

*www.prc.gov*, Docket Nos. MC2017–18, CP2017–37.

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[FR Doc. 2016–27890 Filed 11–18–16; 8:45 am]

**BILLING CODE 7710–12–P**

## POSTAL SERVICE

### Product Change—Priority Mail Negotiated Service Agreement

**AGENCY:** Postal Service™.

**ACTION:** Notice.

**SUMMARY:** The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

**DATES:** *Effective date:* November 21, 2016.

**FOR FURTHER INFORMATION CONTACT:**

Elizabeth A. Reed, 202–268–3179.

**SUPPLEMENTARY INFORMATION:** The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on November 14, 2016, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 256 to Competitive Product List*. Documents are available at *www.prc.gov*, Docket Nos. MC2017–17, CP2017–36.

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[FR Doc. 2016–27899 Filed 11–18–16; 8:45 am]

**BILLING CODE 7710–12–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79313; File No. SR–NYSE–2016–74]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for NYSE BBO and NYSE Trades To Lower the Enterprise Fee

November 15, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> notice is hereby given that, on November 1, 2016, New York Stock Exchange LLC (“NYSE” or the

“Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 fees for NYSE BBO and NYSE Trades to lower the Enterprise Fee. 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 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to amend the fees for NYSE BBO and NYSE Trades market data products,<sup>4</sup> as set forth on the NYSE Proprietary Market Data Fee Schedule (“Fee Schedule”). Specifically, the Exchange proposes to lower the Enterprise Fee. The Exchange proposes to make the fee change effective November 1, 2016.

The Exchange currently charges an enterprise fee of \$185,000 per month for an unlimited number of professional and non-professional users for each of

NYSE BBO and NYSE Trades.<sup>5</sup> A single Enterprise Fee applies for clients receiving both NYSE BBO and NYSE Trades.<sup>6</sup> The Exchange proposes to lower the enterprise fee to \$37,500 per month.

As an example, under the current fee structure for per user fees, if a firm had 40,000 professional users who each received NYSE Trades at \$4 per month and NYSE BBO at \$4 per month, without the Enterprise Fee, the firm would be subject to \$320,000 per month in professional user fees. Under the current pricing structure, the charge would be capped at \$185,000 and effective November 1, 2016 it would be capped at \$37,500.

Under the proposed enterprise fee, the firm would pay a flat fee of \$37,500 for an unlimited number of professional and non-professional users for both products. As is the case currently, a data recipient that pays the enterprise fee would not have to report the number of such users on a monthly basis.<sup>7</sup> However, every six months, a data recipient must provide the Exchange with a count of the total number of natural person users of each product, including both professional and non-professional users.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general, and Sections 6(b)(4) and 6(b)(5) of the Act,<sup>9</sup> in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

The proposed fee change is also equitable and not unfairly discriminatory because it would apply to all data recipients that choose to subscribe to NYSE BBO and NYSE Trades.

The proposed enterprise fees for NYSE BBO and NYSE Trades are reasonable because they could result in a fee reduction for data recipients with a large number of professional and nonprofessional users, as described in the example above. If a data recipient

<sup>5</sup> See Securities Exchange Act Release No. 76912 (January 14, 2016), 81 FR 3490 (January 21, 2016) (SR–NYSE–2016–03).

<sup>6</sup> See Securities Exchange Act Release No. 70211 (August 15, 2013), 78 FR 51781 (August 21, 2013) (SR–NYSE–2013–58).

<sup>7</sup> Professional users currently are subject to a per display device count. See Securities [sic] Act Release No. 73985 (January 5, 2015), 80 FR 1456 (January 9, 2015) (SR–NYSE–2014–75).

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>4</sup> See Securities Exchange Act Release Nos. 61914 (Apr. 14, 2010), 74 [sic] FR 21077 (Apr. 22, 2010) (SR–NYSE–2010–30) (notice—NYSE BBO); 62181 (May 26, 2010), 75 FR 31488 (June 3, 2010) (SR–NYSE–2010–30) (approval order—NYSE BBO); 59309 (Jan. 28, 2009), 74 FR 6073 (Feb. 4, 2009) (SR–NYSE–2009–04) (notice—NYSE Trades); and 59309 (Mar. 19, 2009), 74 FR 13293 (Mar. 26, 2009) (approval order—NYSE Trades) (SR–NYSE–2009–04) and 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR–NYSE–2010–22).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b–4.

has a smaller number of professional users of NYSE BBO and/or NYSE Trades, then it may continue to use the per user fee structure. By reducing prices for data recipient with a large number of professional and non-professional users, the Exchange believes that more data recipients may choose to offer NYSE BBO and NYSE Trades, thereby expanding the distribution of this market data for the benefit of investors. The Exchange also believes that offering an enterprise fee expands the range of options for offering NYSE BBO and NYSE Trades and allows data recipients greater choice in selecting the most appropriate level of data and fees for the professional and non-professional users they are servicing.

