

to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is December 22, 2014. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider this proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,⁶ designates February 5, 2015, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NYSEArca-2014-107)

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73807; File No. SR-NASDAQ-2014-117]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify an Optional Subscriber Fee and Tiered Distribution Fee for “Enhanced” Data Displays (the “Enhanced Display Solution Fee”)

December 10, 2014.

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 November 25, 2014, The NASDAQ Stock Market LLC (“NASDAQ” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the

proposed rule change as described in Items I and II below, which Items have been prepared by the 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 modify an optional Subscriber fee and tiered Distribution fee for “Enhanced” data displays (the “Enhanced Display Solution Fee”).

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

* * * * *

7026. Distribution Models

(a) Display Solutions

(1) Enhanced Display[s] *Solution* (“EDS”) (optional delivery method)

(A) The charges to be paid by Distributors for offering *EDS* S[s]ubscribers of NASDAQ Depth [data] *Information* [controlled display products along] with access to an API or similar solution shall be:

Number of downstream *EDS* subscribers

Monthly Enhanced Display Solution Fee per Distributor for *the* right to *offer an* [display products containing] API or similar solution*.

[1–299 users = \$2,000/month.
300–399 users = \$3,000/month].
1–399 [400–499] users = \$4,000/month.
[500–599 users = \$5,000/month.
600–699 users = \$6,000/month.
700–799 users = \$7,000/month.
800–899 users = \$8,000/month.
900–999 users = \$9,000/month].
400–999 users = \$7,500/month.
1,000 users or more = \$15[0],000/month.

* [Customers] *Distributors* that are subscribing to certain enterprise depth capped fees as described in NASDAQ Rule 7023(a)(1)(c) are exempt from this fee.

(B) The monthly fee per Professional [or Non-Professional] *EDS* S[s]ubscriber for utilizing *NASDAQ Level 2*, NASDAQ TotalView or NASDAQ OpenView data on a [controlled display] product with access to an API or similar solution [through that display] is *\$74 per month for TotalView and Level 2 and \$6 per month for OpenView*. [the applicable NASDAQ TotalView or NASDAQ OpenView rates.]

The monthly fee per Non-Professional EDS Subscriber for utilizing NASDAQ Level 2, NASDAQ TotalView or NASDAQ OpenView data on a product with access to an API or similar solution is the applicable NASDAQ Level 2,

NASDAQ TotalView or NASDAQ OpenView rates.

[The monthly fee per Professional or Non-Professional subscriber for utilizing the Level 2 data for NASDAQ-listed securities on a controlled display product with access to an API or similar solution through that display is the applicable NASDAQ TotalView rates.]

[The monthly fee per Professional or Non-Professional subscriber for utilizing NASDAQ Level 2 data for NYSE, AMEX or regional listed securities on a controlled display product with access to an API or similar solution through that display is the applicable NASDAQ OpenView rates.]

(C) *EDS Enterprise License: EDS Distributors may elect to purchase an Enterprise License for \$30,000 per month. Such Enterprise License shall entitle the EDS Distributor to distribute to an unlimited number of Professional EDS Subscribers for a monthly fee of \$70 for TotalView and/or Level 2 and \$6 for OpenView, notwithstanding the fees set forth in subsection (B) above.*

(2) The term “[n]Non-[p]Professional” shall have the same meaning as set forth in NASDAQ Rule 7011(b).

(3) The term “Distributor” shall have the same meaning as set forth in NASDAQ Rule 7019(c).

(b)–(c) No change.

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⁶ *Id.*

⁷ 17 CFR 200.30–3(a)(31).

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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is proposing to amend NASDAQ Rule 7026 (Distribution Models) to modify the optional Enhanced Display Solution ("EDS") Fee governing the distribution of NASDAQ TotalView, NASDAQ OpenView and NASDAQ Level 2 Information (collectively, "NASDAQ Depth Information"). The modified optional EDS Fee will offer increased flexibility and simplified market data administration for members and to Distributors with external subscribers that use the NASDAQ Depth Information internally.

Existing EDS Fee. Currently, the optional EDS Fee provides a pricing option for Distributors who provide a "controlled device" product³ along with an Application Programming Interface ("API") or similar solution to Subscribers. Non-display use is not permitted under the Enhanced Display Solution fee structure. To ensure proper application of the EDS Fee, NASDAQ requires Distributors to monitor for any non-display or excessive use suggesting that the EDS Subscriber is not in

compliance. The Distributor is liable for any unauthorized use by the EDS Subscribers under the EDS Fee. The optional fee is available only to NASDAQ members and external Distributors offering NASDAQ Depth Information and who apply and are approved for an Enhanced Display Solution.

