

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64652; File No. SR-NASDAQ-2011-075)

June 13, 2011

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding BONOSM and ITTO Market Data

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 May 31, 2011, The NASDAQ Stock Market LLC (“NASDAQ”) 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 NASDAQ. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

NASDAQ proposes changes to add new Rule 7054 (NASDAQ Options Market Data Distributor Fees) setting forth the fees for options market data feeds known as Best of NASDAQ Options and NASDAQ ITCH to Trade Options.

While the proposed fee changes are effective upon filing, the Exchange has designated these changes to be operative on July 1, 2011.

The text of the proposed rule change is available at nasdaq.cchwallstreet.com, at NASDAQ’s principal office, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, NASDAQ included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to add new Rule 7054 setting forth the fees for options market data feeds known as Best of NASDAQ Options (“BONOSM”) and NASDAQ ITCH to Trade Options (“ITTO”).

Background

The Exchange recently modified Chapter VI, Section 1(a)(3) of the NASDAQ Options Market (“NOM”) Rules to specify the names and content of the two data feeds that are the subject of this filing, BONOSM and ITTO.³

ITTO is currently described in the Exchange’s option rules at subsection (a)(3)(B) of Chapter VI, Section 1 as a data feed that provides quotation information for individual orders on the NOM book, last sale information for trades executed on NOM, and Order Imbalance Information as set forth in NOM Rules Chapter VI, Section 8. ITTO is the options equivalent of the NASDAQ TotalView/ITCH data feed that NASDAQ offers under NASDAQ Rule 7023 with respect to equities traded on NASDAQ. As with TotalView, members use ITTO to “build” their

³ Securities Exchange Act Release No. 63983 (February 25, 2011), 76 FR 12178 (March 4, 2011)(SR-NASDAQ-2011-032)(notice of filing and immediate effectiveness to offer, among other things, BONOSM and ITTO market data for free). The filing also offered NASDAQ Options Depth at Price (DAP) and NASDAQ Options Net Order Imbalance (NOIView) for free; this proposal does not affect the DAP and NOIView data feeds. Chapter VI, Section 1(a)(3) states generally that the NOM trading system includes data feeds that can be used to display without attribution to Participants' MPIDs Displayed Orders on both the bid and offer side of the market for price levels then within the NASDAQ Options Market using the minimum price variation applicable to that security.

view of the NOM book by adding individual orders that appear on the feed, and subtracting individual orders that are executed.

BONOSM is currently described in subsection (a)(3)(A) of Chapter VI, Section 1 as a data feed that provides the NOM Best Bid and Offer (“NBBO”) and last sale information for trades executed on NOM. The NBBO and last sale information are identical to the information that NOM sends the Options Price Regulatory Authority (“OPRA”) and which OPRA disseminates via the consolidated data feed for options. BONO is the options equivalent of the NASDAQ Basic data feed offered for equities under NASDAQ Rule 7047.

The Proposal

The Exchange has been offering the BONOSM and ITTO options market data feeds free of charge. The Exchange now proposes to institute Rule 7054 setting forth fees for recipients of BONOSM and ITTO data, with a free trial offer for certain data recipients.

The definitions of BONOSM and ITTO are established in new Rule 7054. Proposed Rule 7054(d) states that BONOSM is a data feed that provides the NBBO and last sale information for trades executed on NOM. Proposed Rule 7054(e) states that ITTO is a data feed that provides quotation information for individual orders on the NOM book, last sale information for trades executed on NOM, and Order Imbalance Information as set forth in NOM Rules Chapter VI, Section 8.⁴

Using elements of the current fee structure for recipients of NASDAQ TotalView and NASDAQ Basic,⁵ which are similar on the equities side to BONOSM and ITTO, the Exchange proposes to charge monthly fees for firms that are distributors of BONOSM and ITTO market

⁴ The language of subsections (d) and (e) within Rule 7054 is identical to the language that describes BONOSM and ITTO in NOM option rules at Chapter VI, Section 1(a)(3)(A) and (B).

