

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-78749; File No. SR-NASDAQ-2016-121)

September 1, 2016

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change Related to the NASDAQ Options Market LLC's Pricing at Chapter XV, Section 2(6)

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> notice is hereby given that on August 29, 2016, The Nasdaq Stock Market LLC ("Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 related to the NASDAQ Options Market LLC's ("NOM") pricing at Chapter XV, Section 2(6).

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.

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

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

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

1. Purpose

The Exchange proposes to file to provide notice that Execution Access, LLC<sup>3</sup> will offer a credit to its clients authorized to transact business at EA, provided those clients, who are also NOM Participants (“dual access client”), qualify for one of the two highest Market Access and Routing Subsidy or “MARS” Payment tiers available on NOM. The NOM Participant must qualify for the MARS Payment tier in order for the dual access client to receive a credit on EA. The dual access client may be an affiliate entity of the NOM Participant at EA.<sup>4</sup> The qualification and credit are explained further below.<sup>5</sup> The purpose of this proposal is to lower prices to transact U.S. Treasury securities on EA in response to competitive forces in the treasury markets and increase trading on NOM.

MARS Program

The Exchange currently offers MARS Payments to qualifying NOM Participants in Chapter XV, Section 2(6). NOM Participants that have System Eligibility<sup>6</sup> and have executed

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<sup>3</sup> Execution Access, LLC (“EA”) is a broker-dealer that operates a fully electronic central limit order book known as eSpeed. EA facilitates the matching of client orders in U.S. Treasury securities.

<sup>4</sup> Affiliates would include other legal entities under common control.

<sup>5</sup> Nasdaq believes that EA is not a “facility” of the Exchange. 15 U.S.C. § 78c(a)(2). The Act defines “facility” to include an exchange’s “premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.” EA is a distinct entity that is separate from NOM and engages in a discrete line of business that is not “for the purpose of effecting or reporting a transaction” on an exchange.

<sup>6</sup> To qualify for MARS, a Participant’s routing system (“System”) is required to: (1) enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2)

the requisite number of Eligible Contracts<sup>7</sup> in a month are paid rebates based on average daily volume (“ADV”) in a month. Today, MARS Payments are currently based on a 3 tier rebate based on ADV. The Exchange pays a MARS Payment of \$0.07 for ADV of 2,500 Eligible Contracts. The Exchange pays a MARS Payment of \$0.09 for ADV of 5,000 Eligible Contracts. Finally, the Exchange pays a MARS Payment of \$0.11 for ADV of 10,000 Eligible Contracts. The Exchange pays a MARS Payment on all executed Eligible Contracts that add liquidity, which are routed to NOM through a participating NOM Participant’s System and meet the requisite Eligible Contracts ADV.

#### EA Credit Proposal

Provided a dual access client qualifies for NOM’s MARS Payment Tier 2 or 3 in a given month, EA will credit the dual access client or its affiliate a specific dollar amount on its monthly billing statement for that same corresponding month, depending on the MARS Payment tier the dual access client qualified for in that month on NOM.<sup>8</sup> If the dual access client qualified for NOM MARS Payment Tier 2, which requires ADV of 5,000 Eligible Contracts, the dual access client would receive a credit of \$22,000 on its EA bill for the corresponding month. If the dual

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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 would also need to cause NOM to be the 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 would be 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 remains solely responsible for implementing and operating its System. See Chapter XV, Section 2(6).

<sup>7</sup> MARS Eligible Contracts include electronic Firm, Non-NOM Market Maker, Broker-Dealer or Joint Back Office orders that add liquidity, excluding Mini Options. See Chapter XV, Section 2(6).

<sup>8</sup> This credit will not be paid by NOM, but by EA. The credit is not transferable and will offset transaction fees.

access client qualified for NOM MARS Payment Tier 3, which requires ADV of 10,000 Eligible Contracts, the dual access client would receive a credit of \$40,000 on its EA bill for the corresponding month.<sup>9</sup> These rebates are the same rebates that any qualifying NOM Participant would receive for transacting Eligible Contracts.

By way of example, if the dual access client, who has System Eligibility, transacts ADV of 7,000 Eligible Contracts on NOM during the month of August 2016, the dual access client would be credited \$22,000 on its EA August 2016 monthly statement because the dual access client qualified for NOM MARS Payment Tier 2. As provided in NOM's fee schedule, the dual access client would also be paid a \$0.09 per contract rebate for all Eligible Contracts transacted on NOM during the month of August 2016. This rebate would be the same rebate paid to any qualifying NOM Participant. The NOM Participant would receive the MARS rebate on its NOM August 2016 monthly billing statement.

