

owners of the Fund's shares held through such financial intermediary; (b) will provide, in a timely manner, to the financial intermediary, or its agent, enough copies of the 19(a) Notice assembled in the form and at the place that the financial intermediary, or its agent, reasonably requests to facilitate the financial intermediary's sending of the 19(a) Notice to each beneficial owner of the Fund's shares; and (c) upon the request of any financial intermediary, or its agent, that receives copies of the 19(a) Notice, will pay the financial intermediary, or its agent, the reasonable expenses of sending the 19(a) Notice to such beneficial owners.

5. Additional Board Determinations for Funds Whose Shares Trade at a Premium:

If:

(a) The Fund's common shares have traded on the stock exchange that they primarily trade on at the time in question at an average premium to NAV equal to or greater than 10%, as determined on the basis of the average of the discount or premium to NAV of the Fund's common shares as of the close of each trading day over a 12-week rolling period (each such 12-week rolling period ending on the last trading day of each week); and

(b) The Fund's annualized distribution rate for such 12-week rolling period, expressed as a percentage of NAV as of the ending date of such 12-week rolling period, is greater than the Fund's average annual total return in relation to the change in NAV over the 2-year period ending on the last day of such 12-week rolling period; then:

(i) At the earlier of the next regularly scheduled meeting or within four months of the last day of such 12-week rolling period, the Board including a majority of the Independent Trustees:

(1) Will request and evaluate, and the Fund's Investment Adviser will furnish, such information as may be reasonably necessary to make an informed determination of whether the Plan should be continued or continued after amendment;

(2) will determine whether continuation, or continuation after amendment, of the Plan is consistent with the Fund's investment objective(s) and policies and in the best interests of the Fund and its shareholders, after considering the information in condition 5(b)(i)(1) above; including, without limitation:

(A) Whether the Plan is accomplishing its purpose(s);

(B) the reasonably foreseeable material effects of the Plan on the Fund's long-term total return in relation

to the market price and NAV of the Fund's common shares; and

(C) the Fund's current distribution rate, as described in condition 5(b) above, compared with the Fund's average annual taxable income or total return over the 2-year period, as described in condition 5(b), or such longer period as the Board deems appropriate; and

(3) based upon that determination, will approve or disapprove the continuation, or continuation after amendment, of the Plan; and

(ii) The Board will record the information considered by it, including its consideration of the factors listed in condition 5(b)(i)(2) above, and the basis for its approval or disapproval of the continuation, or continuation after amendment, of the Plan in its meeting minutes, which must be made and preserved for a period of not less than six years from the date of such meeting, the first two years in an easily accessible place.

6. *Public Offerings:* The Fund will not make a public offering of the Fund's common shares other than:

(a) A rights offering below NAV to holders of the Fund's common shares;

(b) an offering in connection with a dividend reinvestment plan, merger, consolidation, acquisition, spin-off or reorganization of the Fund; or

(c) an offering other than an offering described in conditions 6(a) and 6(b) above, provided that, with respect to such other offering:

(i) the Fund's annualized distribution rate for the six months ending on the last day of the month ended immediately prior to the most recent distribution record date,⁴ expressed as a percentage of NAV as of such date, is no more than 1 percentage point greater than the Fund's average annual total return for the 5-year period ending on such date;⁵ and

(ii) the transmittal letter accompanying any registration statement filed with the Commission in connection with such offering discloses that the Fund has received an order under section 19(b) to permit it to make periodic distributions of long-term capital gains with respect to its common shares as frequently as twelve times each year, and as frequently as distributions are specified by or determined in accordance with the

⁴ If the Fund has been in operation fewer than six months, the measured period will begin immediately following the Fund's first public offering.

⁵ If the Fund has been in operation fewer than five years, the measured period will begin immediately following the Fund's first public offering.

terms of any outstanding preferred shares as such Fund may issue.

7. Amendments to Rule 19b-1:

The requested order will expire on the effective date of any amendment to rule 19b-1 that provides relief permitting certain closed-end investment companies to make periodic distributions of long-term capital gains with respect to their outstanding common shares as frequently as twelve times each year.