⁵ See Rules 7023 and 7047.

data. Proposed Rule 7054(b) states that a "distributor" of NASDAQ options market data is any entity that receives a feed or data file of NASDAQ data directly from NASDAQ or indirectly through another entity and then distributes the data either internally (within that entity) or externally (outside that entity). Proposed subsection (b) also states that all distributors would be required to execute a NASDAQ distributor agreement. The amount of the monthly fees would depend on whether a distributor is an "Internal Distributor" or "External Distributor."⁶

An Internal Distributor is a firm that is permitted by agreement with the Exchange to provide BONOSM and ITTO data to internal users (i.e., users within their own organization). Under the proposal, Internal Distributors of BONOSM and ITTO data would be charged a monthly fee of \$1,500 per firm.

An External Distributor is a firm that is permitted by agreement with the Exchange to provide BONOSM and ITTO data to both internal users and to external users (i.e., users outside of their own organization). External Distributors would be charged a monthly fee of \$2,000 per firm. The fee paid by an External Distributor includes the Internal Distributor Fee. The fee paid by an Internal Distributor or an External Distributor would allow access to both the BONOSM and ITTO data feeds.

The Exchange also proposes to assess user fees for BONOSM and ITTO data on a per-user basis.⁷ These fees would vary based on whether they are for Professional users or Non-Professional users. Proposed Rule 7054 (f) states that the term "Non-Professional" shall have the same meaning as in NASDAQ Rule 7011(b)(2). Rule 7011(b)(2) defines a "Non-Professional" as a natural person who is neither: (A) registered or qualified in any capacity with the

⁶ Thus, a distributor may pay either "Internal Distributor" or "External Distributor" fees.

⁷ While the user fees would be paid by firms (Internal Distributors and External Distributors), some portion of the fees may be passed through to users inside or outside the firms (that is, to internal or external users).

Commission, the Commodities 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 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (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 performed for an organization not so exempt.⁸ A Professional user is any user that is not a Non-Professional.

For BONOSM data, the proposed per-user fees are \$5 per Professional user; and \$1 per Non-Professional user. For ITTO data, the proposed per-user fees are \$10 per Professional user; and \$1 per Non-Professional user.

The Exchange notes that for many years, exchanges have engaged in and the Commission has accepted the practice of price differentiation, both in the context of market data as well as in the context of executions. With respect to market data, NASDAQ and NYSE Euronext ("NYSE") in their capacities as network processors and exchanges have differentiated in pricing between Professional and Non-Professional market data users, often charging Professionals many times more than Non-Professionals for using the same data. For example, NASDAQ currently charges Non-Professional users (subscribers) \$60 a month for NASDAQ Depth Data received via a Managed Depth Solution and Professional users \$300 a month.⁹ Also, NASDAQ currently charges Non-Professionals \$15 per terminal for its NASDAQ Depth Data via a standalone terminal, while Professional investors pay roughly five times the Non-Professional

⁸ The Exchange believes that Non-Professional users of market data, in contrast to Professional data users and distributors, often tend to be individual consumers, smaller retail investors, and public customers.

⁹ See Rule 7026.

rate.¹⁰ This reflects the value of the service to various constituencies (i.e., lower prices are charged to consumers with more elastic demand) and allows both types of investors to contribute to the high fixed costs of operating an exchange platform. The Exchange believes that this differentiation for Professional and Non-Professional data usage, as the differentiation for Professional and Non-Professional users proposed in this filing, is completely consistent with past Commission precedent and economic theory.¹¹

The Exchange also proposes to assess a monthly non-display enterprise license fee. Proposed Rule 7054 (c) states that an “enterprise license” entitles a distributor to provide BONOSM or ITTO market data pursuant to this rule to an unlimited number of non-display devices¹² within the firm without any per user charge. Under the proposal, distributors of BONOSM and ITTO data may, if they choose to subscribe to a non-display enterprise license, be charged a monthly enterprise license fee or \$2,500.

The non-display enterprise license is in addition to other distributor fees. Thus, a firm that has a non-display enterprise license could pay an Internal Distributor fee and distribute data to limitless number of non-user display devices (devices within the firm) pursuant to the license without incurring further fees for each internal user. However, the enterprise license does not allow external distribution without incurring an External Distributor fee and external per user

¹⁰ See Rule 7023.