The Exchange would offer the credit to dual access clients as of November 1, 2016, if approved by the SEC.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>11</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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<sup>9</sup> The Exchange would request that the dual access client consent to certain information sharing for purposes of providing information related to the credit.

<sup>10</sup> 15 U.S.C. 78f(b).

<sup>11</sup> 15 U.S.C. 78f(b)(4) and (5).

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>12</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>13</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>14</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>15</sup>

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution

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<sup>12</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>13</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>14</sup> See NetCoalition, at 534 - 535.

<sup>15</sup> Id. at 537.

of order flow from broker dealers' ...."<sup>16</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

### EA Credit Proposal

Nasdaq, Inc., the parent company of NOM and EA, has various affiliates that offer services to firms conducting a securities business. In the US, Nasdaq has six options exchanges and three equities exchanges along with EA and a routing broker-dealer.<sup>17</sup> Firms have overlapping memberships at various Nasdaq entities. Any firm may register to become a member of The NASDAQ Stock Market LLC and transact business on NOM. There are various NOM members that are members of other options exchanges and transact business on other platforms such as eSpeed. Today, NOM does not offer a U.S. Treasury securities product. EA and NOM offer different services to firms, such as banking institutions seeking to establish securities positions and hedge their portfolios.

This proposal for EA to pay a credit to a dual access client is reasonable because it would attract greater liquidity to NOM for the benefit of its market participants because it would encourage NOM Participants to execute a greater number of Eligible Contracts<sup>18</sup> on NOM to qualify for the higher MARS Payment tiers. Order flow benefits all market participants that have an opportunity to interact with the additional order flow. NOM Participants receive a corresponding benefit in terms of a NOM MARS Payment in return for that order flow.

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<sup>16</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>17</sup> Nasdaq, Inc. owns and operates, among other entities, Nasdaq, NASDAQ PHLX, LLC, NASDAQ BX, INC., the International Securities Exchange, Inc., ISE GEMINI, LLC, ISE Mercury, LLC, EA and Nasdaq Execution Services.

<sup>18</sup> See note 6 above.

This proposal for EA to pay a credit to a dual access client is equitable and not unfairly discriminatory because all NOM Participants are eligible to qualify for MARS Payments provided they have System Eligibility and execute the requisite number of Eligible Contracts on NOM. The Exchange uniformly pays MARS Payments to NOM Participants.

Diversity in the products and services offered by Nasdaq among its affiliates enhances competition and benefits consumers. Dual access clients seeking to transact business on NOM and also on EA are eligible to receive multiple benefits with this proposal that would result in lower costs to transact business on NOM and EA. This proposal will continue to treat all NOM Participants in a similar fashion as explained in more detail below. Likewise, all EA clients will be treated uniformly. The proposal does not create a disparity in the treatment of market participants transacting business on NOM or EA. This proposal would allow dual access clients to benefit from lower costs of transacting business as a result of providing a benefit to NOM in terms of order flow. NOM will reward all NOM Participants that execute Eligible Contracts on NOM in a uniform fashion; all NOM Participants are eligible to qualify for MARS and receive rebates.

The Exchange believes that this proposal serves the interests of customers, issuers, broker-dealers, and other persons using the facilities of NOM because this proposal continues to offer rebates to NOM Participants directing order flow to NOM to the benefit of all NOM Participants who then have access to the additional liquidity. The credit being paid by EA is not inconsistent with the Act in any respect. The NOM rebates and the EA credit are both reasonable for the reasons mentioned herein. The proposed EA credit should attract order flow to NOM to the benefit of NOM Participants. The Exchange's proposal continues to provide all NOM Participants an opportunity to receive rebates and therefore enables them to lower costs. The

proposal does not restrict any existing rebates or increase any other fees, and therefore will not place any NOM Participants that do not qualify for the rebate in a less favorable position. In fact, to the extent that the proposal succeeds in its competitive goal of attracting more order flow to NOM, it has the potential to benefit all NOM Participants.

The proposed credit to dual access clients is consistent with an equitable allocation of fees because it benefits not only NOM Participants receiving the MARS rebate, but has the potential to benefit all other NOM Participants as well. Specifically, the proposal is intended to attract a larger amount of Eligible Contracts to the Exchange. Today, NOM offers MARS Payments to encourage NOM to direct Eligible Contracts to the Exchange, and the proposal will provide an additional incentive to direct order flow to NOM.