The EDS option also has administrative requirements for data usage. As administered today, the Distributor must agree to reformat, redisplay and/or alter the NASDAQ Depth Information prior to retransmission, but not to affect the integrity of the NASDAQ Depth Information and not to render it inaccurate, unfair, uninformative, fictitious, misleading or discriminatory. An Enhanced Display Solution is any controlled display product containing NASDAQ Depth Information where the Distributor controls a display of NASDAQ Depth Information, but also allows the EDS Subscriber to access an API or similar solution from that display product. The EDS Subscriber may use the NASDAQ Depth Information for the EDS Subscriber's own purposes and may not redistribute the information outside of their organization. The EDS Subscriber may not redistribute the data internally to other users in the same organization.

Proposed Modification. The new Enhanced Display Solution will offer even greater flexibility. Where previously, EDS required the Distributor to both "control" the display and the entitlement to the display, effective January 1, 2015, Distributors will have the option to disseminate NASDAQ Depth Information to EDS Subscribers without the requirement of controlling the display. This does not replace the existing EDS program, but rather provides additional flexibility by offering two options under the EDS program. In response to industry demand and ongoing changes in the technical distribution of market data, NASDAQ will now permit Distributors to offer APIs that power third party software display applications where the Distributor controls the entitlement but not the display of data. Previously, downstream firms receiving this type of NASDAQ Depth Information would have been classified as a data feed recipient and pay a much higher internal distributor fee. These downstream data feed recipients are now able to reduce their cost and the cost to the industry by paying a modest fee increase for each EDS Subscriber, while also removing reporting and administration requirements by allowing the Distributor to manage this

on behalf of the EDS Subscriber firm. The EDS program will continue to cover the same NASDAQ Depth Information, namely NASDAQ TotalView, NASDAQ OpenView, and NASDAQ Level 2.

The EDS Subscriber, or end user, to an Enhanced Display Solution may use the NASDAQ Depth Information for its own purposes but may not redistribute the NASDAQ Depth Information outside of their organization or even internally to other subscribers in the same organization. Any EDS Subscriber distributing the NASDAQ Depth Information further downstream from NASDAQ—such as posting the NASDAQ Depth Information on a shared drive or delivering the NASDAQ Depth Information into another system—would forfeit eligibility for the EDS Fee.⁴ Additionally, EDS Distributors must offer an integrated data solution with secured data transmissions, a robust entitlement system and monitor EDS Subscribers for any non-display or excessive usage to ensure compliance. EDS Distributors must also offer NASDAQ Depth Information in Distributor's own messaging formats (rather than its raw NASDAQ message formats) by reformatting, redisplaying and/or altering the NASDAQ Depth Information prior to retransmission, but not to affect the integrity of the NASDAQ Depth Information and not to render it inaccurate, unfair, uninformative, fictitious, misleading or discriminatory.

Non-display use is not included or permitted under the EDS Fee. While Distributors are not required to technically control against non-display usage (due to the difficulty of achieving such control), the Distributor is required to restrict non-display usage contractually by including such restrictions in any agreements with recipients of the Information. The non-display definition in the policy document is not changing. Today, data use that powers the display is allowed. For example, if an application is updating a portfolio and exposes such information on the display, this use is included under EDS. Also, calculating VWAPs or other derived information for use on the display/device is permitted under EDS. Examples of prohibited non-display use include but are not limited to, auto-quoting, algorithmic trading, and risk management, even if that information is used to power the display.

⁴ Such use would be considered a Re-transmission and would be governed by NASDAQ Rule 7019 governing market data distribution.

³ The term "controlled device" is defined as follows in Rule 7023(a)(6): A Controlled Device is any device that a Distributor of NASDAQ Depth-of-Book data permits to: (1) Access the Depth-of-Book information or (2) communicate with the Distributor so as to cause the Distributor to access the Depth-of-Book data. Where a Controlled Device is part of an electronic network between computers used for investment, trading or order routing activities, the Distributor must demonstrate that the particular Controlled Device should not have to pay for an entitlement. For example, in some Display systems the Distributor gives the Subscribers the choice to view the data or not; a Subscriber that chooses not to view it would not be charged. Similarly, in a Non-Display system, users of Controlled Devices may have a choice of basic or advanced computerized trading or order routing services, where only the advanced version uses the information. Customers of the basic service would not be charged.

Finally, Distributors offering an Enhanced Display Solution have several administrative requirements. They must report the number of EDS Subscribers under new report titles and separately from controlled non-EDS products. Distributors must include EDS Subscribers under new products codes in the Detailed Usage Reporting. Distributors also assume the liability for

any unauthorized use of NASDAQ Depth Information by EDS Subscribers. While there are more administrative requirements for this program for the Distributor, the industry administration burden is lessened, as downstream data feed recipient firms no longer need to go through the process of having data feeds approved or tracking and reporting usage.

