

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-71934; File No. SR-NYSEMKT-2014-30)

April 11, 2014

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Professional User Fees for NYSE Amex Options Market Data, Operative on April 1, 2014

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 March 31, 2014, 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 Professional User fees for NYSE Amex Options market data, operative on April 1, 2014. The text of the proposed rule change is available on the Exchange’s website 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 Professional User fees for NYSE Amex Options market data, operative on April 1, 2014.

On October 1, 2012, the Exchange began offering the following real-time options market data products: 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”).⁴ Fees cover all six products.⁵ From that time until May 1, 2013, the Exchange charged Professional Users \$50 per month for each User per Source for the receipt and use of the Amex Options Products. Effective May 1, 2013, the Exchange introduced the following tiered fee structure for display usage by Professional Users based on the number of

⁴ See Securities Exchange Act Release No. 67719 (Aug. 23, 2012), 77 FR 52767 (Aug. 30, 2012) (SR-NYSEMKT-2012-40).

⁵ See SR-NYSEMKT-2013-35 (establishing a fee schedule) and Securities Exchange Act Release No. 68004 (Oct. 9, 2012), 77 FR 62582 (Oct. 15, 2012) (SR-NYSEMKT-2012-49) (establishing fees for Amex Options Products). Amex Options Products are not offered with separate fees for the individual underlying products.

users:⁶

Professional Users	Fee per Professional User
1-50	\$50
51-100	\$35
101+	\$20

Because the tiered pricing has not encouraged customers to provide access to the Exchange's market data to a greater number of Professional Users as anticipated, the Exchange proposes to return to the flat fee of \$50 per month for each Professional User. The Exchange does not propose to make any other changes to the fees for Amex Options Products.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁷ in general, and Sections 6(b)(4) and 6(b)(5) of the Act,⁸ 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 the proposed change is reasonable because it returns Professional User fees to the level that was charged from October 2012 to May 2013. The current tiered pricing structure has not encouraged sufficient customers to provide access to the Exchange's market data to a greater number of Professional Users as the Exchange anticipated. The proposed fee is equitable and not unfairly discriminatory

⁶ See Securities Exchange Act Release No. 69553 (May 10, 2013), 78 FR 28926 (May 16, 2013) (SR-NYSEMKT-2013-40).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4), (5).

because the same fee will be charged to all Professional Users.

The Exchange also notes that purchasing Amex Options Products is entirely optional. Firms are not required to purchase them and have a wide variety of alternative options market data products from which to choose. Moreover, the Exchange is not required to make these proprietary data products available or to offer any specific pricing alternatives to any customers.

The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010), upheld reliance by the Securities and Exchange Commission (“Commission”) upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’

Id. at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323). The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”⁹ The Exchange believes that this is also true with respect to options markets.

⁹ NetCoalition, 615 F.3d at 535.

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 data and that the Commission can rely upon such evidence in concluding that the fees proposed in this filing are the product of competition and therefore satisfy the relevant statutory standards.¹⁰ In addition, the existence of alternatives to these data products, such as options 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 elect such alternatives.

As the NetCoalition decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach.¹¹ 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.¹²

¹⁰ Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”) amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make clear that all exchange fees for market data may be filed by exchanges on an immediately effective basis.

¹¹ NetCoalition, 615 F.3d at 536.

¹² 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

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

In accordance with Section 6(b)(8) of the Act,¹³ 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 data products is constrained by actual competition for the sale of proprietary 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 to the proprietary products themselves. Numerous exchanges compete with each other for options trades and sales of options market data itself, providing virtually limitless 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.

Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary options data products and therefore

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 website at <http://www.sec.gov/rules/concept/s72899/buck1.htm>.

¹³ 15 U.S.C. 78f(b)(8).

constrain markets from overpricing proprietary market data. The U.S. Department of Justice has acknowledged the aggressive competition among exchanges, including for the sale of proprietary market data itself. In 2011, Assistant Attorney General Christine Varney 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.”¹⁴ Similarly, the options markets vigorously compete with respect to options data products.¹⁵ It is common for broker-dealers to further exploit this recognized competitive constraint by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market.

In addition, in the case of products that are distributed through market data vendors, the market data 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 the Amex Options Products unless their customers request it, and data recipients with Professional Users will not elect to

¹⁴ 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>.

¹⁵ See, e.g., Securities Exchange Act Release No. 67466 (July 19, 2012), 77 FR 43629 (July 25, 2012) (SR-Phlx-2012-93), which describes a variety of options market data products and their pricing.

purchase them unless they can be used for profit-generating purposes. All of these 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, market data and trade execution 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 quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become. Further, data products are valuable to many end-users only insofar as they provide information that end-users expect will assist them in making trading decisions. In that respect, the Exchange believes that the Amex Options Products offer options market data information that is useful for professionals in making trading decisions.

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 transaction execution platform 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 view the costs of transaction executions and market data as a unified cost of doing business with the exchange.

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a

joint platform and have common costs.¹⁶ 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.¹⁷

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. Thus, because it is impossible to obtain the data inputs to create market data products without a

¹⁶ See Securities Exchange Act Release No. 62887 (Sept. 10, 2010), 75 FR 57092, 57095 (Sept. 17, 2010) (SR-Phlx-2010-121); 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) (“all 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 Nos. 71217 (Dec. 31, 2013), 79 FR 875, 877 (Jan. 7, 2014) (SR-NASDAQ-2013-162) and 70945 (Nov. 26, 2013), 78 FR 72740, 72741 (Dec. 3, 2013) (SR-NASDAQ-2013-142) (“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, market data and trade execution are a paradigmatic example of joint products with joint costs.”).

¹⁷ 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.”).

fast, technologically robust, and well-regulated execution system, system costs 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.

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 which were approved in the last two years.¹⁸ The Exchange believes that these new entrants demonstrate that competition is robust.

Each SRO market competes to produce transaction reports via trade executions. 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 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)

¹⁸ See Securities Exchange Act Release Nos. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (File No. 10-209) and 68341 (December 3, 2012), 77 FR 73065 ((December 7, 2012) (File No. 10-207).

to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. 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 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 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; NASDAQ; Phlx; BX; BATS Exchange, Inc. (“BATS”); and Miami International Securities Exchange LLC. Because market data users can thus find suitable substitutes for most proprietary market data products,¹⁹ 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.

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

¹⁹ See supra note 15.

approved by the SEC in the last two years alone.²⁰

In establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary options 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 its cost to purchase is not justified by the returns any particular vendor or subscriber 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)²¹ of the Act and subparagraph (f)(2) of Rule 19b-4²² thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

²⁰ See supra note 18.

²¹ 15 U.S.C. 78s(b)(3)(A).

²² 17 CFR 240.19b-4(f)(2).

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)²³ 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2014-30 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-2014-30. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The

²³ 15 U.S.C. 78s(b)(2)(B).

Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet website at 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-NYSEMKT-2014-30 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Jill M. Peterson
Assistant Secretary

²⁴ 17 CFR 200.30-3(a)(12).