

additional orders to be sent to the Exchange for execution. The Exchange also believes that the proposed rule change is consistent with the Act in this regard, because it strikes an appropriate balance between fees and credits, which will encourage submission of orders to the Exchange, thereby promoting competition. The removal of obsolete pricing tiers is not competitive in nature, but would result in a more streamlined Fee Schedule.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed changes will impair the ability of ETP Holders or competing order execution venues to maintain their competitive standing in the financial markets.

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

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

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>14</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>15</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the

public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>16</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEARCA-2014-95 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-NYSEARCA-2014-95. 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 Section, 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 will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at [www.nyse.com](http://www.nyse.com). 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-NYSEARCA-2014-95 and should be submitted on or before October 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014-21651 Filed 9-10-14; 8:45 am]

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-73008; File No. SR-NYSEMKT-2014-73]

### **Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Fees for Non-Display Use of NYSE Amex Options Market Data**

September 5, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on August 25, 2014, NYSE MKT LLC ("Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission ("Commission" or "SEC") 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 its fees for non-display use of NYSE Amex Options market data, operative on September 1, 2014. The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://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

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(2).

<sup>16</sup> 15 U.S.C. 78s(b)(2)(B).

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

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

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

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 its fees for non-display use of NYSE Amex Options market data, operative on September 1, 2014.<sup>3</sup>

The Exchange established the current non-display fees for ArcaBook for Amex Options—Trades, ArcaBook for Amex Options—Top of Book, ArcaBook for Amex Options—Depth of Book, ArcaBook for Amex Options—Complex, ArcaBook for Amex Options—Series Status, and ArcaBook for Amex Options—Order Imbalance (collectively, “Amex Options Products”) in May 2013.<sup>4</sup> Fees cover all six products.<sup>5</sup>

Under the proposal, non-display use would continue to mean accessing, processing, or consuming an Exchange data product delivered via direct and/or Redistributor<sup>6</sup> data feeds for a purpose other than in support of a data recipient's display or further internal or external redistribution (“Non-Display Use”). As is the case today, non-display fees would apply to the Non-Display Use of the data product as part of automated calculations or algorithms to support trading decision-making processes or the operation of trading platforms.

The Exchange is proposing to expand the types of uses considered Non-Display Use to also include non-trading uses. In addition, the proposal would specify that Non-Display Use would include any trading use, rather than only certain types of trading, such as high frequency or algorithmic trading, as under the current fee structure. Under the proposal, examples of Non-

Display Use would include any trading in any asset class, automated order or quote generation and/or order pegging, price referencing for algorithmic trading or smart order routing, operations control programs, investment analysis, order verification, surveillance programs, risk management, compliance, and portfolio management. The Exchange believes that non-trading uses benefit data recipients by allowing users to automate functions, achieving greater speed and accuracy, and in turn, for example, reducing costs of labor to perform the functions manually. This approach would address the difficulties of monitoring and auditing different types of trading versus non-trading uses of the data and the burden of counting devices used for non-trading purposes under the current fees.

Proposed Changes to Non-Display Fees

The Exchange proposes to amend the fee structure applicable to Non-Display Use of Amex Options Products. Specifically, the Exchange proposes certain changes to the three categories of, and fees applicable to, data recipients. The Exchange also proposes corresponding changes to the Fee Schedule text to remove references to the current category descriptions.

Under the proposal, Category 1 Fees would apply when a data recipient's Non-Display Use of real-time market data is on its own behalf as opposed to on behalf of its clients. This proposal represents an expansion of the application of Category 1 Fees, which currently apply solely to the Non-Display Use of real time market data for the purpose of principal trading, to usage of such data for non-trading purposes.

Under the proposal, Category 2 Fees would apply to a data recipient's Non-Display Use of real-time market data on behalf of its clients as opposed to on its own behalf. This proposal also represents an expansion of the application of Category 2 Fees, which currently apply solely to trading activities to facilitate a customer business, to usage of such data for non-trading purposes. In contrast to the current fee structure, data recipients will not be liable for Category 2 Non-Display fees for which they are also paying Category 1 Non-Display fees.<sup>7</sup>

The Exchange believes its proposal to apply Category 1 Fees and Category 2 Fees to Non-Display Use of market data for non-trading purposes would address the difficulties of monitoring and auditing trading versus non-trading uses of the data and the burden of counting

devices used for purposes of applying the per-device fees. As discussed in more detail in the 2013 Release,<sup>8</sup> the ability to accurately count devices and audit such counts creates administrative challenges for vendors, data recipients, and the Exchange.

