are not Fridays in which monthly or quarterly options expire.[5] These short term option series may be listed in strike price intervals of $0.50, $1, or $2.50 depending on the strike price and whether the option trades in dollar increments in the related monthly expiration.[6] Specifically, the Exchange may list short term option series at strike price intervals of $0.50 or greater where the strike price is less than $75, or for option classes that trade in one dollar increments in the related non-short term option, $1 or greater where the strike price is between $75 and $150, and $2.50 or greater where the strike price is above $150.[7] During the month prior to expiration of an option class that is selected for the Short Term Option Series Program, the strike price intervals for the related non-short term option shall be the same as the strike price intervals for the short term option.[8]

The Exchange also currently operates a $2.50 Strike Price Program that permits monthly expiration options in classes admitted to the $2.50 Strike Price Program to trade in $2.50 intervals where the strike price is greater than $25 but less than $50; or between $50 and $100 if the strikes are no more than $10 from the closing price of the underlying stock in its primary market on the preceding day.[9] In certain instances, these strike price parameters conflict with the strike prices allowed for related non-short term options as dollar strikes between $75 and $100 otherwise allowed under the Short Term Option Series Program may be within $0.50 of strikes listed pursuant to the $2.50 Strike Price Program. As a result, the Exchange has proposed to amend Supplementary Material .12 to Rule 504 to extend the $0.50 strike price intervals currently allowed for short term options with strike prices less than $75 to short term options with strike prices less than $100. With this proposed change, short term options in non-index option classes will trade in: (1) $0.50 or greater intervals for strike prices less than $100, or for option classes that trade in one dollar increments in the related non-short term option; (2) $1 or greater intervals for strike prices that are between $100 and $150; and (3) $2.50 or greater intervals for strike prices above $150.

[5] *See* Supplementary Material .02 to ISE Rule 504.

[6] *See* Supplementary Material .12 to ISE Rule 504.

[7] *Id.*

[8] *See* Supplementary Material .02(e) to ISE Rule 504.

[9] *See* ISE Rule 504(g). The term ''primary market'' is defined in ISE Rule 100(a)(37) as the principal market in which an underlying security is traded.

With regard to the impact of the proposal on system capacity, the Exchange states that it has analyzed its capacity and represents that it and the Options Price Reporting Authority (''OPRA'') have the necessary systems capacity to handle any potential additional traffic associated with this proposed rule change.[10] In addition, the Exchange states that it believes that its members will not experience a capacity issue as a result of this proposal.[11] Furthermore, the Exchange states that it does not believe the proposed rule change will cause fragmentation of liquidity.[12]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[14] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposed change may provide the investing public and other market participants more flexibility to closely tailor their investment and hedging decisions in short term options, as well as in related non-short term options, thus allowing them to better manage their risk exposure.

In approving this proposal, the Commission notes that the Exchange has represented that it and OPRA have the necessary systems capacity to handle the potential additional traffic associated with this proposed rule change.[15] The Exchange further stated that it believes its members will not have a capacity issue as a result of the proposal and that it does not believe this expansion will cause fragmentation of liquidity.[16]

[10] *See* Notice, *supra* note 4, at 69975.

[11] *Id.*

[12] *Id.*

[13] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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

[15] *See* Notice, *supra* note 4, at 69975.

[16] *Id.*

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act[17] that the proposed rule change (SR–ISE–2014–52) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Brent J. Fields,

Secretary.

[FR Doc. 2015–00218 Filed 1–9–15; 8:45 am]

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[17] 15 U.S.C. 78f(b)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73995; File No. SR–NYSEMKT–2014–114]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for NYSE MKT Order Imbalances

January 6, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 23, 2014, NYSE MKT LLC (''NYSE MKT'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the fees for NYSE MKT Order Imbalances to establish eligibility requirements for redistribution on a managed non-display basis and an access fee for managed non-display data recipients, operative on January 1, 2015. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included

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

[2] 17 CFR 240.19b–4.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish eligibility requirements for redistribution of NYSE MKT Order Imbalances on a managed non-display basis and to establish an access fee for managed non-display data recipients of NYSE MKT Order Imbalances, operative January 1, 2015.

Non-Display Use of NYSE MKT market data means accessing, processing, or consuming NYSE MKT market data delivered via direct and/or Redistributor[3] data feeds for a purpose other than in support of a data recipient's display or further internal or external redistribution. A Redistributor approved for Managed Non-Display Services manages and controls the access to NYSE MKT Order Imbalances and does not allow for further internal distribution or external redistribution of NYSE MKT Order Imbalances by the data recipients. Managed Non-Display Services Fees apply when a data recipient's non-display applications are hosted by a Redistributor that has been approved for Managed Non-Display Services.

