settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The composition and selection of the BX Board of Directors will continue to satisfy the requirement in Section 6(b)(3) of the Act [19] that the rules of the Exchange provide for the fair representation of members in the selection of directors and administration of the Exchange. The Exchange believes that its By-Laws continue to assure fair representation of the Exchange's members in the selection of its directors and administration of its affairs and provide that, among other things, one or more directors shall be representative of investors and not be associated with the exchange, or with a broker or dealer. Twenty percent of the Directors will continue to be Member Representative Directors as required by BX Article IV, Section 4.3(a).

The number of Public Directors that are required to be included in the calculation of Non-Industry Directors will be the same as the number required on the Phlx and NASDAQ Boards.[20] The BX board requirements today are otherwise similar to the requirements at Phlx and NASDAQ. The Exchange believes that this proposal is consistent with the previous filing which eliminated BOX related references from its By-Laws.[21] The number of Public Directors in the Non-Industry Director calculation was directly related to the BX Board composition with BOX representation and the elimination of the BOX representation from the BX Board no longer necessitates the increased number of Public Directors. The Exchange believes that amending the By-Laws to reflect a similar board composition to NASDAQ and Phlx would continue to assure fair representation of the Exchange's members in the selection of its directors and administration of its affairs.

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

BX does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. This proposal will continue to provide for the fair representation of members in the selection of directors and administration of the Exchange. The amendment to amend By-Law Article IV, Section 4.3 to modify the number of Public Directors in the Non-Industry calculation is similar to by-laws on other exchanges.[22]

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

No written comments were either solicited or received.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2013–029 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 20549–1090.

All submissions should refer to File Number SR–BX–2013–029. 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 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–BX–2013–029, and should be submitted on or before April 29, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–08099 Filed 4–5–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69278; File No. SR–NYSE–2013–25]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Non-Display Usage Fees for NYSE OpenBook, NYSE Trades, and NYSE BBO and a Redistribution Fee for NYSE OpenBook

April 2, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the "Act") [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 21, 2013, New York Stock Exchange LLC ("NYSE" or the "Exchange") 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

[19] 15 U.S.C. 78f(b)(3).

[20] *See* Phlx By-Law Article III, Section 3–2(a) and NASDAQ By-Law Article III, Section 2(a).

[21] *See* note 7.

[22] *See* Phlx By-Law Article III, Section 3–2(a) and NASDAQ By-Law Article III, Section 2(a).

[23] 17 CFR 200.30–3(a)(12).

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

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

[3] 17 CFR 240.19b–4.

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 non-display usage fees for NYSE OpenBook, NYSE Trades, and NYSE BBO and a redistribution fee for NYSE OpenBook, all of which will be operative on April 1, 2013. 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish non-display usage fees for NYSE OpenBook, NYSE Trades, and NYSE BBO and a redistribution fee for NYSE OpenBook, all of which will be operative on April 1, 2013. The subsections below describe (1) the background on the current fees for these real-time products; (2) the rationale for creating a new non-display usage fee structure; (3) the proposed fees for non-display use, which will include internal non-display use and managed non-display use; (4) the proposed redistribution fee for NYSE OpenBook; (5) examples comparing the current and proposed fees; and (6) a correction to the Market Data Fee schedule.

Background on Current Fees

The current monthly fees for NYSE OpenBook,[4] NYSE BBO,[5] and NYSE Trades[6] are as follows:

Product	Access Fee	Subscriber Fees	Digital Media Enterprise Fee	Redistribution Fee
NYSE OpenBook[7]	$5,000	Professional: $60 Non-professional: $15 Non-professional Fee Cap: $25,000.	N/A	N/A.
NYSE BBO	1,500	Professional: $15 Non-professional: $5	N/A	N/A.
NYSE Trades	[8] 1,500	Professional: $15	$40,000	$1,000 (operative May 1, 2013).

While the majority of subscribers pay the subscriber fee for each display or non-display device that has access to the market data products as set forth above, a small number of vendors and subscribers are eligible for, and have elected, the NYSE Unit-of-Count Policy that was first introduced as an NYSE OpenBook pilot in 2009 and is now also available for NYSE BBO and NYSE Trades.[9] Under this fee structure, these vendors and subscribers are subject to a fee structure that utilizes the following basic principles:

i. Vendors.

