

reports prepared internally by various subsidiaries and divisions of MLPF&S.

(ii) Certain senior executives of BAC with responsibility for overseeing operations of various divisions, subsidiaries and affiliates of BAC are not precluded from exercising those functions over the Advisor because they oversee MLPF&S as well; provided that such persons shall not have any involvement with respect to proposed transactions pursuant to the exemption and will not in any way attempt to influence or control the placing by the Funds or the Advisor of orders in respect of *Eligible Securities* with MLPF&S.

**8. Record-Keeping Requirements—**The Funds and the Advisor will maintain such records with respect to those transactions conducted pursuant to the exemption as may be necessary to confirm compliance with the conditions to the requested relief. In this regard:

(a) Each Fund shall maintain an itemized daily record of all purchases and sales of instruments pursuant to the exemption, showing for each transaction: the name and quantity of instruments; the unit purchase or sale price; the time and date of the transaction; and whether such instrument was a *First Tier Security* or a *Second Tier Security*. Such records also shall, for each transaction, document two quotations received from other dealers for comparable instruments (except that, in the case of repurchase agreements and consistent with condition 4, if quotations are unavailable from two such dealers only one other competitive quotation is required), including: the names of the dealers; the names of the instruments; the prices quoted; the times and dates the quotations were received; and whether such instruments were *First Tier Securities* or *Second Tier Securities*.

(b) Each Fund shall maintain a ledger or other record showing, on a daily basis, the percentage of the Fund's *Total Assets* (or, in the case of a Fund that is not subject to Rule 2a-7, the percentage of the total of its cash, cash items and *Eligible Securities*) represented by *Second Tier Securities* acquired from MLPF&S.

(c) Each Fund shall maintain records sufficient to verify compliance with the volume limitations contained in condition 3, above. MLPF&S will provide the Funds with all records and information necessary to implement this requirement.

(d) Each Fund shall maintain records sufficient to verify compliance with the requirements related to repurchase

agreements contained in condition 2, above.

The records required by this condition 8 will be maintained and preserved in the same manner as records required under rule 31a-1(b)(1) of the Act.

**9. Guidelines—**MLPF&S and the Advisor, with the assistance of their compliance departments, will prepare and, as necessary, update guidelines for personnel of the MLPF&S or the Advisor, as the case may be, to make certain that transactions conducted pursuant to the exemption comply with the conditions set forth therein, and that the parties generally maintain arm's-length relationships. In training personnel of MLPF&S, particular emphasis will be given to the fact that the Funds are to receive rates as favorable as other institutional purchasers buying the same quantities. The compliance departments of MLPF&S and the Advisor will periodically monitor the activities of MLPF&S and the Advisor to make certain that the conditions set forth in the exemption are adhered to.

**10. Audit Committee Review—**The audit committee or another committee which, in each case, consists of members of the Board who are not interested persons as defined in section 2(a)(19) of the Act ("Independent Members"), will approve, periodically review and update as necessary, guidelines for the Advisor and MLPF&S reasonably designed to ensure that transactions conducted pursuant to the exemption comply with the conditions set forth herein and that the procedures described herein are followed in all respects. The respective audit committees will periodically monitor the activities of the Funds, the Advisor and MLPF&S in this regard to ensure that these matters are being accomplished.

**11. Scope of Exemption—**Applicants expressly acknowledge that any order issued on the application would grant relief from section 17(a) of the Act only, and would not grant relief from any other section of, or rule under, the Act including, without limitation, Rule 2a-7.

**12. Board Review—**The Board, including a majority of the Independent Members, will have approved each Fund's participation in transactions conducted pursuant to the exemption and determined that such participation by the Fund is in the best interests of the Fund and its shareholders. The minutes of the meeting of the Board at which this approval is given will reflect in detail the reasons for the Board's determinations. The Boards will review

no less frequently than annually a Fund's participation in transactions conducted pursuant to the exemption during the prior year and determine whether the Fund's participation in such transactions continues to be in the best interests of the Fund and its shareholders. Such review will include (but not be limited to): (a) A comparison of the volume of transactions in each type of instrument conducted pursuant to the exemption to the market presence of MLPF&S in the market for that type of instrument; and (b) a determination that the Funds are maintaining appropriate trading relationships with other sources for each type of instrument to ensure that there are appropriate sources for the quotations required by condition 4 above. The minutes of the meetings of the Boards at which this determination is made will reflect in detail the reasons for the Boards' determinations.