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

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011-24587 Filed 9-23-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65352; File No. SR-BYX-2011-022]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing of Proposed Rule Change To Amend and Restate the Amended and Restated Bylaws of BATS Global Markets, Inc.

September 19, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 7, 2011, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") 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 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 with the Commission a proposal to amend the bylaws of the Exchange's sole stockholder, BATS Global Markets, Inc.

The text of the proposed rule change is available at the Exchange's Web site at <http://www.batstrading.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 parts of such statements.

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

1. Purpose

On May 13, 2011, BATS Global Markets, Inc., the sole stockholder of the Exchange, filed a registration statement on Form S-1 with the Commission seeking to register shares of Class A common stock and to conduct an initial public offering of those shares, which will be listed for trading on the Exchange (the "IPO"). In connection with its IPO, BATS Global Markets, Inc. intends to amend and restate its Amended and Restated Bylaws (the "Current Bylaws") and adopt these changes as its Second Amended and Restated Bylaws (the "New Bylaws").

The amendments to the Current Bylaws include, among other things, (i) Revising the procedures for stockholder proposals and nomination of directors, (ii) revising the authority to call special meetings of the stockholders, (iii) revising the process for action by written consent of stockholders, (iv) revising the requirements for removal of directors, (v) removal of provisions relating to indemnification of officers and directors, (vi) eliminating the authority to make loans to corporate officers, and (vii) revising certain requirements for approval of future amendments to the New Bylaws.

The purpose of this rule filing is to submit for Commission approval the New Bylaws adopted by BATS Global Markets, Inc., the sole stockholder of the Exchange. The changes described herein relate to the bylaws of BATS Global Markets, Inc. only, not to the governance of the Exchange. The Exchange will continue to be governed by its existing certificate of incorporation and by-laws. The stock in, and voting power of, the Exchange will continue to be directly and solely held by BATS Global Markets, Inc.

The Exchange has separately filed with the Commission a proposed amendment to the certificate of incorporation of BATS Global Markets, Inc. (the "New Certificate of Incorporation"). It is anticipated that the New Bylaws and the New Certificate of Incorporation will become effective (the "Effective Date") the moment before the closing of the IPO. The amendments to the bylaws primarily reflect (i) Changes to conform the Current Bylaws to provisions more customary for publicly-owned companies, (ii) amendments to conform the Current Bylaws to the New Certificate of Incorporation, and (iii) stylistic and other non-substantive changes.

Registered Office

Article I of the Current Bylaws designates the initial registered office of BATS Global Markets, Inc. in the State of Delaware as 1209 Orange Street in the City of Wilmington, County of New Castle, Delaware. Section 1.01 of the New Bylaws would amend Article I to state the registered office will continue to be located at the same location and to further provide the board of directors with the authority to designate another location from time to time. This will provide the board with the flexibility to change the registered office in the future if it believes such a change is necessary.

Annual Meeting of Stockholders

Section 2.02(a) of the Current Bylaws require that an annual meeting of stockholders for the purpose of election of directors and such other business that comes before the meeting occur on the third Tuesday of January, or such other time as the board of directors may designate. The Amended Bylaws remove the reference to the third Tuesday of January from Section 2.02(a) and authorize the board of directors to determine the date and time of the annual meeting.

Section 2.02(b) of the Current Bylaws specifies the procedures for stockholders to properly bring matters before the annual meeting, including specifying that stockholders provide timely notice to BATS Global Markets, Inc. of the business desired to be brought before the meeting. In addition to the requirements contained in the Current Bylaws, Section 2.02(b) of the New Bylaws would require that the stockholder's notice (i) Disclose the text of the proposal, (ii) disclose the beneficial owner on whose behalf the proposal is being made, (iii) disclose all agreements, arrangements or understandings between the stockholder and any other person pursuant to which the proposal is being made, (iv) disclose

all arrangements or understandings (including derivative positions) to create or mitigate loss or manage the risk or benefit of share price changes, or increase or decrease the voting power of the stockholder or any beneficial owner with respect to the securities of BATS Global Markets, Inc., and (v) provide a representation as to whether the stockholder or any beneficial owner intends, or is part of a group that intends, to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the voting power of BATS Global Markets, Inc. needed to approve or adopt the proposal, or otherwise solicit proxies from stockholders in support of the proposal.

