

apply during an opening does not impose an undue burden on competition as it would provide more specificity on how this functionality currently operates. A similar change was recently made to BX's Rules.<sup>74</sup> The Exchange notes that the same procedures used during an opening are used to reopen an option series after a trading halt, and therefore proposes to specify that Anti-Internalization will not apply during the opening (*i.e.*, the opening and halt reopening processes). During the opening, Market Makers are able to observe the primary market and then determine how they would like to quote. They are not required to quote in the opening on NOM. Therefore, Anti-Internalization is unnecessary during an opening due to the high level of control that Market Makers exercise over their quotes during this process.

#### Options 3, Section 23

The Exchange's proposal to amend Options 3, Section 23, Data Feeds and Trade Information, to update its descriptions of the ITTO data feed does not impose an undue burden on competition because the updated descriptions will bring greater transparency to the Exchange's rules and more closely align with current System operation.

The Exchange's proposal will make clear that order imbalance information is provided for both an opening and re-opening process. Today, a re-opening process initiates after a trading halt has occurred intra-day. Also, the Exchange's proposal notes the specific information that would be provided, namely the size of matched contracts and size of the imbalance. The Exchange believes that this additional context to imbalance messages will provide market participants with more complete information about what is contained in the data feed. The Exchange notes that this information is available today and the rule text is being amended to make clear what information is currently provided.

#### 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>75</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>76</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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-2020-083 on the subject line.

##### Paper Comments

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

All submissions should refer to File Number SR-NASDAQ-2020-083. 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

<sup>75</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>76</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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.

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-2020-083, and should be submitted on or before January 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>77</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2020-27483 Filed 12-14-20; 8:45 am]

BILLING CODE 8011-01-P

### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90616; File No. SR-NASDAQ-2020-086]

#### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower the Enterprise License Fee for Broker-Dealers Distributing Nasdaq Basic to Internal Professional Subscribers as Set Forth in the Equity 7 Pricing Schedule, Section 147, and the Enterprise License Fee for Broker-Dealers Distributing Nasdaq Last Sale to Professional Subscribers at Equity 7, Section 139

December 9, 2020.

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 December 7, 2020, 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,

<sup>77</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.

<sup>74</sup> See Securities Exchange Act Release No. 89759 (September 3, 2020). 85 FR 55877 (September 10, 2020) (SR-BX-2020-023).

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 lower the enterprise license fee for broker-dealers distributing Nasdaq Basic to internal Professional Subscribers as set forth in the Equity 7 Pricing Schedule, Section 147, and the enterprise license fee for broker-dealers distributing Nasdaq Last Sale ("NLS") to Professional Subscribers at Equity 7, Section 139.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, 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

Nasdaq proposes to lower the enterprise license fee for broker-dealers distributing Nasdaq Basic to internal Professional Subscribers<sup>3</sup> from a two-tiered fee of \$365,000, plus \$2 for any Professional Subscribers over 16,000, to

<sup>3</sup> A "Professional Subscriber" is any Subscriber other than a Non-Professional Subscriber. A "Non-Professional Subscriber" is "a natural person who is not (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or (ii) any commodities or futures contract market or association; engaged as an 'investment adviser' as that term is defined in Section 201(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt." See Equity 7 Pricing Schedule, Section 147(d)(4).

a flat fee of \$155,000. The license would otherwise remain unchanged. The enterprise license fee for broker-dealers distributing NLS to internal Professional Subscribers would be changed in a similar fashion: The two-tiered fee of \$365,000, plus \$2 for any Professional Subscribers over 16,000, would be replaced with a flat fee of \$155,000. Both fee reductions are designed to help Nasdaq compete against other exchanges selling top-of-book<sup>4</sup> market data products.

The Exchange initially filed the proposed pricing changes on September 30, 2020 (SR-NASDAQ-2020-065). On November 23, 2020, the Exchange withdrew that filing and replaced it with SR-NASDAQ-2020-080. On December 3, 2020, the Exchange withdrew SR-NASDAQ-2020-080 and replaced it with SR-NASDAQ-2020-085. On December 7, 2020, the Exchange replaced SR-NASDAQ-2020-085 with this filing.