• ''Vendors'' are market data vendors, broker-dealers, private network providers, and other entities that control Subscribers' access to a market data product through Subscriber Entitlement Controls (as described below).

ii. Subscribers.

• ''Subscribers'' are unique individual persons or devices (which include both display and non-display devices) to which a Vendor provides a market data product. Any individual or device that receives the market data product from a Vendor is a Subscriber, whether the individual or device works for or belongs to the Vendor, or works for or belongs to an entity other than the Vendor.

• Only a Vendor may control Subscriber access to the market data product.

• Subscribers may not redistribute the market data product in any manner.

iii. Subscriber Entitlements.

• A Subscriber Entitlement is a Vendor's permitting a Subscriber to receive access to the market data product through an Exchange-approved Subscriber Entitlement Control.

• A Vendor may not provide access to a market data product to a Subscriber except through a unique Subscriber Entitlement.

• The Exchange will require each Vendor to provide a unique Subscriber Entitlement to each unique Subscriber.

• At prescribed intervals (normally monthly), the Exchange will require each Vendor to report each unique Subscriber Entitlement.

iv. Subscriber Entitlement Controls.

• A Subscriber Entitlement Control is the Vendor's process of permitting Subscribers' access to a market data product.

• Prior to using any Subscriber Entitlement Control or changing a previously approved Subscriber Entitlement Control, a Vendor must provide the Exchange with a demonstration and a detailed written description of the control or change and the Exchange must have approved it in writing.

• The Exchange will approve a Subscriber Entitlement Control if it allows only authorized, unique end-users or devices to access the market data product or monitors access to the market data product by each unique end-user or device.

• Vendors must design Subscriber Entitlement Controls to produce an audit report and make each audit report available to the Exchange upon request. The audit report must identify:

• Each entitlement update to the Subscriber Entitlement Control;

[4] *See* Securities Exchange Act Release Nos. 59544 (Mar. 9, 2009), 74 FR 11162 (Mar. 16, 2009) (SR–NYSE–2008–131) and 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR–NYSE–2010–22).

[5] *See* Securities Exchange Act Release No. 62181 (May 26, 2010), 75 FR 31488 (June 3, 2010) (SR–NYSE–2010–30).

[6] *See* SR–NYSE–2013–24.

[7] The NYSE OpenBook Bundle pricing package includes: (i) NYSE OpenBook Realtime, by which the Exchange makes NYSE OpenBook Realtime available on a snapshot basis, with updates distributed in real-time at intervals of one second; and (ii) NYSE OpenBook Ultra, by which the Exchange updates NYSE OpenBook information upon receipt of each displayed limit order, or upon an event that removes limit orders from NYSE OpenBook (*i.e.,* cancellation or execution). For no additional charge, the Exchange makes available to recipients of NYSE OpenBook additional data feeds containing NYSE BBO and Order Imbalance Information. *See* Securities Exchange Act Release No. 59544 (Mar. 9, 2009), 74 FR 11162 (Mar. 16, 2009) (SR–NYSE–2008–131).

[8] One $1,500 monthly access fee entitles a vendor to receive both the NYSE BBO data feed as well as the Exchange's NYSE Trades data feed. *See supra* n.5.

[9] *See* Securities Exchange Act Release Nos. 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR–NYSE–2010–22); 62181 (May 26, 2010), 75 FR 31488 (June 3, 2010) (SR–NYSE–2010–30); and 59290 (Jan. 23, 2009), 74 FR 5707 (Jan. 30, 2009) (SR–NYSE–2009–05).

- The status of the Subscriber Entitlement Control; and
- Any other changes to the Subscriber Entitlement Control over a given period.
- Only the Vendor may have access to Subscriber Entitlement Controls.

Vendors must count every Subscriber Entitlement, whether it be an individual person or a device. Thus, the Vendor's count would include every person and device that accesses the data regardless of the purpose for which the individual or device uses the data.