Section 2.02(c) of the Current Bylaws specifies the procedures for stockholders to properly nominate persons for the board of directors, including that the stockholder provide timely notice to BATS Global Markets, Inc. In addition to the requirements contained in the Current Bylaws, Section 2.02(c) of the New Bylaws would require that the stockholder's notice (i) Disclose all agreements, arrangements or understandings (including derivative positions) to create or mitigate loss or manage the risk or benefit of share price changes, or increase or decrease the voting power of the stockholder, beneficial owner or any such nominee with respect to the securities of BATS Global Markets, Inc., (ii) provide a representation that such stockholder is a stockholder entitled to vote at such meeting and intends to appear in person or by proxy at the meeting and to bring such nomination or other business before the meeting, and (iii) provide a representation as to whether the stockholder or any beneficial owner intends, or is part of a group that intends, to deliver a proxy statement and/or form of proxy to holders of at least the percentage of the voting power of BATS Global Markets, Inc. needed to elect each such nominee, or otherwise solicit proxies from stockholders in support of the nomination.

The additional disclosure requirements being added to Sections 2.02(b) and 2.02(c) are intended to assure that stockholders asked to vote on a stockholder proposal or stockholder nominee are more fully informed in their voting and are able to consider any proposals or nominations along with the interests of those stockholders or the beneficial owners on whose behalf such proposal or nomination is being made.

The New Bylaws would further include a new Section 2.02(d) which would require that a stockholder

proposal or a stockholder nomination be disregarded if the stockholder (or a qualified representative) does not appear at the annual or special meeting to present the proposal or nomination, notwithstanding that proxies may have been received and counted for purposes of determining a quorum. A “qualified representative” would include a duly authorized officer, manager or partner of the stockholder, or such other person authorized in writing to act as such stockholder’s proxy. The purpose of this requirement is to assure that the stockholders’ time at meetings is used efficiently and only serious stockholder proposals and nominations are considered.

The New Bylaws would also add Section 2.02(e), which would require that a stockholder, in addition to (and in no way limiting) all requirements set forth in Section 2.02 with respect to proposals or nominations, must also comply with all applicable requirements of the Act and the rules and regulations promulgated thereunder.

New Section 2.02(f) of the New Bylaws would note that, notwithstanding anything to the contrary in the New Bylaws, the notice requirements with respect to business proposals or nominations would be deemed satisfied if the stockholder submitted a proposal in compliance with Rule 14a–8 of the Act³ and the proposal has been included in a proxy statement prepared by BATS Global Markets, Inc. to solicit proxies of the meeting of stockholders. This provision would assure that, in addition to proposals that meet the requirements of Section 2.02(b) of the New Bylaws, BATS Global Markets, Inc. would comply with the provisions of the Act and the rules promulgated thereunder with respect to the inclusion of stockholder proposals in its proxy statement.

Special Meetings of Stockholders

Section 2.03 of the Current Bylaws permits a special meeting of the stockholders to be called by any of (i) The chairman of the board of directors, (ii) the chief executive officer, (iii) the board of directors pursuant to a resolution passed by a majority of the board, or (iv) by the stockholders entitled to vote at least ten percent of the votes at the meeting. The New Bylaws would amend Section 2.03 to only permit a special meeting of the stockholders to be called by the board of directors pursuant to a resolution adopted by the majority of the board. Additionally, whenever any holders of

preferred stock have the right to elect directors pursuant to the New Certificate of Incorporation, such holders may call, pursuant to the terms of a resolution adopted by the board, a special meeting of the holders of such preferred stock. These amendments are designed to prevent any stockholder from exercising undue control over the operation of the Exchange by circumventing the board of directors of BATS Global Markets, Inc. through a special meeting of the stockholders.

Voting Rights

Section 2.07 of the Current Bylaws describes the rights of stockholders of BATS Global Markets, Inc. to vote their shares at a meeting of stockholders. The New Bylaws would amend Section 2.07 to further clarify that any share of stock of BATS Global Markets, Inc. held by BATS Global Markets, Inc. shall have no voting rights, except when such shares are held in a fiduciary capacity.

