free and open market and a national market system, and, in general, more effectively protecting investors and the public interest. In addition, providing Market-Makers with more tools for managing risk will facilitate transactions in securities because, as noted above, the quotes of market makers will be more reliable and could help prevent erroneous orders and transactions. As a result, the new functionality for the QRM Mechanism has the potential to promote just and equitable principles of trade. Also, the proposed changes do not change to whom any aspects of the QRM Mechanism applies, as the proposed changes apply to all market participants to whom the QRM Mechanism previously applied.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the functions of the QRM mechanism help promote fair and orderly markets.

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the use of the QRM Mechanism including the new enhancements is voluntary. Further, the proposed changes do not change to whom any aspects of the QRM Mechanism applies, as the proposed changes apply to all market participants to whom the QRM Mechanism previously applied. Similarly, the Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because, again, the use of the QRM Mechanism including the new enhancements is voluntary. Moreover, the proposed enhancements to the QRM Mechanism apply only to trading on CBOE. To the extent that the proposed changes may make CBOE a more attractive trading venue for market participants on other exchanges, such market participants may elect to become CBOE market participants.

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

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

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11] Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [12] and Rule 19b–4(f)(6) thereunder.[13]

At any time within 60 days of the filing of such 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, 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–CBOE–2014–002 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–CBOE–2014–002. 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 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–CBOE–2014–002 and should be submitted on or before February 14, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01401 Filed 1–23–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71352; File No. SR–NASDAQ–2014–005]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change With Respect to the Composition of NASDAQ Basic

January 17, 2014.

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 January 9, 2014, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'')

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

[11] 17 CFR 240.19b–4(f)(6).

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

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 is filing a proposal to modify the language of NASDAQ Rule 7047 to establish that the NASDAQ Basic market data product currently includes and has, since its inception, included last sale transaction reports from the FINRA/NASDAQ Trade Reporting Facility (''TRF''). The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are in brackets.

* * * * *

7047. NASDAQ Basic

(a) NASDAQ shall offer proprietary data feeds containing real-time market information from the NASDAQ Market Center *and the FINRA/NASDAQ Trade Reporting Facility (''TRF'').*

(1) ''NASDAQ Basic for NASDAQ'' shall contain NASDAQ's best bid and offer and last sale for NASDAQ-listed stocks *from NASDAQ and the FINRA/NASDAQ TRF;* and

(2) ''NASDAQ Basic for NYSE'' shall contain NASDAQ's best bid and offer and last sale for NYSE-listed stocks *from NASDAQ and the FINRA/NASDAQ TRF.*

(3) ''NASDAQ Basic for [Alternext] *NYSE MKT*'' shall contain NASDAQ's best bid and offer and last sale for [Alternext] *NYSE MKT*-listed stocks *from NASDAQ and the FINRA/NASDAQ TRF.*

(b) User Fees

(1) Except as provided in (b)(2) and (b)(3), for the NASDAQ Basic product there shall be a per subscriber monthly charge of $10 for NASDAQ-listed stocks, $5 for NYSE-listed stocks, and $5 for [Alternext] *NYSE MKT*-listed stocks; or

(2) For each non-professional subscriber, as defined in Rule 7011(b), there shall be a per subscriber monthly charge of $0.50 for NASDAQ-listed stocks, $0.25 for NYSE-listed stocks, and $0.25 for [Alternext] *NYSE MKT*-listed stocks; or

(3) There shall be a per query fee for NASDAQ Basic of $0.0025 for NASDAQ-listed stocks, $0.0015 for NYSE-listed stocks, and $0.0015 for [Alternext] *NYSE MKT*-listed stocks.

(4) No change.

(c) No change.

* * * * *

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

In June of 2008, NASDAQ received Commission approval to offer the NASDAQ Last Sale (''NLS'') market data product on a pilot basis. NLS is a non-core market data product designed for distribution through internet portals and broadcast television, as well as distribution to individuals that access the data via a username/password-identified account and/or quote-counting mechanisms.[3] NLS includes two data elements: (1) Last sale transaction reports from the NASDAQ Market Center, and (2) last sale transaction reports from the FINRA/NASDAQ TRF.[4] Based upon information from NLS distributors, NASDAQ believes that since its launch in 2008, the NLS data has been viewed by millions of investors, and that the NLS product has greatly increased the availability of market data to investors.

