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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85504; File No. SR-NASDAQ-2019-024]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Equity 7 Pricing Schedule, Section 139

April 3, 2019

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, 2019, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the Equity 7 Pricing Schedule, Section 139, to introduce, for no additional fee, an enterprise license for the distribution of Nasdaq Last Sale ("NLS") data for personal use. The Exchange expects the proposed license to lower the cost of distributing last sale data and expand its availability to the general investing public by: (i) eliminating certain counting requirements for NLS usage, and (ii) expanding the available mechanisms for the delivery of NLS data. The proposed enterprise license will not increase any

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

2 17 CFR 240.19b-4.

fee because it will replace the current maximum fee of $41,500 for distribution of NLS data with a monthly enterprise license for the same amount.

The text of the proposed rule change is available on the Exchange's Website at http://nasdaq.cchwallstreet.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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to introduce, for no additional fee, an enterprise license for the distribution of NLS data for personal use. The Exchange expects the proposed license to lower the cost of distributing last sale data and expand its availability to the general investing public by: (i) eliminating certain counting requirements for NLS usage, and (ii) expanding the available mechanisms for the delivery of NLS data. The proposed enterprise license will not increase any fee because it will replace the current maximum fee of $41,500 for distribution of NLS data with a monthly enterprise license for the same amount.[3]

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[3] The Exchange initially filed the proposed rule change on March 14, 2019 (SR-NASDAQ-2019-018). On March 28, 2019, the Exchange withdrew that filing and submitted this filing.

Nasdaq Last Sale

NLS provides real-time last sale information for executions occurring within the Nasdaq Market Center and trades reported to the jointly-operated FINRA/Nasdaq Trade Reporting Facility ("TRF").[4] The NLS data feed, which provides price, volume and time of execution data for last sale transactions, includes transaction information for Nasdaq-listed stocks ("NLS for Nasdaq") and for stocks listed on NYSE, NYSE American, and other Tape B listing venues ("NLS for NYSE/NYSE American").[5] NLS is a "non-core" product that provides a subset of the "core" last sale data provided by securities information processors ("SIPs") under the CTA Plan and the Nasdaq UTP Plan.[6]

NLS was designed to enable market-data distributors "to provide free access to [] data to millions of individual investors via the internet and television" and was expected to "increase[] the availability of N[asdaq] proprietary market data to individual investors."[7] As Nasdaq explained when proposing to change NLS from a pilot to a permanent program, "the program has vastly increased the availability of N[asdaq] proprietary market data to individual investors. Based upon data from NLS Distributors, N[asdaq] believes that since its launch in July 2008, the

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4 See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (proposing NLS); see also Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approving SR-NASDAQ-2006-060, as amended by Amendment Nos. 1 and 2, to implement NLS on a pilot basis).

5 See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060).

6 See Securities Exchange Act Release No. 34-82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-NASDAQ-2018-010).

7 See SR-NASDAQ-2006-060 (Amendment No. 2, June 10, 2008), at 3, available at http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060_Amendment_2.pdf.

NLS data has been viewed by millions of investors on websites operated by Google, Interactive Data, and Dow Jones, among others."[8]

NLS is offered through two fee schedules: one for the general investing public, and another for specialized usage.[9] Distribution to the general investing public is available under three stair-stepped[10] fee models: Per User,[11] Per Query,[12] and Per Device.[13]

The Per User model measures usage through a username/password entitlement system. To adopt the Per User model, a Distributor[14] must distribute NLS solely to Users[15] for Display Usage;[16] all such Users must be either Non-Professionals[17] or Professionals[18] whom the

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8 See Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006).

9 See Equity 7, Section 139(b) (General Investing Public) and 139(c) (Specialized Usage).

10 Pricing is "stair-stepped" in that the tiered fees are effective for the incremental Users in the new tier. See Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060).

11 See Equity 7, Section 139(b)(1).

12 See Equity 7, Section 139(b)(2).

13 See Equity 7, Section 139(b)(3).

14 A "Distributor" is "an entity, as identified in the Nasdaq Global Data Agreement (or any successor agreement), that executes such an Agreement and has access to Exchange Information, together with its affiliates having such access." See Equity 7, Section 139(f)(3).

