SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68005; File No. SR–NYSEARCA–2012–106]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Fees for Certain Proprietary Options Market Data Products

October 9, 2012.

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 September 26, 2012, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') 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 the Substance of the Proposed Rule Change

The Exchange proposes to establish fees for certain proprietary options market data products. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

The Exchange proposes to establish fees for certain proprietary options market data products. The products covered by the fees are ArcaBook for Arca Options—Trades, ArcaBook for Arca Options—Top of Book, ArcaBook for Arca Options—Depth of Book, ArcaBook for Arca Options—Complex, ArcaBook for Arca Options—Series Status, and ArcaBook for Arca Options—Order Imbalance (collectively, the ''Arca Options Products'').[4] The fees set forth below, which will be implemented on October 1, 2012, are for all six of the Arca Options Products collectively; at this time, the Exchange is not establishing separate pricing for each of the individual products.

Access and Redistribution Fees

The Exchange proposes to charge an Access Fee of $3,000 per month and a Redistribution Fee of $2,000 per month.

Professional End-User [5] Fee

For the receipt and use of the Arca Options Products, the Exchange proposes to charge Professional End-Users $50 per month for each ''User per Source.'' [6] A ''Source'' is a Professional End-User-controlled source of data from a Redistributor,[7] such as a data feed; in this case, it is the Arca Options Products. Professional End-Users must receive approval to report User per Source by way of a license with the Exchange; without such approval, the Professional End-User must report each access identifier (''Access ID''). An Access ID is a unique identifier that a Professional End-User has assigned to a natural person, application, or device (each, a ''User''),[8] which identifier the Professional End-User's Entitlement System uses to administer technical controls over access to market data.[9]

Controlled Access

The unit-of-count for Redistributors of controlled accesses to market data, such as display devices and single-use application program interfaces (''APIs''), is each Access ID. Redistributors must ensure, by way of their agreements with clients, that Access IDs are not shared among Users. If a Professional End-User cannot or does not disclose in advance its restrictions relating to Access ID sharing, thereby enabling simultaneous access by multiple Users, the maximum number of potential accesses (i.e., the greatest number of natural persons, applications, and devices that can access the market data) will be chargeable.

Reporting Internal Use

Professional End-Users approved for User per Source reporting may report the total number of natural persons per each Source rather than the number of Access IDs per Source. For example, if a natural person has two Access IDs receiving data from a single Redistributor's data feed, the Professional End-User may report a count of one. If a natural person has one Access ID receiving data from two Redistributors' data feeds, however, the Professional End-User must report a count of two. Likewise, if a natural person has two Access IDs receiving data feeds from two separate Redistributors, the Professional End-User must report a count of two.

In order to report User per Source, the Professional End-User must identify the User associated with each Access ID. Possible methods to identify the User include using human resources or other

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

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

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 67720 (Aug. 23, 2012); 77 FR 52769 (Aug. 30, 2012) (SR–NYSEArca–2012–89).

[5] A Professional End-User is a person or entity that receives market data from the Exchange or a Redistributor and uses that market data solely for its own internal purposes. A Professional End-User is not permitted to redistribute that market data to any person or entity outside of its organization.

[6] The Exchange notes that the User per Source reporting policy differs from the unit-of-count policy used for other Exchange market data products, such as NYSE Arca Trades and NYSE Arca BBO. *See* Securities Exchange Act Release No. 62188 (May 27, 2010), 75 FR 31484 (June 3, 2010) (SR–NYSEArca–2010–23). Because the Arca Options Products are new and the Exchange has not charged for them before, the Exchange has determined to utilize an updated methodology that it believes may be easier for it and its customers to administer. Based on its experience with these products, the Exchange will consider adopting User per Source reporting for other market data products in the future.

[7] A Redistributor is any entity that makes market data available to any person other than the Redistributor and its employees, directors, officers and partners, irrespective of the means of transmission or access.

[8] An Access ID may be a User name, but is not limited to a User name. For example, it could be a host name, Internet protocol (''IP'') address, or a MAC/network address. A User may have more than one Access ID assigned to control access to market data. Sharing of passwords and/or Access IDs among Users is prohibited, as is simultaneous access by multiple Users using the same Access ID. Simultaneous access by an individual User is allowed if the Professional End-User discloses in advance the technical and/or process controls that prohibit the sharing of Access IDs or other means of accessing data.