In March of 2009, NASDAQ received Commission approval for a pilot to offer NASDAQ Basic, another non-core market data product.[5] As originally proposed, the NASDAQ Basic product was to provide two data feeds: (1) A feed carrying the best bid and offer on the NASDAQ Market Center, and (2) a feed containing NLS which, as noted above, carries last sale transaction reports from NASDAQ and from the FINRA/NASDAQ TRF. Subsequently, NASDAQ amended the NASDAQ Basic filing to remove from the product the last sale transaction reports from the FINRA/NASDAQ TRF. On October 11, 2010, NASDAQ submitted an immediately effective proposed rule change to offer NASDAQ Basic on a permanent basis,[6] and to offer a NASDAQ Basic Enterprise License, which limits the expense of firms that offer NASDAQ Basic to large numbers of users.[7]

NASDAQ has determined through an internal review that the NASDAQ Basic market data product currently includes and has included since its inception last sale transaction reports for the NASDAQ/FINRA TRF.[8] While NASDAQ Rule 7039 reflects the inclusion of last sale transaction reports for the FINRA/NASDAQ TRF in the NLS product, NASDAQ Rule 7047 does not reflect the inclusion of the same data element via the NASDAQ Basic product.

Through this proposed rule change, NASDAQ seeks to establish that it may disseminate last sale transaction reports for the FINRA/NASDAQ TRF through NASDAQ Basic, and to modify the language of Rule 7047 to reflect their inclusion in that product. NASDAQ is also proposing a clerical change to reflect the correct name for the NYSE MKT, previously known as the NYSE Alternext market. NASDAQ is proposing no change to the fees for NASDAQ Basic through this filing.[9]

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act[10] in general, and with Section 6(b)(5) of the Act[11] in particular, in that the proposal

[3] *See* Securities Exchange Act Release No. 57964 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR–NASDAQ–2006–060). NASDAQ has renewed the Last Sale Pilot continuously since 2008, most recently in December 2013. Securities Exchange Act Release No. 71217 (December 31, 2013), 79 FR 875 (January 7, 2014) (SR–NASDAQ–2013–162).

[4] *See* NASDAQ Rule 7039.

[5] Securities Exchange Act Release No. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR–NASDAQ–2008–102) (finding pilot to be consistent with Sections 6(b)(4), (5) and (8) of the Act and Rule 603(a) under Regulation NMS). *See also* Securities Exchange Act Release No. 59933 (May 15, 2009), 74 FR 24889 (May 26, 2009) (SR–NASDAQ–2009–208) (finding reduction in fees for NASDAQ Basic to be consistent with Sections 6(b)(4), (5) and (8) of the Act and Rule 603(a) under Regulation NMS).

[6] *See* Securities Exchange Act Release No. 65527 (October 11, 2011), 76 FR 64147 (October 17, 2011) (SR–NASDAQ–2011–129).

[7] *See* Securities Exchange Act Release No. 65526 (October 11, 2011), 76 FR 64137 (October 17, 2011) (SR–NASDAQ–2011–130).

[8] The inclusion of the data appears to have stemmed from a misunderstanding on the part of personnel who understood NASDAQ Basic to be a combination of the NLS product with NASDAQ best bid and offer data, rather than a product containing only Exchange data, without data from the FINRA/NASDAQ TRF.

[9] NASDAQ has announced its intention to modify fees for NASDAQ Basic. *See http://www.nasdaqtrader.com/TraderNews.aspx?id=dn2013-09.* However, any such fee change would be effected through a separate proposed rule change that would fully explain the statutory basis for the change.

