASDAQ TRF data that is a component of NLS, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce

competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

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

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange’s transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.*, if the software can be downloaded over the internet after being purchased).<sup>12</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

<sup>11</sup> Securities Exchange Act Release No. 12425 (March 16, 2009), 74 FR 12423, 12425 (March 24, 2009) (SR-NASDAQ-2008-102).

<sup>12</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).

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>13</sup> and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

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

Similarly, in the case of products such as NLS that are 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 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.

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. Similarly, the inclusion of TRF trade reporting data in a product such as NLS may assist in attracting customers to the product, thereby assisting in covering the additional costs associated with operating and regulating a TRF.

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

attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

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

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including thirteen SRO markets, as well as internalizing BDs and various forms of alternative trading systems ("ATs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products.

The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, AT, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE MKT, NYSE Arca, BATS, and Direct Edge.

Any AT or BD can combine with any other AT, BD, or multiple ATs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate

<sup>13</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.

single or multiple BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless. Notably, the potential sources of data include the BDs that submit trade reports to TRFs and that have the ability to consolidate and distribute their data without the involvement of FINRA or an exchange-operated TRF.

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

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

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg and Thomson Reuters. In Europe, Markit aggregates and disseminates data from

over 50 brokers and multilateral trading facilities.<sup>14</sup>

In the case of TRFs, the rapid entry of several exchanges into this space in 2006–2007 following the development and Commission approval of the TRF structure demonstrates the contestability of this aspect of the market.<sup>15</sup> Given the demand for trade reporting services that is itself a by-product of the fierce competition for transaction executions—characterized notably by a proliferation of ATSS and BDs offering internalization—any supra-competitive increase in the fees associated with trade reporting or TRF data would shift trade report volumes from one of the existing TRFs to the other<sup>16</sup> and create incentives for other TRF operators to enter the space. Alternatively, because BDs reporting to TRFs are themselves free to consolidate the market data that they report, the market for over-the-counter data itself, separate and apart from the markets for execution and trade reporting services—is fully contestable.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at \$1 per month for non-professional users. Second, consolidated data is also available *at no cost* with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

The competitive nature of the market for products such as NLS is borne out by the performance of the market. In May 2008, the Internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote

data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an “enterprise cap” of \$100,000 for customers receiving only one of the NLS products, and \$150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of \$30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to \$50,000 (*i.e.*, a reduction of \$100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's product, several other major content providers, including MSN and Morningstar, use the BATS product.

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

In establishing the price for the NASDAQ Last Sale Products, NASDAQ considered the competitiveness of the market for last sale data and all of the

<sup>14</sup> <http://www.markit.com/en/products/data/boat/boat-boat-data.page>.

<sup>15</sup> The low cost exit of two TRFs from the market is also evidence of a contestable market, because new entrants are reluctant to enter a market where exit may involve substantial shut-down costs.

<sup>16</sup> It should be noted that the FINRA/NYSE TRF has, in recent weeks, received reports for over 10% of all over-the-counter volume in NMS stocks. In addition, FINRA has announced plans to update its Alternative Display Facility, which is also able to receive over-the-counter trade reports. See Securities Exchange Act Release No. 70048 (July 26, 2013), 78 FR 46652 (August 1, 2013) (SR-FINRA-2013-031).

implications of that competition. NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to NLS, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Accordingly, NASDAQ believes that the acceptance of the NLS product in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

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

Three comment letters were filed regarding NLS as originally published for comment. NASDAQ responded to these comments in a letter dated December 13, 2007. Both the comment letters and NASDAQ's response are available on the SEC Web site at <http://www.sec.gov/comments/sr-nasdaq-2006-060/nasdaq2006060.shtml>. In addition, in response to prior filings to extend the NLS pilot,<sup>17</sup> the Securities Industry and Financial Markets Association ("SIFMA") and/or NetCoalition<sup>18</sup> filed comment letters contending that the SEC should suspend and institute disapproval proceedings with respect to the filing. SIFMA and NetCoalition had also filed petitions seeking review by the United States Court of Appeals for the District of Columbia Circuit with respect to the NLS pricing pilots in effect from July 1, 2011 through September 30, 2011, from October 1, 2011 through December 31, 2011, from July 1, 2012 through September 30, 2012, and from January 1, 2013 through March 31, 2013. These appeals were stayed pending resolution of the consolidated *NetCoalition II* case. On April 30, 2013, the court issued a

decision dismissing *NetCoalition II*, concluding that it lacked jurisdiction to entertain the case. Subsequently, the court issued orders dismissing each of the pending petitions seeking review of prior extensions of the NLS pricing pilot. On May 30, 2013, SIFMA filed with the Commission an "Application for an Order Setting Aside Rule Changes of Certain Self-Regulatory Organizations Limiting Access to their Services" that purports to challenge prior filings under Section 19(d) and (f) of the Act.<sup>19</sup> Pursuant to a Commission procedural order, interested parties have recently completed submission of briefs to the Commission regarding appropriate procedures and other threshold questions.

