

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76525; File No. SR-NYSEMKT-2015-95)

November 25, 2015

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Establishing Fees for the NYSE MKT Integrated Feed

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 16, 2015, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to establish fees for the NYSE MKT Integrated Feed. 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 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 establish the fees for the NYSE MKT Integrated Feed in the NYSE MKT Equities Proprietary Market Data Fee Schedule ("Fee Schedule").³ The Exchange proposes to make the NYSE MKT Integrated Feed available without charge starting on November 16, 2015. The Exchange proposes to establish the following fees for the NYSE MKT Integrated Feed operative on January 1, 2016:

1. Access Fee. For the receipt of access to the NYSE MKT Integrated Feed, the Exchange proposes to charge \$2,500 per month.
2. User Fees. The Exchange proposes to charge a Professional User Fee (Per User) of \$10 per month and a Non-Professional User Fee (Per User) of \$2 per month. These user fees would apply to each display device that has access to the NYSE MKT Integrated Feed.
3. Non-Display Fees. The Exchange proposes to establish non-display fees for the NYSE MKT Integrated Feed using the same non-display use fee structure established for the Exchange's other market data products.⁴ Non-display use would mean accessing, processing, or consuming the NYSE MKT Integrated Feed delivered via direct and/or

³ The proposed rule change establishing the NYSE MKT Integrated Feed was immediately effective on January 23, 2015. See Securities Exchange Act Release No. 74127 (Jan. 23, 2015), 80 FR 4956 (Jan. 29, 2015)(SR-NYSEMKT-2015-06),

⁴ See Securities Exchange Act Release Nos. 69285 (April 3, 2013), 78 FR 21172 (April 9, 2013)(SR-NYSEMKT-2013-32) and 72020 (Sept. 9, 2014), 79 FR 55040 (Sept. 15, 2014) (SR-NYSE-2014-72) [sic].

Redistributor⁵ data feeds for a purpose other than in support of a data recipient's display or further internal or external redistribution ("Non-Display Use"). Non-Display Use would include any trading use, such as high frequency or algorithmic trading, and would also 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.

Under the proposal, for Non-Display Use of NYSE MKT Integrated Feed, there would be three categories of, and fees applicable to, data recipients. One, two or three categories of Non-Display Use may apply to a data recipient.

- Under the proposal, the Category 1 Fee would be \$5,000 per month and would apply when a data recipient's Non-Display Use of the NYSE MKT Integrated Feed is on its own behalf, not on behalf of its clients.
- Under the proposal, Category 2 Fees would be \$5,000 per month and would apply to a data recipient's Non-Display Use of the NYSE MKT Integrated Feed on behalf of its clients.
- Under the proposal, Category 3 Fees would be \$5,000 and would apply to a data recipient's Non-Display Use of the NYSE MKT Integrated Feed for the purpose of internally matching buy and sell orders within an organization, including matching customer orders for data recipient's own behalf and/or on behalf of its clients. This category would apply to Non-

⁵ "Redistributor" means a vendor or any person that provides a real-time 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.

Display Use in trading platforms, such as, but not restricted to, alternative trading systems (“ATs”), broker crossing networks, broker crossing systems not filed as ATs, dark pools, multilateral trading facilities, exchanges and systematic internalization systems. Category 3 Fees would be capped at \$15,000 per month for each data recipient for the NYSE MKT Integrated Feed.

Non-Display Use fees for NYSE MKT Integrated Feed include, for customers also paying access fees for NYSE MKT BBO, NYSE MKT Trades, NYSE MKT OpenBook and NYSE MKT Order Imbalances, the Non-Display Use for such products when declared within the same category of use.

The description of the three non-display use categories is set forth in the Fee Schedule in endnote 1 and that endnote would be referenced in the NYSE MKT Integrated Feed fees on the Fee Schedule. The text in the endnote would remain unchanged.

Data recipients that receive the NYSE MKT Integrated Feed for Non-Display Use would be required to complete and submit a Non-Display Use Declaration before they would be authorized to receive the feed.⁶ A firm subject to Category 3 Fees would be required to identify each platform that uses the NYSE MKT Integrated Feed on a Non-Display Use basis, such as ATs and broker crossing systems not registered as ATs, as part of the Non-Display Use Declaration.