Under the proposal, Category 3 Fees would apply to data recipients' Non-Display Use of real-time market data for the purpose of internally matching buy and sell orders within an organization, including matching customer orders on a data recipient's own behalf and/or on behalf of its clients. This category would apply to Non-Display Use in trading platform(s), such as, but not restricted to, alternative trading systems (“ATSS”), broker crossing networks, broker crossing systems not filed as ATSSs, dark pools, multilateral trading facilities, exchanges and systematic internalization systems. Currently, Category 3 Fees apply where a data recipient's non-display use of market data is, in whole or in part, for the purpose of providing reference prices in the operation of one or more trading platforms. The Exchange believes its proposed revision to its description of the data recipients to whom Category 3 Fees apply is more precise because it focuses on the functions of internally matching orders.

In addition, the Exchange is proposing to change the application of Category 3 Fees to data recipients that also use data for purposes that give rise to Category 1 and/or Category 2 Fees. Currently, a data recipient is not liable for Category 3 Fees for those Amex Options Products for which it is also paying Category 1 and/or Category 2 Fees.<sup>9</sup> Under the proposal, a data recipient's Non-Display Use of real-time market data for Category 3 purposes would require such data recipient to pay Category 3 Fees in addition to any Category 1 Fees or Category 2 Fees it is required to pay for Non-Display Use of market data.

There will continue to be no monthly or other reporting requirements for data recipients' Non-Display Use. However, the Exchange continues to reserve the right to audit data recipients' Non-Display Use of Exchange market data products in accordance with the Exchange's vendor and subscriber agreements.

A data recipient that receives real-time Exchange market data for Non-Display Use would be required to complete and submit a Non-Display Use Declaration before September 1, 2014. The Non-Display Use Declaration would

<sup>3</sup> The Exchange's affiliates have submitted or will be submitting similar proposals. See, e.g., SR-NYSE-2014-43.

<sup>4</sup> See Securities Exchange Act Release No. 69553 (May 10, 2013), 78 FR 28926 (May 16, 2013) (SR-NYSEMKT-2013-40) (“2013 Release”).

<sup>5</sup> The Exchange began offering ArcaBook for Amex Options—Complex separately at no charge on May 1, 2014. See Securities Exchange Act Release No. 72074 (May 1, 2014), 79 FR 26277 (May 7, 2014) (SR-NYSEArca-2014-51).

<sup>6</sup> “Redistributor” means a vendor or any person that provides a real-time NYSE data product to a data recipient or to any system that a data recipient uses, irrespective of the means of transmission or access.

<sup>7</sup> See 2013 Release, *supra* note 4, at 28929.

<sup>8</sup> See *id.* at 28928.

<sup>9</sup> See *id.*

replace the current declaration on the NYSE Euronext Non-Display Usage Declaration.<sup>10</sup> A firm subject to Category 3 Fees would be required to identify each platform that uses data on a Non-Display Use basis, such as ATSS and broker crossing systems not registered as ATSS, as part of the Non-Display Use Declaration. Beginning in 2016, data

recipients would be required to submit, by January 31 of each year, a Non-Display Use Declaration. In addition, if a data recipient's use of real-time Exchange market data changes at any time after the data recipient submits a Non-Display Use Declaration, the data recipient would be required to update it

at the time of the change to reflect the change of use.

#### Comparison of Current Fees to Proposed Fees

The chart below compares the proposed changes to current monthly fees:

Data feed	Current fee	Proposed fee
Amex Options Products Non-Display Category 1 .....	\$1,000 .....	\$5,000.*
Amex Options Products Non-Display Category 2 .....	\$1,000 .....	\$5,000.*
Amex Options Products Non-Display Category 3 .....	\$1,000, or \$0 if Category 1 or 2 fees paid.	\$5,000, capped at \$15,000.