#### Nasdaq Basic and Nasdaq Last Sale

Nasdaq Basic is a real-time market data product that offers best bid and offer and last sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center and trades reported to the FINRA/Nasdaq Trade Reporting Facility ("TRF"). It is a subset of the "core" quotation and last sale data provided by securities information processors ("SIPs") distributing consolidated data pursuant to the CTA/CQ Plan and the UTP Plan. Nasdaq Basic is separated into three components, which may be purchased individually or in combination: (i) Nasdaq Basic for Nasdaq, which contains the best bid and offer on the Nasdaq market center and last sale transaction reports for Nasdaq and the FINRA/Nasdaq TRF for Nasdaq-listed stocks; (ii) Nasdaq Basic for NYSE, which covers NYSE-listed stocks, and (iii) Nasdaq Basic for NYSE American, which provides data on stocks listed on NYSE American and other listing venues that disseminate quotes and trade reports on Tape B. The specific data elements available through Nasdaq Basic are: (i) Nasdaq Basic Quotes ("QBBO"), the best bid and offer and associated size available in the Nasdaq Market Center, as well as last sale transaction reports; (ii) Nasdaq opening and closing prices, as well as IPO and trading halt cross prices; and (iii) general exchange information,

<sup>4</sup> "Top-of-book" market data products provide last sale information, or both last sale and best bid and offer information to the user, without additional "depth of book" data. Both Nasdaq Last Sale and Nasdaq Basic are examples of top-of-book products.

including systems status reports, trading halt information, and a stock directory.

NLS provides real-time last sale information for executions occurring within the Nasdaq market center and trades reported to the jointly-operated FINRA/Nasdaq TRF.<sup>5</sup> The NLS data feed, which provides price, volume and time of execution data for last sale transactions, includes transaction information for Nasdaq-listed stocks ("NLS for Nasdaq") and for stocks listed on NYSE, NYSE American, and other Tape B listing venues ("NLS for NYSE/NYSE American").<sup>6</sup> This is also a non-core product that provides a subset of the core last sale data distributed by the SIPs under the CTA/CQ Plan and the UTP Plan.<sup>7</sup>

#### Current Top-of-Book Enterprise Licenses for Internal Professional Subscribers

Broker-dealers may purchase Nasdaq Basic, or Derived Data<sup>8</sup> therefrom, for internal professional use for a monthly per-Subscriber fee of \$26,<sup>9</sup> or, in lieu of a per-Subscriber fee, purchase an enterprise license for the internal distribution of Nasdaq Basic to Professional Subscribers for \$365,000, plus \$2 for any Professional Subscribers over 16,000 if an external Distributor<sup>10</sup> controls the display of the product.<sup>11</sup>

<sup>5</sup> See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (proposing NLS); 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>6</sup> See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060).

<sup>7</sup> See Securities Exchange Act Release No. 34-82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-NASDAQ-2018-010).

<sup>8</sup> "Derived Data" is "pricing data or other information that is created in whole or in part from Nasdaq information; it cannot be reverse engineered to recreate Nasdaq information, or be used to create other data that is recognizable as a reasonable substitute for Nasdaq information." See Equity 7, Section 147(d)(6).

<sup>9</sup> See Equity 7 Pricing Schedule, Section 147(b)(1). The \$26 monthly per-Subscriber fee consists of monthly charges of \$13 for Nasdaq Basic for Nasdaq, \$6.50 for Nasdaq Basic for NYSE, and \$6.50 for Nasdaq Basic for NYSE MKT.

<sup>10</sup> "Distributor" refers to "any entity that receives Nasdaq Basic data directly from Nasdaq or indirectly through another entity and then distributes it to one or more Subscribers. (A) "Internal Distributors" are Distributors that receive Nasdaq Basic data and then distribute that data to one or more Subscribers within the Distributor's own entity. (B) "External Distributors" are Distributors that receive Nasdaq Basic data and then distribute that data to one or more Subscribers outside the Distributor's own entity. See Equity 7, Section 147(d)(1).