¹¹ In economic terms, charging lower fees to non-professional consumers increases overall economic welfare by increasing output – in this case, providing more data to more investors – and avoids two equally undesirable alternatives: (i) requiring the firm to charge uniformly high prices that constrict demand, or (ii) insisting on uniformly low prices at marginal cost (potentially zero or close to zero) that do not allow the firm to cover its fixed costs and thereby lead to bankruptcy.

¹² Non-display devices do not graphically show (display) BONOSM or ITTO market data but instead use the data for performance of analytic or calculative functions (e.g. algorithms).

fees, if applicable under the circumstances.

Finally, the Exchange proposes a 30-Day Free Trial Offer in subsection (g) of Rule 7054.¹³ In particular, the 30-day waiver of the user fees for NASDAQ options market data pursuant to the rule extends to all new individual (non-firm) users (subscribers) and potential new individual users. This fee waiver period will be applied on a rolling basis, determined by the date on which a new individual (non-distributor or firm) user or potential individual user is first entitled by a distributor to receive access to NASDAQ options market data. Subsection (g) provides that a distributor may only provide this waiver to a specific individual user one time.

The Exchange notes that the categories of BONOSM and ITTO market data and fees compare favorably with similar products offered by other markets such as International Stock Exchange (“ISE”), NYSE, NASDAQ OMX PHLX (“Phlx”), and Chicago Board Options Exchange (“CBOE”). For example, ISE offers market data products that are similar to BONOSM: a data feed that shows the top of the market entitled TOP Quote Feed,¹⁴ and a data feed that shows the top five price levels entitled Depth of Market.¹⁵ NYSE offers a market data product for Arca and Amex that is similar to BONOSM and ITTO: a feed that shows top of book,

¹³ For other Exchange data products that offer a 30-day free trial, see Rules 7023, 7044 and 7036. See also Rules 7049 and 7055.

¹⁴ The ISE TOP Quote Feed has a monthly base access fee of \$5,000 applicable to professionals and non-professionals plus a \$10 variable device fee for professionals and a no device fee for internal use professionals; or a flat fixed enterprise fee of \$2,500 for professionals and a \$2,000 fee for internal use professionals. The Exchange notes that the monthly fees for the ISE TOP Quote Feed are higher than those proposed in this filing.

¹⁵ The ISE Depth of Market Feed has a monthly base access fee of \$5,000 applicable to professionals and non-professionals plus a \$50 variable device fee for professionals and a \$5 per device fee for external distribution non-professionals; or a flat fixed enterprise fee of \$7,500 for internal use professionals, \$12,500 for external use professionals, and \$10,000 for non-professionals. The Exchange notes that the monthly fees for ISE Depth of Market are higher than those proposed in this filing for a more robust product.

last sale, and depth of quote and is entitled NYSE Arca Book for Options.¹⁶ Phlx offers a market data feed entitled TOPO that is similar to BONOSM and shows orders and quotes at the top of the market, as well as trades; and a TOPO Plus Orders feed that is similar to ITTO and shows the data in the TOPO data feed as well as the depth of orders.¹⁷ A subsidiary of CBOE for which CBOE charges fees offers a market data feed that is similar to BONOSM and shows BBO, last sale, and top of book data.¹⁸ And BATS offers Multicast PITCH, which is their depth of market and last sale feed similar to ITTO.¹⁹

The Exchange believes that the continued availability of BONOSM and ITTO data feeds enhances transparency, fosters competition among orders and markets, and enables buyers and sellers to obtain better prices.

¹⁶ The fee for NYSE Arca Book for Options is \$750 per month.

¹⁷ TOPO Plus Orders has a monthly fee of \$4,000 for internal distributors or \$5,000 for external distributors plus a monthly fee of \$1 per non-professional subscribers (users) and \$20 for professional subscribers. The Exchange notes that the monthly fees for TOPO Plus Orders are higher than those proposed in this filing. See Securities Exchange Act Release No. 62194 (May 28, 2010), 75 FR 31830 (June 4, 2010)(SR-Phlx-2010-48)(order approving proposal related to TOPO Plus Orders market data fees).

¹⁸ The subsidiary is identified as Market Data Express, LLC (“MDX”) by CBOE, which indicates that the feed will also provide data regarding contingency orders and complex strategies. The monthly fee charged by CBOE for the data is \$3,500 plus a \$25 per user or device fee. See Securities Exchange Act Release No. 63997 (March 1, 2011), 76 FR 12388 (March 7, 2011)(SR-CBOE-2011-014)(notice of filing and immediate effectiveness). In the filing, CBOE specifically references as similar products the Phlx TOPO Plus Orders feed and the ISE Depth of Market Feed.