Action Without a Meeting

Section 2.10 of the Current Bylaws permits certain actions to be taken by written consent of stockholders if signed by the holders of outstanding stock representing not less than the number of votes necessary to authorize or take such action at a meeting where all shares entitled to vote were present and voted. Section 2.10(c) of the Current Bylaws also require that prompt notice of such actions by less than unanimous consent be given to those stockholders that did not consent in writing. The New Bylaws would amend Section 2.10(c) to clarify that such notice need only be provided to those stockholders who would have been entitled to notice of the meeting if the record date for such notice had been the date the written consent was delivered to BATS Global Markets, Inc.

Section 2.10(c) of the Current Bylaws further provides that no action by written consent may be taken following an initial public offering of the common stock of BATS Global Markets, Inc. The New Bylaws would amend Section 2.10(c) to instead provide that no action by written consent may be taken following a Change in Ownership, as defined in the New Certificate of Incorporation.⁴ This change is consistent with amendments contained in the New Certificate of Incorporation and is designed to prevent any stockholder from exercising undue

control over the operation of the Exchange by circumventing the board of directors of BATS Global Markets, Inc. through action by written consent.

Removal of Directors

Section 3.05 of the Current Bylaws provides that the board of directors or any director may be removed, with or without cause, by the affirmative vote of at least sixty-six and two-thirds percent of the voting power of all then-outstanding shares of voting stock of BATS Global Markets, Inc. The New Bylaws would amend Section 3.05 to reduce the percentage of the voting power required to remove a director, with or without cause, from sixty-six and two-thirds percent to a simple majority.

The purpose of this amendment is to align BATS Global Markets, Inc.’s requirements for removal of directors with Section 141(k) of the Delaware General Corporation Law, which generally permits a simple majority of stockholders to remove any director or a the board of directors with or without cause.

Committees of Directors

Section 3.10(a) of the Current Bylaws permit the board of directors to appoint an executive committee with certain enumerated powers of the board, as well as other committees permitted by law. The New Bylaws would amend Section 3.10(a) to eliminate specific reference to an executive committee and authorize the board to designate one or more committees that may exercise the power of the board to the extent permitted in the resolution designating the committee. This amendment would enhance the board’s flexibility to create those committees it deems necessary and most efficient for the functioning of the board. Section 3.10(a) would be further amended to provide that no committee would have the power to (i) Approve, adopt or recommend to the stockholders any matter required by Delaware law to be submitted to stockholder approval, or (ii) adopt, amend or repeal any bylaw. These amendments are being made to assure that the full board of directors considers and passes upon these significant corporate decisions.

Preferred Stock Directors

The New Bylaws would add new Section 3.12 to clarify that whenever the holders of one or more classes or series of preferred stock have the right to elect a preferred stock director, pursuant to the New Certificate of Incorporation, the provisions of Article 3 of the New Bylaws relating to the election, term of

⁴ Under the New Certificate of Incorporation, a “Change in Ownership” is deemed to occur at such time as the beneficial owners of the Class B Common Stock and Non-Voting Class B Common Stock own, in the aggregate, less than a majority of the total voting power of BATS Global Markets, Inc.

³ 17 CFR 240.14a–8.

office, filling of vacancies, removal, and other features of directorships would not apply to preferred stock directors. Rather, such features would be governed by the applicable provisions of the New Certificate of Incorporation. This amendment is consistent with the New Certificate of Incorporation with respect to the rights of preferred stockholders, should any class or series of preferred stock be issued with director voting rights in the future.

Form of Stock Certificates

The New Bylaws would amend Section 6.01 of the Current Bylaws to state that the shares of BATS Global Markets, Inc. shall be represented by certificates, unless the board provides by resolution that some or all of any class or series of stock be uncertificated. Except as otherwise provided by law, holders of certificated and uncertificated shares of the same class and series would have identical rights and obligations. The board will also have the power to make rules for issuance, transfer and registration of certificated or uncertificated shares, and the issuance of new certificates in lieu of those lost or destroyed. The New Bylaws further amend Section 6.01 to provide that BATS Global Markets, Inc. will not have the power to issue a certificate in bearer form. These amendments are intended to align the bylaws of BATS Global Markets, Inc. with standard provisions for Delaware public companies.