Vendors must report all Subscriber Entitlements in accordance with the following:

i. In connection with a Vendor's external distribution of the market data product, the Vendor should count as one Subscriber Entitlement each unique Subscriber that the Vendor has entitled to have access to the market data product. However, where a device is dedicated specifically to a single individual, the Vendor should count only the individual and need not count the device.

ii. In connection with a Vendor's internal distribution of a market data product, the Vendor should count as one Subscriber Entitlement each unique individual (but not devices) that the Vendor has entitled to have access to such market data.

iii. The Vendor should identify and report each unique Subscriber. If a Subscriber uses the same unique Subscriber Entitlement to gain access to multiple market data services, the Vendor should count that as one Subscriber Entitlement. However, if a unique Subscriber uses multiple Subscriber Entitlements to gain access to one or more market data services (*e.g.,* a single Subscriber has multiple passwords and user identifications), the Vendor should report all of those Subscriber Entitlements.

iv. Vendors should report each unique individual person who receives access through multiple devices as one Subscriber Entitlement so long as each device is dedicated specifically to that individual.

v. The Vendor should include in the count as one Subscriber Entitlement devices serving no entitled individuals. However, if the Vendor entitles one or more individuals to use the same device, the Vendor should include only the entitled individuals, and not the device, in the count.

Rationale for New Non-Display Usage Fee Structure

As noted in the original NYSE Unit-of-Count Policy proposal, ''technology has made it increasingly difficult to define 'device' and to control who has access to devices, [and] the markets have struggled to make device counts uniform among their customers.'' [10] Significant change has characterized the industry in recent years, stemming in large measure from changes in regulation and technological advances, which has led to the rise in automated and algorithmic trading. Additionally, market data feeds have become faster and contain a vastly larger number of quotes and trades. Today, a majority of trading is done by leveraging non-display devices consuming massive amounts of data. Some firms base their business models largely on incorporating non-display data into applications and do not require widespread data access by the firm's employees. Changes in market data consumption patterns have increased the use and importance of non-display data.

Applications that can be used in non-display devices provide added value in their capability to manipulate and spread the data they consume. Such applications have the ability to perform calculations on the live data stream and manufacture new data out of it. 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 the non-display data has become increasingly valuable to data recipients who can use it to generate substantial profits, it has become increasing 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.

For these reasons, the Exchange determined that its current fee structure, which is based on counting non-display devices, is no longer appropriate in light of market and technology developments and does not reflect the value of the non-display data and its many profit-generating uses for subscribers. As such, the Exchange, in conjunction with its domestic and foreign affiliate exchanges, undertook a review of its market data policies with a goal of bringing greater consistency and clarity to its fee structure; easing administration for itself, vendors, and subscribers; and setting fees at a level that better reflects the current value of the data provided. As a result of this review, the Exchange has determined to offer a new fee structure for display and non-display use of certain market data products. Initially, the Exchange will implement the new non-display use fee structure for NYSE OpenBook, NYSE BBO, and NYSE Trades, operative on April 1, 2013. The Exchange anticipates implementing a new display use fee structure later this year; until such time, existing fees for display use will apply.

Proposed Non-Display Usage Fees

The Exchange proposes to establish new monthly fees for non-display usage, which for purposes of the proposed fee structure will mean accessing, processing or consuming an NYSE data product delivered via direct and/or Redistributor [11] data feeds, for a purpose other than in support of its display or further internal or external redistribution. The proposed non-display fees will apply to the non-display use of the data product as part of automated calculations or algorithms to support trading decision-making processes or the operation of trading platforms (''Non-Display Trading Activities''). They include, but are not limited to, high frequency trading, automated order or quote generation and/or order pegging, or price

[10] *See* Securities Exchange Act Release No. 59544 (Mar. 9, 2009), 74 FR 11162 (Mar. 16, 2009) (SR–NYSE–2008–131). At least one other Exchange also has noted such administrative challenges. In establishing a non-display usage fee for internal distributors of TotalView and OpenView, NASDAQ Stock Market LLC (''NASDAQ'') noted that as ''the number of devices increase, so does the administrative burden on the end customer of counting these devices.'' *See* Securities Exchange Act Release No. 61700 (Mar. 12, 2010), 75 FR 13172 (Mar. 18, 2010) (SR–NASDAQ–2010–034).