<sup>11</sup> The additional \$2 fee was introduced to defray additional costs incurred by Nasdaq when distributing Nasdaq Basic through an External

The license also allows the broker-dealer to display NLS data for its own stock price and that of up to ten of its competitors or peers on its internal website. Separate licenses must be purchased if more than one external Distributor controls display of the product. The license excludes Distributor fees, which are \$1,500 per month for internal distribution.<sup>12</sup>

Although NLS was initially designed for general distribution to individual investors,<sup>13</sup> a broker-dealer may elect to distribute this data to its registered representatives through an employer-provided workstation or software application. To allow for such usage, Nasdaq adopted a fee schedule for “specialized usage” of NLS not associated with distribution of data to the general investing public. In general, broker-dealers paying for specialized usage track either the number of Subscribers receiving data or the number of queries for the data, and pay the corresponding fee.

As an alternative to per-Subscriber or per-query fees, however, a broker-dealer may purchase an enterprise license for internal Subscribers to receive NLS, or Derived Data therefrom, through an external Distributor that controls display of the product. The fee is \$365,000 per month for up to 16,000 internal Subscribers, plus \$2 for each additional internal Subscriber over 16,000, the same fee structure as the enterprise license for the internal distribution of Nasdaq Basic to Professionals. A separate enterprise license must be purchased for each external Distributor that controls the display of the product. The enterprise license does not include distributor fees.

#### Proposed Fee Reduction for Nasdaq Basic and NLS Enterprise Licenses

Nasdaq proposes to reduce its enterprise license fees for Nasdaq Basic and NLS to bolster its ability to compete effectively against other exchanges selling top-of-book market data products, which are substitutes for Nasdaq Basic and NLS. Nasdaq faces vigorous competition for the sale of this

Distributor that controls display of the product. See Securities Exchange Act Release No. 71507 (February 7, 2014), 79 FR 8763 (February 13, 2014) (SR-NASDAQ-2014-011).

<sup>12</sup> See Equity 7 Pricing Schedule, Section 147(c)(1).

<sup>13</sup> See Securities Exchange Act Release No. 82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-Nasdaq-2018-010) (explaining that “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.’”).

data, including from the “Best Quote and Trade” (“BQT”) product sold by the NYSE-affiliated exchanges and the Cboe One Summary Feed.

Nasdaq received customer feedback requesting that it lower the price of the professional licenses for its top-of-book products. This feedback prompted a reexamination of Nasdaq’s four enterprise licenses for top-of-book data: (i) The license for internal Professional distribution of Nasdaq Basic to Professionals for \$365,000 per month (the subject of this proposal); (ii) the license for external distribution of Nasdaq Basic to Professionals and Non-Professionals in the context of the brokerage relationship for \$100,000 per month;<sup>14</sup> (iii) the license for external distribution of NLS data to the General Investing Public for Display Usage for \$41,500;<sup>15</sup> and (iv) the license for internal and external distribution of top-of-book<sup>16</sup> and depth-of-book<sup>17</sup> products for \$500,000 with a twelve-month commitment, or a month-to-month fee of \$600,000.<sup>18</sup>

Fees for three of these four licenses have been reduced in the last several years. In 2016, Nasdaq lowered the fee for external distribution of Nasdaq Basic in the context of the brokerage relationship from \$350,000 to \$100,000.<sup>19</sup> Also in 2016, the Exchange reduced the monthly fee for the external distribution of NLS data from \$50,000 to \$41,500.<sup>20</sup> In 2018, Nasdaq introduced an enterprise license that substantially lowered the cost of purchasing top-of-book and depth-of-book data together by replacing three separate enterprise licenses—\$365,000 for internal distribution of Nasdaq Basic, \$100,000 for external distribution in a brokerage relationship, and \$500,000 for distribution of depth-of-book products—with a single license for a monthly fee of \$500,000, with a twelve-month service commitment.<sup>21</sup>

In light of customer feedback and Nasdaq’s history of lowering fees for top-of-book products, Nasdaq

<sup>14</sup> See Equity 7 Pricing Schedule, Section 147(b)(5).