\* Data recipients will not be liable for Category 2 Non-Display fees for which they are also paying Category 1 Non-Display fees.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>11</sup> in general, and Sections 6(b)(4) and 6(b)(5) of the Act,<sup>12</sup> in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

The Exchange believes that charging for non-trading uses is reasonable because data recipients can derive substantial value from such uses, for example, by automating tasks so that they can be performed more quickly and accurately and less expensively than if they were performed manually. The Exchange also notes that The NASDAQ Stock Market ("NASDAQ") and NASDAQ OMX PHLX ("Phlx") do not make any distinction in their non-display use fees between trading or non-trading uses, and as such, the proposed change will harmonize the Exchange's approach with those exchanges. Finally, the Exchange notes that eliminating the trading versus non-trading distinction would substantially simplify fee calculations and ease administrative burdens for the Exchange.

After further experience, the Exchange also believes that it is more equitable and not unfairly discriminatory to eliminate the distinction for non-trading versus trading uses in light of the significant value of both types of uses. The Exchange notes that because non-display fees are flat fees, the expansion

to cover non-trading uses could only result in a fee increase for a data recipient that is using the data solely for non-trading purposes and is only subject to per-device fees; at this time, the Exchange has not identified such a data recipient. Based on data available to the Exchange, all data recipients use the data for at least one trading purpose, and therefore the changes to the fees that they will pay under the proposal would not be due to the elimination of the distinction between trading and non-trading uses. The Exchange further notes that based on Non-Display Use Declarations submitted to date, some users have declared no Non-Display Use, and as such the proposed changes would have no impact on them.

The Exchange believes that it is reasonable to require annual submissions of the Non-Display Use Declaration so that the Exchange will have current and accurate information about the use of its market data products and can correctly assess fees for the uses of those products. The annual submission requirement is equitable and not unfairly discriminatory because it will apply to all users.

The Exchange believes that the proposed fee increases of \$4,000 per month for each of Categories 1, 2, and 3 is reasonable. In establishing the non-display fees in May 2013, the Exchange set its fees below comparable fees charged by certain of its competitors.<sup>13</sup> After gaining further experience with its new display/non-display fee structure, the Exchange believes that the proposed fees better reflect the significant value of the non-display data to data recipients, which purchase such data on an entirely

voluntary basis. Non-display data can be used by data recipients for a wide variety of profit-generating purposes, including proprietary and agency trading and smart order routing, as well as by data recipients that operate order matching and execution platforms that compete directly with the Exchange for order flow. The data also can be used for a variety of non-trading purposes that indirectly support trading, such as risk management and compliance. While some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce the recipient's costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs, thereby benefiting end users. The Exchange believes that the proposed 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.<sup>14</sup>

The fee increases are also reasonable in that they support the Exchange's efforts to regularly upgrade systems to support more modern data distribution formats and protocols as technology evolves. For example, the Exchange will make its proprietary data products available over an upgraded distribution channel and protocol "XDP" early next year.

Charging a separate fee for Category 3 data recipients that already pay a fee under Category 1 or 2 is reasonable

<sup>10</sup> As described in more detail in the Statutory Basis section, in order to modulate the overall fee increase that could apply, if a firm subject to Category 3 Fees has more than three platforms, it would only be required to declare three platforms.

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

<sup>12</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>13</sup> See 2013 Release, *supra* note 4, at 28930.

<sup>14</sup> See also Exchange Act Release No. 69157, March 18, 2013, 78 FR 17946, 17949 (March 25, 2013) (SR-CTA/CQ-2013-01) ("[D]ata feeds have become more valuable, as recipients now use them to perform a far larger array of non-display functions. Some firms even base their business

models on the incorporation of data feeds into black boxes and application programming interfaces that apply trading algorithms to the data, but that do not require widespread data access by the firm's employees. As a result, these firms pay little for data usage beyond access fees, yet their data access and usage is critical to their businesses.")