The Exchange notes that NYSE BBO and NYSE Trades are entirely optional. The Exchange is not required to make NYSE BBO and NYSE Trades available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase NYSE BBO and NYSE Trades. Firms that do purchase NYSE BBO and NYSE Trades do so for the primary goals of using them to increase revenues, reduce expenses, and in some instances compete directly with the Exchange (including for order flow); those firms are able to determine for themselves whether NYSE BBO and NYSE Trades or any other similar products are attractively priced or not.<sup>10</sup>

Firms that do not wish to purchase NYSE BBO and NYSE Trades have a variety of alternative market data products from which to choose,<sup>11</sup> or if NYSE BBO and NYSE Trades do not provide sufficient value to firms as offered based on the uses those firms have or planned to make of it, such firms may simply choose to conduct their business operations in ways that do not use NYSE BBO and NYSE Trades or use them at different levels or in different configurations. The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.<sup>12</sup>

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v.

<sup>10</sup> See, e.g., Proposing Release on Regulation of NMS Stock Alternative Trading Systems, Securities Exchange Act Release No. 76474 (Nov. 18, 2015) (File No. S7-23-15). See also, "Brokers Warned Not to Steer Clients' Stock Trades Into Slow Lane," Bloomberg Business, December 14, 2015 (Sigma X dark pool to use direct exchange feeds as the primary source of price data).

<sup>11</sup> See NASDAQ Rule 7047 (Nasdaq Basic) and BATS [sic] Rule 11.22 (BATS TOP and Last Sale).

<sup>12</sup> See FINRA Regulatory Notice 15-46, "Best Execution," November 2015.

*SEC*, 615 F.3d 525 (D.C. Cir. 2010), upheld reliance by the Securities and Exchange Commission ("Commission") upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary 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.'

*Id.* at 535 (quoting H.R. Rep. No. 94-229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 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.'" <sup>13</sup>

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for proprietary market data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards. In addition, the existence of alternatives to these data products, such as consolidated data and proprietary data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can select such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for proprietary market data would be so complicated that it could not be done practically or offer any significant benefits.<sup>14</sup>

<sup>13</sup> *NetCoalition*, 615 F.3d at 535.

<sup>14</sup> The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties and the Commission to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, and as described below, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate

In addition, the Exchange believes that the proposed fees are reasonable when compared to fees for comparable products offered by at least one other exchange. For example, Bats BZX Exchange ("BYX") charges an enterprise fee of \$15,000 per month for each of BZX Top and BZX Last Sale, which includes best bid and offer and last sale data, respectively.<sup>15</sup> While the Exchange is proposing enterprise fees that would be higher than the fees currently charged by BZX, the Exchange believes the proposed fees, which would be lower than current fees, are appropriate and would be beneficial to firms with a large number of users.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

#### 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. An exchange's ability to price its proprietary market data feed products is constrained by actual competition for the sale of proprietary market data products, the joint product nature of exchange platforms, and the existence of alternatives to the Exchange's proprietary data.

#### The Existence of Actual Competition

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary for the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with one another for listings and order flow and sales of market data itself, providing ample opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data.

increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's Web site at <http://www.sec.gov/rules/concept/s72899/buck1.htm>.

<sup>15</sup> See Market Data Fees at [https://batstrading.com/support/fee\\_schedule/bzx/](https://batstrading.com/support/fee_schedule/bzx/).

Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market. Indeed, the U.S. Department of Justice (“DOJ”) (the primary antitrust regulator) has expressly acknowledged the aggressive actual competition among exchanges, including for the sale of proprietary market data. In 2011, the DOJ stated that exchanges “compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.”<sup>16</sup>

Moreover, competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. Broker-dealers send their order flow and transaction reports to multiple venues, rather than providing them all to a single venue, which in turn reinforces this competitive constraint. As a 2010 Commission Concept Release noted, the “current market structure can be described as dispersed and complex” with “trading volume . . . dispersed among many highly automated trading centers that compete for order flow in the same stocks” and “trading centers offer[ing] a wide range of services that are designed to attract different types of market participants with varying trading needs.”<sup>17</sup> More recently, SEC Chair Mary Jo White has noted that competition for order flow in exchange-listed equities is “intense” and divided among many trading venues, including exchanges, more than 40 alternative trading systems, and more than 250 broker-dealers.<sup>18</sup>

<sup>16</sup> Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), available at <http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html>; see also Complaint in *U.S. v. Deutsche Borse AG and NYSE Euronext*, Case No. 11-cv-2280 (D.C. Dist.) ¶ 24 (“NYSE and Direct Edge compete head-to-head . . . in the provision of real-time proprietary equity data products.”).

