

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79287; File No. SR-NYSEMKT-2016-100)

November 10, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Adopting a Decommission Extension Fee for Receipt of the NYSE MKT Order Imbalances Market Data Product

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 October 28, 2016, NYSE MKT LLC (“NYSE MKT” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, 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 adopt a Decommission Extension Fee for receipt of the NYSE MKT Order Imbalances market data product. The proposed 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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The Exchange proposes to adopt a Decommission Extension Fee for receipt of the NYSE MKT Order Imbalances market data product,³ as set forth on the NYSE MKT Proprietary Market Data Fee Schedule (“Fee Schedule”). Recipients of NYSE MKT Order Imbalances would continue to be subject to the already existing subscription fees currently set forth in the Fee Schedule. The proposed Decommission Extension Fee would apply only to those subscribers who decide to continue to receive the NYSE MKT Order Imbalances feed in its legacy format for up to two months after which the feed will be distributed exclusively in the new format explained below.

NYSE MKT Order Imbalances is an NYSE MKT-only market data feed of real-time order imbalances that accumulate prior to the opening of trading on the Exchange and prior to the close of trading on the Exchange. The Exchange distributes information about these imbalances in real-time at specified intervals prior to the opening and closing auction each day.⁴

³ See Securities Exchange Act Release Nos. 59743 (April 9, 2009), 74 FR 17699 (April 16, 2009) (SR-NYSEAmex-2009-11 - Notice of Filing and Immediate Effectiveness of Proposed Rule Change Making Available an NYSE Amex Order Imbalance Information Datafeed); and 60385 (July 24, 2009), 74 FR 38249 (July 31, 2009) (SR-NYSEAmex-2009-26 – Order Approving Proposed Rule Change to Charge a \$500 Monthly Fee to Recipients of the NYSE Amex Order Imbalance Information Datafeed). See also Securities Exchange Act Release Nos. 72020 (September 9, 2014), 79 FR 55040 (September 15, 2014) (SR-NYSEMKT-2014-72) (establishing fees for non-display use of NYSE MKT Order Imbalances); and 76911 (January 14, 2016), 81 FR 3496 (January 21, 2016) (SR-NYSEMKT-2016-05) (amending fees for NYSE MKT Order Imbalances).

⁴ See Rules 15 - Equities (Pre-Opening Indications and Opening Order Imbalance Information) and 123C - Equities (The Closing Procedures).

As part of the Exchange's efforts to regularly upgrade systems to support more modern data distribution formats and protocols as technology evolves, beginning October 31, 2016, NYSE MKT Order Imbalances will be transmitted in a new format, Exchange Data Protocol (XDP). Beginning October 31, 2016, the Exchange will transmit NYSE MKT Order Imbalances in both the legacy format and in XDP format without any additional fee being charged for providing this data feed in both formats. The dual dissemination will remain in place until February 28, 2017, the planned decommission date of the legacy format. Beginning March 1, 2017, recipients of NYSE MKT Order Imbalances who wish to continue to receive NYSE MKT Order Imbalances in the legacy format will be subject to the proposed Decommission Extension Fee of \$5,000 per month.⁵ During the extension period, recipients of NYSE MKT Order Imbalances would continue to be subject to the subscription fees currently noted in the Fee Schedule. The extension period for receiving this data feed in the legacy format will expire on April 28, 2017, on which date distribution of NYSE MKT Order Imbalances in the legacy format will be permanently discontinued.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁶ in general, and Sections 6(b)(4) and 6(b)(5) of the Act,⁷ in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data

⁵ The concept of a Decommission Extension Fee is not novel. The Exchange recently adopted a Decommission Extension Fee for receipt of the NYSE MKT BBO and NYSE MKT Trades market data products when the Exchange migrated those products to the XDP format. See Securities Exchange Act Release No. 77389 (March 17, 2016), 81 FR 15363 (March 22, 2016) (SR-NYSEMKT-2016-37).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4), (5).

and is not designed to permit unfair discrimination among customers, issuers, and brokers.