<sup>15</sup> See Equity 7 Pricing Schedule, Section 139(b)(4).

<sup>16</sup> The top-of-book products distributed under this license are Nasdaq Basic, NLS and NLS Plus.

<sup>17</sup> The depth-of-book products distributed under this license are TotalView and Level 2.

<sup>18</sup> See Equity 7 Pricing Schedule, Section 132.

<sup>19</sup> See Securities Exchange Act Release No. 79456 (December 2, 2016), 81 FR 88716 (December 8, 2016) (SR-NASDAQ-2016-162).

<sup>20</sup> See Securities Exchange Act Release No. 77578 (April 11, 2016), 81 FR 22344 (April 15, 2016) (SR-NASDAQ-2016-048).

<sup>21</sup> See Securities Exchange Act Release No. 83751 (July 31, 2018), 83 FR 38428 (August 6, 2018) (SR-Nasdaq-2018-058).

determined that the proposed fee will better position it to operate in the current competitive environment. Fees for Nasdaq’s other three enterprise licenses have been lowered over the course of the last four years, while the license fee for internal professionals has not changed since the enterprise license was introduced in 2014.<sup>22</sup> Nasdaq believes that this fourth fee reduction will allow it to continue to compete in the market for top-of-book products.

The new enterprise license fee will substantially lower total and per-Subscriber costs for broker-dealers with approximately 5,962 or more internal Professional Subscribers. All current enterprise license purchasers will save the difference between the current base fee of \$365,000 and the proposed fee of \$155,000 (which is \$210,000 per month), plus \$2 times the number of internal Professional Subscribers over 16,000. A broker-dealer with 17,000 internal Professional Subscribers, for example, would save a total of \$212,000 per month as compared to the current license,<sup>23</sup> reducing average per-Subscriber monthly charges from \$21.60<sup>24</sup> to \$9.12.<sup>25</sup>

In addition, a number of the mid-size broker-dealers that currently have too few professional subscribers to benefit from the license would be able to achieve substantial savings at the new, lower rate. The “break even” point—*i.e.*, the point at which the average per-Subscriber rate of a licensee falls below the per-Subscriber rate of \$26—is currently 14,038 internal Professional Subscribers.<sup>26</sup> Under the new fee schedule, broker-dealers with as few as 5,962 internal Professional Subscribers would be able to save money.<sup>27</sup> A hypothetical broker-dealer with 10,000 internal Professional Subscribers would

<sup>22</sup> See Securities Exchange Act Release No. 71507 (February 7, 2014), 79 FR 8763 (February 13, 2014) (SR-NASDAQ-2014-011).

<sup>23</sup> The broker-dealer would save the difference between \$365,000 and \$155,000 (\$210,000), plus an additional \$2,000 for the 1,000 Professional Subscribers over 16,000.

<sup>24</sup> The hypothetical current average per-Subscriber monthly charge is estimated as the current fee of \$365,000 plus \$2,000 for the 1,000 Professional Subscribers over 16,000 divided by 17,000 internal Professional Subscribers.

<sup>25</sup> The hypothetical per-Subscriber monthly charge for the Proposal is estimated as the flat fee of \$155,000 divided by 17,000 internal Professional Subscribers.

<sup>26</sup> See Securities Exchange Act Release No. 71507 (February 7, 2014), 79 FR 8763 (February 13, 2014) (SR-NASDAQ-2014-011) (explaining that the \$365,000 monthly fee for all internal subscribers, divided by \$26 monthly fee for each internal Subscriber, is equal to 14,038).