¹⁹ BATS offers Multicast PITCH without charge ostensibly to attract order flow to that exchange.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²⁰ in general and with Sections 6(b)(5) of the Act,²¹ in particular in that it 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.

In adopting Regulation NMS, the Commission granted self-regulatory organizations like NASDAQ 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. NASDAQ believes that this proposal is in keeping with those principles by promoting increased transparency through the dissemination of more useful proprietary data and also by clarifying its availability to various market participants.

Additionally, NASDAQ has made a voluntary decision to make this market data available. NASDAQ is not required by the Exchange Act in the first instance to make the data available, unlike the best bid and offer which must be made available under the Act. NASDAQ has chosen to make the noted data available to improve market quality, to attract order flow, and to increase transparency; and will continue to make the data available until such time as NASDAQ changes its rule.

²⁰ 15 U.S.C. 78f.

²¹ 15 U.S.C. 78f(b)(5).

NASDAQ believes that its ITTO and BONOSM, which includes the NBBO and last sale information for trades executed on NOM in BONOSM, are precisely the sort of market data products that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by lessening regulation of 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.²²

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

The recent decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoaliton v. SEC, No. 09-1042 (D.C. Cir. 2010) upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’ NetCoalition, at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

²² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

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.’ ”²³

The Court in NetCoalition, although 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 NYSEArca’s data product at issue in that case. As discussed previously and 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 case, and that the Commission is entitled to rely upon such evidence in concluding that the fees established in this filing are the product of competition, and therefore in accordance with the relevant statutory standards.²⁴

Competitive products similar to BONOSM and ITTO are, as previously discussed, offered by other exchanges, albeit sometimes at higher prices. ISE offers two data products similar to BONOSM that are called TOP Quote Feed, Depth of Market and have fees higher than those

²³ NetCoalition v. SEC at p. 16.

²⁴ It should also be noted that Section 916 of 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. Although this change in the law does not alter the Commission’s authority to evaluate and ultimately disapprove exchange rules if it concludes that they are not consistent with the Act, it unambiguously reflects a conclusion that market data fee changes do not require prior Commission review before taking effect, and that a formal proceeding with regard to a particular fee change is required only if the Commission determines that it is necessary or appropriate to suspend the fee and institute such a proceeding.

proposed in this filing.²⁵ NYSE offers a market data product similar to BONOSM and ITTO called NYSE Arca Book of Options that has market data for NYSE Arca and NYAE Amex. Phlx offers a market data product that is similar to ITTO.²⁶ CBOE offers a market data product that is similar to BONOSM.²⁷ BATS offers a market data product similar to ITTO. Moreover, the Exchange notes that, as a substitute for exchange data, consolidated market data (e.g. last sale, NBBO, current quotes) are also available from securities information processors such as OPRA.

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 its BONOSM and ITTO products is constrained by (1) competition between exchanges and other trading platforms that compete with each other in a variety of dimensions; (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data; and (3) the inherent contestability of the market for proprietary last sale data. NASDAQ believes that the Dodd-Frank Act amendments to Section 19 materially alter the scope of the Commission's review of future market data filings, by creating a presumption that all fees may take effect immediately, without prior analysis by the Commission of the competitive environment. Even in the absence of this important statutory change, however, NASDAQ believes that a record may readily be established to demonstrate the competitive nature of the market in question.

²⁵ For the fees related to ISE TOP Quote Feed and Depth of Market, see supra notes 14 and 15.

²⁶ For the fees related to NYSE Arca Book of Options and Phlx TOPO Plus Orders, see supra notes 16 and 17.

²⁷ For the fees related to the CBOE market data product, see supra note 18.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Broker-dealers currently have numerous alternative venues for their order flow, including ten self-regulatory organization ("SRO") markets, as well as internalizing broker-dealers ("BDs") and various forms of alternative trading systems ("ATs") and electronic communication networks ("ECNs"). For example, the Exchange has noted that numerous other U.S. options exchanges offer market data products that are substantially similar to the ITTO and BONOSM products, which the Exchange must consider in its pricing discipline in order to compete for listings, trades, and the market data itself.