The proposed credit to dual access clients is structured as a volume-based discount. The Commission has previously accepted such volume tiers, and they have been adopted by various options exchanges. Tiers are a well-established method for drawing liquidity to an exchange by paying higher rebates to those members that direct a greater amount of order flow to the Exchange. Volume tiers in both the cash equity and options markets provide reduced pricing to the heaviest liquidity providers and liquidity takers. As with existing tiers, the higher the percentage of a market participant's executed orders on NOM, the higher the rebate. This proposal pays MARS Payments on the volume executed only on NOM, thereby targeting the benefit on the exchange. The MARS rebate is an equitable means of incentivizing dual access clients to increase the amount of Eligible contracts transacted on NOM to receive multiple benefits.

The Exchange's proposal is not unfairly discriminatory. MARS Payments will continue to be paid uniformly to NOM Participants that qualify for these rebates. Any NOM Participant



may qualify for MARS. Those NOM Participants that send a certain amount of Eligible Contracts today already benefit by receiving MARS rebates for those Eligible Contracts when transacted on NOM. This proposal seeks to incentivize those Participants to send more Eligible Contracts to receive not only the MARS rebate, but also another benefit associated with their participation at EA. Any firm may register to access EA to transact U.S. Treasury securities and therefore would become eligible for the credit, provided the market participant transacted the requisite Eligible Contracts on NOM. Therefore, the proposal does not discriminate among NOM Participants, but rather continues to incentivize them to execute as many Eligible Contracts as possible on NOM in order to receive the benefit of the rebate on those orders. The proposal may also incentivize NOM Participants to register to transact business on EA to enjoy even more benefits in addition to the MARS rebates they may receive on NOM if they qualify.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The proposed fee changes are competitive and do not impose a burden on inter-market competition. Today, other venues offer rebate programs, discounted fees and incentives for maintain routing systems.<sup>19</sup> In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

#### EA Credit Proposal

This proposal is not anti-competitive in nature. Today, NOM Participants are eligible to receive MARS Payments without being clients of EA. The proposal does not require NOM Participants to become clients of EA; rather dual access clients are simply provided another benefit for transacting volume on NOM, as NOM Participants. The proposal does not burden intra-market competition on NOM; rather, it incentivizes NOM Participants to execute as many Eligible Contracts on NOM as possible to obtain higher MARS rebates and reduce costs – an inherently pro-competitive result. NOM and EA offer firms diverse product offerings. This proposal simply encourage NOM Participants to utilize EA’s services and provides them discounted costs. NOM Participants that do not become clients of EA continue to receive the same rebates as NOM Participants that are clients of EA when executing the same number of Eligible Contracts on NOM. For these reasons the Exchange does not believe that the proposal imposes a burden on competition with respect to NOM Participants. The Exchange does not

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<sup>19</sup> See Phlx’s Pricing Schedule at Section B (Customer Rebate Program) and Section IV, Part E (MARS). Also, the International Securities Exchange LLC (“ISE”) offers a lower Market Maker Taker Fee for Select Symbols of \$0.44 per contract for Market Makers with total affiliated Priority Customer Complex ADV of 150,000 or more contracts. See ISE’s Fee Schedule.

believe that a NOM Participant transacting Eligible Contracts on NOM is in any worse of a position with this proposal. All NOM Participants are eligible to participate in the MARS program and receive rebates, provided they qualify for MARS.

The NOM Participant that does not choose to be a client of EA is not able to take advantage of the credit in this proposal, because it has not expended the effort to become a client of EA and therefore transacted business on eSpeed, but it is free to do so at any time. Any firm may register to access EA to transact U.S. Treasury securities and therefore would become eligible for the credit, provided the market participant transacted the requisite Eligible Contracts on NOM. Fundamentally, this proposal offers market participants a price decrease, the essence of competition. There is no evidence to support a conclusion that competition would be harmed with the implementation of this proposal. The interests of all investors are furthered by the lowering of prices as a result of robust competition. NOM does not have market power with respect to U.S. Treasury securities. Therefore, offering a credit to dual access clients on EA is not anti-competitive and does not result in an undue burden on inter-market competition with respect to U.S. Treasury securities.

The Exchange believes that paying the proposed MARS Payment to qualifying NOM Participants that have System eligibility and have executed the Eligible Contracts in a month does not create an undue burden on intra-market competition because the Exchange is counting all Firm, JBO, Broker-Dealer and Professional volume toward the Eligible Contracts. The increased order flow will bring increased liquidity to the Exchange for the benefit of all Exchange participants. To the extent the purpose of the proposed MARS is achieved, all the Exchange's market participants, including Professionals and Broker-Dealers, should benefit from the improved market liquidity.