because it eliminates what is effectively a discount for such data recipients under the current Fee Schedule and results in a more equitable allocation of fees to users that derive a benefit from a Category 3 use, and as such is not unfairly discriminatory. The current fee can be viewed as having an effective non-display fee cap of \$2,000 while the proposed fee would have an effective non-display fee cap of \$20,000. The Exchange believes that the proposed fees (and their associated caps) more closely correspond to the value that Category 3 recipients derive from the various uses of the data, some of which are operating various types of alternative trading venues that directly compete for order flow with the Exchange. Limiting the fees in Category 3 to no more than three trading platforms and charging only one fee for users that fall under both Category 1 and 2 is reasonable because it modulates the size of the fee increase for certain recipients as compared to what they pay under the current fee structure, in much the same manner as the current fee does by limiting the non-display fees to a maximum of two categories. The Exchange does not believe that it will be burdensome for Category 3 recipients to determine, or the Exchange to audit, whether a recipient has one, two, three or more separate platforms.

The fees are also competitive with offerings by other exchanges, which structure and set their fees in a variety of ways. For example, NASDAQ Options Market (“NOM”) offers a \$2,500 per month “Non-Display Enterprise License” fee that permits distribution of Best of NASDAQ Options (“BONO”) or NASDAQ ITCH-to-Trade Options (“ITTO”) to an unlimited number of non-display devices within a firm without any per user charge.<sup>15</sup> In addition, Phlx offers an alternative \$10,000 per month “Non-Display Enterprise License” fee that permits distribution to an unlimited number of internal non-display subscribers without incurring additional fees for each internal subscriber.<sup>16</sup> The Non-Display Enterprise License covers non-display subscriber fees for all Phlx proprietary direct data feed products (Top of Phlx Options (“TOPO”), TOPO Plus Orders, PHLX Orders and PHLX

Depth Data feeds) and is in addition to any other associated distributor fees for Phlx proprietary direct data feed products.<sup>17</sup> The Exchange further notes that its proposed fees are less than the non-display fees charged by the Options Price Reporting Authority (“OPRA”).<sup>18</sup>

The Exchange also notes that all of the products described herein are entirely optional. The Exchange is not required to make these proprietary data products available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase any of the products. Firms that do purchase non-display products do so with the primary goals of using them to increase revenues, reduce expenses, and in some instances compete directly with the Exchange for order flow; those firms are able to determine for themselves whether any specific product such as these are attractively priced or not.

Firms that do not wish to purchase the data at the new prices have a wide variety of alternative market data products from which to choose,<sup>19</sup> or if the non-display data products do not provide sufficient value to firms as offered based on the uses those firms have or planned to make of them, such firms may simply choose to conduct their business operations in ways that do not require those data products. The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.<sup>20</sup> Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions.

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:

<sup>17</sup> See *id.*

<sup>18</sup> See Securities Exchange Act Release No. 67648 (August 14, 2012), 77 FR (August 17, 2012) (SR-OPRA-2012-04) (establishing effective October 1, 2012 a non-display application fee of \$500/installation/month, with an enterprise fee alternative of \$7500/month that would permit a professional subscriber to receive access to OPRA data for use in an unlimited number of non-display application installations).

<sup>19</sup> See *supra* notes 14–17. Because ArcaBook for Amex Options—Trades and ArcaBook for Amex Options—Top of Book are subsets of the consolidated core data offered by OPRA, customers may choose to purchase those consolidated data products instead.

<sup>20</sup> 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).

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.’

635 F.3d at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323). The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”<sup>21</sup>

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

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically or offer any significant benefits.<sup>22</sup>

<sup>21</sup> *NetCoalition*, 615 F.3d at 535.

<sup>22</sup> 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

<sup>15</sup> See NASDAQ Options Rules Chapter XV, Section 4. Alternatively, NOM charges each professional subscriber \$5 per month for BONO and \$10 per month for ITTO.

<sup>16</sup> See Section IX of the NASDAQ OMX PHLX LLC Pricing Schedule and Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx–2012–145). Alternatively, Phlx charges each professional subscriber \$40 per month.