15 A "User" is "a natural person who has access to Exchange Information." See Equity 7, Section 139(f)(10).

16 "Display Usage" refers to "any method of accessing Exchange Information that involves the display of such data on a screen or other mechanism designed for access or use by a natural person or persons." See Equity 7, Section 139(f)(2).

17 "Non-Professional" means "a natural person who is not: (A) registered or qualified in any capacity with the Securities and Exchange Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (B) engaged as an 'investment adviser' as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (C) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were

Distributor has no reason to believe are using NLS in their professional capacity, and the Distributor must restrict and track access to NLS using a username/password logon or comparable method of regulating access approved by Nasdaq. While many of the Recipients[19] of data under such a model would be Non-Professionals, the model does not require a Distributor to limit distribution to Non-Professionals. Occasional, incidental use by a Professional in connection with professional activities would not affect the Distributor's eligibility for the Per User fee, as long as the Distributor, in establishing the connection to the Professional User, did not have reason to believe that professional usage would occur.[20]

The Per Query model determines usage based on the number of queries received. This model is available for Distributors that disseminate NLS solely to Users for Display Usage and track queries using a method approved by Nasdaq. In contrast to a Per User model, which makes all data available in a streaming or a montage format, the Per Query model supplies only as much data as the User requests on an ad hoc basis. Because a Per Query model is likely to be of less use to Professionals acting in a professional capacity, the model does not place limitations on the persons to whom it is offered (as long as they are natural persons viewing the data through Display Usage). The model also does not require the Distributor to limit access through any sort of entitlement system. As such, Per Query data may be made available through a publicly accessible website.

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performed for an organization not so exempt." See Equity 7, Section 139(f)(6).

18 "Professional" means "any natural person, proprietorship, corporation, partnership, or other entity whatever other than a Non-Professional." See Equity 7, Section 139(f)(7).

19 "Recipient" means "any natural person, proprietorship, corporation, partnership, or other entity whatever that has access to Exchange Information." See Equity 7, Section 139(f)(8).

20 See Securities Exchange Act Release No. 34-82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-NASDAQ-2018-010) (discussing application of the Per User model).

The Per Device model tracks usage according to the number of Devices[21] that access NLS. The Per Device model is available to Distributors that distribute NLS for Display Usage in a manner that does not restrict access and which track the number of unique Devices that access NLS during each month using a tracking method approved by Nasdaq.

The current fee schedule sets a maximum fee for any Distributor using the Per User, Per Query, or Per Device models (or any combination thereof) of $41,500 per month.[22]

A Distributor that is not able to use any of the distribution models for the general investing public but nevertheless wishes to distribute NLS will be required to pay fees applicable to a model for "specialized usage."[23]

Proposed Enterprise License

The Exchange proposes to replace the current maximum fee of $41,500 per month for a Distributor using the Per User, Per Query, or Per Device models for distribution to the General Investing Public with a monthly enterprise license for the same amount for any customer that would otherwise be eligible for the such fees, excluding any requirement to count or track usage. The proposal will not change any fee because any Distributor currently paying the maximum fee of $41,500 would continue to pay the same fee for the same data, albeit using an enterprise

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21 "Device" has the same meaning as "Subscriber," which is "a device, computer terminal, automated service, or unique user identification and password combination that is not shared and prohibits simultaneous access, and which is capable of accessing Exchange Information; 'Interrogation Device,' 'Device' or 'Access' have the same meaning as Subscriber. For any device, computer terminal, automated service, or unique user identification and password combination that is shared or allows simultaneous access, Subscriber shall mean the number of such simultaneous accesses." See Equity 7, Section 139(f)(9).

22 A Distributor that wishes to distribute Nasdaq Last Sale via television must pay the maximum fee and may then distribute Nasdaq Last Sale either solely via television or in combination with unlimited use of the Per User, Per Query, and/or Per Device model. See Equity 7, Section 139(b)(4).

23 See Equity 7, Section 139(c).

license that is easier to administer and allows for more methods of distribution.[24] To be eligible for the enterprise license, NLS must be distributed on platform(s) controlled by the Distributor[25] and pre-approved by the Exchange as providing the Distributor with a reasonable basis to conclude that all Users of such Information are either Non-Professionals or Professionals whom the Distributor has no reason to believe are using NLS in their professional capacity.