For the Commission, by the Division of Investment Management, under delegated authority.

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011-19852 Filed 8-4-11; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64994; File No. SR-NASDAQ-2011-091]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer an Optional Derived Data Fee for NASDAQ Basic

July 29, 2011.

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 July 25, 2011, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASDAQ proposes to offer an optional NASDAQ Basic Derived Data

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

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

Fee for distribution of data derived from an existing NASDAQ Basic data feed to non-professional users.

The text of the proposed rule change is below. Proposed new language is in *italics*.<sup>3</sup>

\* \* \* \* \*

#### 7047. Nasdaq Basic

(a)–(b) No change.

(c) Distributor Fees.

(1)–(4) No change.

(5) *A Distributor may pay \$1,500 per month to distribute data derived from Nasdaq Basic to an unlimited number of non-professional subscribers. This fee is in addition to the Distributor Fee listed in (c)(1).*

(6) The terms “Distributor” and “Direct Access” shall have the same meanings as set forth in Rule 7019.

\* \* \* \* \*

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

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

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

##### 1. Purpose

*Current Proposal.* NASDAQ will begin offering a voluntary NASDAQ Basic Derived Data Fee for non-professional usage of data derived from the NASDAQ Basic product (NASDAQ Rule 7047), which will cost \$1,500 per month. The \$1,500 NASDAQ Basic Derived Data Fee would be in lieu of the non-professional subscriber fees only. Therefore, a customer taking advantage of this fee will no longer pay non-professional subscriber fees. The non-professional fees will no longer apply to those customers taking advantage of this new fee since they will be able to redistribute this data (in the manner described herein) to an unlimited number of non-professional users. Customers redistributing this data to

professional customers will still be liable for the professional user fees.

The NASDAQ Basic Derived Data Fee would be in addition to the existing \$1,500 per month Distributor Fee in NASDAQ Rule 7047(c)(1). Therefore, firms that choose the NASDAQ Basic Derived Data Fee pay \$1,500 to derive data from NASDAQ Basic plus \$1,500 for the NASDAQ Basic Distributor Fee and, if applicable, NASDAQ Basic professional subscriber fees. The NASDAQ Basic Derived Data Fee does not involve the creation of a new data feed, but rather is a new pricing option for an existing data feed. The NASDAQ Basic Derived Data Fee allows firms to use the NASDAQ Basic data feed and display/re-distribute it in a derived manner. This is not a new service or a new product. NASDAQ is merely creating a new fee for a different use of its data.

*Background.* NASDAQ disseminates market data feeds in two capacities. First, NASDAQ disseminates consolidated or “core” data in its capacity as Securities Information Processor (“SIP”) for the national market system plan governing securities listed on NASDAQ as a national securities exchange (“NASDAQ UTP Plan”).<sup>4</sup> Second, NASDAQ separately disseminates proprietary or “non-core” data in its capacity as a registered national securities exchange. Non-core data is any data generated by the NASDAQ Market Center Execution System that is voluntarily disseminated by NASDAQ separate and apart from the consolidated data.<sup>5</sup> NASDAQ has numerous proprietary data products, such as NASDAQ TotalView, NASDAQ Last Sale, and NASDAQ Basic.

NASDAQ continues to seek broader distribution of non-core data and to reduce the cost of providing non-core data to larger numbers of investors. In the past, NASDAQ has accomplished this goal in part by offering similar capped fees, flat fees or enterprise licenses for professional and non-professional usage of TotalView which contains the full depth of book data for the NASDAQ Market Center Execution System. NASDAQ has also implemented these capped/flat fees with other products, such as NASDAQ Last Sale. NASDAQ believes that the adoption of flat fee structures or enterprise licenses has led to greater distribution of market data, particularly among non-professional users.

Based on input from market participants and market data

distributors, NASDAQ believes that this increase in distribution is attributable in part to the relief it provides distributors from the NASDAQ requirement that distributors count and report each non-professional user of NASDAQ proprietary data. In addition to increased administrative flexibility, flat fees and enterprise licenses also encourage broader distribution by firms that are currently over the fee cap as well as those that are approaching the cap and wish to take advantage of the benefits of the program. Further, NASDAQ believes that capping fees in this manner creates goodwill with broker-dealers and increases transparency for non-professional users.