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 options 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 options trades and sales of options 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 options market data. Proprietary options data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market. Indeed, the U.S. Department of Justice ("DOJ") (the primary antitrust regulator) has expressly acknowledged the aggressive actual competition among exchanges, including for the sale of proprietary market data. In 2011, the DOJ stated that exchanges "compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale."<sup>23</sup> Similarly, the options markets vigorously compete with respect to options data products.<sup>24</sup>

to provide appropriate pricing discipline. See Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's Web site at <http://www.sec.gov/rules/concept/s72899/buck1.htm>.

<sup>23</sup> Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), available at <http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html>.

<sup>24</sup> See, e.g., Securities Exchange Act Release No. 67466 (July 19, 2012), 77 FR 43629 (July 25, 2012)

Moreover, competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary options data products and therefore constrain markets from overpricing proprietary options market data. Broker-dealers send their order flow to multiple venues, rather than providing them all to a single venue, which in turn reinforces this competitive constraint. Options markets, similar to the equities markets, are highly fragmented.<sup>25</sup>

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 options 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 options 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 Amex Options Products described herein unless their customers request them, and customers will not elect to pay the proposed increased fees for non-display uses unless the non-display uses of these data products can provide value by sufficiently increasing revenues or reducing costs in the customer's

(SR-Phlx-2012-93), which describes a variety of options market data products and their pricing.

<sup>25</sup> See, e.g., Press Release, TABB Says US Equity Options Market Makers Need Scalable Technology to Compete in Today's Complex Market Structure (February 25, 2013), available at <http://www.tabbgroup.com/PageDetail.aspx?PageID=16&ItemID=1231>; Fragmentation Vexes Options Markets (April 21, 2014), available at <http://marketsmedia.com/fragmentation-vexes-options-market/>.

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 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 July 2014 more than 80% of the options transaction volume on each of NYSE MKT and NYSE Arca was executed by market participants that purchased one or more proprietary market data products. A super-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.<sup>26</sup> The Exchange agrees with and adopts those discussions and the arguments therein. The Exchange also notes that the economics literature confirms that there is no way to allocate common costs between joint products that would shed any light on competitive or efficient pricing.<sup>27</sup>

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.

<sup>26</sup> 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 (September 14, 2010), 75 FR 57314, 57317 (September 20, 2010) (SR-NASDAQ-2010-110), and Securities Exchange Act Release No. 62908 (September 14, 2010), 75 FR 57321, 57324 (September 20, 2010) (SR-NASDAQ-2010-111).

<sup>27</sup> See generally Mark Hirschey, *Fundamentals of Managerial Economics*, at 600 (2009) ("It is important to note, however, that although it is possible to determine the separate marginal costs of goods produced in variable proportions, it is impossible to determine their individual average costs. This is because common costs are expenses necessary for manufacture of a joint product. Common costs of production—raw material and equipment costs, management expenses, and other overhead—cannot be allocated to each individual by-product on any economically sound basis. . . . Any allocation of common costs is wrong and arbitrary."). This is not new economic theory. See, 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.").

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 self-regulatory organization ("SRO") options markets. Two of the 12 have launched operations since December 2012.<sup>28</sup> The Exchange believes that these new entrants demonstrate that competition is robust.

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 Exchange, Inc. ("BATS"), which previously operated as an ATS and obtained exchange status in 2008, has provided certain market data at no charge on its Web site in order to attract more order flow, and uses revenue rebates from resulting additional executions to maintain low execution charges for its users.<sup>29</sup> The Exchange currently offers ArcaBook for Arca Options—Complex for free. 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.<sup>30</sup>

<sup>28</sup> See Securities Exchange Act Release Nos. 70050 (July 26, 2013), 78 FR (August 1, 2013) (approving exchange registration for Topaz Exchange, LLC) (known as ISE Gemini); and 68341 (December 3, 2012), 77 FR 73065 (December 7, 2012) (approving exchange registration for Miami International Securities Exchange LLC ("Miami Exchange")).

<sup>29</sup> See description of free market data from BATS Options, available at [http://www.batsoptions.com/market\\_data/products/](http://www.batsoptions.com/market_data/products/). This is simply a securities market-specific example of the well-established principle that in certain circumstances more sales at lower margins can be more profitable than fewer sales at higher margins; this example is additional evidence that market data is an inherent part of a market's joint platform.