<sup>27</sup> This estimated cutoff point is calculated as the Proposed license fee of \$155,000 divided by the per-Subscriber rate of \$26 per month.

be able to save \$105,000 per month,<sup>28</sup> reducing per-Subscriber fees from \$26<sup>29</sup> to \$15.50.<sup>30</sup>

In addition to lowering Nasdaq's fees, the proposed rule change will allow users to lower internal administrative costs by eliminating the need to report monthly usage. Nasdaq does not have sufficient information about broker-dealer operations and costs to accurately estimate these savings, but believes that monthly savings in administrative expenditures—as well as the improved ability to project future expenditures achieved by eliminating audit liability for errors in reporting usage—to be substantial.

Staff of the Commission's Division of Trading and Markets have indicated that self-regulatory organizations ("SROs") proposing fee changes should provide "the projected number of purchasers (including members, as well as non-members) of any new or modified product or service . . . ." <sup>31</sup> Prior to the proposed change, two customers had purchased the Nasdaq Basic Professional Subscriber enterprise license for \$365,000, plus \$2 for any Professional Subscriber over 16,000 if an external Distributor controls the display of the product.<sup>32</sup> Of these two customers, one informed Nasdaq that it would abandon the Nasdaq license in favor of a license offered by one of its two major competitors, Cboe and NYSE. After the proposed license fee was instituted on October 1, 2020, the complaining customer decided to retain the license. Nasdaq is also in discussions with additional customers to purchase the license, including both customers that do not currently purchase Nasdaq Basic, and customers that do purchase Nasdaq Basic, but not through an enterprise license. To date, however, no new firms have purchased the enterprise license.

While any broker-dealer with approximately 5,962 or more internal Subscribers will be able to benefit from the proposed license, Nasdaq does not know, and is unable to ascertain with precision, the number of internal

<sup>28</sup> Savings are calculated as follows: 10,000 internal Professional Subscribers multiplied by \$26 per-Subscriber equals \$260,000. The difference between \$260,000 and \$155,000 is \$105,000.

<sup>29</sup> See Equity 7 Pricing Schedule, Section 147(b)(1).

<sup>30</sup> This figure is calculated as the proposed flat fee of \$155,000 divided by 10,000 internal Professional Subscribers.

<sup>31</sup> See Division of Trading and Markets, U.S. Securities and Exchange Commission, "Staff Guidance on SRO Filings Related to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

<sup>32</sup> No customers purchased the comparable license for NLS, discussed above.

Professional Subscribers utilized by various broker-dealers, nor can it anticipate the actions of its competitors in response to the lower enterprise license fee, and therefore cannot project precisely the number of expected purchasers. Nevertheless, judging from expressions of interest and Nasdaq's experience in the financial services industry, Nasdaq estimates that between fifteen and twenty broker-dealers worldwide may elect to purchase the license.<sup>33</sup>

## 2. Statutory Basis

The Exchange believes that its Proposal is consistent with Section 6(b) of the Act,<sup>34</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>35</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As a preliminary matter, the statutory basis for the current Nasdaq Basic and NLS enterprise licenses have already been explained in prior filings.<sup>36</sup> The Proposal lowers fees for enterprise licenses that have already been shown to be consistent with Section 6(b) of the Act, and this analysis therefore focuses on the new, lower fees.<sup>37</sup>

### The Proposal Is an Equitable Allocation of Reasonable Dues, Fees and Other Charges

As the Commission and courts <sup>38</sup> have recognized, "[i]f competitive forces are

<sup>33</sup> This estimate is based on customer conversations and the experience and judgment of Nasdaq staff.

<sup>34</sup> See 15 U.S.C. 78f(b).

<sup>35</sup> See 15 U.S.C. 78f(b)(4) and (5).

<sup>36</sup> See, e.g., Securities Exchange Act Release No. 81697 (September 25, 2017), 82 FR 45639 (September 29, 2017) (SR-NASDAQ-2017-095); Securities Exchange Act Release No. 72620 (July 16, 2014), 79 FR 42572 (July 22, 2014) (SR-NASDAQ-2014-070); Securities Exchange Act Release No. 72153 (May 12, 2014), 79 FR 28575 (May 16, 2014) (SR-NASDAQ-2014-045); Securities Exchange Act Release No. 71507 (February 7, 2014), 79 FR 8763 (February 13, 2014) (SR-NASDAQ-2014-011); see Securities Exchange Act Release No. 82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-Nasdaq-2018-010).