⁶ Data recipients are required to complete and submit the Non-Display Declaration with respect to each market data product on the Fee Schedule that includes Non-Display Fees. See Securities Exchange Act Release Nos. 74885 (May 6, 2015), 80 FR 27205 (May 12, 2015)(SR-NYSEMKT-2015-34)(NYSE MKT OpenBook) and 74884 (May 6, 2015), 80 FR 27212 (May 12, 2015)(SR-NYSEMKT-2015-35)(NYSE MKT Order Imbalances) and 74882 (May 6, 2015), 80 FR 27210 (May 12, 2015)(SR-NYSEMKT-2015-36)(NYSE MKT Trades and NYSE MKT BBO).

4. Non-Display Declaration Late Fee. Data recipients that receive the NYSE MKT Integrated Feed for Non-Display Use would be required to complete and submit a Non-Display Use Declaration before they would be authorized to receive the feed. Beginning in 2017, NYSE MKT Integrated Feed data recipients would be required to submit, by January 31st of each year, the Non-Display Use Declaration that applies to all real-time NYSE MKT market data products that include Non-Display Use fees.⁷ The Exchange proposes to charge a Non-Display Declaration Late Fee of \$1,000 per month to any data recipient that pays an Access Fee for NYSE MKT Integrated Feed that has failed to complete and submit a Non-Display Use Declaration. Specifically, with respect to the Non-Display Use Declaration due by January 31st of each year beginning in 2017, the Non-Display Declaration Late Fee would apply to data recipients that fail to complete and submit the Non-Display Use Declaration by the January 31st due date, and would apply beginning February 1st and for each month thereafter until the data recipient has completed and submitted the annual Non-Display Use Declaration. The Exchange also proposes to apply current endnote 2 on the Fee Schedule to the Non-Display Declaration Late Fee for NYSE MKT Integrated Feed, but proposes to modify endnote 2 to the Fee Schedule so that it is clear that the Non-Display Declaration Late Fee applies to the NYSE MKT Integrated Feed beginning February 1st of 2017 and each year with respect to the Non-Display Use Declaration due by January 31st each year.⁸

⁷ Id.

⁸ The second sentence of endnote 2 to the Fee Schedule refers to a late fee for the Non-Display Use Declarations due September 1, 2014 that have not been submitted by July 1, 2015. This sentence is not applicable to the NYSE MKT Integrated Feed because NYSE MKT Integrated Feed was not available as of the September 1, 2014 due date and because data recipients of the NYSE MKT Integrated Feed will have to complete and submit a Non-Display Declaration before they can receive the feed. The Exchange

In addition, if a data recipient's use of the NYSE MKT Integrated Feed data changes at any time after the data recipient submits a Non-Display Use Declaration, the data recipient must inform the Exchange of the change by completing and submitting at the time of the change an updated declaration reflecting the change of use.

5. Redistribution Fee. For redistribution of the NYSE MKT Integrated Feed, the Exchange proposes to establish a fee of \$1,500 per month.

The Exchange notes that the three existing data feed products – NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT Order Imbalances – would continue to be available to vendors and subscribers separately, in each case at the same prices at which they are currently available.⁹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁰ in general, and Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ 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 it is equitable and not unfairly discriminatory to make the NYSE MKT Integrated Feed available free of charge through December 31, 2015 because providing it at no charge would provide an opportunity for vendors and subscribers to determine whether the

proposes to modify the second sentence so that it applies only to NYSE MKT OpenBook, NYSE MKT BBO, NYSE MKT Trades and NYSE MKT Order Imbalances and not to the NYSE MKT Integrated Feed. The Exchange proposes to modify the third sentence so that it is clear that it applies to all market data products, including the NYSE MKT Integrated Feed, to which Non-Display Use fees apply.

⁹ See Fee Schedule.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4), (5).

NYSE MKT Integrated Feed suits their needs without incurring fees. Other exchanges provide or have provided market data products free for a certain period of time.¹²

The fees for the NYSE MKT Integrated Feed are reasonable because they represent not only the value of the data available from three existing data feeds but also the value of receiving the data on an integrated basis. Receiving the data on an integrated basis provides greater efficiencies and reduced errors for vendors and subscribers that currently choose to integrate the data themselves after receiving it from the Exchange. Some vendors and subscribers may not have the technology or resources to integrate the separate data feeds in a timely and/or efficient manner, and thus the integration feature of the product may be valuable to them.