The Exchange expects the proposal to lower administrative costs for Distributors of NLS to the general investing public by replacing the counting of users, queries or devices with a "systems" approach in which the Distributor would set forth—and Nasdaq would review and approve—a system of distribution that provides the Distributor and the Exchange with a reasonable basis to conclude that all Users of such Information[26] are either Non-Professionals or Professionals whom the Distributor has no reason to believe are using NLS in their professional capacity. Distributors would not be required to track access to NLS using a username/password logon for the Per User model, queries as required by the Per Query model, or the number of unique Devices that access NLS as required by the Per Device model.

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24 Distributors that do not elect to purchase the enterprise license, but inadvertently exceed $41,500 in Per User, Per Query or Per Device fees, may purchase the enterprise license for the month(s) in which fees exceeded $41,500 without pre-approval.

25 Any Distributor able to meet the criteria set forth under the Per User, Per Query or Per Device models will be able to demonstrate control over the platform because the applicable tracking requirements and other limitations necessarily require such control.

26 "Information" is defined as "any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) eligible securities or other financial instruments, markets, products, vehicles, indicators or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information." See Equity 7, Section 139(f)(5).

The Exchange would evaluate each system using the same approach used today to evaluate distribution through the Per User model, which currently requires that Distributors disseminate data to Users who are "either Non-Professionals or Professionals whom the Distributor has no reason to believe are using Nasdaq Last Sale in their professional capacity."[27] A Distributor has "no reason to believe" that NLS is being used in a professional capacity when, for example, the data is made available to the general investing public in a format that would be "unlikely to be of significant use to Professionals acting in a professional capacity," as in the Per Query model,[28] or when the Information is "made freely available to internet users," as in the Per Device model.[29] Any Distributor currently eligible to disseminate NLS under the Per User, Per Query, or Per Device models will be able to demonstrate that it is disseminating Information to Non-Professionals or Professionals whom the Distributor has no reason to believe are using Nasdaq Last Sale in their professional capacity because that test is already inherent (or explicit) within the eligibility criteria for each model.[30]

The proposed license will allow Distributors to disseminate NLS data to the general investing public in a manner that is not readily tracked using the Per User, Per Query, or Per Device models. An example of the type of distribution model intended to benefit from the

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27 See Section 139(b)(1).

28 See Securities Exchange Act Release No. 34-82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-NASDAQ-2018-010).

29 See Securities Exchange Act Release No. 34-82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-NASDAQ-2018-010).

30 The "no reason to believe" test is explicitly part of the criteria for the Per User model. See Section 139(b)(1). It is inherent in the Per Query model because, as noted above and in the filing instituting that fee, this model "is unlikely to be of significant use to Professionals acting in a professional capacity . . ." See Securities Exchange Act Release No. 34-82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-NASDAQ-2018-010). It is also inherent in the Per Device model because that model is designed to make information "freely available to internet users," and therefore is unlikely to be of significant use to Professionals acting in a professional capacity. See Id.

proposed license is a spreadsheet program that allows the User to refresh a stock price using an in-program command without copying data. Such usage is analogous to the Per Query model, which supplies only as much data as the User requests on an ad hoc basis, but is less susceptible to counting because the request is done using a command embedded within another program.

Since the launch of NLS in July 2008, the Exchange has strived to make last sale data available to individual investors using the latest available technology, such as television and the internet. The proposed enterprise license continues in that tradition, making NLS data available to the general investing public using mechanisms in which the traditional methods of counting usage—Per Query, Per User and Per Device—are unavailable or impractical, while at the same time lowering administrative costs for distributors by eliminating the need to count users, queries and devices.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[31] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[32] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The fees established under Equity 7, Section 139, reflect Nasdaq's expectation, in creating NLS, that it would be used by market data Distributors to allow widespread dissemination of last sale information to individual investors by various means, including websites and television. The statutory basis for Nasdaq's current fees for NLS has already been

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(4) and (5).

described in prior filings,[33] and Nasdaq is not modifying these long-established fees except to add an enterprise license, for no additional fee, that would lower the cost of distributing last sale data and expand its availability to the general investing public by: (i) eliminating certain counting requirements for distributors and (ii) expanding the available mechanisms for the delivery of last sale data to the public. The proposed change is an equitable allocation of reasonable dues, fees and other charges because it expands the availability of last sale data while also lowering the cost of distribution for an already established fee. The proposed enterprise license is furthermore consistent with an equitable allocation of reasonable dues, fees and other charges because it alleviates the administrative costs and burdens associated with tracking usage of the product by allowing the Distributor to purchase a license without counting actual usage. The change is reasonable and not unfairly discriminatory because it will allow for the distribution of NLS data to all Distributors and Users that currently have access to such data using a wider variety of delivery formats such as, for example, distributing NLS data through a spreadsheet program that includes a command for in-program updates of NLS data.