<sup>30</sup> The Exchange notes that a small number of Category 3 non-display data recipients could be using the market data strictly for competitive purposes (e.g., other exchanges) or for business purposes unrelated to trading or investment (e.g., Internet portals that wish to attract "eyeballs" to their pages primarily generate advertising revenue for themselves). The Exchange does not believe that

*Existence of Alternatives.* The large number of SROs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO 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 Arca, Inc.; Chicago Board Options Exchange, Incorporated; C2 Options Exchange, Incorporated; International Securities Exchange, LLC; ISE Gemini; NASDAQ; Phlx; BX; BATS; and Miami Exchange.

The fact that proprietary data from 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. For example, with respect to ArcaBook for Arca Options—Trades and ArcaBook for Arca Options—Top of Book, the data appears in the real-time core data offered by OPRA for a fee. Close substitute products also are offered by several competitors.<sup>31</sup> Because market data users can find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute one or more other sources of market data information for its own.

Those competitive pressures imposed by available alternatives are evident in the Exchange's proposed pricing. As noted above, the proposed non-display fees are generally lower than the maximum non-display fees charged by other exchanges such as NASDAQ and Phlx, for comparable products.<sup>32</sup>

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

the proposed fees will impose any unnecessary burden on these competitors or other businesses.

<sup>31</sup> See *supra* notes 15–18.

<sup>32</sup> *Id.*

Tradebook, Island, RediBook, Attain, TrackECN, and BATS. As noted above, BATS launched as an ATS in 2006 and became an exchange in 2008. Two new options exchanges have launched operations since December 2012.<sup>33</sup>

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

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

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

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>34</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>35</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>36</sup> of the Act to determine whether the proposed rule

change should be approved or disapproved.

**IV. Solicitation of Comments**

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

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2014-73 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-2014-73. 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 such 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-2014-73 and should be submitted on or before October 2, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-73007; File No. SR-ICC-2014-11]

**Self-Regulatory Organizations; ICE Clear Credit LLC; Order Approving Proposed Rule Change, As Modified by Amendment No. 2 Thereto, To Revise Rules To Provide for the 2014 ISDA Definitions**

September 5, 2014.

**I. Introduction**

On July 24, 2014, ICE Clear Credit LLC ("ICC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change SR-ICC-2014-11 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder.<sup>2</sup> The proposed rule change was published for comment in the **Federal Register** on August 5, 2014.<sup>3</sup> The Commission did not receive comments on the proposed rule change. On September 2, 2014, ICC filed Amendment No. 2 to the proposed rule change to correct a factual inaccuracy in a statement made in its filing.<sup>4</sup> For the reasons described below, the Commission is approving the proposed rule change.

<sup>37</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> Securities Exchange Act Release No. 34-72701 (Jul. 29, 2014); 79 FR 45565 (Aug. 5, 2014) (SR-ICC-2014-11).

<sup>4</sup> On August 28, 2014, ICC filed Amendment No. 1 to the proposed rule change. ICC withdrew Amendment No. 1 on September 2, 2014. ICC subsequently filed Amendment No. 2 on September 2, 2014. In Amendment No. 2, ICC clarified that CDS contracts on sovereigns cleared at ICC will be Converting Contracts (as discussed herein). ICC stated that its implementation of the 2014 ISDA definitions is intended to be fully consistent with the planned ISDA protocol implementation. ICC noted that, on August 15, 2014, ISDA published a memorandum and FAQ that, in relevant part, explains that based on industry feedback related to the draft protocol, the protocol would be amended to include certain emerging market sovereign single names. Following the protocol amendment, all sovereign single names cleared at ICC will now be included in the protocol. Amendment No. 2 corrects a factual inaccuracy in a statement made in ICC's filing, and because it does not materially affect the substance of the proposed rule change, the Commission is not publishing it for comment.

<sup>33</sup> See *supra* note 28.

<sup>34</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>35</sup> 17 CFR 240.19b-4(f)(2).

<sup>36</sup> 15 U.S.C. 78s(b)(2)(B).