Moreover, the fees are equitably allocated and not unfairly discriminatory because vendors and subscribers may choose to continue to receive some or all of the data through the existing separate feeds at current prices, or they can choose to pay for the NYSE MKT Integrated Feed in order to receive integrated data, or they can choose a combination of the two approaches, thereby allowing each vendor or subscriber to choose the best business solution for itself.

The Exchange believes the proposed monthly Access Fee of \$2,500 and monthly Redistribution Fee of \$1,500 for NYSE MKT Integrated Feed are reasonable because they are comparable to the total of the same types of fees for NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT Order Imbalances. The monthly Access Fee for NYSE MKT

¹² For example, the Exchange, through NYSE Amex Options LLC, offered ArcaBook for Amex Options-Complex and NYSE Arca, Inc. (“NYSE Arca”), an affiliate of the Exchange, without charge between May 1, 2014 and October 31, 2014. See Securities Exchange Act Release Nos. 72074 (May 1, 2014), 79 FR 26277 (May 7, 2014) (NYSEArca 2014-51) and 72075 (May 1, 2014), 79 FR 26290 (May 7, 2014) (NYSEMKT 2014-40). NASDAQ provides a 30-day free trial related to NASDAQNASDAQ [sic] TotalView. See NASDAQ Rule 7023(e).

OpenBook is \$1,000, for NYSE MKT Trades is \$750 and for NYSE MKT Order Imbalances is \$500.¹³ The monthly Redistribution Fee for NYSE MKT Trades is \$750.¹⁴

The Exchange believes that it is reasonable to charge redistribution fees because vendors receive value from redistributing the data in their business products for their customers. The redistribution fees also are equitable and not unfairly discriminatory because they will be charged on an equal basis to those vendors that choose to redistribute the data. Also, the proposed redistribution fee for NYSE MKT Integrated Feed is reasonable because it is comparable to the redistribution fees that are currently charged by other exchanges.¹⁵

The proposed monthly Professional User Fee (Per User) of \$10 and Non-Professional User Fee (Per User) of \$2 are reasonable because they are comparable to the total of the per user fees for NYSE MKT OpenBook and NYSE MKT Trades. The monthly Professional User Fee (Per User) for NYSE MKT OpenBook is \$5 and for NYSE MKT Trades, it is \$1. The monthly Non-Professional User Fee (Per User) for NYSE MKT OpenBook is \$1 and for NYSE MKT Trades, it is \$0.05.

The Exchange believes that having separate Professional and Non-Professional User fees for the NYSE MKT Integrated Feed is reasonable because it will make the product more

¹³ The Access Fee for Managed Non-Display Services only for NYSE MKT OpenBook is \$500 per month, for NYSE MKT Trades is \$375 per month and for NYSE MKT Order Imbalances is \$250 per month. Managed Non-Display Services will not be offered for NYSE MKT Integrated Feed.

¹⁴ There are no Redistribution fees charged for NYSE MKT OpenBook or Redistribution or User fees charged for NYSE MKT Order Imbalances.

¹⁵ NYSE Arca charges a \$3,000 per month redistribution fee for the NYSE Arca Integrated Feed. See Securities Exchange Act Release No. 66128 (Jan. 10, 2012), 77 FR 2331 (Jan. 17, 2012) (SR-NYSEArca-2011-96). Distributors of a NASDAQ listed security depth entitlements pay a Monthly External Distributor Fee of \$2,500. See NASDAQ Rule 7019(b).

affordable and result in greater availability to Professional and Non-Professional Users. Setting a modest Non-Professional User fee is reasonable because it provides an additional method for Non-Professional Users to access the NYSE MKT Integrated Feed by providing the same data that is available to Professional Users. The Exchange believes that the proposed fees are equitable and not unfairly discriminatory because they will be charged uniformly to recipient firms and Users. The fee structure of differentiated Professional and Non-Professional fees applies to the user fees applicable to NYSE MKT OpenBook and NYSE MKT Trades and has long been used by the Exchange in order to reduce the price of data to Non-Professional Users and make it more broadly available.¹⁶ Offering the NYSE MKT Integrated Feed to Non-Professional Users with the same data available to Professional Users results in greater equity among data recipients.