<sup>17</sup> Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (File No. S7-02-10). This Concept Release included data from the third quarter of 2009 showing that no market center traded more than 20% of the volume of listed stocks, further evidencing the dispersal of and competition for trading activity. *Id.* at 3598. Data available on ArcaVision show that from June 30, 2013 to June 30, 2014, no exchange traded more than 12% of the volume of listed stocks by either trade or dollar volume, further evidencing the continued dispersal of and fierce competition for trading activity. See.

<sup>18</sup> Mary Jo White, *Enhancing Our Equity Market Structure*, Sandler O’Neill & Partners, L.P. Global

If an exchange succeeds in competing for quotations, order flow, and trade executions, then it earns trading revenues and increases the value of its proprietary market data products because they will contain greater quote and trade information. Conversely, if an exchange is less successful in attracting quotes, order flow, and trade executions, then its market data products may be less desirable to customers in light of the diminished content and data products offered by competing venues may become more attractive. Thus, competition for quotations, order flow, and trade executions puts significant pressure on an exchange to maintain both execution and data fees at reasonable levels.

In addition, in the case of products that are also redistributed through market data vendors, such as Bloomberg and Thompson Reuters, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Vendors will not elect to make available NYSE BBO or NYSE Trades unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE BBO and NYSE Trades can provide value by sufficiently increasing revenues or reducing costs in the customer’s business in a manner that will offset the fees. All of these factors operate as constraints on pricing proprietary data products.

#### Joint Product Nature of Exchange Platform

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, proprietary market data and trade executions are a paradigmatic example of joint products with joint costs. The decision of whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data availability and quality, and price and distribution of data products. Without a platform to post quotations, receive orders, and

Exchange and Brokerage Conference (June 5, 2014) (available on the Commission Web site), citing Tuttle, Laura, 2014, “OTC Trading: Description of Non-ATS OTC Trading in National Market System Stocks,” at 7–8.

execute trades, exchange data products would not exist.

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 platform for posting quotes, accepting orders, and executing transactions 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 broker-dealer customers generally view the costs of transaction executions and market data as a unified cost of doing business with the exchange. A broker-dealer will only choose to direct orders to an exchange if the revenue from the transaction exceeds its cost, including the cost of any market data that the broker-dealer chooses to buy in support of its order routing and trading decisions. If the costs of the transaction are not offset by its value, then the broker-dealer may choose instead not to purchase the product and trade away from that exchange.

Other market participants have noted that proprietary market data and trade executions are joint products of a joint platform and have common costs.<sup>19</sup> The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.<sup>20</sup>

<sup>19</sup> See Securities Exchange Act Release No. 72153 (May 12, 2014), 79 FR 28575, 28578 n.15 [sic] (May 16, 2014) (SR-NASDAQ-2014-045) (“[A]ll 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.”). See also Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR-NASDAQ-2010-110), and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR-NASDAQ-2010-111).

<sup>20</sup> See generally Mark Hirschey, *Fundamentals of Managerial Economics*, at 600 (2009) (“It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. . . . Any allocation of common costs is wrong and arbitrary.”). This is not new economic theory. See,

Continued

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, and system and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an 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.

As noted above, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 13 equities self-regulatory organization ("SRO") markets, as well as various forms of alternative trading systems ("ATs"), including dark pools and electronic communication networks ("ECNs"), and internalizing broker-dealers. SRO markets compete to attract order flow and produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities compete to attract transaction reports from the non-SRO venues.

Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different trading platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products 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 data products, and setting relatively low prices for accessing posted liquidity. For example, BATS Global Markets ("Bats") and Direct Edge, which previously operated as ATs and obtained exchange status in 2008 and 2010, respectively, provided certain market data at no charge on their Web sites in order to attract more order flow, and used revenue rebates from resulting additional executions to maintain low execution charges for their users.<sup>21</sup> 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.

#### Existence of Alternatives

The large number of SROs, ATs, and internalizing broker-dealers that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, AT, and broker-dealer is currently permitted to produce and sell proprietary data products, and many currently do, including but not limited to the Exchange, NYSE Arca, Inc., NYSE MKT LLC, NASDAQ, Bats [sic], and Direct Edge.