[11] ''Redistributor'' means a vendor or any other person that provides an NYSE data product to a data recipient or to any system that a data recipient uses, irrespective of the means of transmission or access.

referencing for the purposes of algorithmic trading and/or smart order routing. Applications and devices that solely facilitate display, internal distribution, or redistribution of the data product with no other uses and applications that use the data product for other non-trading activities, such as the creation of derived data, quantitative analysis, fund administration, portfolio management, and compliance, are not covered by the proposed non-display fee structure and are subject to the current standard per-device fee structure. The Exchange reserves the right to audit data recipients' use of NYSE market data products in Non-Display Trading Activities in accordance with NYSE's vendor and subscriber agreements.

There will be two types of fees, which are described below. The first type of fee is for internal non-display use. The second type of fee is for managed non-display services. The current NYSE Unit-of-Count Policy will no longer apply to any non-display usage.[12]

Proposed Fees for Internal Non-Display Use

The proposed internal non-display use fees will apply to NYSE OpenBook, NYSE BBO, and NYSE Trades. Internal non-display use occurs when a data recipient either manages its own non-display infrastructure and controls the access to and permissioning of the market data product on its non-display applications or when the data recipient's non-display applications are hosted by a third party that has not been approved to provide the managed non-display services as described below.

The fee structure will have three categories, which recognize the different uses for the market data. Category 1 Fees apply where a data recipient's non-display use of real time market data is for the purpose of principal trading. Category 2 Fees apply where a data recipient's non-display use of market data is for the purpose of broker/agency trading, *i.e.,* trading-based activities to facilitate the recipient's customers' business. If a data recipient trades both on a principal and agency basis, then the data recipient must pay both categories of fees. Category 3 Fees apply where a data recipient's non-display use of market data is, in whole or in part, for the purpose of providing reference prices in the operation of one or more trading platforms, including but not limited to multilateral trading facilities, alternative trading systems, broker crossing networks, dark pools, and systematic internalization systems. A data recipient will not be liable for Category 3 Fees for those market data products for which it is also paying Category 1 and/or Category 2 Fees.

The fees for internal non-display use per data recipient organization for each category will be as follows:

Product	Category 1 trading as principal (per month)	Category 2 trading as broker/agency (per month)	Category 3 trading platform (per month)
NYSE OpenBook	$5,000	$5,000	$5,000
NYSE BBO	1,500	1,500	1,500
NYSE Trades	2,000	2,000	2,000

Subscribers to NYSE OpenBook, which includes access to NYSE BBO and NYSE Order Imbalances, are not required to subscribe to these two individual services as part of the non-display activity for these products.[13] Subscribers who are not currently subscribing to NYSE OpenBook Bundle pricing package[14] will be responsible for the individual product licenses for the non-display activity.

For internal non-display use, there will be no reporting requirements regarding non-display device counts, thus doing away with the administrative burdens described above. Data recipients will be required to declare the market data products used within their non-display trading applications by executing an NYSE Euronext Non-Display Usage Declaration.

Proposed Fees for Managed Non-Display Services

The Exchange also proposes to establish fees for managed non-display services for NYSE OpenBook and NYSE Trades. Under the managed non-display service, a data recipient's non-display applications must be hosted by a Redistributor approved by the Exchange, and this Redistributor must manage and control the access to NYSE OpenBook and/or NYSE Trades for these applications and may not allow for further internal distribution or external redistribution of these market data products. The Redistributor of the managed non-display services and the data recipient must be approved under the current NYSE Unit-of-Count policy described above,[15] which will no longer be available for non-display use after the proposed fees are implemented. If a data recipient is receiving NYSE OpenBook and/or NYSE Trades for Non-Display Trading Activities from a Redistributor that is not approved under the NYSE Unit-of-Count policy, then the internal non-display fees described above will apply.

The fees for managed non-display services per data recipient organization will be as follows:

Product	Managed non-display use fee (per month)
NYSE OpenBook	$2,000
NYSE Trades	700

Data recipients will not be liable for managed non-display fees for those market data products for which they pay the internal non-display fee.

Upon request, a Redistributor offering managed non-display services must provide the Exchange with a list of data recipients that are receiving NYSE OpenBook or NYSE Trades through the Redistributor's managed non-display service. Data recipients of the managed non-display service have no additional reporting requirements, thus easing the administrative burdens described above.

NYSE OpenBook Redistribution Fee

The Exchange proposes to establish a monthly redistribution fee of $3,000 for NYSE OpenBook. The Exchange believes that it is reasonable to charge this redistribution fee because vendors receive value from redistributing the

[12] Existing customers that are approved for the NYSE Unit-of-Count Policy for display usage may continue to follow that Policy until the new display fees are implemented.