<sup>37</sup> The statutory bases for both the Nasdaq Basic and NLS enterprise licenses are identical. Both are top-of-book products sold to broker-dealers for internal distribution to Professionals. The fee structure and use requirements are currently the same for both, and will continue to be the same under the Proposal. The discussion contained herein therefore applies to both licenses.

<sup>38</sup> 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) upheld the Commission's reliance upon

operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior." <sup>39</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>40</sup> Nasdaq believes that competitive forces constrain the price of top-of-book products based on competition among exchanges for top-of-book data. The proposed fee change is a direct response to this competition.

Nasdaq Basic and NLS provide choices to broker-dealers and other data consumers by providing less than the quantum of data provided through the consolidated tape feeds, but at a lower price. The same is true for the top-of-book proprietary products offered by other exchanges. All of these top-of-book products are substitutes for each other. Nasdaq Basic provides data derived from liquidity within the Nasdaq market center and trades reported to the FINRA/Nasdaq TRF. The NYSE BQT feed disseminates top-of-book information from the NYSE, NYSE American, NYSE Arca and NYSE National exchanges.<sup>41</sup> The Cboe One Summary Feed provides data from the four Cboe equities exchanges: BZX Exchange, BYX Exchange, EDGX Exchange and EDGA Exchange.<sup>42</sup> These exchanges compete on price and quality

competitive markets to set reasonable and equitably allocated fees for market data. "In fact, the legislative history indicates that the Congress intended that the market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed and that the SEC wield its regulatory power in those situations where competition may not be sufficient, such as in the creation of a consolidated transactional reporting system." *NetCoalition I*, at 535 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.A.N. 321, 323) (internal quotation marks omitted). 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." *Id.* (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74,771 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>39</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

<sup>40</sup> *Id.*

<sup>41</sup> See <https://www.nyse.com/market-data/real-time/nyse-bqt>.

<sup>42</sup> See [https://markets.cboe.com/us/equities/market\\_data\\_services/#:-:text=Cboe%20Top%20is%20a%20real,time%20on%20a%20Cboe%20book.&text=It%20is%20a%20real%2Dtime,time%20on%20a%20Cboe%20book](https://markets.cboe.com/us/equities/market_data_services/#:-:text=Cboe%20Top%20is%20a%20real,time%20on%20a%20Cboe%20book.&text=It%20is%20a%20real%2Dtime,time%20on%20a%20Cboe%20book) We note that Cboe recently proposed a fee reduction for top-of-book data as well. See Securities Exchange Act Release No. 86670 (August 14, 2019), 84 FR 43207 (August 20, 2019) (SR-CboeBYX-2019-012).

for their top-of-book feeds. NYSE<sup>43</sup> and Cboe,<sup>44</sup> like Nasdaq, offer enterprise licenses. Cboe touts its price in promotional literature,<sup>45</sup> and reduced its fee for certain top-of-book customers just this year.<sup>46</sup>

Top-of-book data can be used for many purposes—from a retail investor casually surveying the market to sophisticated market participants using it for a variety of applications, such as investment analysis, risk management, or portfolio valuation. The value of that data depends on its quality and how well it approximates the NBBO, which is determined by the amount of order flow attracted by the exchange—the more order flow, the more quotes and trades, and the better the exchange data will be able to match the NBBO.

Nasdaq's own experience with sales of top-of-book feeds underscores their substitutability, as the customer whose feedback motivated this price change informed Nasdaq that it would drop Nasdaq Basic in favor of a competing product unless a change is made.

