Number SR–NASDAQ–2013–074 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–NASDAQ–2013–074. 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–NASDAQ–2013–074, and should be submitted on or before June 6, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[26]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–11636 Filed 5–15–13; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69554; File No. SR–NYSEArca–2013–47]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Non-Display Usage Fees and Amending the Professional End-User Fees for NYSE Arca Options Market Data

May 10, 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 May 1, 2013, 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 Substance of the Proposed Rule Change

The Exchange proposes to establish non-display usage fees and to amend the Professional End-User fees for NYSE Arca Options market data, operative on May 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.

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

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

[3] 17 CFR 240.19b–4.

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

1. Purpose

The Exchange proposes to establish non-display usage fees and to amend the Professional End-User fees for NYSE Arca Options market data, operative on May 1, 2013. The subsections below describe (1) the background on the current fees for these real-time products; (2) the rationale for creating the new non-display usage fee structure; (3) the proposed fee change for non-display usage by Professional End-Users; (4) the proposed fee change for display usage by Professional End-Users; and (5) an example comparing the current and proposed fees.

Background

On October 1, 2012, the Exchange began offering the following real-time options market data products: 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, ''Arca Options Products'').[4] Fees cover all six products.[5]

The Exchange charges an access fee of $3,000 per month and a redistribution fee of $2,000 per month for the Arca Options Products.

The Exchange charges Professional End-Users $50 per month for each ''User per Source'' for the receipt and use of the Arca Options Products.[6] 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. A ''Source'' is a Professional End-User-controlled

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

[5] *See* SR–NYSEArca–2013–41 (establishing a fee schedule) and Securities Exchange Act Release No. 68005 (Oct. 9, 2012), 77 FR 63362 (Oct. 16, 2012) (SR–NYSEArca–2012–106) (establishing fees for Arca Options Products). Arca Options Products are not offered with separate fees for the individual underlying products.

[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).

source of data from a Redistributor,[7] such as a data feed; in this case, it is the Arca Options Products. An access identifier (''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] The term ''device'' includes display and non-display devices.

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.

The following sections describe the unit-of-count for different types of access to and usage of Arca Options Products.

Redistributor 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) is charged.

Internal Use

Professional End-Users using 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.[10]

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 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. (A virtual device can be either a display or non-display device.) 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.[11]

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

[7] Under the current User per Source policy, 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. *See infra* n.13.

[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, an 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. *See supra* n.5.

[10] The Professional End-User must identify the User associated with each Access ID. Where an Access ID cannot be associated to a natural person User (e.g., because it is associated with a non-display device), the Professional End-User must treat that Access ID as a User per Source.

[11] 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.

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.

Rationale for New Non-Display Usage Fee Structure

As noted in a previous market data fee filing by the Exchange's affiliate, ''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.'' [12] 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 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 in certain instances is based on counting non-display devices, does not adequately reflect market and technology developments and 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 amend its fee schedule.

Proposed Non-Display Usage Fees

The Exchange proposes to establish new monthly fees for non-display usage, which will be consistent with the structure of certain non-display fees established for certain equity market data products of the Exchange and its affiliates.[13] Non-display usage will mean accessing, processing or consuming an NYSE Arca data product delivered via direct and/or Redistributor [14] 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 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 fee structure. The Exchange reserves the right to audit data recipients' use of NYSE Arca market data products in Non-Display Trading Activities in accordance with NYSE Arca's vendor and subscriber agreements.

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

[12] *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).

[13] *See* Securities Exchange Act Release Nos. 69315 (Apr. 5, 2013), 78 FR 21668 (Apr. 11, 2013) (SR–NYSEArca–2013–37); 69278 (Apr. 2, 2013), 78 FR 20973 (Apr. 8, 2013) (SR–NYSE–2013–25); 69285 (Apr. 3, 2013), 78 FR 21172 (Apr. 9, 2013) (SR–NYSEMKT–2013–32). The Exchange and its affiliates established fees for internal use and for managed non-display services. Under the latter, a data recipient's non-display applications must be hosted by a Redistributor approved by the respective exchange. The Exchange does not propose to establish fees for managed non-display services for options market data products at this time.