[13] There is currently a $500/month access fee for the NYSE Order Imbalances data feed.

[14] *See supra* n.7

[15] *See supra* n.9.

data in their business products for their customers.

Examples

Broker-Dealer A obtains NYSE OpenBook directly from the Exchange for internal use and does not fall under the NYSE Unit-of-Count Policy. Broker-Dealer A trades both on a principal and agency basis and has (i) 80 individual persons who use 100 display devices and (ii) 50 non-display devices.

• Under the current fee schedule, Broker-Dealer A pays the Exchange the $5,000 access fee plus $60 for each of the 100 display devices (although 80 individual persons use them, the number of devices is counted), or $6,000, and $60 for each of the 50 non-display devices, or $3,000, for a total of $14,000 per month.

• Under the proposed fee schedule, Broker-Dealer A would pay the Exchange the $5,000 access fee plus $60 for each of the 100 display devices, or $6,000, and Category 1 and Category 2 fees for internal non-display use, or $10,000, for a total of $21,000 per month. No redistribution fee would be charged.

Broker-Dealer B, which only trades as principal, obtains NYSE OpenBook from Vendor X. Broker-Dealer B and Vendor X are both approved for the NYSE Unit-of-Count Policy. Broker-Dealer B has (i) 10 individual persons who use 12 display devices and (ii) 5 non-display devices.

• Under the current fee schedule, Vendor X pays the $5,000 access fee and Broker-Dealer B pays $900 ($60 for the 10 individual persons (under the NYSE Unit-of-Count Policy, the larger number of display devices is not counted), or $600, plus $60 for each of the 5 non-display devices, or $300).

• Under the proposed fee schedule, Broker-Dealer B would pay $600 as it does today for its individual persons using display devices, and $2,000 for managed non-display use, for a total of $2,600 per month in fees. Vendor X would pay the $5,000 access fee and the $3,000 redistribution fee, for a total of $8,000 per month.

Correction to Market Data Fee Schedule

The Exchange recently created a Market Data Fee Schedule. The Exchange proposes to correct the subscriber fee line for NYSE Trades to reflect that there is only a professional subscriber fee and no non-professional subscriber fee.[16]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[17] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[18] 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.

As described in detail in the section ''Rationale for New Non-Display Usage Fee Structure'' above, which is incorporated by reference herein, technology has made it increasingly difficult to define ''device'' and to control who has access to devices. Significant change has characterized the industry in recent years, stemming in large measure from changes in regulation and technological advances, which has led to the rise in automated and algorithmic trading, which have the potential to generate substantial profits. Indeed, data used in a single non-display device running a single trading algorithm can generate large profits. 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. Rather, the Exchange believes that its proposed flat fee structure for non-display use is reasonable, equitable, and not unfairly discriminatory in light of these developments.

Other exchanges also have established differentiated fees based on non-display usage, including a flat or enterprise fee. For example, NASDAQ professional subscribers pay monthly fees for non-display usage based upon direct access to NASDAQ Level 2, NASDAQ TotalView, or NASDAQ OpenView, which range from $300 per month for customers with one to 10 subscribers to $75,000 for customers with 250 or more subscribers.[19] In addition, NASDAQ OMX PHLX, Inc. (''Phlx'') offers an alternative $10,000 per month ''Non-Display Enterprise License'' fee that permits distribution to an unlimited number of internal non-display subscribers without incurring additional fees for each internal subscriber.[20] The Non-Display Enterprise License covers non-display subscriber fees for all Phlx proprietary direct data feed products and is in addition to any other associated distributor fees for Phlx proprietary direct data feed products. NASDAQ OMX BX, Inc. (''BX'') also offers an alternative non-display usage fee of $16,000 for its BX TotalView data feed.[21] NASDAQ and Phlx also both offer managed non-display data solutions at higher overall fees than the Exchange proposes to charge.[22]

The Exchange also believes that it is reasonable, equitable, and not unfairly discriminatory to charge relatively lower fees for managed non-display services because the Exchange expects that they will generally be used by a small number of Redistributors and data recipients that are currently eligible for the NYSE Unit-of-Count Policy. These data recipients are constrained by whatever applications are available via Redistributors operating in the Exchange's co-location center and other hosted facilities. In comparison, a data recipient that elects internal non-display use is free to use the data in any manner it chooses and create new uses in an unlimited number of non-display devices. The lack of constraint in this regard will make the non-display usage of the data more valuable to such an internal use data recipient.