Accordingly, NASDAQ is establishing the NASDAQ Basic Derived Data Fee for distributors who derive data from NASDAQ Basic under NASDAQ Rule 7047(c)(5), a non-professional fee option for distributors of NASDAQ Basic.<sup>6</sup> The NASDAQ Basic Derived Data Fee covers derived data and consists of pricing data or other information that is created in whole or in part from NASDAQ Basic data (e.g., real-time volume weighted data).

The NASDAQ Basic Derived Data Fee is completely optional and does not impact individual usage fees for any product or in any way raise the costs of any user of any NASDAQ data product.

##### 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>7</sup> in general, and with Section 6(b)(4) of the Act,<sup>8</sup> in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of NASDAQ data. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself

<sup>6</sup> NASDAQ relies on distributor self-reporting of usage rather than on individual contact with each end-user customer. NASDAQ permits distributors to designate an entire user population as “non-professional” provided that the number of professional subscribers within that user population does not exceed ten percent (10%) of the total population and does not exceed fifty percent (50%) of the total subscriber population through any one of the Distributor's systems.

<sup>7</sup> 15 U.S.C. 78f.

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>3</sup> Changes are marked to the rules of The NASDAQ Stock Market LLC found at <http://nasdaq.cchwallstreet.com>.

<sup>4</sup> See Securities Exchange Act Release No. 59039 (Dec. 2, 2008) at p. 41.

<sup>5</sup> *Id.*

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>9</sup>

By removing "unnecessary regulatory restrictions" on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well. NASDAQ Basic is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS.

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

whether the proposed rule should be approved or disapproved."

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, No. 09-1042 (DC Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. "In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'" *NetCoalition*, at 15 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323). The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

NASDAQ believes that this proposal is in keeping with those principles by promoting increased transparency through the dissemination of NASDAQ Basic Derived Data. The dissemination is designed to increase not only transparency for non-professional users, but also to reduce burdensome administrative costs in addition to actual per user costs. NASDAQ notes also that NASDAQ Basic data is already distributed and that this filing proposes to distribute no additional data elements. NASDAQ Basic is distributed and purchased on a voluntary basis, in that neither NASDAQ nor market data distributors are required by any rule or regulation to make this data available. Accordingly, distributors and users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged.

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

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not

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

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price and distribution of its data products. Without the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without trade executions, exchange data products cannot exist. Data products are valuable to many end 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, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected

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

value, the broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable.

Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. "No one disputes that competition for order flow is 'fierce'." *NetCoalition* at 24. However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.

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

Competition among trading platforms can be expected to constrain the aggregate return each platform earns

from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platform may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. This would be akin to strictly regulating the price that an automobile manufacturer can charge for car sound systems despite the existence of a highly competitive market for cars and the availability of after-market alternatives to the manufacturer-supplied system.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

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

The large number of SROs, TRFs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is

currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including NASDAQ, NYSE, NYSE Amex, NYSEArca, and BATS.

Any ATS or BD can combine with any other ATS, BD, or multiple ATSs or BDs to produce joint proprietary data products. Additionally, order routers and market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end 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 Yahoo, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of

entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATSs operate profitably with fragmentary shares of consolidated market volume.

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

The court in *NetCoalition* concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission's *NetCoalition* order because, in the court's view, the Commission had not adequately demonstrated that the depth-of-book data at issue in the case is used to attract order flow. NASDAQ believes, however, that evidence not before the court clearly demonstrates that availability of depth data attracts order flow. For example, NASDAQ submits that in and of itself, NASDAQ's decision voluntarily to cap fees on existing products, as is the effect of a flat fee or an enterprise license, is evidence of market forces at work.

The court in *NetCoalition* did cite favorably an economic study by Ordoover and Bamberger which concluded that "[a]lthough an exchange may price its trade execution fees higher and its market data fees lower (or vice versa), because of 'platform' competition the exchange nonetheless receives the same return from the two 'joint products' in the aggregate."<sup>10</sup> Ordoover and Bamberger also provided additional comments expanding upon the impact of platform competition.<sup>11</sup> Among the conclusions that Ordoover and Bamberger reach are: NASDAQ is subject to significant competitive forces in setting the prices and other terms of execution services and proprietary data products.