[9] The Exchange considers any mechanism that controls access to market data to constitute an Entitlement System. Examples of an Entitlement System include a system that a Redistributor provides for permissioning Users to receive and use market data, a dedicated system that a Professional End-User develops internally, a server-based market data application that controls access to a limited group of authorized Users, and a closed network in which physical access to the network determines a User's ability to access market data. Each Professional End-User must use an Entitlement System to control all data distribution. Each Entitlement System should control or track simultaneous access, generate authentic entitlement reports, control Access IDs and passwords, and maintain an audit trail.

corporate identifiers associated with a User in an inventory system. Where an Access ID cannot be associated to a natural person User, the Professional End-User must treat that Access ID as a User per Source.

This aspect of User per Source reporting applies only to a Professional End-User's controlled internal distribution of data, and does not apply to Redistributor-controlled access as described above; therefore, a Professional End-User may not net internal Users against Access IDs for a Redistributor's controlled access, such as a device or API, as described in the preceding section.

Application Usage

Some internal distribution networks feature downstream applications that control access to market data without using a centralized Entitlement System. The Access IDs of each such application must be reported, and Professional End-Users must ensure that audit trails are maintained. Professional End-Users that have been approved for User per Source reporting may report each of the Users of the application and not the Access IDs of these systems; however, Professional End-Users must ensure that all Users are reported across all Entitlement Systems and applications. For example, a User that has an Access ID from an Entitlement System and an Access ID from a downstream application each receiving data from a single Redistributor source would be reported once.

Counting Users in Closed Networks

In a Closed Network, a Professional End-User has an environment whereby market data is published on an intranet or subnet with no other access control such as an Entitlement System. In environments such as this, all assigned IP addresses on the network range are considered a User per Source and are therefore reportable. In the case of a closed network in which physical access to the network determines a User's ability to access market data, the Professional End-User must report any device that has physical access to the network as a separate User per Source.

In closed networks that employ virtual devices, the Professional End-User must report all physical and virtual devices. For example, if a server provides five different market data products through five different IP addresses, each of which is capable of accessing market data, the Professional End-User must report all five IP addresses for each of the five products. That is, the Professional End-User must report virtual devices (in the form of IP addresses) as well as physical devices, and not just the physical server.[10]

Audit Trails

In order to remove an Access ID from the reporting and fee obligations for the Arca Options Products, the Professional End-User must disable the ability of the Access ID to receive such data entirely. The Professional End-User must maintain an audit trail to evidence the disabling of an Access ID for any period. In the absence of an adequate audit trail, all Access IDs that connect to the server remain fee liable. If the Professional End-User cannot limit or track the number of Access IDs, it must report all Access IDs.

Same User Name for Multiple Uses

Frequently, Users are assigned the same User name to log into multiple services and applications that do not share a common Entitlement System. For example, a natural person might elect to use the same User name to gain access to Redistributor A's services as it uses to gain access to Redistributor B's services. Or, he or she may use the same User name to access Redistributor A's Service X as he or she uses to gain access to Redistributor A's Service Y. Or, he or she may use the same User name to access Application A with Redistributor A's data as he or she may use to access Application B with Redistributor A's data. Despite the use of the same User name for multiple purposes, each use of a User name by a separate Entitlement System must be treated as a separate Access ID.

Simultaneous Access and Contention-Based Entitlement Systems

Simultaneous Access is the capability of a single Access ID to be used concurrently on two or more devices identified on a network by their host name, IP address, or other system-level identifier for network access. Entitlement Systems must control and track the number of simultaneous accesses by a single Access ID.

Contention-Based Entitlement Systems are not consistent with User per Source reporting. Those are systems for which a limited number of ''tokens'' or ''accesses'' that control the number of simultaneous Users are shared among Users. As is the case if a Professional End-User cannot or does not disclose in advance its restrictions relating to Access ID sharing, thereby enabling simultaneous access by multiple Users, the maximum number of potential accesses (i.e., the greatest number of natural persons, applications, and devices that can access the market data) will be chargeable.