A Redistributor approved for Managed Non-Display Services is required to report to the Exchange on a monthly basis the data recipients that are receiving NYSE MKT Order Imbalances through the Redistributor's Managed Non-Display Service. A data recipient receiving NYSE MKT Order Imbalances through a Redistributor's Managed Non-Display Service does not have any reporting requirements.

Currently, to be approved for Managed Non-Display Services, a Redistributor of the Managed Non-Display Services must be approved under the Exchange's Unit-of-Count policy.[4] The Exchange is proposing to retire the Unit-of-Count Policy,[5] and as a result, eligibility for Managed Non-Display Services of NYSE MKT Order Imbalances would no longer be based on eligibility under the Unit-of-Count Policy. The Exchange proposes instead to establish eligibility requirements specifically for the redistribution of market data for Managed Non-Display Services. The Exchange also proposes to add an access fee that would apply to a data recipient that receives NYSE MKT Order Imbalances from an approved Redistributor of Managed Non-Display Services.

The proposed eligibility requirements for the provision of Managed Non-Display Services would be similar to the eligibility requirements for the Unit-of-Count Policy in that they would require the Redistributor to manage and control the access to NYSE MKT Order Imbalances for data recipients' non-display applications and not allow for further internal distribution or external redistribution of the information by data recipients. In addition, to be eligible to provide Managed Non-Display Services, the Redistributor would be required to (a) host the data recipients' non-display applications in equipment located in the Redistributor's data center and/or hosted space/cage and (b) offer NYSE MKT Order Imbalances in the Redistributor's own messaging formats (rather than using raw NYSE message formats) by reformatting and/or altering NYSE MKT Order Imbalances prior to retransmission without affecting the integrity of NYSE MKT Order Imbalances and without rendering NYSE MKT Order Imbalances inaccurate, unfair, uninformative, fictitious, misleading or discriminatory. The proposed eligibility requirements are similar to data distribution models currently in use and align the Exchange with other markets.[6]

The reporting requirements associated with the Managed Non-Display Service would not change. A Redistributor approved for Managed Non-Display Service would be required to report to the Exchange on a monthly basis the data recipients that are receiving NYSE MKT Order Imbalances through the Redistributor's Managed Non-Display Service. A data recipient receiving NYSE MKT Order Imbalances through a Redistributor's Managed Non-Display Service would continue not to have any reporting requirements.

In addition, the Exchange proposes to adopt an Access Fee of $250/month applicable only to data recipients that receive NYSE MKT Order Imbalances from an approved Redistributor of Managed Non-Display Services, operative January 1, 2015. Currently, all data recipients, including recipients of Managed Non-Display Services, are required to pay an Access Fee of $500/month to receive NYSE MKT Order Imbalances. Because the purpose of an access fee is to charge data recipients for access to the Exchange's proprietary market data, the Exchange believes it is appropriate to charge an access fee to all data recipients.[7] In recognition that data recipients of Managed Non-Display Services receive NYSE MKT Order Imbalances in a controlled format, the Exchange proposes to reduce the Access Fee by half for those data recipients that only receive Managed Non-Display Services for NYSE MKT Order Imbalances. In connection with this change, the Exchange also proposes to amend the NYSE MKT LLC Equities Proprietary Market Data Fees Schedule to specify that the current Access Fee of $500/month is charged to data recipients other than those receiving data through Managed Non-Display Services. The proposed Managed Non-

[3] "Redistributor" means a vendor or any other person that provides an NYSE data product to a data recipient or to any system that a data recipient uses, irrespective of the means of transmission or access.

[4] *See* Securities Exchange Act Release Nos. 61936 (Apr. 16, 2010), 75 FR 21088 (Apr. 22, 2010)(SR–NYSEAmex–2010–30 (notice) and 62187 (May 27, 2010), 75 FR 31500 (June 2, 2014) (SR–NYSEAmex–2010–35) (approval order) (Unit-of-Count Policy filing). *See also* Securities Exchange Act Release Nos. 69285 (April 3, 2013), 78 FR 21172(Apr. 9, 2013) (SR–NYSEMKT–2013–32) and 72020 (Sept. 9, 2014), 79 FR 55040 (Sept. 15, 2014) (SR–NYSEMKT–2014–72) (establishing fees for non-display use of NYSE MKT Order Imbalances). The Unit-of-Count Policy currently applies to NYSE MKT OpenBook, NYSE MKT Trades and NYSE MKT BBO as a method for counting Users. For NYSE MKT Order Imbalances, the Policy sets the criteria for eligibility for Managed Non-Display Services.