The proposed redistribution fee for NYSE OpenBook also is reasonable because it is comparable to other redistribution fees that are currently charged by other exchanges.[23] As noted

[16] *See* Securities Exchange Act Release No. 59309 (Jan. 28, 2009) 74 FR 6073 (Feb. 4, 2009) (SR–NYSE–2009–04).

[17] 15 U.S.C. 78f(b).

[18] 15 U.S.C. 78f(b)(4), (5).

[19] *See* NASDAQ Rule 7023(b)(4).

[20] *See* Securities Exchange Act Release No. 68576 (Jan. 3, 2013), 78 FR 1886 (Jan. 9, 2013) (SR–Phlx–2012–145). Alternatively, Phlx charges each professional subscriber $40 per month.

[21] *See* NASDAQ OMX BX Rule 7023(a)(2). Alternatively, BX charges each professional subscriber $40 per month.

[22] NASDAQ established fees for a Managed Data Solution to Distributors, which includes a monthly Managed Data Solution Administration fee of $1,500 and monthly Subscriber fees ranging from $60 to $300. *See* NASDAQ Rule 7026(b). Phlx also established a Managed Data Solution, which includes a monthly Managed Data Solution Administration fee of $1,500 and a monthly Subscriber fee of $250. The monthly License fee is in addition to Phlx's monthly Distributor fee of $2,500 (for external usage), and the $250 monthly Subscriber fee is assessed for each Subscriber of a Managed Data Solution. *See* Securities Exchange Act Release No. 67466 (July 19, 2012), 77 FR 43629 (July 25, 2012) (SR–Phlx–2012–93).

[23] NYSE Arca, Inc. (''NYSE Arca'') charges a $3,000 per month redistribution fee for the NYSE Arca Integrated Feed, which includes depth-of-book data. *See* Securities Exchange Act Release No. 66128 (Jan. 10, 2012), 77 FR 2331 (Jan. 17, 2012) (SR–NYSEArca–2011–96). In addition, NYSE Arca and NYSE MKT LLC (''NYSE MKT'') charge redistribution fees of $2,000 per month for certain proprietary options market data products. *See* Securities Exchange Act Release Nos. 68005 (Oct.

Continued

above, 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.

The Exchange has not recently raised the market data fees for these three proprietary products. The Exchange set the NYSE OpenBook professional subscriber fee at $60 per device in 2006, the NYSE Trades subscriber fee at $15 per device in 2009, and the NYSE BBO professional subscriber fee at $15 per device in 2010.[24] The Exchange believes that the new fee schedule, which may result in certain vendors and data recipients paying more than they have in the last several years, is fair and reasonable in light of market and technology developments. The current per-device fee structure no longer reflects the significant overall value that non-display data can provide in trading algorithms and other uses that provide professional users with the potential to generate substantial profits. The Exchange believes that it is equitable and not unfairly discriminatory to establish an overall monthly fee that better reflects the value of the data to the data recipients in their profit-generating activities and does away with the burden of counting non-display devices.

The Exchange also notes that products described herein are entirely optional. Firms are not required to purchase NYSE OpenBook, NYSE BBO, or NYSE Trades. Firms have a wide variety of alternative market data products from which to choose.[25] Moreover, the Exchange is not required to make these proprietary data products available or to offer any specific pricing alternatives to any customers.

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

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

Id. at 535 (quoting H.R. Rep. No. 94–229 at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 323). The court agreed with the Commission's conclusion that ''Congress intended that 'competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.' '' [26]

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.[27] In addition, the existence of alternatives to these data products, such as proprietary last sale data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach, and the Exchange incorporates by reference into this proposed rule change its affiliate's analysis of this topic in another rule filing.[28]

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

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. An exchange's ability to price its proprietary 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 last sale 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 each other for listings and order flow and sales of market data itself, providing virtually limitless opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market.