Nonprofessional End-User Fees

The Exchange proposes to charge each Redistributor $1.00 per month for each Nonprofessional End-User to whom it provides Arca Options Products. The Exchange proposes to impose the charge on the Redistributor, rather than on the Nonprofessional End-User. In addition, the Exchange proposes to cap the Nonprofessional End-User Fee at $5,000 per month for each Redistributor. The Exchange proposes to apply the same criteria for qualification as a Non-Professional End-User as it does for non-professional subscribers to its other products.[11]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the ''Act'')[12] in general and with Section 6(b)(4) and 6(b)(5) of the Act[13] 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 proposed Arca Options Products fees are reasonable, equitable, and not unfairly discriminatory because they will provide additional data to the marketplace and give investors greater choices at prices that are comparable to other similar products. For example, the Chicago Board Options Exchange (''CBOE'') offers CBOE Streaming Markets, a streaming data feed that includes best bids and offers (''BBOs''), trades, customer vs. non-customer breakdown of the BBOs, contingent

[10] If a physical or virtual device (including an IP address) is capable of receiving a market data product, the Professional End-User must report the device regardless of whether a User uses the device to gain access to the market data product.

[11] The Exchange defines a nonprofessional subscriber as a natural person who receives market data solely for his or her personal, non-business use and who is not a ''Securities Professional,'' meaning that the person is not (1) registered or qualified with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (2) engaged as an ''investment adviser'' as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that statute); or (3) employed by a bank or other organization that is exempt from registration under federal and/or state securities laws to perform functions that would require him or her to be so registered or qualified if he or she were to perform such function for an organization not so exempt. The nonprofessional subscriber policy is available at *http://www.nyxdata.com/Docs/Market-Data/Policies.*

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(4) and (5).

prices (all-or-none orders) better than or equal to the BBOs, and BBO data and last sale data for complex strategies.[14] CBOE charges a direct connect fee of $3,500 per connection per month, a per user fee of $25 per month per Authorized User or Device, and $500 per month per data port for receipt of this data.[15] NASDAQ PHLX offers PHLX Depth of Market, a data product that provides order and quotation information for individual quotes and orders on the PHLX book, last sale information for trades executed on PHLX, and an imbalance message, for which it charges $4,000 per month for internal distribution and $4,500 per month for external distribution.[16] The Exchange also notes that it offers an integrated equities market data feed and equity depth-of-book product that are priced comparably to the proposed Arca Options Products pricing.[17] The Exchange further believes that the proposed Arca Options Products fees are equitable and not unfairly discriminatory because the general categories of fees—Direct Access, Redistributor, Professional End-User, and Non-Professional End-User—are comparable to the fee categories already established by the Exchange as well as other exchanges for market data products and the fees will apply equally to all persons in the respective categories that choose to purchase the Arca Options Product.

The Exchange believes that the proposed User per Source reporting methodology is reasonable, equitable, and not unfairly discriminatory because it will help to simplify market data administration. The Exchange recognizes that each Redistributor and Professional End-User may use Arca Options Products differently, and the reporting methodology takes into account the various uses and provides a means to avoid duplicative counting that will allow data recipients to better manage their costs. Moreover, the reporting methodology does not discriminate among data recipients and users, as the reporting methodology would apply equally to all Professional End-Users that choose to utilize it.

The existence of alternatives to the Arca Options Products, including real-time consolidated data, free delayed consolidated data, and 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 such alternatives. The recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC,* No. 09–1042 (DC Cir. 2010), upheld the Commission's reliance 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.'

NetCoalition at 15 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 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.' ''[18]

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 established in this filing are the product of competition and therefore satisfy the relevant statutory standards.[19]

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach, and the Exchange incorporates by reference into this proposed rule change its analysis of this topic in another recent rule filing.[20]

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

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. An exchange's ability to price its data feed products is constrained by (1) competition among exchanges in a variety of dimensions, (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data, and (3) the inherent contestability of the market for proprietary data.

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous options exchanges compete with each other for trades and market data, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange in a vigorously competitive market.

It is common for broker-dealers to further exploit this competition by sending their order flow to multiple markets, rather than providing it all to a single market. The current options market structure is dispersed and complex with trading volume dispersed among many highly automated trading centers that compete for order flow in the same options, with trading centers offering a wide range of services that are designed to attract different types of market participants with varying trading needs.[21]

Competitive markets for 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. The U.S. Department of Justice recently

[14] *See* Securities Exchange Act Release No. 66486 (Feb. 28, 2012), 77 FR 13166 (Mar. 5, 2012) (SR–CBOE–2012–016).