The constraint imposed by direct competition on the price of top-of-book data is further illustrated by proposals to reduce fees for three of the four top-of-book enterprise licenses in the past several years: (i) The enterprise license for external distribution of Nasdaq Basic;<sup>47</sup> (ii) the enterprise license for the external distribution of NLS;<sup>48</sup> and (iii) the combined enterprise license for distribution of top-of-book and depth-of-book data.<sup>49</sup> Nasdaq is not alone in lowering fees to compete against the other exchanges. Just this year, Cboe

proposed a fee reduction for its top-of-book data.<sup>50</sup>

As shown, Nasdaq competes against other exchanges in the sale of top-of-book products. That competition constrains the price of top-of-book market data, and 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.

#### The Proposal Does Not Permit Unfair Discrimination

The Proposal is not unfairly discriminatory. As previously noted, the Nasdaq Basic enterprise license subject to this Proposal was shown to be non-discriminatory and otherwise consistent with the Act over six years ago.<sup>51</sup> The only difference between that initial proposal and the change under consideration today is that the new license costs less and more broker-dealers will be able to benefit from the lower prices. Enterprise licenses in general have been widely recognized as an effective and not unfairly discriminatory method of distributing market data. This applies to Nasdaq's enterprise licenses as well as those offered by the NYSE and Cboe exchanges.<sup>52</sup>

The Act does not prohibit all distinctions among customers; only discrimination that is unfair. It is not unfair discrimination to charge those Distributors that are able to reach the largest audiences of retail investors a lower fee for incremental investors in order to encourage the widespread distribution of market data.

The instant Proposal, like other enterprise licenses, will cause top-of-book data to become more widely available to investors. It will save current enterprise license purchasers the \$210,000 per month difference between the current base fee of \$365,000 and \$155,000, plus \$2 times the number of internal Professional Subscribers over 16,000. Broker-dealers that do not currently purchase the license will nevertheless benefit because the "break even" point—*i.e.*, the point where the average per-Subscriber rate of a licensee falls below per-Subscriber rate of \$26—will fall from 14,038 to 5,962 internal

Professional Subscribers.<sup>53</sup> All purchasers of the proposed license will also be able to save in administrative expenditures by eliminating monthly reporting requirements and periodic review of such reports by compliance staff.

It is of particular importance now to expand the availability of top-of-book data. In recent months, retail investors have become increasingly interested in equities markets. Many of these retail investors will require advice and assistance from equity market professionals, and this license will enable broker-dealers that serve such clients to do so at a lower cost.

In addition, the proposed enterprise license will be subject to significant competition, and that competition will ensure that there is no unfair discrimination. Each Distributor will be able to accept or reject the license depending on whether it will or will not lower costs for that particular Distributor, and, if the license is not sufficiently competitive, the Exchange may lose market share.

For all of these reasons, the Proposal is not unreasonably discriminatory.

#### 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. With respect to inter-market competition—the competition among SROs—the Exchange's ability to price market data products is constrained by competition among exchanges for top-of-book data. With respect to intra-market competition—the competition among consumers of exchange data—the Exchange expects the Proposal to promote competition through lower-cost data.

#### Intermarket Competition

As discussed in detail under Statutory Basis, Nasdaq competes with other exchanges in the sale of top-of-book products. In order to better compete for this segment of the market, the Exchange is proposing to reduce the cost of top-of-book data by lowering the enterprise license fee for internal Professional Subscribers. The proposed price reduction will not cause any unnecessary or inappropriate burden on intermarket competition, as other

<sup>43</sup> See <https://www.nyse.com/market-data/real-time/nyse-bqt>.

<sup>44</sup> See [https://markets.cboe.com/us/equities/market\\_data\\_services/cboe\\_one/](https://markets.cboe.com/us/equities/market_data_services/cboe_one/).

<sup>45</sup> See [https://markets.cboe.com/us/equities/market\\_data\\_services/#:~:text=Cboe%20Top%20is%20a%20real,time%20on%20a%20Cboe%20book.&text=It%20is%20a%20real%20time,time%20on%20a%20Cboe%20book](https://markets.cboe.com/us/equities/market_data_services/#:~:text=Cboe%20Top%20is%20a%20real,time%20on%20a%20Cboe%20book.&text=It%20is%20a%20real%20time,time%20on%20a%20Cboe%20book) ("The Cboe One Feed is 60% less expensive per professional user and more than 85% less expensive for an enterprise license for professional users and non-professional users when compared to a similar competitor exchange product.").

