introducing Supplemental Orders to the market.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because numerous alternatives exist to the execution and routing services offered by NASDAQ, if NASDAQ increases its fees to an excessive extent, it will lose customers to its competitors. Accordingly, NASDAQ believes that competitive market forces help to ensure that the fees it charges for execution and routing are reasonable, equitably allocated, and non-discriminatory.

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. Because the market for order and routing execution is extremely competitive, members may readily opt to disfavor NASDAQ's execution services if they believe that alternatives offer them better value. Accordingly, NASDAQ does not believe that the proposed changes will unfairly affect the ability of members or competitors to maintain their competitive standing in the financial markets.

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.[9] 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*. Please include File Number SR–NASDAQ–2012–040 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–2012–040. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–040 and should be submitted on or before May 1, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–8581 Filed 4–9–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A)(ii).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66740; File No. SR–NASDAQ–2012–042]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Re-Organize NASDAQ's Rules Governing the Fees Applicable to NASDAQ's Depth-of-Book Market Data

April 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 28, 2012, 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: (1) Re-organize NASDAQ's rules governing the fees applicable to NASDAQ's Depth-of-Book market data; and (2) establish an Enterprise License for Non-Professional Usage of certain NASDAQ Depth-of-Book market data.

The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com/,* at NASDAQ'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, 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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

NASDAQ is proposing two changes to the fees governing distribution of NASDAQ market data: (1) Re-organize NASDAQ's rules governing the fees applicable to NASDAQ's Depth-of-Book market data; and (2) establish an Enterprise License for Non-Professional Usage of certain NASDAQ Depth-of-Book market data.

Re-Organizing NASDAQ Rules 7017 and 7023

NASDAQ proposes to create a single rule containing all fees applicable to NASDAQ Depth-of-Book market data. To accomplish this, NASDAQ will combine NASDAQ Rule 7017 which governs the NASDAQ Quotation Data Service or NQDS and NASDAQ Rule 7023 which governs NASDAQ TotalView and NASDAQ OpenView. In doing so, NASDAQ will collect and improve all existing defined terms and add several new defined terms where needed to enhance the clarity of NASDAQ's rules. None of these proposed modifications will change the substance of NASDAQ's rules or the manner in which NASDAQ applies the existing fees for NASDAQ Depth-of-Book data.

New Rule 7023 begins by defining the relevant terminology in subsection (a). New Rule 7023(a)(1) defines in one place the three Depth-of-Book feeds that NASDAQ offers: NASDAQ Level 2 (formerly known as the NASDAQ Quotation Data Service or NQDS) currently defined in Rule 7017(a); NASDAQ TotalView, currently defined in Rule 7023(a), and NASDAQ OpenView, currently defined at Rule 7023(c).

NASDAQ is proposing to rename NQDS as NASDAQ Level 2, and to clarify the definition of NASDAQ Level 2 without substantively modifying its content or cost. NQDS (now Level 2) currently consists of three components: individual market maker quotations from NASDAQ, NASDAQ Level 1, and the Last Sale Information Service (''Last Sale''). The NASDAQ Level 1 and Last Sale Services are consolidated data feeds disseminated by the network processor for NASDAQ-listed stocks. The current monthly fee for NASDAQ Level 1 is $20 per Professional Subscriber and $1 per Non-Professional Subscriber for NASDAQ Level 1 and Last Sale. However, because NASDAQ Level 1 and Last Sale are consolidated feeds, the fees for those services are remitted to the network processor rather than to the Exchange.

The current fee for NASDAQ Level 2, listed in Rule 7017(a) and (b), is $50 monthly for Professional Subscribers and $10 monthly for Non-Professional Subscribers. Of that $50 for Professional Subscribers, $20 is attributable to NASDAQ Level 1; and of that $10 for Non-Professional Subscribers, $1 is attributable to NASDAQ Level 1. Thus, the current monthly fee attributable to individual market maker quotations from NASDAQ is $30 for Professional Subscribers and $9 for Non-Professional Subscribers.

Going forward, new NASDAQ Rule 7023(a)(1)(A) will properly define NASDAQ Level 2 to include only individual market maker quotations from NASDAQ (thereby excluding the consolidated data feeds), and new Rule 7023(b)(1) will properly list the monthly fee of $30 for Professional Subscribers and $9 for Non-Professional Subscribers (thereby excluding the fees for the consolidated data feeds). As a result, there will be no impact to current or future Subscribers either in the price or content of NASDAQ Level 2.

New NASDAQ Rule 7023(a)(2) contains new definitions of Display and Non-Display Usage of Depth-of-Book data based on the distinction already reflected throughout current NASDAQ Rule 7023, most clearly at subsection (a)(1)(D). NASDAQ has assessed fees for Display and Non-Display Usage since 2006, although it was not until 2010 that NASDAQ assessed different fees based on the two different usage methods.[3]

New NASDAQ Rule 7023(a)(3) defines and distinguishes between Professional and Non-Professional Subscribers, carrying forward the same definition set forth in current NASDAQ Rule 7017(c).