[15] *Id.*

[16] *See* Securities Exchange Act Release No. 67466 (July 19, 2012), 77 FR 43629 (July 25, 2012) (SR–Phlx–2012–93) (''PHLX Filing'').

[17] The proposed Access Fee of $3,000 per month is the same as the $3,000 Direct Access Fee for the NYSE Arca Integrated Data Feed, an equities market data product that includes NYSE Arca BBO, NYSE Arca Trades, NYSE ArcaBook, and certain additional market data. The proposed Redistribution Fee of $2,000 per month is less than the $3,000 Redistribution Fee for the NYSE Arca Integrated Feed. The proposed Non-Professional End-User Fee of $1.00 per month (capped at $5,000) is less than the $10 per month Non-Professional Subscriber Fee (capped at $20,000) charged by the Exchange for NYSE ArcaBook. The Professional End-User Fee of $50 per month per User per Source is more than the NYSE ArcaBook $30 per month Professional Subscriber Fee. *See* Securities Exchange Act Release Nos. 66128 (Jan. 10, 2012), 77 FR 2331 (Jan. 17, 2012) (SR–NYSEArca–2011–96), and 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97). However, the Exchange believes that the difference in the Professional fees is reasonable and equitable because the Arca Options Products offer more data than the NYSE Arca Integrated Feed.

[18] *NetCoalition* at 16.

[19] Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''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.

[20] *See* Securities Exchange Act Release No. 63291 (Nov. 9, 2010), 75 FR 70311 (Nov. 17, 2010) (SR–NYSEArca–2010–97).

[21] *See, e.g.,* Securities Exchange Act Release No. 49175, Concept Release: Competitive Developments in the Options Markets (Feb. 3, 2004), 69 FR 6124, 6125–6126 (Feb. 3, 2004) (S7–07–04).

acknowledged the aggressive competition among exchanges. In announcing the abandoned bid for NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc., 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.''[22] Similarly, the options markets vigorously compete with respect to options data products.[23]

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 platform where the order can be posted, including the execution fees, data quality, and price and distribution of its data products. Without trade executions, exchange data products cannot exist. Further, data products are valuable to many end-users only insofar as they provide information that end-users expect will assist them or their customers in making trading decisions. In that respect, the Exchange believes that the Arca Options Products will offer options market data information that is useful for both professionals and non-professionals in making trading and investment 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.[24] 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 of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the proprietary product exceeds its expected value, the broker-dealer will choose not to buy it.

Moreover, if broker-dealers choose to direct fewer orders to a particular exchange, the value of that exchange's market data product to those broker-dealers decreases for two reasons. First, the product will contain less information because executions of fewer orders will be reflected in it. Second, and perhaps more importantly, the product will be less valuable to broker-dealers that choose to direct their orders to other venues because it does not provide information about the venues to which they are directing their orders. Data from the competing venues to which the broker-dealers are directing orders would become correspondingly more valuable.

Similarly, in the case of products that are distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to certain end-users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end-users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract ''eyeballs'' that contribute to their advertising revenue.

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.[25] 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.[26]

The Exchange believes that retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates what they believe is sufficient commission revenue to justify the cost of acquiring that data. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide what they believe is sufficient value. The Exchange and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, the Exchange believes that products can enhance order flow to the Exchange by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market. Conversely, less order flow to a venue decreases the value of that venue's market data products to distributors and investors because the products contain less content.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably

[22] 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.*

[23] *See* PHLX Filing, *supra* note 16 [sic], which describes a variety of options market data products and their pricing.

[24] Although the Exchange charges an Options Regulatory Fee, it does not offset the full cost of the Exchange's regulatory program, e.g., non-customer trading activity. *See* Securities Exchange Act Release No. 64399 (May 4, 2011), 76 FR 27114 (May 10, 2011) (SR–NYSEArca–2011–20).

[25] *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) (SR–NASDAQ–2010–111), 75 FR 57321, 57324 (Sept. 20, 2010) (''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* August 1, 2008 Comment Letter of Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., Statement of Janusz Ordover and Gustavo Bamberger (''because market data is both an input to and a byproduct of executing trades on a particular platform, market data and trade execution services are an example of 'joint products' with 'joint costs.' ''), attachment at pg. 4, available at *www.sec.gov/comments/34–57917/3457917–12.pdf.*

[26] *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.'').

underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint product. 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.