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(5).

is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The purpose of the proposed rule change is to recognize inclusion of FINRA/NASDAQ TRF last sale data from the NLS product in the NASDAQ Basic product. The NASDAQ Basic product, in turn, provides a subset of the data that is also provided by the Level 1 data feed available under the NASDAQ UTP Plan. NASDAQ believes that the proposal facilitates transactions in securities, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest by confirming the availability of an additional means by which investors may access information about transactions reported to the FINRA/NASDAQ TRF, thereby providing investors with additional options for accessing information that may help to inform their trading decisions. Given that Section 11A the Act [12] requires the dissemination of FINRA/NASDAQ TRF last sale reports under the NASDAQ UTP Plan, and the dissemination of the same data is currently permitted through the NLS product, NASDAQ believes that the inclusion of the same data in NASDAQ Basic is also consistent with the Act.

NASDAQ further notes that the current fees for NASDAQ Basic have been previously established, and that the Commission has either specifically determined them to be consistent with the Act or has permitted them to become effective on an immediately effective basis.[13] Thus, this proposed rule change does not establish or change a fee of the Exchange. However, to the extent that the proposed rule change confirms that NASDAQ Basic may contain FINRA/NASDAQ TRF data, NASDAQ believes that the change also provides further justification that the fees for NASDAQ Basic provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers,[14] in that the change reflects the full value of the product without any increase in its cost.[15]

In adopting Regulation NMS, the Commission granted self-regulatory organizations (''SROs'') and broker-dealers (''BDs'') 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. NASDAQ believes that its NASDAQ Basic market data product, as amended, is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. 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.[16]

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 BDs at all, it follows that the price at which such data is sold should be set by the market as well.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010) (''*NetCoalition I''*), 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 I,* at 535 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.'' [17]

The Court in *NetCoalition I,* while upholding the Commission's conclusion that competitive forces may be relied upon to establish the fairness of prices, nevertheless concluded that the record *in that case* did not adequately support the Commission's conclusions as to the competitive nature of the market for NYSE Arca's data product at issue in that case. As explained below in NASDAQ's Statement on Burden on Competition, however, NASDAQ believes that there is substantial evidence of competition in the marketplace for data that was not in the record in the *NetCoalition I* case, and that the Commission is entitled to rely upon such evidence in concluding fees are the product of competition, and therefore in accordance with the relevant statutory standards.[18] Moreover, NASDAQ further notes that the product at issue in this filing—a NASDAQ quotation and last sale data product that replicates a subset of the information available through ''core'' data products whose fees have been reviewed and approved by the SEC—is quite different from the NYSE Arca depth-of-book data product at issue in *NetCoalition I.* Accordingly, any findings of the court with respect to that product may not be relevant to the product at issue in this filing. As the Commission noted in approving the initial pilot for NASDAQ Basic, all of the information available in NASDAQ

[12] 15 U.S.C. 78k–1.

[13] Securities Exchange Act Release No. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR–NASDAQ–2008–102) (finding current per user and per subscriber fees to be consistent with the Act); Securities Exchange Act Release No. 59933 (May 15, 2009), 74 FR 24889 (May 26, 2009) (SR–NASDAQ–2009–208) (finding current distributor fees for NASDAQ Basic to be consistent with the Act); Securities Exchange Act Release No. 64994 (July 29, 2011), 76 FR 47621 (August 5, 2011) (SR–NASDAQ–2011–091) (immediate effectiveness of optional derived data fee); Securities Exchange Act Release No. 65526 (October 11, 2011), 76 FR 64137 (October 17, 2011) (SR–NASDAQ–2011–130) (immediate effectiveness of enterprise license fee).

[14] 15 U.S.C. 78f(b)(4), (5).

[15] *But see supra* n. 9.

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

[17] *NetCoalition I,* at 535.

[18] It should also be noted that Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act'') has amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make it clear that all exchange fees, including fees for market data, may be filed by exchanges on an immediately effective basis. *See also NetCoalition* v. *SEC,* 715 F.3d 342 (D.C. Cir. 2013) (''*NetCoalition II''*) (finding no jurisdiction to review Commission's non-suspension of immediately effective fee changes).