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. The U.S. Department of Justice also has acknowledged the aggressive competition among exchanges, including for the sale of proprietary market data itself. In announcing that the bid for NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. had been abandoned, 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.'' [29]

It is common for broker-dealers to further exploit this recognized competitive constraint by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex''

9, 2012), 77 FR 63362 (Oct. 16, 2012) (SR–NYSEArca–2012–106), and 68004 (Oct. 9, 2012), 77 FR 62582 (Oct. 15, 2012) (SR–NYSEMKT–2012–49). All distributors of a NASDAQ Last Sale Data Feed also pay a monthly fee of $1,500. *See* NASDAQ Rule 7039(d).

[24] *See* Securities Exchange Act Release Nos. 53585 (March 31, 2006), 71 FR 17934 (April 7, 2006) (SR–NYSE–2004–43 and SR–NYSE–2005–32); 59606 (Mar. 19, 2009), 74 FR 13293 (Mar. 26, 2009) (SR–NYSE–2009–04); and 62181 (May 26, 2010), 75 FR 31488 (June 3, 2010) (SR–NYSE–2010–30).

[25] *See supra* nn.19–22.

[26] *NetCoalition,* 615 F.3d at 535.

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

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

[29] 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.*

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.'' [30]

In addition, in the case of products that are distributed through market data vendors, the market data vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Internet portals, such as Google, impose price discipline by providing only data that they believe will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Similarly, vendors will not elect to make available the NYSE products described herein unless their customers request them, and customers will not elect to purchase them unless they can be used for profit-generating purposes. All of these operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade executions are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and market data as a unified cost of doing business with the exchange.

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a joint platform and have common costs.[31] 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.[32]

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products. Thus, because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 12 equities self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives. The large number of SROs, BDs, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATS, and BD 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, NYSE Arca, NASDAQ OMX, BATS, and Direct Edge.

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[30] 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.

[31] *See* Securities Exchange Act Release No. 62887 (Sept. 10, 2010), 75 FR 57092, 57095 (Sept. 17, 2010) (SR–Phlx–2010–121); Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110); and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR–NASDAQ–2010–111) (''all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''); *see also* 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.*

[32] *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.'').

The fact that proprietary data from ATSs, BDs, 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. 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. Because market data users can thus find suitable substitutes for most proprietary market data products,[33] 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. As noted above, the proposed non-display fees for NYSE OpenBook, NYSE Trades, and NYSE BBO are generally lower than the maximum non-display fees charged by other exchanges such as NASDAQ, Phlx, and BX for comparable products.[34] The proposed redistribution fee for NYSE OpenBook also is comparable to the other exchanges' similar fees.[35]

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. Today, BATS and Direct Edge provide certain market data at no charge on their Web sites in order to attract more order flow, and use revenue rebates from resulting additional executions to maintain low execution charges for their users.[36]

Further, data products are valuable to certain end users only insofar as they provide information that end users expect will assist them or their customers. The Exchange believes the proposed non-display fees will benefit customers by providing them with a clearer way to determine their fee liability for non-display devices, and with respect to internal use, to obviate the need to count such devices. The Exchange further believes that only vendors that expect to derive a reasonable benefit from redistributing the market data products described herein will choose to become Redistributors and pay the attendant monthly fees.

In establishing the proposed fees, 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, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

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

The Exchange published draft Data Policies on its Web site on November 20, 2012. Among other things, the Data Policies addressed non-display use for certain market data products. The Exchange solicited comments on the Data Policies in the form of a survey. The Exchange received 14 comments relating to non-display use. Exhibit 2 contains a copy of the notice soliciting comment, the Data Policies, the 14 comments received in alphabetical order, and an alphabetical listing of such comments.

Nine commenters[37] requested greater clarity with respect to the definition and examples of non-display use. Specifically, the commenters requested that the Exchange provide a consistent definition of non-display use. As described above, the definition of non-display use will be accessing, processing or consuming an NYSE data product delivered via direct and/or Redistributor data feeds, for a purpose other than in support of its display or further internal or external redistribution. The Exchange believes that this definition addresses the comments and will clearly describe the types of activities that will qualify for the proposed fee. The Exchange also provided examples for illustrative purposes, which are not exclusive.