The Act does not prohibit all distinctions among customers, but rather discrimination that is unfair. As the Commission has recognized, "[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior."[34] Accordingly, "the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[35]

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33 See, e.g., Securities Exchange Act Release No. 34-82723 (February 15, 2018), 83 FR 7812 (February 22, 2018) (SR-NASDAQ-2018-010).

34 See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

35 Id.

In adopting Regulation NMS, the Commission granted self-regulatory organizations ("SROs") 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.[36]

The Commission was speaking to the question of whether broker-dealers should be subject to a regulatory requirement to purchase data, such as depth-of-book data, that is *in excess of* the data provided through the consolidated tape feeds, and the Commission concluded that the choice should be left to them. Accordingly, Regulation NMS removed unnecessary regulatory restrictions on the ability of exchanges to sell their own data, thereby advancing 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.

Products such as NLS provide additional choices to broker-dealers and other data consumers, in that they provide *less than* the quantum of data provided through the consolidated tape feeds but at a lower price. Thus, they provide broker-dealers and others with an option to use a lesser amount of data in circumstances where SEC Rule 603(c) does not require a broker-

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[36] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) ("Regulation NMS Adopting Release").

dealer to provide a consolidated display.[37] They are all, however, voluntary products for which market participants can readily substitute the consolidated data feeds. Accordingly, Nasdaq is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. Moreover, the fees for these products, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow.[38]

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange 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, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange 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 competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

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37 17 CFR 242.603(c).

38 See NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)). ("No one disputes that competition for order flow is 'fierce.' … As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'….).

In this instance, the proposed change lowers the administrative costs for Distributors disseminating NLS data to the general investing public while expanding the types of delivery mechanisms available for such data. The proposal will advance competition by promoting widespread distribution of data to investors without increasing any current fee.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. This rule proposal does not burden competition, since other SROs and data vendors continue to offer alternative data products and, like the Exchange, set fees, but rather reflects the competition between data feed vendors and will further enhance such competition.

NLS is part of the existing market for proprietary last sale data products that is currently 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.

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 trade executions, exchange data products cannot exist. Moreover, 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, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (*e.g.*, if the software can be downloaded over the internet after being purchased).[39]

In Nasdaq's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because, if all sales were priced at the margin, Nasdaq would be unable to defray its platform costs of providing joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating, and maintaining a trade reporting system—costs

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[39] See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," Antitrust Law Journal, Vol. 70, No. 3 (2003).

that must be covered through the fees charged for use of the facility and sales of associated data. As such, Nasdaq's overall fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

An exchange's broker-dealer customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will disfavor a particular exchange if the expected revenues from executing trades on the exchange do not 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.

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 trading activity 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 more orders will become correspondingly more valuable.

Products such as NLS can enhance order flow to Nasdaq by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to Distributors and investors decreases if order flow falls, because the products contain less content.

Similarly, in the case of products such as NLS that may be distributed through market data vendors, the vendors provide 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 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 impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue.[40] Retail broker-dealers offer their retail 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. Exchanges, TRFs, 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.

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. Nasdaq pays rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their

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[40] Indeed, the proposed enterprise license itself provides evidence of such competition as it was designed, in part, to lower vendor costs.

costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

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. Such regulation is unnecessary because an "excessive" price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.[41]

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.

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[41] Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing broker-dealers 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 TRFs compete to attract internalized transaction reports. It is common for broker-dealers to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. 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, broker-dealers, 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 broker-dealer is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE American, NYSE Arca, IEX, and CBOE.

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.[42]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2019-024 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-2019-024. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

[42] 15 U.S.C. 78s(b)(3)(A)(ii).

your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2019-024 and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Eduardo A. Aleman,

Deputy Secretary.

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[43] 17 CFR 200.30-3(a)(12).

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