The Exchange believes the proposed Non-Display Use fees are reasonable, equitable and not unfairly discriminatory because they reflect the value of the data to the data recipients in their profit-generating activities and do not impose the burden of counting non-display devices. After gaining further experience with the non-display fee structure, the Exchange believes that the proposed Non-Display Use fees 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

¹⁶ See e.g., Securities Exchange Act Release No. 69285 (April 3, 2013), 78 FR 21172 (April 9, 2013) (SR-NYSEMKT-2013-32)(establishing the \$1 Non-Professional User Fee (Per User) and \$5 Professional User Fee (Per User) for NYSE MKT OpenBook). See e.g., Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983), 48 FR 34552 (July 29, 1983)(establishing nonprofessional fees for CTA data); NASDAQ Rules 7023(b), 7047.

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 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.

Data can be processed much faster by a non-display device than it can be by a human being processing information that he or she views on a data terminal. Non-display devices also can dispense data to multiple computer applications as compared with the restriction of data to one display terminal. While non-display data has become increasingly valuable to data recipients who can use it to generate substantial profits, it has become increasingly difficult for them and the Exchange to accurately count non-display devices. The number and type of non-display devices, as well as their complexity and interconnectedness, have grown in recent years, creating administrative challenges for vendors, data recipients, and the Exchange to accurately count such devices and audit such counts. Unlike a display device, such as a Bloomberg terminal, it is not possible to simply walk through a trading floor or areas of a data recipient's premises to identify non-display devices. During an audit, an auditor must review a firm's entitlement report to determine usage. While display use is generally associated with an individual end user and/or unique user ID, a non-display use is more difficult to account for because the entitlement report may show a server name or Internet protocol ("IP") address or it may not. The auditor must review each IP or server and further inquire about downstream use

and quantity of servers with access to data; this type of counting is very labor-intensive and prone to inaccuracies.

Market data technology and usage has evolved to the point where it is no longer practical, nor fair and equitable, to simply count non-display devices. The administrative costs and difficulties of establishing reliable counts and conducting an effective audit of non-display devices have become too burdensome, impractical, and non-economic for the Exchange, vendors, and data recipients. Indeed, some data recipients dislike the burden of having to comply with count-based audit processes, and the Exchange's non-display pricing policies are a direct response to such complaints as well as a further competitive distinction between the Exchange and other markets. The Exchange believes that the proposed fee structure for non-display use is reasonable, equitable, and not unfairly discriminatory in light of these developments.

The Non-Display Use fees for the NYSE MKT Integrated Feed are reasonable because they represent the extra value of receiving the data for Non-Display Use on an integrated basis. The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using NYSE MKT Integrated Feed on a non-display basis 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.¹⁷

The Exchange believes that it is reasonable to require annual submissions of the Non-

¹⁷ 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.”).

Display Use Declaration so that the Exchange will have current and accurate information about the use of the NYSE MKT Integrated Feed and can correctly assess fees for the uses of the NYSE MKT Integrated Feed. The annual submission requirement is equitable and not unfairly discriminatory because it will apply to all users.

The Exchange believes that it is reasonable to impose a late fee in connection with the submission of the Non-Display Use Declaration. In order to correctly assess fees for the non-display use of NYSE MKT Integrated Feed, the Exchange needs to have current and accurate information about the use of NYSE MKT Integrated Feed. The failure of data recipients to submit the Non-Display Use Declaration on time leads to potentially incorrect billing and administrative burdens, including tracking and obtaining late Non-Display Use Declarations and correcting and following up on payments owed in connection with late Non-Display Use Declarations. The purpose of the late fee is to incent data recipients to submit the Non-Display Use Declaration promptly to avoid the administrative burdens associated with the late submission of Non-Display Use Declarations. The Non-Display Declaration Late Fee is equitable and not unfairly discriminatory because it will apply to all data recipients that choose to subscribe to the NYSE MKT Integrated Feed.

In addition, the proposed fees are reasonable when compared to fees for comparable products, including the NYSE Arca Integrated Feed,¹⁸ offered by the Exchange's affiliate, NYSE Arca and NASDAQ TotalView-Itch,¹⁹ offered by The NASDAQ Stock Market, Inc.

¹⁸ See NYSE Arca Integrated Feed, <http://www.nyxdata.com/page/1084> (last visited June 8, 2015)(data feed that provides a unified view of events, in sequence as they appear on the NYSE Arca matching engine, including depth of book, trades, order imbalance data, and security status messages).