Four commenters[38] also questioned whether price referencing, compliance, accounting or auditing activities, and derived data should be considered non-display use. The Data Policies listed price referencing, compliance, accounting or auditing activities, and derived data as examples of non-display usage; however, as discussed above, the Exchange has determined that price referencing for the purposes of algorithmic trading and/or smart order routing would be considered Non-Display Trading Activities, and applications that use the data product for non-trading activities, such as compliance, accounting or auditing activities, and derived data are not covered by the non-display fees and are subject to the current standard per-device fee structure.

Three commenters[39] requested clarity on the NYSE Unit-of-Count Policy for non-display use. As discussed above, the NYSE Unit-of-Count Policy will continue to apply to Redistributors and customers that have been approved under the NYSE Unit-of Count Policy. Under the proposed rule change, the pricing structure for display usage will remain the same. However, for non-display usage, customers approved under the NYSE Unit-of-Count Policy will be eligible for the managed non-display services at the managed non-display fee, which is offered either directly from the Exchange or through a Redistributor.

Two commenters[40] asked for more detail on the managed non-display service, which the Exchange has provided above.

Three commenters[41] asked for examples of how the Exchange would charge for customers that use both display and non-display devices. The Exchange believes that the pricing examples provided above are responsive to this request. One commenter[42] stated that the proposed fees are excessive. The Exchange believes that the proposed fees are reasonable, equitable,

[33] *See supra* nn.19–22.

[34] *Id.*

[35] *See supra* n.23.

[36] 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.

[37] Barclays, Brown Brothers Harriman, CMC Markets, Deutsche Bank, Flowtraders, Nomura, Threadneedle, Transtrend BV, and UBS.

[38] Barclays, CMC Markets, Transtrend BV, and UBS.

[39] Barclays, Essex Radez LLC, and UBS.

[40] FXCM and RTS Group.

[41] Essex Radez LLC, Fidelity Market Data, and Lloyds TSB Bank plc.

[42] Essex Radez LLC.

and not unfairly discriminatory for the reasons discussed in Section 3(b) above.

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) [43] of the Act and subparagraph (f)(2) of Rule 19b–4 [44] 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) [45] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2013–25 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 20549–1090.

All submissions should refer to File Number SR–NYSE–2013–25. 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 the 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–NYSE–2013–25 and should be submitted on or before April 29, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[46]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–08098 Filed 4–5–13; 8:45 am]

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[43] 15 U.S.C. 78s(b)(3)(A).

[44] 17 CFR 240.19b–4(f)(2).

[45] 15 U.S.C. 78s(b)(2)(B).

[46] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69269; File No. SR–Phlx–2013–37]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Its FLEX Option No Minimum Value Size Pilot Program to March 28, 2014

April 2, 2013.

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 March 27, 2013, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II 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 is filing with the Commission a proposal to amend Phlx Rule 1079 (FLEX Index, Equity and Currency Options) to extend a pilot program that eliminates minimum value sizes for FLEX index options and FLEX equity options (together known as ''FLEX Options'').[3]

The text of the amended Exchange rule is set forth immediately below.

Additions are *italicized* and deletions are [bracketed].

* * * * *

Rule 1079. FLEX Index, Equity and Currency Options

A Requesting Member shall obtain quotes and execute trades in certain non-listed FLEX options at the specialist post of the non-FLEX option on the Exchange. The term ''FLEX option'' means a FLEX option contract that is traded subject to this Rule. Although FLEX options are generally subject to the rules in this section, to the extent that the provisions of this Rule are inconsistent with other applicable Exchange rules, this Rule takes precedence with respect to FLEX options.

(a)–(f) No Change.

* * * *Commentary:*

.01 Notwithstanding subparagraphs (a)(8)(A)(i) and (a)(8)(A)(ii) above, for a pilot period ending March [29]*28,* [2013]*2014,* there shall be no minimum value size requirements for FLEX options.

* * * * *

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/,* 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

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

[2] 17 CFR 240.19b–4.

[3] In addition to FLEX Options, FLEX currency options are also traded on the Exchange. These flexible index, equity, and currency options provide investors the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices; and may have expiration dates within five years. *See* Rule 1079. FLEX currency options traded on the Exchange are also known as FLEX World Currency Options (''WCO'') or Foreign Currency Options (''FCO''). The pilot program discussed herein does not encompass FLEX currency options.