The Commission believes that it is appropriate to approve the WEDs proposal on a pilot basis and extend the existing Pilot in order to allow the Exchange to gain experience with the new WEDs and collect data concerning WEDs. The addition of WEDs would offer additional investment options to investors and may be useful for their investment or hedging objectives. The Commission believes that the proposal strikes a reasonable balance between the Exchange's desire to offer a wider array of investment opportunities and the need to avoid unnecessary proliferation of options series that may burden some liquidity providers and further stress options quotation and transaction infrastructure. Further, CBOE's proposed extended Pilot period should allow for both the Exchange and the Commission to continue to monitor the potential for adverse market effects of P.M. settlement on the market, including the underlying cash equities markets at the expiration of these options.

The Commission notes that CBOE will provide the Commission with the Annual Report analyzing volume and open interest of EOWs, EOMs, and WEDs, which will also contain information and analysis of EOWs, EOMs, and WED trading patterns and index price volatility and share trading activity for series that exceed minimum parameters. This information should be useful to the Commission as it evaluates whether allowing P.M. settlement for EOWs, EOMs, and WEDs has resulted in increased market and price volatility in the underlying component stocks, particularly at expiration. The Pilot information should help the Commission and CBOE assess the impact on the markets and determine whether changes to these programs are necessary or appropriate. Furthermore, the Exchange's ongoing analysis of the Pilot should help it monitor any potential risks from large P.M.-settled positions and take appropriate action if warranted.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[26] that the proposed rule change (SR–CBOE–2015–106) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–01059 Filed 1–20–16; 8:45 am]

BILLING CODE 8011–01–P

(September 2, 2011), 76 FR 55969 (September 9, 2011) (SR–C2–2011–008). The SPXPM Pilot was subsequently transferred from C2 to CBOE and reset to a new 12-month pilot period. *See* Securities Exchange Act Release No. 68888 (February 8, 2013), 78 FR 10668 (February 14, 2013) (SR–CBOE–2012–120). In 2013, the Commission approved the addition of P.M.-settled mini-SPX index options to the SPXPM Pilot and the pilot's extension. *See* Securities Exchange Act Release No. 70087 (July 31, 2013), 78 FR 47809 (August 6, 2013) (SR–CBOE–2013–055).

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–76901; File No. SR–NYSEMKT–2016–03]

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

January 14, 2016.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 4, 2016, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the fees for NYSE MKT OpenBook to: (1) Establish a multiple data feed fee; (2) discontinue fees relating to managed non-display; (3) modify the application of the non-professional user fee cap; and (4) modify fees relating to non-display use. The proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to amend the fees for NYSE MKT OpenBook,[4] as set forth on the NYSE MKT Equities Proprietary Market Data Fee Schedule ("Fee Schedule"). The Exchange proposes to make the following fee changes effective January 4, 2016:

- Establish a multiple data feed fee;
- Discontinue fees relating to managed non-display;
- Modify the application of the non-professional user fee cap; and
- Modify fees relating to non-display use.

The Exchange also proposes to modify the application of the non-professional fee cap, effective April 1, 2016.

Multiple Data Feed Fee

The Exchange proposes to establish a new monthly fee, the "Multiple Data Feed Fee," that would apply to data recipients that take a data feed for a market data product in more than two locations. Data recipients taking NYSE MKT OpenBook in more than two locations would be charged $200 per additional location per month. No new reporting would be required.[5]

Managed Non-Display Fees

Non-Display Use of NYSE MKT market data means accessing, processing, or consuming NYSE MKT market data delivered via direct and/or

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

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

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 60123 (June 17, 2009), 74 FR 30192 (June 24, 2009) (SR–NYSEAmex–2009–28) (establishing NYSE MKT OpenBook). *See also* Securities Exchange Act Release Nos. 69285 (April 3, 2013), 78 FR 21172 (April 9, 2013) (SR–NYSEMKT–2013–32) (adopting access fees, subscriber fees, and non-display fees) ("2013 Non-Display Filing"), 72020 (Sept. 9, 2014), 79 FR 55040 (Sept. 15, 2014) (SR–NYSEMKT–2014–72) (amending non-display fees) ("2014 Non-Display Filing") and 73986 (Jan. 9, 2015), 80 FR 1444 (Jan. 9, 2015) (SR–NYSEMKT–2014–113) ("2015 NYSE MKT OpenBook Notice").