The large number of SROs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATs, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including ISE, CBOE, NYSE (NYSE Amex and NYSE Arca), Phlx, and BATS. Indeed, the Exchange has discussed a host of products that are similar to ITTO and BONOSM, including: ISE's TOP Quote Feed and Depth of Market feed; NYSE's Arca Book of Options feed; Phlx's TOPO Plus Orders feed; BATS' Multicast PITCH feed; and CBOE's recently fee liable data feed through MDX.

Furthermore, any ATs or BD can combine with any other ATs, BD, or multiple ATs or BDs to produce joint proprietary data products. Additionally, order routers and market data

vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from 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 an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and 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 Yahoo, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide sufficient value. NASDAQ and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TracECN, BATS Trading and Direct Edge. A proliferation of ATSS operate profitably with fragmentary shares of consolidated market volume.

Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson-Reuters.

The court in NetCoalition concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission's NetCoalition order because, in the court's view, the Commission had not adequately demonstrated that the depth-of-book data at issue in the case is used to attract order flow. NASDAQ believes, however, that evidence not before the court clearly demonstrates that availability of depth data attracts order flow.

Competition among platforms has driven NASDAQ continually to improve its platform data offerings and to cater to customers' data needs. For example, NASDAQ has been offerings front end applications such as its NetView and ITCH equity data products and ITTO and BONOSM options data products to help customers utilize data. Yet another example of the

continuous effort by exchanges to improve platform data is Phlx's TOPO Plus Orders and TOPO data products.

Moreover, the Exchange believes that 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. 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.

In the recent filing approving the aforementioned Phlx TOPO Plus Orders data feed,²⁸ the Commission recognized the intense competition among exchanges, particularly as related to options market data, stating:

Phlx currently competes with seven other options exchanges for order flow. Attracting order flow is an essential part of Phlx's competitive success. If Phlx cannot attract order flow to its market, it will not be able to execute transactions. If Phlx cannot execute transactions on its market, it will not generate transaction revenue. If Phlx cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. This compelling need to attract order flow imposes significant pressure on Phlx to act reasonably in setting its fees for Phlx market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom Phlx must attract order flow. These market participants include broker-dealers that control the

²⁸ See Securities Exchange Act Release No. 62194 (May 28, 2010), 75 FR 31830 (June 4, 2010)(SR-Phlx-2010-48)(order approving proposal related to TOPO Plus Orders market data fees).

handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.

The primary competition and anti-trust regulator in the U.S., the Antitrust Division of the U.S. Department of Justice (the “Antitrust Division”), has recognized the intensely competitive nature of exchange market data. When analyzing competition among exchanges, Assistant Attorney General Christine Varney recently stated:

If the acquisition [of NYSE by NASDAQ and ICE] proceeded, it would have eliminated substantial competition in the following ways... NASDAQ and NYSE also 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. Post-merger, the [new] firm would have the ability to raise the cost of real-time proprietary equity data and the firm would be less likely to develop new, innovative, real-time data products.²⁹

In establishing the price for the BONOSM and ITTO products, NASDAQ considered the competitiveness of the market for 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 a fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of alternatives to ITTO and BONOSM, including noted competitive products by other exchanges and real-time consolidated last sale and NBBO data, free delayed consolidated data, and even proprietary data from other sources,

²⁹ See Remarks as Prepared for Delivery by Assistant Attorney General Christine Varney Regarding NASDAQ OMX Group Inc. and Intercontinental Exchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011).

ensures that NASDAQ cannot set unreasonable fees, or fees that are unreasonably discriminatory, without losing business to these alternatives.³⁰ NASDAQ believes that this demonstrates the consistency of these fees with applicable statutory standards.

Accordingly, 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 purpose of the Act.

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

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.³¹ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

³⁰ The Exchange notes also that competitiveness in the market data field (as in other areas such as, for example, securities offerings and pricing) encourages - and often requires - exchanges to be innovative and forward-thinking in terms of market data product offerings.

³¹ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2011-075 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-2011-075. 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 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 such filing will also 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 No. SR-NASDAQ-2011-075 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Cathy H. Ahn
Deputy Secretary

³² 17 CFR 200.30-3(a)(12).