¹⁹ See NASDAQ TotalView-ITCH, <http://www.nasdaqtrader.com/Trader.aspx?id=Totalview2> (last visited June 8, 2015)(displays the full order book depth for NASDAQ market participants and also

“NASDAQ”). Specifically, the fees for NYSE Arca Integrated Feed, which like NYSE MKT Integrated Feed, includes depth of book, trades, and order imbalances data for the NYSE Arca market, and a security status message, consist of an Access Fee of \$3,000 per month, a Professional User Fee (Per User) of \$40 per month a Non-Professional User Fee (Per User) of \$20 per month, Non-Display Fees of \$7,000 per month for each of Categories 1, 2 and 3, and a Redistribution Fee of \$3,000 per month.

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

The Exchange also notes that the NYSE MKT Integrated Feed is entirely optional. The Exchange is not required to make the NYSE MKT Integrated Feed available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase the NYSE MKT Integrated Feed. Firms that purchase the NYSE MKT Integrated Feed would 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 the NYSE MKT Integrated Feed or any other similar products are attractively priced or not.

Firms that do not wish to purchase the NYSE MKT Integrated Feed at the new prices have a variety of alternative market data products from which to choose,²⁰ or if the NYSE MKT Integrated Feed 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 the NYSE MKT Integrated Feed. The Exchange notes that

disseminates the Net Order Imbalance Indicator (NOII) for the NASDAQNASDAQ [sic] Opening and Closing Crosses and NASDAQ IPO/Halt Cross).

²⁰ See supra notes 19-20.

broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.²¹ Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSS have chosen not to do so.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 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

²¹ 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).

²² For example, Goldman Sachs Execution and Clearing, L.P. disclosed in 2014 that it was not using proprietary market data in connection with Sigma X, its ATS. See response to Question E3, available at <http://www.goldmansachs.com/media-relations/in-the-news/current/pdf-media/gsec-order-handling-practices-ats-specific.pdf>. By way of comparison, IEX has disclosed that it uses proprietary market data feeds from all registered stock exchanges. See <http://www.iextrading.com/about/>.

²³ NetCoalition, 615 F.3d at 535.

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.²⁴

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

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

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

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

The Existence of Actual Competition.

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary for the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with one another for listings and order flow and sales of market data itself, providing ample opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market. Indeed, the U.S. Department of Justice ("DOJ") (the primary antitrust regulator) has expressly acknowledged the aggressive actual competition among exchanges, including for the sale of proprietary market data. In 2011, the DOJ stated that exchanges "compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale."²⁵

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->

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 its competition for quotations, order flow, and trade executions, then it earns trading revenues and increases the value of its proprietary market data

[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 website), citing Tuttle, Laura, 2014, “OTC Trading: Description of Non-ATS OTC Trading in National Market System Stocks,” at 7-8.

products because they will contain greater quote and trade information. Conversely, if an exchange is less successful in attracting quotes, order flow, and trade executions, then its market data products may be less desirable to customers using them in support of order routing and trading decisions in light of the diminished content; data products offered by competing venues may become correspondingly more attractive. Thus, competition for quotations, order flow, and trade executions puts significant pressure on an exchange to maintain both execution and data fees at reasonable levels.

In addition, in the case of products that are 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 Integrated Feed unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE MKT Integrated Feed 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 April 2015, more than 80% of the transaction volume on each of NYSE MKT and NYSE MKT's affiliates NYSE Arca and New York Stock Exchange LLC ("NYSE") 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

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

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.”).

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 ATs, 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 ATs and obtained exchange status in 2008 and 2010, respectively, provided certain market data at no charge on their websites 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 or have announced plans to do so, including but not limited to the Exchange, NYSE, NYSE Arca, NASDAQ OMX, BATS, and Direct Edge.

The fact that proprietary data from ATSS, internalizing broker-dealers, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. By way of example, BATS and NYSE Arca both published proprietary data on the Internet before registering as exchanges. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. With respect to NYSE MKT Integrated Feed, competitors offer close substitute products.³¹

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 notes 19-20.

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 setting the proposed fees for the NYSE MKT Integrated Feed, 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, and continued availability of the Exchange's separate data feeds at a lower price, 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-4³³ 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2015-95 on the subject line.

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).

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-2015-95. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-2015-95, 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.³⁵

Brent J. Fields
Secretary

³⁵ 17 CFR 200.30-3(a)(12).