[5] The Exchange has separately proposed to retire the Unit-of-Count Policy and modify the eligibility requirements for Managed Non-Display Services for all of its proprietary market data products, including NYSE MKT Order Imbalances, and thereby harmonize the eligibility requirements for all NYSE MKT data products that have Managed Non-Display fees. *See* SR–NYSEMKT–2014–113 (amending fees for NYSE MKT OpenBook) and SR–NYSEMKT–2014–115 (amending fees for NYSE MKT BBO and NYSE MKT Trades) (collectively, "NYSE MKT 2014 Filings").

[6] *See* Securities Exchange Act Release Nos. 70748 (Oct. 23, 2013), 70748 (Oct. 23, 2013), 78 FR 64569 (Oct. 29, 2013) (SR–Phlx–2013–105) (notice of filing and immediate effectiveness of proposed rule change to establish non-display Managed Data Solution for NASDAQ OMX Phlx ("Phlx")); 70269 (Aug. 27, 2013), 78 FR 54336 (Sept. 3, 2013) (SR–NASDAQ–2013–106) (notice of filing and immediate effectiveness of proposed rule change to establish non-display Managed Data Solution for NASDAQ Stock Market ("NASDAQ")); and 69182 (Mar. 19, 2013), 78 FR 18378 (Mar. 26, 2013) (SR–Phlx–2013–28) (notice of filing and immediate effectiveness of proposed rule change to establish non-display Managed Data Solution for Phlx equities market PSX).

[7] In order to harmonize its approach to fees for its market data products, the Exchange is proposing to establish access fees for Managed Non-Display Services for NYSE MKT OpenBook, NYSE MKT BBO, and NYSE MKT Trades that is also half of the existing access fee for each respective data feed. *See* NYSE MKT 2014 Filings, *supra* note 5.

Display Access Fee would be in addition to the current Managed Non-Display Services Fee of $100/month by each data recipient.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[8] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[9] 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 Exchange believes that revising the eligibility requirements for Managed Non-Display Services so that the requirements are more closely aligned with the nature of the services being provided is reasonable. The proposed additional requirements for hosting in the Redistributor's data center and for reformatting and/or altering the market data prior to retransmission are also consistent with similar requirements of other markets for the provision of managed data.[10]

The Exchange believes that the proposed Access Fee for Managed Non-Display Services is reasonable, because the data is of value to recipients, and it is reasonable to charge them a lower access fee because they are receiving the data through a Redistributor in a controlled form rather than from the Exchange in raw form. The Exchange believes that the proposed fee directly and appropriately reflects the significant value of using non-display data in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments. NASDAQ and Phlx also both offer managed non-display data solutions and charge access fees for such services.[11] The fee is also equitable and not unfairly discriminatory because it would apply to all data recipients that choose to subscribe to Managed Non-Display Services for NYSE MKT Order Imbalances.

The fees are also equitable and not unfairly discriminatory because they will apply to all data recipients that choose to subscribe to the feeds.

The Exchange notes that NYSE MKT Order Imbalances is entirely optional. The Exchange is not required to make NYSE MKT Order Imbalances available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase NYSE MKT Order Imbalances. Firms that do purchase NYSE MKT Order Imbalances do so for the primary goals of using it 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 MKT Order Imbalances or any other similar products are attractively priced or not.

The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.[12] Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and alternative trading systems (''ATSs'') have chosen not to do so.[13] Firms that do not wish to purchase NYSE MKT Order Imbalances at the new price can choose similar alternative products,[14] or can choose to conduct their business operations in ways that do not use NYSE MKT Order Imbalances data.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010), 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.' ''[15]

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.

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 non-core market data would be so complicated that it could not be done practically or offer any significant benefits.[16]

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

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[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4), (5).

[10] *See supra* note 6.

[11] *See supra* note 6. NASDAQ offers a Managed Data Solution that assesses a monthly Managed Data Solution Administration fee of $1,500 and monthly Subscriber fees of $60 for non-professionals to $300 for professionals. *See* NASDAQ Rule 7026(b). Phlx charges a monthly Managed Data Solution Administration fee of $2,000 and a monthly Subscriber fee of $500. The monthly License fee is in addition to the monthly Distributor fee of $3,500 (for external usage), and the $500 monthly Subscriber fee is assessed for each Subscriber of a Managed Data Solution. *See* Securities Exchange Act Release No. 70748 (Oct. 23, 2013), 78 FR 64569 (Oct. 29, 2013) (SR–Phlx–2013–105).