The Exchange believes that adopting an extension fee for subscribers of NYSE MKT Order Imbalances who wish to receive this data feed in the legacy format for a period of time beyond the built-in overlap period is reasonable, equitable and not unfairly discriminatory because the proposed fee would apply equally to all data recipients that currently subscribe to NYSE MKT Order Imbalances. The Exchange believes that it is reasonable to require data recipients to pay an additional fee for taking the data feed in the legacy format beyond the period of time specifically allotted by the Exchange for data feed customers to adapt to the new XDP format at no extra cost. To that end, the extension fee is designed to encourage data recipients to migrate to the XDP format in order to continue to receive NYSE MKT Order Imbalances in XDP as the legacy format would no longer be available after that date. The Exchange does not intend to support the legacy format at all after April 28, 2017.

The Exchange notes that NYSE MKT Order Imbalances is entirely optional. The Exchange is not required to make NYSE MKT Order Imbalances available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase NYSE MKT Order Imbalances, nor is the Exchange required to offer any feed (NYSE MKT Order Imbalances, or otherwise) in a particular format, and it is a benefit to the markets generally that NYSE MKT update its distribution technology to make it more efficient (and at the same time eliminate less efficient forms of dissemination). Firms that do purchase NYSE MKT Order Imbalances do so for the primary goals of using them to increase revenues, reduce expenses, and in some instances compete directly with the Exchange (including for order flow); those firms are able to determine for themselves whether NYSE MKT Order Imbalances or any other similar

products are attractively priced or not.⁸

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

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

⁸ See, e.g., Proposing Release on Regulation of NMS Stock Alternative Trading Systems, Securities Exchange Act Release No. 76474 (Nov. 18, 2015) (File No. S7-23-15). See also, “Brokers Warned Not to Steer Clients’ Stock Trades Into Slow Lane,” Bloomberg Business, December 14, 2015 (Sigma X dark pool to use direct exchange feeds as the primary source of price data).

⁹ NetCoalition, 615 F.3d at 535.

statutory standards. In addition, the existence of alternatives to the legacy format, such as converting to XDP as soon as possible, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can select such alternatives.

As the NetCoalition decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for proprietary market data would be so complicated that it could not be done practically or offer any significant benefits.¹⁰

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

¹⁰ 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>. Finally, the prices set herein are prices for continuing to support distribution formats the Exchange has elected to retire in favor of new and more efficient distribution formats, making cost-based analyses even less relevant.

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 (and in this instance, the ability of any firm to switch to the new distribution format in a time frame that eliminates the need to pay these fees entirely).

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."¹¹

¹¹ Press Release, U.S. Department of Justice, Assistant Attorney General Christine Varney Holds Conference Call Regarding NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. Abandoning Their Bid for NYSE Euronext (May 16, 2011), available at <http://www.justice.gov/iso/opa/atr/speeches/2011/at-speech-110516.html>; see also Complaint in U.S. v. Deutsche Borse AG and NYSE Euronext,

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.”¹² 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.¹³

If an exchange succeeds in competing for quotations, order flow, and trade executions, then it earns trading revenues and increases the value of its proprietary market data products

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.”).

¹² 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>.

¹³ 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.

because they will contain greater quote and trade information. Conversely, if an exchange is less successful in attracting quotes, order flow, and trade executions, then its market data products may be less desirable to customers in light of the diminished content and data products offered by competing venues may become more attractive. Thus, competition for 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 Order Imbalances in the legacy format unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE MKT Order Imbalances can provide value in the legacy formats by sufficiently increasing revenues or reducing costs in the customer's business in a manner that will offset the fees. The Exchange has provided customers with adequate notice that it intends to discontinue dissemination of the data feed in the legacy format. Therefore, the proposed Decommission Extension Fee would only be applicable to those customers who have a need or desire to continue to take the data feed in the legacy format beyond the period provided for migration to the XDP format. Customers who timely migrate to the XDP format to receive the data feed would not need to receive the data feed in the legacy format and therefore would not be subject to the Decommission Extension Fee at all. All of these factors operate as constraints on pricing proprietary data products.

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

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

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and paragraph (f) of Rule 19b-4¹⁵ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings 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-2016-100 on the subject line.

Paper comments:

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

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f).

All submissions should refer to File Number SR-NYSEMKT-2016-100. 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 office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-NYSEMKT-2016-100, 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.¹⁶

Brent J. Fields
Secretary

¹⁶ 17 CFR 200.30-3(a)(12).