<sup>46</sup> See Securities Exchange Act Release No. 88221 (February 14, 2020), 85 FR 9904 (February 20, 2020) (SR-CboeBYX-2020-007) (stating that "the Exchange's top of book market data products are among the most competitively priced in the industry due to modest subscriber fees, and a lower Enterprise cap . . ."). The filing included a table comparing its pricing to Nasdaq Basic.

<sup>47</sup> See Securities Exchange Act Release No. 79456 (December 2, 2016), 81 FR 88716 (December 8, 2016) (SR-NASDAQ-2016-162).

<sup>48</sup> See Securities Exchange Act Release No. 77578 (April 11, 2016), 81 FR 22344 (April 15, 2016) (SR-NASDAQ-2016-048).

<sup>49</sup> See Securities Exchange Act Release No. 83751 (July 31, 2018), 83 FR 38428 (August 6, 2018) (SR-Nasdaq-2018-058).

<sup>50</sup> See Securities Exchange Act Release No. 86670 (August 14, 2019), 84 FR 43207 (August 20, 2019) (SR-CboeBYX-2019-012).

<sup>51</sup> See Securities Exchange Act Release No. 71507 (February 7, 2014), 79 FR 8763 (February 13, 2014) (SR-NASDAQ-2014-011) (initially adopting the current enterprise license).

<sup>52</sup> See, e.g., Sections 123(c) and 147 (b); Securities Exchange Act Release No. 82182 (November 30, 2017), 82 FR 57627 (December 6, 2017) (SR-NYSE-2017-60) (changing an enterprise fee for NYSE BBO and NYSE Trades).

<sup>53</sup> See Securities Exchange Act Release No. 71507 (February 7, 2014), 79 FR 8763 (February 13, 2014) (SR-NASDAQ-2014-011) (explaining that the \$365,000 monthly fee for all internal subscribers, divided by \$26 monthly fee for each internal Subscriber, is equal to 14,038).

exchanges and data vendors are free to lower their prices to better compete with the Exchange's offering. Nasdaq's main competitors, in particular, offer directly competing enterprise licenses for their top-of-book products, and are readily able to lower enterprise license fees in response to Nasdaq. Indeed, the Exchange's decision to lower its enterprise license fee was itself generated by the need to compete with other exchanges. The Proposal may in turn generate competitive responses from other exchanges, enhancing overall competition.

#### Intramarket Competition

The Proposal will not cause any unnecessary or inappropriate burden on intramarket competition. In fact, it will foster competition among broker-dealers by lowering costs for current licensees, while at the same time increasing the number of broker-dealers able to purchase that license. The current enterprise license, just like all of the enterprise licenses offered by Nasdaq's competitors, does not itself impose an unnecessary or inappropriate burden on intramarket competition. Relatively smaller broker-dealers have fewer internal Professional Subscribers and therefore operate with lower fixed costs, helping them compete with the larger broker-dealers. Moreover, the underlying fee of \$26 per Professional Subscriber fee has itself been shown not to place an undue burden on competition, and, if that fee proves to be excessive, broker-dealers would be able to purchase top-of-book data from one of the Exchange's competitors offering a substitute product. For all of these reasons, the Proposal will not place any unnecessary or inappropriate burden on intramarket competition.

#### 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>54</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-2020-086 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to File Number SR-NASDAQ-2020-086. 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-2020-086 and

should be submitted on or before January 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>55</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90612; File No. SR-EMERALD-2020-16]

### Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Establish Market Data Fees

December 9, 2020.

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 November 25, 2020, MIAX Emerald, LLC ("MIAX Emerald" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by 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 amend the MIAX Emerald Fee Schedule (the "Fee Schedule") to establish market data fees.

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX'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

<sup>55</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.

<sup>54</sup> 15 U.S.C. 78s(b)(3)(A)(ii).