New NASDAQ Rule 7023(a)(4) defines Distributor and distinguishes between Internal and External Distribution.

New NASDAQ Rule 7023(a)(5) defines and distinguishes between Direct Access and Indirect Access based on the existing definition and distinction set forth at NASDAQ Rule 7019(d). This will not change the application of NASDAQ rules or fees.

New NASDAQ Rule 7023(a)(6) defines Controlled Device with minor, stylistic changes to the definition set forth at existing NASDAQ Rule 7023(b). The stylistic changes are intended only to improve the clarity and not to change the application or impact of the defined term.

New NASDAQ Rule 7023(b) collects and reorganizes the Subscriber fees for NASDAQ Level 2, NASDAQ TotalView, and NASDAQ OpenView. Subsection (b)(1)(A) and (b)(1)(B) set forth the monthly Non-Professional and Professional Subscriber fees currently set forth in NASDAQ Rule 7017(a) and (b). The fee for Professional usage of NASDAQ Level 2 will appear lower by $20 (down from $50 to $30) per month because (as stated above) NASDAQ is removing the $20 monthly fee for NASDAQ Level 1 that previously had been combined in the fee for NASDAQ Level 2. The fee for Non-Professional usage of Level 2 will also appear lower by $1 (from $10 to $9) because NASDAQ is removing the $1 fee for NASDAQ Level 1 which also had been combined with the fee for NASDAQ Level 2. New NASDAQ Rule 7023(b)(1)(C) states clearly that the fees for NASDAQ Level 1 and NASDAQ Level 2 are completely separate, as they have been and should be. The feeds themselves also have been and will remain separately available for the same monthly Subscriber fees.

The Subscriber fees for NASDAQ TotalView and NASDAQ OpenView are now set forth at NASDAQ Rule 7023(b)(2) and (b)(3) in the same form as currently set forth in NASDAQ Rule 7023(a) and (c).

New NASDAQ Rule 7023(c) sets forth the fee caps generally referred to as Enterprise Licenses. Subsections (c)(1), (c)(2), and (c)(4) reflect the enterprise licenses currently set forth in NASDAQ Rule 7023(a)(1)(C) and (D). Current Rule 7023(a)(1)(E) is being modified and moved to new NASDAQ Rule 7023(c)(3) as described in more detail below in the second section of this proposed rule change.

New NASDAQ Rule 7023(d) and (e) are repeated almost verbatim from current Rule 7023(a)(2) and (d). NASDAQ is proposing to make minor, stylistic changes to those provisions, which will have no impact on the application of the rule.

With the exception of those provisions identified above and described in detail below, the elimination of NASDAQ Rule 7017 and the proposed changes to NASDAQ Rule 7023 are technical and administrative changes that will not impact the fees assessed to any Subscriber.

[3] *See* NASDAQ Rule 7023(a)(1)((D). *See also* Securities Exchange Act Release No. 34–61700 (Mar. 12, 2010), 75 FR 13172 (Mar. 18, 2010).

Depth-of-Book Enterprise License for Non-Professional Usage

New NASDAQ Rule 7023(c)(3) will offer an optional Enterprise License for unlimited Non-Professional Usage of NASDAQ Level 2, NASDAQ TotalView, or NASDAQ OpenView for certain NASDAQ members. Specifically, Distributors that are also broker-dealers registered under the Act can choose to pay a fee of $325,000 per month that covers all Non-Professional Usage fees to Subscribers with whom the firm has a brokerage relationship.[4] This Depth-of-Book Enterprise License Fee includes Non-Professional Usage fees, but does not include Distributor fees. Non-broker-dealer vendors and application service providers are not eligible for the enterprise license; such firms typically pass through the cost of market data Subscriber fees to their customers.[5]

NASDAQ continues to seek broader distribution of Depth-of-Book data and to reduce the cost of providing Depth-of-Book data to larger numbers of investors. In the past, NASDAQ has accomplished this goal in part by offering similar 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 believes that the adoption of enterprise licenses has led to greater distribution of market data, particularly among Non-Professional Subscribers.

Based on input from market participants, 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 Subscriber of NASDAQ Depth-of-Book data. In addition to increased administrative flexibility, 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 retail investors.

The Depth-of-Book Enterprise License Fee covers usage fees for data received directly from NASDAQ as well as data received from third-party vendors (*e.g.,* Bloomberg, Thomson-Reuters, etc.). Upon joining the program, firms may inform third-party market data vendors they utilize (through a NASDAQ-provided form) that, going forward, depth data usage by the broker-dealer may be reported to NASDAQ on a non-billable basis. This structure attempts to address a long-standing concern that broker-dealers are over-billed for market data consumed by one person through multiple market-data display devices. At the same time, the proposed billing structure will continue to provide NASDAQ with accurate reporting information for purposes of usage monitoring and auditing.