[12] *See* In the Matter of the Application of Securities Industry And Financial Markets Association For Review of Actions Taken by Self-Regulatory Organizations, Release Nos. 34–72182; AP–3–15350; AP–3–15351 (May 16, 2014).

[13] For example, Goldman Sachs Execution and Clearing, L.P. has disclosed that it does not use proprietary market data in connection with Sigma X, its ATS. *See* response to Question E3, available at *http://www.goldmansachs.com/media-relations/in-the-news/current/pdf-media/gsec-order-handling-practices-ats-specific.pdf.* By way of comparison, IEX has disclosed that it uses proprietary market data feeds from all registered stock exchanges and LavaFlow ECN. *See http://www.iextrading.com/about/.*

[14] *See* NASDAQ Rule 7023 (Nasdaq Totalview and Openview).

[15] *NetCoalition,* 615 F.3d at 535.

[16] The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including 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 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.*

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. 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.'' [17]

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.'' [18] 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.[19]

If an exchange succeeds in its competition 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 using them in support of order routing and trading decisions in light of the diminished content; data products offered by competing venues may become correspondingly 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 distributed 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 MKT Order Imbalances unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE MKT Order Imbalances 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 their data products. Without a platform to post quotations, receive orders, and 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. There is substantial evidence of the strong correlation between order flow and market data purchases. For example, in November 2014 more than 80% of the transaction volume on each of NYSE MKT, and the

[17] 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.'').

[18] 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 https://www.arcavision.com/Arcavision/arcalogin.jsp.*

[19] Mary Jo White, Enhancing Our Equity Market Structure, Sandler O'Neill & Partners, L.P. Global 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.

NYSE's affiliates, New York Stock Exchange LLC (''NYSE'') and NYSE Arca, Inc. (''NYSE Arca''), was executed by market participants that purchased one or more proprietary market data products (the 20 firms were not the same for each market). A supra-competitive increase in the fees for either executions or market data would create a risk of reducing an exchange's revenues from both products.

Other market participants have noted that proprietary market data and trade executions are joint products of a joint platform and have common costs.[20] 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.[21]

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 12 equities self-regulatory organization (''SRO'') markets, as well as various forms of ATSs, 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.[22]

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 and Direct Edge, which previously operated as ATSs and obtained exchange status in 2008 and 2010, respectively, have provided certain market data at no charge on their Web sites in order to attract more order flow, and use revenue rebates from resulting additional executions to maintain low execution charges for their users.[23] Similarly, LavaFlow ECN provides market data to its subscribers at no charge.[24] 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, ATSs, 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, ATS, and broker-dealer is currently permitted to produce and sell proprietary data products, and many currently do or have announced plans to do so, including but not limited to the Exchange, NYSE, NYSE Arca, NASDAQ OMX, BATS, and Direct Edge.

The fact that proprietary data from ATSs, 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 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. With respect to NYSE MKT Order Imbalances, competitors offer similar data.[25] 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, and indeed in the fact that the changes here have the effect of lowering the price for NYSE MKT Order Imbalances.

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

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[20] *See* Securities Exchange Act Release No. 72153 (May 12, 2014), 79 FR 28575, 28578 n.15 (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).

[21] *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, 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.'').

[22] FINRA's Alternative Display Facility also receives over-the-counter trade reports that it sends to CTA.

[23] 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.

[24] *See* ''LavaFlow—ADF Migration,'' available at *https://www.lavatrading.com/news/pdf/LavaFlow_ADF_Migration.pdf.*

[25] *See supra* note 14.

Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge. As noted above, BATS launched as an ATS in 2006 and became an exchange in 2008, while Direct Edge began operations in 2007 and obtained exchange status in 2010. As noted above, LavaFlow ECN provides market data to its subscribers at no charge.[26]

In setting the proposed fees, 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 has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[27] and paragraph (f)(2) of Rule 19b–4 thereunder.[28] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSEMKT–2014–114 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–NYSEMKT–2014–114. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NYSE MKT. 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–NYSEMKT–2014–114 and should be submitted on or before February 2, 2015.

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

Brent J. Fields,

Secretary.

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[26] *See supra* note 24.

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

[28] 17 CFR 240.19b–4(f)(2).

[29] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–74004; File No. SR–ISE–2014–56]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Regarding Complex Orders

January 6, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 23, 2014 the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change, as described in Items I and II 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 ISE proposes to amend its rules to permit a greater number of complex orders to leg into the regular market. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of this proposed rule change is to permit a greater number of complex orders to leg into the regular market. The Exchange currently

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

[2] 17 CFR 240.19b–4.