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 information (or provide information 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 information, 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.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 10 self-regulatory organization (''SRO'') options markets. Plans to launch two new options exchanges have been announced.[27] Each SRO market competes to produce transaction reports via trade executions. 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 MKT, CBOE, C2, ISE, NASDAQ OMX, NASDAQ PHLX, NASDAQ BX, and BATS. Because market data users can thus 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 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 Trading and Direct Edge.[28] As noted above, two new options exchanges recently have been proposed.[29]

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change may affect the overall cost of doing business with the platform, and affected market participants will assess whether they can lower their trading costs by directing orders elsewhere, thereby lessening the need for the more expensive data, or simply not purchase the data.

In establishing the fees for the Arca Options Products, the Exchange considered the competitiveness of the market for 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 product, including real-time consolidated data, free delayed consolidated data, and 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. Accordingly, the Exchange believes that the acceptance of data feed products in the marketplace demonstrates the consistency of these fees with applicable statutory standards.

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)[30] of the Act and subparagraph (f)(2) of Rule 19b–4[31] thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

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.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEARCA–2012–106 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549.

[27] Nina Mehta and Nikolaj Gammeltoft, ''Miami Options Exchange Moves Closer to Becoming 11th U.S. Venue,'' Bloomberg.com (Aug. 16, 2012), available at *http://www.bloomberg.com/news/2012–08–16/miami-options-exchange-moves-closer-to-becoming-11th-u-s-venue.html.*

[28] Today, BATS provides data at no charge on its Web site in order to attract more order flow, and uses market data revenue rebates from resulting additional executions to maintain low execution charges for its users. 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.

[29] *See supra* note 28 [sic].

[30] 15 U.S.C. 78s(b)(3)(A).

[31] 17 CFR 240.19b–4(f)(2).

All submissions should refer to File Number SR–NYSEARCA–2012–106. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEARCA–2012–106 and should be submitted on or before November 6, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25320 Filed 10–15–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68009; File No. SR–C2–2012–035]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Order Routing Rules

October 9, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 4, 2012, C2 Options Exchange, Incorporated (the ''Exchange'' or ''C2'') 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 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 amend its order routing rules. The text of the proposed rule change is available on the Exchange's Web site (*http://www.c2exchange.com/Legal/*), at the Exchange's Office of the Secretary, 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 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

Rule 6.36 governs the Exchange's process for routing sweep orders to other markets pursuant to intermarket linkage rules and states that the Exchange may contract with one or more routing brokers that are not affiliated with the Exchange to route sweep orders to other exchanges. The Rule imposes certain obligations on the Exchange and routing brokers. In particular, Rule 6.36(e) provides that the Exchange will determine the logic that provides when, how and where orders are routed away to other exchanges. Additionally, Rule 6.36(f) provides that a routing broker cannot change the terms of an order or the routing instructions, nor does the routing broker have any discretion about where to route an order.

The proposed rule change adds Interpretation and Policy .01 to Rule 6.36 to clarify that the Rule does not prohibit a routing broker from designating a preferred market-maker (or equivalent market participant) at the other exchange to which an outbound sweep order is being routed. The proposed rule change has no impact on customer orders, which receive the same level of order protection and trade at the best market prices regardless of whether the routing broker designates a preferred market-maker recipient at the destination exchange. The Exchange still makes the sole determination as to which exchange an order will be routed, as well as when and how the order will be routed. Additionally, routing brokers are still prohibited from changing the terms of an order or the Exchange's routing instructions and still have no discretion about to which exchange an order will be routed.

The proposed rule change merely clarifies that a routing broker may indicate which market-maker at the away exchange may trade against the routed order in accordance with the order terms and the Exchange's routing instructions. In other words, if a routing broker preferences a customer order that is to be routed to another exchange, the order is not handled any differently by the routing broker than if the routing broker did not preference the order.[3] Further, the order is executed at the same exchange and at the same price and in accordance with the same order terms as it would if the routing broker did not preference the order. Therefore, the proposed rule change does not disadvantage customers in any way. The Exchange believes that other exchanges allow this practice and that its routing brokers should be able to do the same.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[4] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[5] requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and to

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[32] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] The Exchange notes that orders that may be routed to other exchanges under Rule 6.36 are all immediate-or-cancel orders. Therefore, routed orders would not be subject to any automated price improvement mechanisms that may exist under other exchanges' rules.

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

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