Indemnification

Article X of the Current Bylaws contains certain provisions for the indemnification of directors, officers, employees and certain other agents of BATS Global Markets, Inc. The New Bylaws will eliminate such provisions in their entirety. These provisions are being eliminated because provisions regarding indemnification will instead be contained in Article 10 of the New Certificate of Incorporation.

Future Bylaws Amendments

In addition to the power of the board to adopt, amend or repeal bylaws provided by Article Eighth of the current certificate of incorporation and Article 9 of the New Certificate of Incorporation, Article XII of the Current Bylaws permit the bylaws to be amended or repealed by the action of stockholders holding seventy percent of the shares entitled to vote. To conform to the New Certificate of Incorporation, Article 11 of the New Bylaws would amend Article XII to provide that, until a Change in Ownership, the bylaws may be adopted, amended or repealed by the

stockholders with the affirmative vote of not less than a majority of the total voting power then entitled to vote in the election of directors. Upon the occurrences of a Change in Ownership, the New Bylaws would provide that bylaws may be adopted, amended or repealed by the stockholders only with the affirmative vote of not less than seventy percent of the total voting power then entitled to vote in the election of directors.

This change is consistent with amendments contained in Section 9.02 of the New Certificate of Incorporation. Section 11.01(c) of the New Bylaws will maintain the provisions contained in Article XII of the Current Bylaws requiring that, for so long as BATS Global Markets, Inc. will control the Exchange, before any amendment to the New Bylaws may become effective, the amendment must be submitted to the board of directors of the Exchange, and if required by Section 19 of the Act,⁵ filed with or filed with and approved by the Commission.

Loans to Officers

Article XIII of the Current Bylaws authorize BATS Global Markets, Inc. to lend money to or guarantee obligations of any officer of the company under certain circumstances. In order to comply with Section 13(k)(1) of the Act,⁶ which will apply to BATS Global Markets, Inc. after the IPO, the New Bylaws eliminate this authority.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.⁷ In particular, Sections 2.03 and 2.10(c) of the proposed New Bylaws, which prohibit the ability of the stockholders to call a special meeting of the stockholders to act by written consent is consistent with Section 6(b)(1) of the Act, because it prevents any stockholder from exercising undue control over the operation of the Exchange and thereby enables the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations

thereunder, and the rules of the Exchange.

(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 that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) As the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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. Please include File No. SR-BYX-2011-022 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 No. SR-BYX-2011-022. 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/>

⁵ 15 U.S.C. 78s.

⁶ 15 U.S.C. 78m(k)(1).

⁷ 15 U.S.C. 78f(b).

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 changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing will also 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 No. SR-BYX-2011-022 and should be submitted on or before October 17, 2011.

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

Elizabeth M. Murphy,
Secretary.

[FR Doc. 2011-24584 Filed 9-23-11; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65362; File No. SR-NASDAQ-2011-010]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Disapproving a Proposed Rule Change To Link Market Data Fees and Transaction Execution Fees

September 20, 2011.

I. Introduction

On January 10, 2011, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to discount certain market data fees and increase certain liquidity provider credits for members that both (1) Execute specified levels of

transaction volume on NASDAQ as a liquidity provider, and (2) purchase specified levels of market data from NASDAQ. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ Notice of filing of the proposed rule change was published in the **Federal Register** on January 27, 2011.⁴ The Commission suspended the proposed rule change and instituted proceedings to determine whether to disapprove the proposed rule change in an order published in the **Federal Register** on February 3, 2011.⁵ The Commission received three comment letters on the proposed rule change.⁶ On April 4, 2011, NASDAQ submitted a response letter to the comments.⁷ This order disapproves the proposed rule change.