Basic is included in the core data feeds made available pursuant to the joint-SRO plans, the fees for which have been approved by the Commission.[19] The inclusion of FINRA/NASDAQ TRF data in NASDAQ Basic does not alter this fact, since such data is also included in the core data distributed under the NASDAQ UTP Plan. As the Commission further determined, ''the availability of alternatives to NASDAQ Basic significantly affect the terms on which NASDAQ can distribute this market data. In setting the fees for its NASDAQ Basic service, NASDAQ must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.'' [20] Thus, to the extent that the fees for core data have been determined to be reasonable under the Act, it follows that the fees for NASDAQ Basic are also reasonable, since charging unreasonably high fees would cause market participants to rely solely on core data rather than purchasing NASDAQ Basic.

Moreover, as discussed in the order approving the initial pilot, and as further discussed below in NASDAQ's Statement on Burden on Competition, data products such as NASDAQ Basic are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they are able to provide. Conversely, to the extent that exchanges are unsuccessful, the inputs needed to add value to data products are diminished. Accordingly, the need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable. The inclusion of FINRA/NASDAQ TRF data in NASDAQ Basic increases the value of the product, the fees for which have previously been established as reasonable.

The fees for NASDAQ Basic also continue to reflect an equitable allocation and continue not be unfairly discriminatory, because NASDAQ Basic is a voluntary product for which market participants can readily substitute core data feeds that provide additional quotation and last sale information not available through NASDAQ Basic. Accordingly, NASDAQ is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. Moreover, the fee schedule for NASDAQ Basic is designed to ensure that the fees charged are tailored to the specific usage patterns of a range of potential customers. Thus, low per-query fees are designed for customers that use the product only sporadically. Fees for non-professional subscribers, as well as the derived data fee and enterprise license fee that provide for unlimited distribution to non-professional users, are intended to provide a means to provide for low-cost availability of the product to retail investors through brokerage firms and market data vendors. Finally, professional subscriber fees provide a means for brokerage customers to use the information internally. The distinction between fees for professional and non-professional users is consistent with the distinction made under Commission-approved fees for core data, and the applicable fees are lower than applicable fees for core data to reflect the lesser quantum of data made available. The range of fee options further ensures that customers are not charged a fee that is inequitably disproportionate to the use that they make of the product.

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. NASDAQ's ability to price NASDAQ Basic is constrained by (1) competition among exchanges, other trading platforms, and TRFs that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and market-specific data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary data.

The market for proprietary data products 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. Similarly, with respect to the TRF data, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

Transaction executions 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.[21] 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).[22] In NASDAQ's case, it is costly to build and maintain a trading platform, but the

[19] Securities Exchange Act Release No. 12425 (March 16, 2009), 74 FR 12423, 12425 (March 24, 2009) (SR–NASDAQ–2008–102).

[20] *Id.* at 12425.

[21] A complete explanation of the pricing dynamics associated with joint products is presented in a study that NASDAQ originally submitted to the Commission in SR–NASDAQ–2011–010, and which is also submitted as Exhibit 3 to this filing. *See* Statement of Janusz Ordover and Gustavo Bamberger at 2–17 (December 29, 2010).

[22] *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).

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 the 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,[23] and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD 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 BD 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 BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing orders will become correspondingly more valuable.

Similarly, in the case of products such as NASDAQ Basic that are 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 such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Retail BDs, 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. 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. Moreover, NASDAQ believes that products such as NASDAQ Basic 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 data through their brokerage firm or other distribution sources. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

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 exchange 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. Similarly, the inclusion of trade reporting data in a product such as NASDAQ Basic may assist in attracting customers to the product, thereby assisting in covering the additional costs associated with operating and regulating a TRF.

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 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.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including thirteen 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 TRFs compete to attract internalized transaction reports. It is common for BDs 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, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products.

[23] It should be noted that the costs of operating the FINRA/NASDAQ TRF borne by NASDAQ include regulatory charges paid by NASDAQ to FINRA.

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 MKT, NYSE Arca, BATS, and Direct Edge.

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 BDs' production of proprietary data products. The potential sources of proprietary products are virtually limitless. Notably, the potential sources of data include the BDs that submit trade reports to TRFs and that have the ability to consolidate and distribute their data without the involvement of FINRA or an exchange-operated TRF.