The proposed Depth-of-Book Enterprise License Fee is completely optional and does not replace existing enterprise license fee alternatives set forth in Rule 7023. Additionally, the proposal does not impact individual usage fees for any product or raise the costs of any Subscriber of any NASDAQ data product. To the contrary, it provides broker-dealers with an additional approach to providing more NASDAQ data at a fixed cost.

b. [sic] Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Section 6(b)(4) of the Act,[7] in particular, in that it provides an equitable allocation of reasonable fees among Subscribers 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 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.[8]

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. Level 2, TotalView and OpenView are 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 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.

[4] NASDAQ previously offered the same optional Enterprise License on a pilot basis. *See* Securities Exchange Act Release No. 63892 (Feb. 11, 2011); 76 FR 9391 (Feb. 17, 2011) (SR–NASDAQ–2011–021); Securities Exchange Act Release No. 63084 (Oct. 13, 2010); 75 FR 64379 (Oct. 19, 2010) (SR–NASDAQ–2010–125). *See also* Securities Exchange Act Release No. 62908 (Sept. 14, 2010); 75 FR 57321 (Sept. 20, 2010) (SR–NASDAQ–2010–111). The proposed Depth Enterprise License will be a permanent rule rather than a pilot.

[5] NASDAQ relies on Distributor self-reporting of usage rather than on individual contact with each end-user Subscriber. NASDAQ permits Distributors to designate an entire Subscriber population as Non-Professional provided that the number of Professional Subscribers within that Subscriber population does not exceed ten percent (10%) of the total population.

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

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.

For the reasons stated above, NASDAQ believes that the proposed fees are fair and equitable, and not unreasonably discriminatory. As described above, the proposed fees are based on pricing conventions and distinctions that exist in NASDAQ's current fee schedule, and the fee schedules of other exchanges. These distinctions (top-of-book versus Depth-of-Book, Professional versus non-Professional Subscribers, Direct versus Indirect Access, Internal versus External Distribution) are each based on principles of fairness and equity that have helped for many years to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with equal or greater force to the current proposal.

As described in greater detail below, if NASDAQ has calculated improperly and the market deems the proposed fees to be unfair, inequitable, or unreasonably discriminatory, firms can diminish or discontinue the use of their data because the proposed fee is entirely optional to all parties. Firms are not required to purchase Depth-of-Book data or to utilize any specific pricing alternative if they do choose to purchase Depth-of-Book data. NASDAQ is not required to make Depth-of-Book data available or to offer specific pricing alternatives for potential purchases. NASDAQ can discontinue offering a pricing alternative (as it has in the past) and firms can discontinue their use at any time and for any reason (as they often do), including due to their assessment of the reasonableness of fees charged. NASDAQ continues to create new pricing policies aimed at increasing fairness and equitable allocation of fees among Subscribers, and NASDAQ believes this is another useful step in that direction.

NASDAQ believes that the Depth-of-Book Enterprise License promotes increased transparency by offering a new pricing option resulting in lower fees for heavy users of Depth-of-Book data. This fee limitation will, in turn, enable firms to make additional information available to the firms' clients, thereby increasing transparency of the market. Additionally, the proposal provides for simplified market data administration by eliminating the current requirement that firms identify and track the number of individual Subscribers of Depth-of-Book data. NASDAQ continues to create new pricing policies aimed at increasing transparency in the market and believes this is useful step in that direction.

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 Subscribers only insofar as they provide information that end Subscribers 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 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 SRO markets, as well as internalizing 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 Depth-of-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 Subscribers. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end Subscribers will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail 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 data attracts order flow. For example, as of July 2010, 92 of the top 100 broker-dealers by shares executed on NASDAQ consumed NQDS and 80 of the top 100 broker-dealers consumed TotalView. During that month, the NQDS–Subscribers were responsible for 94.44% of the orders entered into NASDAQ and TotalView Subscribers were responsible for 92.98%.

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/NQDS, 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 Enterprise License options that 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 market data have remained flat. In fact, as a percent of total Subscriber 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 Depth-of-Book information is significant and the Exchange believes that this proposal itself 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 Depth-of-Book information is highly competitive and continually evolves as products develop and change.