Competition among trading platforms can be expected to constrain the

aggregate return each platform earns from the sale of the array of its products, including the joint products at issue here. In particular, cross-platform competition, and the adverse effects from overpricing proprietary information on the volume of trading on the platform, constrain the pricing of proprietary information.

Competitive forces constrain the prices that platforms can charge for non-core market information. A trading platform cannot generate market information unless it receives trade orders. For this reason, a platform can be expected to use its market data product as a tool for attracting liquidity and trading to its exchange.

While, by definition, information that is proprietary to an exchange cannot be obtained elsewhere, this does not enable the owner of such information to exercise monopoly power over that information vis-à-vis firms with the need for such information. Even though market information from one platform may not be a perfect substitute for market information from one or more other platforms, the existence of alternative sources of information can be expected to constrain the prices platforms charge for market data.

Besides the fact that similar information can be obtained elsewhere, the feasibility of supra-competitive pricing is constrained by the traders' ability to shift their trades elsewhere, which lowers the activity on the exchange and so in the long run reduces the quality of the information generated by the exchange.

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

administrative burden and costs to firms that purchase market data.

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

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

The Exchange has witnessed competitors creating new products and innovative pricing in this space over the course of the past year. NASDAQ continues to see firms challenge its pricing on the basis of the Exchange's explicit fees being higher than the zero-priced fees from other competitors such as BATS. In all cases, firms make decisions on how much and what types of data to consume on the basis of the total cost of interacting with NASDAQ or other exchanges. Of course, the explicit data fees are but one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for this non-core data information is highly competitive and continually evolves as products develop and change.

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

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>12</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend

<sup>10</sup> See *NetCoalition* at fn. 16.

<sup>11</sup> See Securities Exchange Act Release No. 63745 (Jan. 20, 2011); 76 FR 4970 (Jan. 27, 2011) (SR-NASDAQ-2011-010) (attached to original filing as Exhibit 3).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2011-091 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-2011-091. This file number should be included on the subject line if e-mail 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 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-2011-091, and should be submitted on or before August 26, 2011.

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

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64997; File No. SR-NYSE-2011-37]

### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees Charged for the Floor Member Continuing Education Program for Qualified Floor Members Pursuant to NYSE Rule 103A, From a Fixed Flat Fee of \$80 Per Training Module to a Fixed Flat Fee of \$150 Per Qualified Member Per Bi-Annual Session for a Total Cost Per Member Per Year of \$300**

August 1, 2011.

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 July 21, 2011, New York Stock Exchange LLC (the "Exchange" or "NYSE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend, effective immediately, the fees charged for the Floor Member Continuing Education Program for qualified Floor members pursuant to NYSE Rule 103A, from a fixed flat fee of \$80 per training module to a fixed flat fee of \$150 per qualified member per bi-annual session for a total cost per member per year of \$300. The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, at the Commission's Public Reference Room,

and at the Commission's Web site at <http://www.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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

###### **1. Purpose**

As required by NYSE Rule 103A, the Exchange provides Floor members with mandatory continuing education program, known as the Floor Member Continuing Education Program ("FMCE Program"). Since June 14, 2010, the Financial Industry Regulatory Authority ("FINRA") has been developing and administering the FMCE Program on the Exchange's behalf pursuant to a regulatory services agreement.

The Exchange proposes to amend, effective immediately, the fees charged for the FMCE Program. Currently, members pay a fee of \$80 per training module. Because the number of modules that the Exchange administers per year can vary (ranging from four to six modules per year), Floor members are currently faced with a level of uncertainty of the amount of fees that they may be charged in connection with the FMCE program. In addition, because modules can be issued throughout the year, Floor members face additional uncertainty as to when such fees will be charged.

To eliminate this uncertainty, the Exchange proposes to delete the per module fee and instead charge a flat \$150 fee per session per member per year, with two sessions a year amounting to a total of \$300 total charges per year for the FMCE Program. Consistent with Rule 103A and current practice, each session will include two to three modules of education programming, for a total of four to six modules per year. Accordingly, this proposed fee change will not impact the quantity or quality of educational training that will be issued to Floor members. Rather, the same level of

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

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

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