[5] Data vendors currently report a unique Vendor Account Number for each location at which they provide a data feed to a data recipient. The Exchange considers each Vendor Account Number a location. For example, if a data recipient has five Vendor Account Numbers, representing five locations, for the receipt of the NYSE MKT OpenBook product, that data recipient will pay the Multiple Data Feed fee with respect to three of the five locations.

Redistributor[6] data feeds for a purpose other than in support of a data recipient's display usage or further internal or external redistribution.[7] 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.[8] A Redistributor approved for Managed Non-Display Services manages and controls the access to NYSE MKT OpenBook and does not allow for further internal distribution or external redistribution of NYSE MKT OpenBook by the data recipients. A Redistributor approved for Managed Non-Display Services is required to report to NYSE MKT on a monthly basis the data recipients that are receiving NYSE MKT market data through the Redistributor's managed non-display service and the real-time NYSE MKT market data products that such data recipients are receiving through such service. Recipients of data through Managed Non-Display Service have no additional reporting requirements. Data recipients that receive NYSE MKT OpenBook from an approved Redistributor of Managed Non-Display Services are charged an access fee of $500 per month and a Managed Non-Display Services Fee of $750 per month, for a total fee of $1,250 per month.

The Exchange proposes to discontinue the fees related to Managed Non-Display Services because of the limited number of Redistributors that have qualified for Managed Non-Display Services and the administrative burdens associated with the program in light of the limited number of Redistributors that have qualified for Managed Non-Display Services. As proposed, all data recipients currently using NYSE MKT OpenBook on a managed non-display basis would be subject to the same access fee of $1,000 per month, and the same non-display services fees,[9] as other data recipients.[10]

Non-Professional User Fee Cap

For display use of the NYSE MKT OpenBook data feed, the Fee Schedule sets forth a Professional User Fee of $5 per user per month and a Non-Professional User Fee of $1 per user per month. These user fees generally apply to each display device that has access to NYSE MKT OpenBook.

For customers that are broker-dealers, these fees are subject to a $20,000 per month cap on non-professional user fees (the ''Non-Professional User Fee Cap'').[11] When adopting these fees, the Exchange adopted guidelines under which the broker-dealer would be eligible for the Non-Professional User Fee Cap notwithstanding the inclusion, temporarily or unintentionally, of a limited number of account-holding professional users (the ''Professional User Exception''), subject to a complex set of conditions relating to the percentage of professional users, the relationship of those professional users to the broker-dealer, and the method of display and use of the data.[12] The Exchange proposed the Professional User Exception to the Non-Professional User Fee Cap to permit broker-dealers that primarily serve non-institutional brokerage account holders to offer an online client experience without undue administrative burdens while at the same time guarding against potential abuses by monitoring the use of the exception closely and reserving the right to deny application of the exception if a broker-dealer is determined to be misusing it, such as by opening up retail brokerage accounts to disseminate data to institutional clients.

The Exchange proposes to eliminate the Professional User Exception for NYSE MKT OpenBook effective April 1, 2016. The Exchange notes the Professional User Exception was an accommodation, the benefits of which were, when implemented, outweighed by the complexity of the terms of the exception and the burdens on customers and on the Exchange that have to track compliance with the exception. In addition, the Exchange notes that the Professional User Exception has been used by a small number of customers since it was adopted.

Accordingly, as proposed, the Non-Professional User Fee Cap would no longer include any professional users that receive NYSE MKT OpenBook data feed and the Professional User fee of $5 per user per month would apply with respect to all Professional Users.

Modification to Fees Relating to Non-Display Use

The Exchange proposes to modify the Non-Display Use fees for NYSE MKT OpenBook to provide that such fees include the Non-Display Use of NYSE MKT BBO and NYSE MKT Order Imbalances for customers paying NYSE MKT OpenBook non-display fees that also pay access fees for NYSE MKT BBO and NYSE MKT Order Imbalances. This proposed rule change is based on how the Exchange's affiliate, New York Stock Exchange LLC (''NYSE'') charges Non-Display Fees for NYSE OpenBook, NYSE BBO and NYSE Order Imbalances.[13] The Exchange proposes to describe this application of the Non-Display Use fees in note 1 to the Fee Schedule.[14]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[15] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[16] 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.

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

[7] *See e.g.* 2015 NYSE MKT OpenBook Notice, *supra* note 4.

[8] To be approved for Managed Non-Display Services, a Redistributor must manage and control the access to NYSE MKT OpenBook for data recipients' non-display applications and not allow for further internal distribution or external redistribution of the information by data recipients. In addition, the Redistributor is 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 OpenBook in the Redistributor's own messaging formats (rather than using raw NYSE message formats) by reformatting and/or altering NYSE MKT OpenBook prior to retransmission without affecting the integrity of NYSE MKT OpenBook and without rendering NYSE MKT OpenBook inaccurate, unfair, uninformative, fictitious, misleading or discriminatory.