Additional evidence cited by NYSE Arca in SR–NYSE Arca–2010–097 [9] [sic] which was not before the *NetCoalition* court also demonstrates that availability of Depth-of-Book data attracts order flow and that competition for order flow can constrain the price of market data:

1. Terrence Hendershott & Charles M. Jones, *Island Goes Dark: Transparence, Fragmentation, and Regulation,* 18 Review of Financial Studies 743 (2005);

2. Charts and Tables referenced in Exhibit 3B to that filing;

3. PHB Hagler Bailly, Inc., ''Issues Surrounding Cost-Based Regulation of Market Data Prices;'' and

4. PHB Hagler Bailly, Inc., ''The Economic Perspective on Regulation of Market Data.''

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.[10] 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.* Please include File Number SR–NASDAQ–2012–042 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–2012–042. This file number should be included on the subject line if email is used.

To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 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–

[9] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010) 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

NASDAQ–2012–042, and should be submitted on or before May 1, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–8580 Filed 4–9–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66734; File No. SR–ISE–2012–29]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Additions to the Schedule of Fees

April 4, 2012.

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 April 2, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission (the ''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 ISE proposes to add notes to its Schedule of Fees with respect to two fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

The Exchange proposes to add notes to its Schedule of Fees with respect to the application of two fees currently assessed by ISE. The first note relates to Non-ISE Market Maker fees, which apply to regular and complex orders, and how those fees are applied to execution of complex orders on the Exchange.[3] Non-ISE Market Maker fees were adopted by ISE in 2006.[4] Prior to this fee change, Non-ISE Market Makers were subject to the fee listed on the Schedule of Fees under ''firm proprietary'' for both regular and complex orders. In order to attract complex orders to the Exchange, ISE charged an execution fee only on the largest leg of a complex order. Most of the execution fees for complex orders on the Exchange's Schedule of Fees currently note that for complex orders, this fee is ''charged for the leg of the trade consisting of the most contracts.'' However, in 2006, when ISE carved out the fee for Non-ISE Market Makers as a separate line item on the Schedule of Fees, the Exchange inadvertently failed to note that the Exchange only charges an execution fee on the largest leg of a trade for complex orders sent to the Exchange. The Exchange continued to charge Non-ISE Market Makers only for the largest leg of a complex order. The Exchange now proposes to add the following note under the Non-ISE Market Maker line item: ''For Complex Orders, fee charged only for the leg of the trade consisting of the most contracts.''

The second note relates to a fee for executions in symbols that are subject to the Exchange's modified maker/taker fees. The Exchange initially adopted modified maker/taker fees in April 2010[5] and has since amended these fees regularly in response to competitive changes made by other options exchanges. These fees apply to market participants that add or remove liquidity from the Exchange in 101 options classes.[6] When the Exchange adopted modified maker/taker fees, it did not specify how the maker/taker fees would apply to executions by Primary Market Makers (PMMs) when they provide away market price protection for marketable public customer orders when the ISE market is not at the NBBO in accordance with their obligations under ISE rules and the Intermarket Linkage Plan.[7] Since the PMM is performing its linkage obligations when it executes (i.e., ''trade reports'') such public customer orders, it is neither a taker nor maker of liquidity as those terms are used within the framework of the ISE's maker/taker pricing model. Accordingly, when PMMs are performing this intermarket price protection function, the Exchange has not charged any fees or provided any rebates for PMM trade reports since the adoption of the maker/taker fees. The Exchange now proposes to specify in a note that: ''Primary Market Makers do not receive a maker rebate nor pay a taker fee when trade reporting a public customer order in accordance with their obligation to provide away market price protection pursuant to ISE Rule 803(c)(2).''

2. Statutory Basis

The Exchange believes that its proposal to clarify its Schedule of Fees is consistent with Section 6(b) of the Act[8] in general, and furthers the objectives of Section 6(b)(4) of the Act[9] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and other persons using its facilities. In particular, the proposal will correct an ambiguity that was created by the adoption of a separate Non-ISE Market Maker fee that failed to specify the fee's application to complex orders. Non-ISE Market Makers were only charged for the largest leg of a complex order prior to that fee change, and continued to be charged only for the largest leg of a complex order after the fee change. Accordingly, the Exchange's application of the transaction fee to complex orders remained consistent, and Non-ISE Market Makers continued to be treated

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] A Non-ISE Market Maker is a market maker as defined in Section 3(a)(38) of the Act, registered in the same options class on another options exchange.

[4] *See* Securities Exchange Act Release No. 53630 (April 11, 2006), 71 FR 19918 (April 18, 2006) (SR–ISE–2006–18).

[5] *See* Securities Exchange Act Release No. 61869 (April 7, 2010), 75 FR 19449 (April 14, 2010) (SR–ISE–2010–25).

[6] Options classes subject to maker/taker fees are identified by their ticker symbol on the Exchange's Schedule of Fees.

[7] The Intermarket Linkage Plan prohibits an exchange from allowing the automatic execution of public customer orders at a price that is inferior to the best prices being publically displayed by another exchange. Under ISE Rule 803(c)(2), it is the responsibility of the PMM to either execute an order at a price that matches or betters the NBBO, or obtain such better prices on behalf of the public customer.

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).