Effective January 1, 2015, NASDAQ will offer new pricing for the optional EDS program. If the Distributor offers multiple Enhanced Display Solutions, it would only be fee liable for one EDS Distribution fee. The simplified fees to be paid by Distributors offering EDS are as follows:

Old fee for number of downstream subscribers	New fee for number of downstream subscribers
1–299 Subscribers = \$2,000/month	1–399 Subscribers = \$4,000/month.
300–399 Subscribers = \$3,000/month.	
400–499 Subscribers = \$4,000/month	400–999 Subscribers = \$7,500/month.
500–599 Subscribers = \$5,000/month.	
600–699 Subscribers = \$6,000/month.	
700–799 Subscribers = \$7,000/month.	
800–899 Subscribers = \$8,000/month.	
900–999 Subscribers = \$9,000/month.	
1,000 or more Subscribers = \$10,000/month	1,000 or more Subscribers = \$15,000/month.

With one exception, distributors opting for an Enhanced Display Solution are, in addition, liable for the applicable Professional or Non-Professional Subscriber fees for the underlying NASDAQ Depth Information products. Distributors opting for an Enhanced Display Solution that provides access to NASDAQ TotalView, NASDAQ Level 2 or OpenView will be charged a monthly fee of \$74 per Professional EDS Subscriber of TotalView or Level 2 and \$6 per Professional EDS Subscriber of OpenView. The fees otherwise applicable to such Subscribers would be \$70 and \$6 for TotalView and OpenView.⁵

NASDAQ is also creating a new Enterprise License option for EDS Distributors. Specifically, as set forth in new Rule 7026(a)(1)(C), an EDS Distributor may elect to purchase an Enterprise License for \$30,000 per month. This Enterprise License will permit the EDS Distributor to distribute to an unlimited number of Professional EDS Subscribers for \$70 per month each for TotalView and Level 2 and \$6 per month each for OpenView. The EDS Enterprise License does not modify the fees assessed for distribution to Non-Professional Subscribers. Distributors that subscribe to existing NASDAQ enterprise licenses set forth in Rule 7023(c)(1–3) are not impacted by the new EDS Enterprise License and they remain exempt from the EDS Distributor fee as they are today.

This new pricing and administrative option respond to industry demand, as well as to changes in the technology to distribute market data. By providing this new fee option, Distributors will have more administrative flexibility in their receipt and distribution of NASDAQ Depth Information.

2. 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 users and recipients of NASDAQ Depth Information.

NASDAQ believes that this proposal represents an equitable allocation of reasonable dues and fees, consistent with the requirements of the Act. The EDS Fee, which has been available as an option for two years, has reduced costs for Distributors and Subscriber firms that voluntarily opt for this service. The fee is tiered by number of subscribers, which has been found to be consistent with the Act in multiple contexts due to the economic efficiencies attributable to providing the same data elements to an increasing population of subscribers. NASDAQ's proposal to reduce the number of price tiers is also consistent with the Act in that it merely simplifies the existing tiers and only modestly adjusts the fees—some higher, some lower—of Distributors that opt for the program and that fall within the old and new tiers.

NASDAQ's proposal to increase by \$4 the monthly fee for EDS Subscribers

with access to NASDAQ TotalView and Level 2 is also consistent with the Act in that it reflects an equitable allocation of reasonable fees. The Commission has long recognized the equitable nature of assessing different fees for Professional and Non-Professional users of the same data. NASDAQ also believes it is equitable to assess a higher fee per EDS Professional TotalView Subscriber than to an ordinary Professional TotalView Subscriber due to the enhanced flexibility and lower overall costs that the EDS program offers Distributors, as well as to the voluntary nature of the EDS program itself.

Finally, NASDAQ believes that the new EDS Enterprise License is fair and equitable and not unreasonably discriminatory. Enterprise Licenses have long been accepted as an economically efficient form of volume discount for the heaviest users of market data (see Rule 7023 enterprise licenses). NASDAQ notes that the EDS Enterprise License Fee—and the entire EDS program—is entirely optional in that NASDAQ is not required to offer it and Distributors are not required to pay it. 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. NASDAQ continues to create new pricing policies aimed at increasing transparency in the market and believes this is another step in that direction.

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

⁵ Effective January 1, 2015, the fees for non-EDS Level 2 subscribers will be increasing from \$45 to \$50 per month. See SR-NASDAQ-2014-111, filed November 17, 2014.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4).

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.

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.”