[9] *See* Fee Schedule.

[10] In order to harmonize its approach to fees for its market data products, the Exchange is simultaneously proposing to remove fees related to Managed Non-Display Services for NYSE MKT BBO, NYSE MKT Trades, and NYSE MKT Order Imbalances. *See* SR–NYSEMKT–2016–04 and SR–NYSEMKT–2016–05. The fees applicable to NYSE MKT Integrated market data product effective as of January 4, 2016 do not include Managed Non-Display Services fees.

[11] *See* 2013 Non-Display Filing, *supra* note 4, at 21174. In the 2013 Non-Display Filing, the Exchange described the Non-Professional User Fee Cap as being subject to being increased (but not decreased) by the percentage increase (if any) in the annual composite share volume for the calendar year preceding that calendar year, subject to a maximum annual increase of five percent. *Id.* The Exchange has waived its right to implement the increases it would have been entitled to implement and has not increased the fee cap commensurate since 2013 and hereby proposes to set the fee cap at a constant $20,000 per month that would not be subject to any adjustments.

[12] *See id.*

[13] *See, e.g.,* Securities Exchange Act Release No. 69278 (April 2, 2013), 78 FR 20973, 20976 (SR–NYSE–2013–25).

[14] The Exchange added a similar note, Note 1(b), to the Fee Schedule in connection with the addition of fees for the NYSE MKT Integrated Feed. *See* Securities Exchange Act Release No. 76525 (Nov. 25, 2015), 80 FR 74148 (Dec. 1, 2015) (SR–NYSEMKT–2015–95).

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

[16] 15 U.S.C. 78f(b)(4), (5).

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

Multiple Data Feed Fee

The Exchange believes that it is reasonable to require data recipients to pay a modest additional fee [sic] taking a data feed for a market data product in more than two locations, because such data recipients can derive substantial value from being able to consume the product in as many locations as they want. In addition, there are administrative burdens associated with tracking each location at which a data recipient receives the product. The Multiple Data Feed Fee is designed to encourage data recipients to better manage their requests for additional data feeds and to monitor their usage of data feeds. The proposed fee is designed to apply to data feeds received in more than two locations so that each data recipient can have one primary and one backup data location before having to pay a multiple data feed fee. The Exchange notes that this pricing is consistent with similar pricing adopted in 2013 by the Consolidated Tape Association (''CTA'').[17] The Exchange also notes that the OPRA Plan imposes a similar charge of $100 per connection for circuit connections in addition to the primary and backup connections.[18]

Managed Non-Display Fees

The Exchange believes that it is reasonable to discontinue Managed Non-Display Fees. As the Exchange noted in the 2013 Non-Display Filing, the Exchange determined at that time that its fee structure, which was then based primarily on counting both display and non-display devices, was no longer appropriate in light of market and technology developments. Since then, the Exchange also modified its approach to display and non-display fees with changes to the fees as reflected in the 2014 Non-Display Filing.[19] Discontinuing the fees applicable to Managed Non-Display as proposed reflects the Exchange's continuing review and consideration of the application of non-display fees, and would harmonize and simplify the application of Non-Display Use fees by applying them consistently to all users. In particular, after further experience with the application of non-display use fees, the Exchange believes that it is more equitable and less discriminatory to discontinue the distinction for Managed Non-Display services because all data recipients using data on a non-display basis are using it in a comparable way and should be subject to similar fees regardless of whether or not they receive the data directly from the Exchange. The Exchange believes that applying the same non-display fees to all data recipients on the same basis better reflects the significant value of non-display data to data recipients and eliminates what is effectively a discount for certain data recipients, and as such is not unfairly discriminatory. The Exchange believes that the non-display fees directly and appropriately reflect 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.

Non-Professional User Fee Cap

The Exchange believes that it is reasonable to modify the application of the non-professional user fee cap by eliminating the Professional User Exception. The Exchange notes that the Professional User Exception was an accommodation, the benefits of which were, when implemented, outweighed by the complexity of the terms of the exception and the burdens on customers and on the Exchange entailed with tracking compliance with the exception. Eliminating the Professional User Exception would make the application of the Non-Professional User Fee Cap simpler and ease administrative burdens for customers and the Exchange by removing an administrative exception that has had limited use and application.