II. Description of the Proposal

NASDAQ proposes to provide a discount on non-professional market data fees for NASDAQ Depth Data⁸ ("NASDAQ Depth Data Product Fees") charged to a member that provides liquidity through the NASDAQ Market Center and incurs NASDAQ Depth Data Product Fees at certain specified levels.⁹ Specifically, a member would qualify as a:

- "Tier 1 Firm" for purposes of pricing during a particular month if it (i) Has an average daily volume of 12 million shares or more of liquidity

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release No. 63745 (January 20, 2011) 76 FR 4970 ("Notice").

⁵ See Securities Exchange Act Release No. 63796 (January 28, 2011) 76 FR 6165 ("Order Instituting Disapproval Proceedings").

⁶ See Letter dated January 13, 2011 from William O'Brien, Chief Executive Officer, Direct Edge to Florence E. Harmon, Deputy Secretary, Commission (the "Direct Edge Letter"); Letter dated January 31, 2011 from Christopher Nagy, Managing Director Order Strategy, and Richard P. Urian, Global Head of Market Data, TD Ameritrade Inc. to Elizabeth M. Murphy, Secretary, Commission (the "TD Ameritrade Letter"); and Letter dated March 21, 2011 from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, and Markham Erickson, Executive Director and General Counsel, NetCoalition to Elizabeth M. Murphy, Secretary, Commission (the "SIFMA/NetCoalition Letter").

⁷ See Letter dated April 4, 2011 from Joan Conley, Senior Vice President, NASDAQ OMX Group, Inc. to Elizabeth M. Murphy, Secretary, Commission (the "NASDAQ Response Letter"). In addition, on August 2, 2011, counsel for NASDAQ submitted a brief letter. See Letter dated August 1, 2011 from Eugene Scalia, Gibson, Dunn & Crutcher LLP to Elizabeth M. Murphy, Secretary, Commission (the "NASDAQ Counsel Letter").

⁸ NASDAQ Depth Data includes National Quotation Data Service (individual market maker quotation data), TotalView (depth-of-book data for NASDAQ-listed securities), and OpenView (depth-of-book data for non-NASDAQ-listed securities) data products.

⁹ For a more detailed description of the proposed rule change, see Notice, *supra* note 4.

provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of \$150,000 or more.

- "Tier 2 Firm" for purposes of pricing during a particular month if it (i) Has an average daily volume of 35 million or more shares of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of \$300,000 or more.

- "Tier 3 Firm" for purposes of pricing during a particular month if it (i) Has an average daily volume of 65 million or more shares of liquidity provided through the NASDAQ Market Center in all securities during the month; and (ii) incurs NASDAQ Depth Data Product Fees during the month of \$500,000 or more.

Tier 1 Firms would receive a 15% discount on NASDAQ Depth Data Product Fees charged to them, Tier 2 Firms would receive a 35% discount on NASDAQ Depth Data Product Fees charged to them, and Tier 3 Firms would receive a 50% discount on NASDAQ Depth Data Product Fees charged to them.¹⁰ In addition, Tier 1 Firms would receive an increased liquidity provider credit for transactions executed on NASDAQ. Specifically, Tier 1 Firms would receive a credit of \$0.0028 per share for displayed liquidity and \$0.0015 per share for non-displayed liquidity, compared to the current liquidity provider credit of \$0.0020 per share of displayed liquidity and \$0.0010 per share of non-displayed liquidity applicable to these firms. There is no proposed enhancement to the existing liquidity provider credits at this time for Tier 2 and Tier 3 firms.

III. Summary of Comment Letters and NASDAQ's Response

The Commission received three comment letters objecting to the proposed rule change.¹¹ Shortly after NASDAQ filed the proposed rule change with the Commission, Direct Edge urged the Commission to suspend the proposed rule change and to institute proceedings to determine whether to approve or disapprove the proposal.¹² TD Ameritrade¹³ and SIFMA/NetCoalition believe that the

¹⁰ A NASDAQ member incurs non-professional fees when it offers NASDAQ Depth Data to natural persons that are not acting in a capacity that subjects them to financial industry regulation (e.g., retail customers).

¹¹ See *supra*, note 6.

¹² See Direct Edge Letter, *supra* note 6 at 1.

¹³ See TD Ameritrade Letter, *supra* note 6 at 1.

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.