The fact that proprietary data from ATSs, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the internet. Second, because a single order or transaction report can appear in a core data product, an SRO proprietary product, and/or a non-SRO proprietary product, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NASDAQ Basic, the data provided through that product appears both in (i) real-time core data products offered by the SIPs for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in similar products of competing venues.

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 BDs have previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs 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. In Europe, Markit aggregates and disseminates data from over 50 brokers and multilateral trading facilities.[24]

In the case of TRFs, the rapid entry of several exchanges into this space in 2006–2007 following the development and Commission approval of the TRF structure demonstrates the contestability of this aspect of the market.[25] Given the demand for trade reporting services that is itself a by-product of the fierce competition for transaction executions—characterized notably by a proliferation of ATSs and BDs offering internalization—any supra-competitive increase in the fees associated with trade reporting or TRF data would shift trade report volumes from one of the existing TRFs to the other[26] and create incentives for other TRF operators to enter the space. Alternatively, because BDs reporting to TRFs are themselves free to consolidate the market data that they report, the market for over-the-counter data itself, separate and apart from the markets for execution and trade reporting services—is fully contestible.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $1 per month for non-professional users. Second, consolidated data is also available *at no cost* with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as quotation and last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data, by highlighting the optional nature of proprietary products.

The competitive nature of the market for non-core ''sub-set'' products such as NASDAQ Basic is borne out by the performance of the market. In May 2008, the Internet portal Yahoo! began offering its Web site viewers real-time last sale data (as well as best quote data) provided by BATS. In response, in June 2008, NASDAQ launched NLS, which was initially subject to an ''enterprise cap'' of $100,000 for customers receiving only one of the NLS products, and $150,000 for customers receiving both products. The majority of NASDAQ's sales were at the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (*i.e.,* a reduction of $100,000 per month). Although each of these products offers only a specific subset of data available from the SIPs, NASDAQ believes that the products are viewed as substitutes for each other and for core last-sale data, rather than as products that must be obtained in tandem. For example, while Yahoo! and Google now both disseminate NASDAQ's last sale product, several other major content providers, including MSN and Morningstar, use the BATS last sale product.

In this environment, 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 I* at 539. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD 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. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in

[24] *http://www.markit.com/en/products/data/boat/boat-boat-data.page.*

[25] The low cost exit of two TRFs from the market is also evidence of a contestible market, because new entrants are reluctant to enter a market where exit may involve substantial shut-down costs.

[26] It should be noted that the FINRA/NYSE TRF has, in recent weeks, received reports for over 10% of all over-the-counter volume in NMS stocks. In addition, FINRA has announced plans to update its Alternative Display Facility, which is also able to receive over-the-counter trade reports. *See* Securities Exchange Act Release No. 70048 (July 26, 2013), 78 FR 46652 (August 1, 2013) (SR–FINRA–2013–031).

the cost of NASDAQ Basic would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NASDAQ Basic data revenues, the value of NASDAQ Basic as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and reported to the FINRA/NASDAQ TRF and the value of its other data products.

In establishing the price for NASDAQ Basic, NASDAQ considered the competitiveness of the market for quotation and last sale data and all of the implications of that competition. NASDAQ believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to NASDAQ Basic, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives. Accordingly, NASDAQ believes that the acceptance of the NASDAQ Basic product in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [27] and subparagraph (f)(6) of Rule 19b–4 thereunder.[28] 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.

[27] 15 U.S.C. 78s(b)(3)(a)(ii).

[28] 17 CFR 240.19b–4(f)(6).

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–2014–005 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–2014–005. 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 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–2014–005 and should be submitted on or before February 14, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–01405 Filed 1–23–14; 8:45 am]

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[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71342; File No. SR–NYSEMKT–2014–02)

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Proposing To Extend the Operation of Its New Market Model Pilot Until the Earlier of Securities and Exchange Commission Approval To Make Such Pilot Permanent or July 31, 2014

January 17, 2014.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that on January 6, 2014, NYSE MKT LLC (''NYSE MKT'' or ''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 extend the operation of its New Market Model Pilot, currently scheduled to expire on January 31, 2014, until the earlier of Securities and Exchange Commission (''Commission'') approval to make such pilot permanent or July 31, 2014. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.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

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

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.