Non-Display Fees

The Exchange believes that the proposed modification to the Non-Display Use fees for NYSE MKT OpenBook to provide that such fees include the Non-Display Use of NYSE MKT BBO and NYSE MKT Order Imbalances for customers paying NYSE MKT OpenBook non-display fees that also pay access fees for NYSE MKT BBO and NYSE MKT Order Imbalances is reasonable and would not permit unfair discrimination among customers, issuers, and brokers because it would be applied equally to all data recipients that choose to subscribe to non-display use of NYSE MKT OpenBook, NYSE MKT BBO, and NYSE MKT Order Imbalances. The Exchange further believes that adding a note to the Fee Schedule to reflect that Non-Display Use fees for NYSE MKT OpenBook include the Non-Display Use of NYSE MKT BBO and NYSE MKT Order Imbalances for customers paying NYSE MKT OpenBook non-display fees that are also paying access fees for NYSE MKT BBO and NYSE MKT Order Imbalances will remove impediments to and help perfect a free and open market by providing greater transparency for the Exchange's customers regarding the application of non-display use fees by providing transparency regarding the Exchange's fees associated with non-display use of these data feeds.

The Exchange notes that NYSE MKT OpenBook is entirely optional. The Exchange is not required to make NYSE MKT OpenBook available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase NYSE MKT OpenBook. Firms that do purchase NYSE MKT OpenBook 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 OpenBook or any other similar products are attractively priced or not.[20]

Firms that do not wish to purchase NYSE MKT OpenBook at the new prices have a variety of alternative market data products from which to choose,[21] or if NYSE MKT OpenBook does not provide sufficient value to firms as offered based on the uses those firms have or planned to make of it, such firms may simply choose to conduct their business operations in ways that do not use NYSE MKT OpenBook or use it at different levels or in different configurations. The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.[22]

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

[17] *See* Securities Exchange Act Release No. 70010 (July 19, 2013), 78 FR 44984 (July 25, 2013) (SR–CTA/CQ–2013–04).

[18] *See* ''Direct Access Fee,'' Options Price Reporting Authority Fee Schedule Fee Schedule PRA Plan at *http://www.opradata.com/pdf/fee_schedule.pdf.*

[19] *See* note 4, *supra.*

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

[21] *See* NASDAQ Rule 7023 (Nasdaq Totalview) and BATS Rule 11.22(a) and (c) (BATS TCP Pitch and Multicast Pitch).

[22] *See* FINRA Regulatory Notice 15–46, ''Best Execution,'' November 2015.

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.' '' [23]

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

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for proprietary market data would be so complicated that it could not be done practically or offer any significant benefits.[24]

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

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. An exchange's ability to price its proprietary market data feed products is constrained by actual competition for the sale of proprietary market data products, the joint product nature of exchange platforms, and the existence of alternatives to the Exchange's proprietary data.

The Existence of Actual Competition

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary for the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with one another for listings and order flow and sales of market data itself, providing ample opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. 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.'' [25]

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.'' [26] 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.[27]

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

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

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

[25] 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.'').

[26] 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.*

[27] 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.

quotations, order flow, and trade executions puts significant pressure on an exchange to maintain both execution and data fees at reasonable levels.

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

Joint Product Nature of Exchange Platform

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, proprietary market data and trade executions are a paradigmatic example of joint products with joint costs. The decision of whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data availability and quality, and price and distribution of data products. Without a platform to post quotations, receive orders, and 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 September 2015, more than 80% of the transaction volume on each of NYSE MKT and NYSE MKT's affiliates 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.[28] 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.[29]

[28] *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).

[29] *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.'').

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 11 equities self-regulatory organization (''SRO'') markets, as well as various forms of alternative trading systems (''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.

Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different trading platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. For example, BATS Global Markets (''BATS'') and Direct Edge, which previously operated as ATSs and obtained exchange status in 2008 and 2010, respectively, provided certain market data at no charge on their Web sites in order to attract more order flow, and used revenue rebates from resulting additional executions to maintain low execution charges for their users.[30] 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, 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 OpenBook, competitors offer close substitute products.[31] Because market data users can find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market data information for its own.

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

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

In determining the proposed changes to the fees for the NYSE MKT OpenBook, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

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

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

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[32] of the Act and subparagraph (f)(2) of Rule 19b–4[33] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[34] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2016–03 on the subject line.

Paper Comments

• Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEMKT–2016–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2016–03 and should be submitted on or before February 11, 2016.

[30] 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.

[31] *See supra* note 21.

[32] 15 U.S.C. 78s(b)(3)(A).