NASDAQ believes that these amendments to Section 19 of the Act reflect Congress's intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a “due, fee or other charge imposed by the self-regulatory organization,” the Commission adopted a policy and subsequently a rule stipulating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. NASDAQ believes that the amendment to Section 19 reflects Congress's conclusion that the evolution of self-regulatory organization governance and competitive market structure have rendered the Commission's prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned not-for-profit corporations into for-profit investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but rather have incentives to maximize the appeal of their products to all customers, whether members or non-members, so as to broaden distribution and grow revenues. Moreover, we believe that the change also reflects an endorsement of the Commission's determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive forces.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, No. 09–1042 (D.C. 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.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.

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. For the reasons discussed above, NASDAQ believes that the Dodd-Frank Act amendments to Section 19 materially alter the scope of the Commission's review of future market data filings, by creating a presumption that all fees may take effect immediately, without prior analysis by the Commission of the competitive environment. Even in the absence of this important statutory change, however, 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.

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

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 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 ("ATs"), 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 ATs 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 ATs 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 ATs, 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 Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract “eyeballs” that contribute to their advertising revenue. Retail 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 Level 2/NQDS and 80 of the top 100 broker-dealers consumed TotalView. During that month, the Level 2/NQDS-users were responsible for 94.44% of the orders entered into NASDAQ and TotalView users 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 Level 2/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 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 depth 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 depth 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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act⁹ and paragraph (f)(2) of Rule 19b–4 thereunder.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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰ 17 CFR 240.19b–4(f)(2).

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-2014-117 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR-NASDAQ-2014-117. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NASDAQ. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2014-117 and should be submitted on or before January 6, 2015.

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

Kevin M. O'Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73805; File No. SR-FICC-2014-11]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Amend the Government Securities Division Rulebook and the Mortgage Backed Securities Clearing Rules In Order To Move the Time of Novation With Respect to Certain Trades, Include Rules To Reflect Existing Processes, and Clarify Certain Rules To Reflect Current Practices

December 10, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4,² notice is hereby given that on December 2, 2014, Fixed Income Clearing Corporation ("FICC") 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 FICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

FICC is proposing to (1) move the time of novation for netting eligible transactions submitted to the Government Securities Division ("GSD") in accordance with the GSD Rulebook ("GSD Rules") and for SBO-Destined Trades³ submitted to the Mortgage-Backed Securities Division ("MBSD") in accordance with the MBSD Clearing Rules ("MBSD Rules") in order to provide members with additional legal certainty that FICC will be the legal counterparty with respect to their guaranteed trades for purposes of regulatory capital requirements, (2) include rules to reflect existing processes, and (3) clarify certain rules to reflect current practices.

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

A. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change.

1. Purpose

FICC is proposing to move the time of novation applicable to certain transactions submitted to the GSD and MBSD to earlier in the clearing process in order to provide members with additional legal certainty that FICC will be their legal counterparty with respect to their guaranteed trades for purposes of members' regulatory capital requirements.

Currently, GSD and MBSD guarantee the settlement of a trade upon comparison, which generally occurs when FICC issues initial "output" to GSD netting members or MBSD clearing members, as applicable, indicating that their trades have compared,⁴ provided that the trade meets the requirements of the GSD Rules or the MBSD Rules, as applicable.⁵ This means that FICC is responsible for settling the guaranteed trades, even if one of the members who submitted the trade becomes insolvent.

Novation, which refers to the termination of delivery, receive and related payment obligations between the original parties to the contract and the replacement of such obligations with identical obligations between each party and FICC, currently does not occur until later in the clearing and settlement process than comparison. In GSD, novation currently occurs when subsequent "netting output" is issued to netting members (usually the day before settlement); in MBSD, novation currently occurs when subsequent "pool netting output" is issued to clearing members (usually the day before settlement).

Because there is a legal distinction between the concept of "guarantee" and "novation", and this legal distinction may have a bearing on how members calculate their capital requirement, FICC proposes to move the time of novation (*i.e.* the point that FICC becomes the legal counterparty) so that it occurs at the time of the trade guarantee.

⁴ In the case of GSD locked-in trades, comparison occurs upon receipt of the trade data submitted to FICC from the locked-in trade source. GSD Rule 6C.

⁵ See GSD Rule 11B and MBSD Rule 5.

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The MBSD Rules define a "SBO-Destined Trade" as a to-be-announced ("TBA") transaction in the clearing system intended for TBA Netting in accordance with the provisions of the Rules. MBSD Rule 1, Definitions. In a TBA transaction, members agree on a sale price, quantity, and the characteristics of the securities being sold, but they do not specify which particular securities will be delivered on the settlement date.