The Exchange believes that the proposed change would increase both inter-market and intra-market competition by providing an opportunity to lower costs on eSpeed and offering NOM Participants continued rebates, thereby lowering costs. The proposed EA credit would enable dual access clients to lower their costs of transacting on eSpeed, as well as NOM, and incent them to provide additional liquidity at the Exchange, thereby enhancing the quality of its markets and increasing the volume of contracts traded on NOM. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity.

With respect to inter-market competition on NOM, today there is fierce competition in options pricing. Several exchanges offer programs similar to MARS.<sup>20</sup> The rebates reduce the transaction cost of doing business on NOM, which ultimately reduces the costs passed on to investors. As a result, investors would be more likely to direct order flow to NOM, which results in tighter spreads, increased trading opportunities, and an overall better functioning trading platform. Thus both the liquidity provider and the investing public would benefit from the price reduction. The rebates on NOM would also provide an incentive for other options exchanges to

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<sup>20</sup> The Chicago Board of Options Exchange, Inc. ("CBOE") currently offers a similar Order Routing Subsidy ("ORS") and Complex Order Routing Subsidy ("CORS") which, similar to the current proposal, allows CBOE members to enter into subsidy arrangements with CBOE Trading Permit Holders ("TPHs") that provide certain order routing functionalities to other CBOE TPHs and/or use such functionalities themselves. See Securities Exchange Act Release Nos. 55629 (April 13, 2007), 72 FR 19992 (April 20, 2007) (SR-CBOE-2007-34) and 57498 (March 14, 2008), 73 FR 15018 (March 20, 2008) (SR-CBOE-2008-27). Also, NYSE MKT LLC ("NYSE MKT") had a Market Access and Connectivity Subsidy ("MAC") which allowed NYSE MKT members to enter into subsidy arrangements with ATP Holders that provided certain order routing functionalities to other ATP Holders and/or use such functionalities themselves. The NYSE MKT program was discontinued. See Securities Exchange Act Release Nos. 71532 (February 19, 2014), 79 FR 9563 (February 12, 2015) (SR-NYSEMKT-2014-12) and 75609 (August 11, 2015), 80 FR 48132 (August 5, 2015) (SR-NYSEMKT-2015-59).

match the discounted prices by developing their own innovative pricing strategies or increasing the quality of their execution services.

With respect to the intra-market burden on competition on EA, the market has very few barriers to entry. Many broker-dealers can facilitate transactions in U.S. Treasuries. EA is one of a number of broker-dealers that offers a trading platform in U.S. Treasury securities. The transaction fees are competitive and often bilaterally negotiated. Competition comes in the form of negotiation with clients over fees, which clients compare with similar fees they are charged on other similar competitive platforms. The Exchange does not believe this proposal imposes an undue burden on intra-market competition for EA because of the nature of its business model and competitive nature of its fees. With respect to the inter-market burden on competition, EA has various broker-dealer competitors. The competitive nature of pricing for EA's services vis-a-vis its competitors has led to the reduction of fees charged by EA over the last few years. The ability to negotiate pricing provides market participants with negotiating power at each venue. Furthermore, as compared to several years ago, the increased number of competitors in this space has forced pricing to be reduced on all venues, which has resulted in lower costs to participants of these venues, including EA. Introducing this credit for participants transacting business on EA, provided they transact business on NOM, will further lower costs to these participants on both venues.

The Exchange believes EA's proposed pricing will not impose an undue harm on intra-market competition but rather will benefit market participants transacting business on EA by lowering costs and providing a more competitive environment to transact treasury securities. EA competitors can adjust their prices to compete with EA. There is no need for EA competitors to replicate the same proposal offered by EA. Fundamentally, the proposal is a price reduction, and

therefore is consistent with achieving the benefits of the robust competition that clearly exists in this market. Forcing other competitors to lower prices to compete with EA benefits investors.

Given the robust competition for volume among options markets, many of which offer the same products, attracting order flow by offering rebates is consistent with the pro-competitive goals of the Act.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (a) by order approve or disapprove such proposed rule change, or
- (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2016-121 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASDAQ-2016-121. 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 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-2016-121 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

Robert W. Errett  
Deputy Secretary

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<sup>21</sup> 17 CFR 200.30-3(a)(12).