[33] 17 CFR 240.19b–4(f)(2).

[34] 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–01053 Filed 1–20–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 31956; 812–13761]

J.P. Morgan Exchange-Traded Fund Trust, et al.; Notice of Application

January 14, 2016.

AGENCY: Securities and Exchange Commission (the ''Commission'').

ACTION: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the ''Act'') for an exemption from sections 2(a)(32), 5(a)(1), 22(d) and 22(e) of the Act and rule 22c–1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and (B) of the Act.

Applicants: J.P. Morgan Exchange-Traded Fund Trust (the ''Trust''), J.P. Morgan Investment Management Inc. (''JPMIM''), and SEI Investments Distribution Co. (the ''Distributor'').

SUMMARY: *Summary of Application:* Applicants request an order that permits: (a) actively-managed series of certain open-end management investment companies to issue shares (''Shares'') redeemable in large aggregations only (''Creation Units''); (b) secondary market transactions in Shares to occur at negotiated market prices; (c) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of Creation Units for redemption; (d) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Units; (e) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Shares; and (f) certain series to perform creations and redemptions of Creation Units in-kind in a master-feeder structure.

DATES: *Filing Dates:* The application was filed on March 10, 2010 and amended on November 8, 2010, October 3, 2011, May 24, 2013, January 24, 2014, September 24, 2014, May 15, 2015, October 10, 2015, and December 23, 2015.

Hearing or Notification of Hearing: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on February 8, 2016, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Brent J. Fields, Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. Applicants: J.P. Morgan Investment Management, Inc., 270 Park Avenue, New York, New York 10017.

FOR FURTHER INFORMATION CONTACT: Laura J. Riegel, Senior Counsel, at (202) 551–6873 or Mary Kay Frech, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's Web site by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. The Trust is organized as a Delaware statutory trust and is registered as an open-end management investment company under the Act. The Trust is organized as a series fund with multiple series. The Trust will offer a new series (the ''New Fund''), whose investment objective will be to seek total return by investing pursuant to a systematic rules-based investment process. The New Fund will invest its assets globally (including in emerging markets) to gain exposure to equity securities (across market capitalizations), debt securities (including below investment grade and unrated debt securities), commodities (through a Wholly-Owned Subsidiary (as defined below) of the New Fund) and currencies.

2. JPMIM, a Delaware corporation, is registered as an investment adviser under the Investment Advisers Act of 1940 (the ''Advisers Act''). JPMIM will serve as the investment adviser to the New Fund. The Adviser (as defined below) may enter into sub-advisory agreements with one or more investment advisers, each of which will act as sub-adviser (''Sub-Adviser'') to a Fund (as defined below) or its respective Master Fund (as defined below). Each Sub-Adviser will be registered or not subject to registration under the Advisers Act. The Distributor, a Pennsylvania corporation, is registered as a broker-dealer (''Broker'') under the Securities Exchange Act of 1934 (the ''Exchange Act''). The Distributor will serve as the principal underwriter and distributor for the New Fund.[1]

3. Applicants request that the order apply to the New Fund, as well as to additional series of the Trust and any other open-end management investment companies or series thereof that may be created in the future (''Future Funds''). Any Future Fund will: (a) Be advised by JPMIM or an entity controlling, controlled by, or under common control with JPMIM (each such entity is referred to as an ''Adviser'') and (b) comply with the terms and conditions of the application. The New Fund and Future Funds together are the ''Funds.''[2] Each Fund relying on the order will operate as an actively-managed exchanged traded fund (''ETF''), and a Fund may operate as a feeder fund in a master-feeder structure (''Feeder Fund'').

4. The Funds, or their respective Master Funds (as defined below), may invest in equity securities or fixed income securities traded in the U.S. or non-U.S. markets. Funds, or their respective Master Funds, that invest in equity securities or fixed income securities traded in the U.S. or non-U.S. markets are ''Global Funds.'' Funds, or their respective Master Funds, that invest solely in foreign equity securities or foreign fixed income securities are ''Foreign Funds.'' The Funds may also invest in a in a broad variety of other

[35] 17 CFR 200.30–3(a)(12).

[1] Applicants request that the order apply to any other Broker hired by a Fund (including an affiliate of the Adviser) to act as distributor and principal underwriter of the Fund that complies with the terms and conditions of the application. Applicants state that neither the Distributor nor any future Distributor is or will be affiliated with any Listing Market (as defined below).

[2] All entities that currently intend to rely on the order are named as applicants. Any other entity that relies on the order in the future will comply with the terms and conditions of the application.