The fact that proprietary data from ATs, internalizing broker-dealers, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. By way of example, Bats [sic] and NYSE Arca both published proprietary data on the Internet before registering as exchanges. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. Indeed, in the case of NYSE BBO and NYSE Trades, the data provided through these products appears both in (i) real-time core data products offered by the Securities Information Processors (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.<sup>22</sup> Because market data users can find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market data information for its own.

Those competitive pressures imposed by available alternatives are evident in the Exchange's proposed pricing.

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 and inexpensive. 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, TrackECN, BATS Trading and Direct Edge. A proliferation of dark pools and other ATs operate profitably with fragmentary share of consolidated market volume.

In determining the proposed changes to the fees for the NYSE BBO and NYSE Trades, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange 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 the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>23</sup> of the Act and

*e.g.*, F.W. Taussig, "A Contribution to the Theory of Railway Rates," *Quarterly Journal of Economics* V(4) 438, 465 (July 1891) ("Yet, surely, the division is purely arbitrary. These items of cost, in fact, are jointly incurred for both sorts of traffic; and I cannot share the hope entertained by the statistician of the Commission, Professor Henry C. Adams, that we shall ever reach a mode of apportionment that will lead to trustworthy results.").

<sup>21</sup> This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

<sup>22</sup> See *supra* note 15.

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

subparagraph (f)(2) of Rule 19b-4<sup>24</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>25</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2016-74 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-NYSE-2016-74. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/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-NYSE-2016-74 and should be submitted on or before December 12, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

**Brent J. Fields,**  
*Secretary.*

[FR Doc. 2016-27893 Filed 11-18-16; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79317; File No. SR-NASDAQ-2016-121]

### Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change Related to the Payment of a Credit by Execution Access, LLC Based on Volume Thresholds Met on the NASDAQ Options Market

November 15, 2016.

#### I. Introduction

On August 29, 2016, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change related to the payment of a credit by Execution Access, LLC ("EA") that would be based on volume thresholds met on the NASDAQ Options Market LLC ("NOM"). The proposed rule change was published for comment in the **Federal Register** on September 8, 2016.<sup>3</sup> On October 19, 2016, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed

rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> To date, the Commission has received no comment letters on the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

#### II. Summary of the Proposed Rule Change

Under the proposal, EA<sup>7</sup> would offer a credit to its clients who are also NOM Participants ("dual access clients"),<sup>8</sup> provided they qualify for one of the two highest Market Access and Routing Subsidy ("MARS") Payment tiers available on NOM. According to the Exchange, NOM Participants that have System Eligibility<sup>9</sup> and have executed the requisite number of Eligible

<sup>5</sup> See Securities Exchange Act Release No. 79118, 81 FR 73186 (October 24, 2016). The Commission designated December 7, 2016 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> According to the Exchange, EA is a broker-dealer that operates a fully electronic central limit order book known as eSpeed, and it facilitates the matching of client orders in U.S. Treasury securities. See Notice, *supra* note 3, at 62212 n.3.

<sup>8</sup> As proposed, the dual access client may be an affiliate entity of the NOM Participant. See *id.* at 62212. Affiliates would include other legal entities under common control. See *id.* at 62212 n.4.

<sup>9</sup> At the time the Exchange initially submitted this proposal, to qualify for MARS, a Participant's routing system ("System") was required to: (1) Enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with NOM's API to access current NOM match engine functionality. Further, the Participant's System needed to cause NOM to be one of the top three default destination exchanges for individually executed marketable orders if NOM is at the national best bid or offer ("NBBO"), regardless of size or time, but allow any user to manually override NOM as a default destination on an order-by-order basis. Any NOM Participant was permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies NOM that it appears to be robust and reliable. The Participant remained solely responsible for implementing and operating its System. See *id.* at 62213 n.6. The Commission notes that the Exchange recently modified MARS, including the System Eligibility requirements. See NOM Rules at Chapter XV, Section 2(6). See also Securities Exchange Act Release No. 79251 (November 7, 2016), 81 FR 79536 (November 14, 2016) (SR-NASDAQ-2016-149) ("MARS Amendment") (modifying the MARS System Eligibility requirements to provide that "the Participant's System would also need to cause NOM to be the one of the top three default destination exchanges for (a) individually executed marketable orders if NOM is at the [NBBO], regardless of size or time or (b) orders that establish a new NBBO on NOM's Order Book, but allow any user to manually override NOM as a default destination on an order-by-order basis") (emphasis added).

<sup>26</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 78749 (September 1, 2016), 81 FR 62212 ("Notice").

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> 17 CFR 240.19b-4(f)(2).

<sup>25</sup> 15 U.S.C. 78s(b)(2)(B).