It appears to NASDAQ that SIFMA's contentions in this new proceeding are similar to the contentions in its numerous prior comment letters, which have repeatedly argued that market data fees are improper unless established through public utility-style rate-making proceedings that are nowhere contemplated by the Act. In making its arguments, SIFMA has sought to rely upon *NetCoalition I*, while repeatedly mischaracterizing the import of that case. Specifically, the court made findings about the extent of the Commission's record in support of determinations about a depth-of-book product offered by NYSE Arca. In making this limited finding, the court nevertheless squarely rejected contentions that cost-based review of market data fees was required by the Act:

The petitioners believe that the SEC's market-based approach is prohibited under the Exchange Act because the Congress intended "fair and reasonable" to be determined using a cost-based approach. The SEC counters that, because it has statutorily-granted flexibility in evaluating market data fees, its market-based approach is fully consistent with the Exchange Act. We agree with the SEC.<sup>20</sup>

While the court noted that cost data could sometimes be relevant in determining the reasonableness of fees, it acknowledged that submission of cost data may be inappropriate where there are "difficulties in calculating the direct costs . . . of market data," *id.* at 539. That is the case here, due to the fact that the fixed costs of market data production are inseparable from the fixed costs of providing a trading platform, and the marginal costs of

market data production are minimal.<sup>21</sup> Because the costs of providing execution services and market data are not unique to either of the provided services, there is no meaningful way to allocate these costs among the two "joint products"—and any attempt to do so would result in inherently arbitrary cost allocations.<sup>22</sup>

SIFMA further contended that prior filings lacked evidence supporting a conclusion that the market for NLS is competitive, asserting that arguments about competition for order flow and substitutability were rejected in *NetCoalition I*. While the court did determine that the record before it was not sufficient to allow it to endorse those theories on the facts of that case, the court did not itself make any conclusive findings about the actual presence or absence of competition or the accuracy of these theories: rather, it simply made a finding about the state of the SEC's record. Moreover, analysis about competition in the market for depth-of-book data is only tangentially relevant to the market for last sale data. As discussed above and in prior filings, perfect and partial substitutes for NLS exist in the form of real-time core market data, free delayed core market data, and the last sale products of competing venues; additional competitive entry is possible; and evidence of competition is readily apparent in the pricing behavior of the venues offering last sale products and the consumption patterns of their customers. Thus, although NASDAQ believes that the competitive nature of the market for all market data, including depth-of-book data, will ultimately be established, SIFMA's submissions have not only mischaracterized the *NetCoalition I* decision, but have also failed to address the characteristics of the product at issue and the evidence already presented.

<sup>21</sup> Because the fees charged for products must cover these fixed costs, however, pricing at marginal cost is impossible.

<sup>22</sup> The court also explicitly acknowledged that the "joint product" theory set forth by NASDAQ's economic experts in *NetCoalition I* (and also described in this filing) could explain the competitive dynamic of the market and explain why consideration of cost data would be unavailing. Indeed, the Commission relied on that theory before the DC Circuit, but the court declined to reach the question because the Commission raised it for the first time on appeal. *Id.* at 541 n.16. For the purpose of providing a complete explanation of the theory, NASDAQ is further submitting as Exhibit 3 to this filing a study that was submitted to the Commission in SR-NASDAQ-2011-010. See Statement of Janusz Ordoover and Gustavo Bamberger at 2-17 (December 29, 2010).

<sup>17</sup> Securities Exchange Act Release Nos. 70575 (September 30, 2013), 78 FR 62820 (October 22, 2013) (SR-NASDAQ-2013-126); 69245 (March 27, 2013), 78 FR 19772 (April 2, 2013) (SR-NASDAQ-2013-053); 68568 (January 3, 2013), 78 FR 1910 (January 9, 2013) (SR-NASDAQ-2012-145); 67376 (July 9, 2012), 77 FR 41467 (July 13, 2012) (SR-NASDAQ-2012-078); 65488 (October 5, 2011), 76 FR 63334 (October 12, 2011) (SR-NASDAQ-2011-132); 64856 (July 12, 2011), 76 FR 41845 (July 15, 2011) (SR-NASDAQ-2011-092); 64188 (April 5, 2011), 76 FR 20054 (April 11, 2011) (SR-NASDAQ-2011-044).

<sup>18</sup> NetCoalition recently terminated its operations.

<sup>19</sup> Admin. Proc. File No. 3-15351. See also Admin Proc. File No. 13-15350 (similar proceeding with respect to NYSE Arca data product).

<sup>20</sup> *NetCoalition I*, 615 F.3d at 534.

### 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)(ii) of the Act<sup>23</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>24</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (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-2014-006 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-NASDAQ-2014-006. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2014-006 and should be submitted on or before February 14, 2014.

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

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014-01404 Filed 1-23-14; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71346; File No. SR-BOX-2014-04]

### Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Add Rule 7290 (Price Protection for Limit Orders)

January 17, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 6, 2014, BOX Options Exchange LLC ("Exchange") 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 the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

<sup>25</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.

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

The Exchange proposes to add Rule 7290 (Price Protection for Limit Orders) to codify an existing price protection feature. The text of the proposed rule change is available from the principal office of the Exchange, on the Exchange's Web site at <http://boxexchange.com>, at the Commission's Public Reference Room, and on the Commission's Web site at <http://sec.gov>.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 Exchange is proposing to add BOX Rule 7290 (Price Protection for Limit Orders) to codify and clarify a price protection feature already available on the Exchange. Specifically, the Exchange currently has a price check feature in place that prevents incoming limit orders<sup>3</sup> and limit order modifications from automatically executing at potentially erroneous prices. The Exchange believes this feature helps maintain a fair and orderly market by mitigating the risks associated with erroneously priced limit orders that have the potential to cause price dislocation.

Proposed Rule 7290 will codify the price protection feature in the BOX Rulebook and provide clarity on its functionality. As set forth in proposed Rule 7290, the Exchange employs a filter on all incoming limit orders and limit order modifications, pursuant to which the Trading Host will cancel these orders if priced outside an acceptable price parameter set by the Exchange. Specifically, as the Exchange receives limit orders and limit order

<sup>3</sup> See BOX Rule 7110(c)(1). Limit Orders entered into the BOX Book are executed at the price stated or better.

<sup>23</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>24</sup> 17 CFR 240.19b-4(f)(6).