[14] ''Redistributor'' will be defined to mean a vendor or any other person that provides an NYSE Arca data product to a data recipient or to any system that a data recipient uses, irrespective of the means of transmission or access. Although the text differs from the definition in n.7 *supra,* the Exchange does not believe there is any material difference in the definition.

systematic internalization systems.[15] 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 NYSE Arca Options non-display use per data recipient organization for each category will be as follows:

Category 1 trading as principal (per month)	Category 2 trading as broker/agency (per month)	Category 3 trading platform (per month)
$1,000	$1,000	$1,000

For 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 Tiered Fee Structure for Display Usage by Professional End-Users

The Exchange proposes to introduce a tiered fee structure for display usage by Professional End-Users based on the number of users. Specifically, the Exchange proposes to charge the following monthly fees for Professional End-Users:

Professional end-users	Fee per professional end-user
1–50	$50
51–100	35
101+	20

Example

Broker-Dealer A obtains Arca Options Products directly from the Exchange for internal use. 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 $3,000 access fee plus $50 for each of 80 individuals who use display devices, or $4,000, and $50 for each of the 50 non-display devices, or $2,500, for a total of $9,500 per month.

• Under the proposed fee schedule, Broker-Dealer A will pay the Exchange the $3,000 access fee, plus $50 for each of the first 50 Professional End-Users of display devices and $35 for the remaining 30 Professional End-Users of display devices, or $3,550, plus Category 1 and Category 2 fees for non-display use, or $2,000, for a total of $8,550 per month. The new fees will result in a $950 monthly savings.

No redistribution fee is charged in either case.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[16] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[17] 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 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.

The Exchange and its affiliates already have established non-display fees for certain equity market data products.[18] Other exchanges also have established differentiated fees based on non-display usage, including a flat or enterprise fee, for options market data. For example, NASDAQ Options Market (''NOM'') offers a $2,500 per month ''Non-Display Enterprise License'' fee that permits distribution of Best of NASDAQ Options (''BONO'') or NASDAQ ITCH-to-Trade Options (''ITTO'') to an unlimited number of non-display devices within a firm without any per user charge.[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]

The Exchange believes that the new fee schedule, which could potentially result in certain data recipients with a small number of non-display devices paying more than they have previously, is fair and reasonable in light of market and technology developments. The current fee structure does not properly reflect the significant overall value that non-display data can provide in trading algorithms and other uses that provide

[15] The Exchange is not aware of any such trading platform for options products, but is including the category to maintain consistency with the structure of its internal non-display use fees for equities products. *See supra* n.13.

[16] 15 U.S.C. 78f(b).

[17] 15 U.S.C. 78f(b)(4), (5).

[18] *See supra* n.13.

[19] *See* NASDAQ Options Rules Chapter XV, Section 4. Alternatively, NOM charges each professional subscriber $5 per month for BONO and $10 per month for ITTO.

[20] *See* Section IX of the NASDAQ OMX PHLX LLC Pricing Schedule and 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 $20 per month for BX TotalView for NASDAQ issues and $20 per month for BX TotalView for NYSE and regional issues.

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 costs and administrative burdens of counting non-display devices. It will also result in a more consistent pricing structure between equities and options markets.

The Exchange also believes that the proposed tiered pricing structure for display usage by Professional End-Users is reasonable because other exchanges use tiered pricing for professional users. For example, professional subscribers pay a monthly fee for non-display usage based upon direct access to NASDAQ Level 2, NASDAQ TotalView, or NASDAQ OpenView ranging from $300 per month for 1–10 subscribers to $75,000 per month for 250+ subscribers.[22] In addition, the Consolidated Tape Association (''CTA'') historically has offered CTA Tape A Market Data, which includes consolidated last sale and bid-ask data, for a monthly fee for professional subscribers on a tiered, sliding scale basis under which subscribers pay less per device as the number of devices increases.[23]

The Exchange also believes that the proposed display fees are reasonable because the Exchange is not increasing its fees for any current data recipient, but rather lowering fees for data recipients with a large number of Professional End-Users. The Exchange believes that the proposed display fees and tiered pricing structure are equitable and not unfairly discriminatory because they will encourage customers to provide access to the Exchange's market data to a greater number of Professional End-Users. In addition, encouraging greater access through reduced fees for display use of the Exchange's market data will increase transparency of the market, which would benefit all market participants.

The Exchange also notes that purchasing Arca Options Products is entirely optional. Firms are not required to purchase them and have a wide variety of alternative options market data products from which to choose.[24] 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.''' [25] The Exchange believes that this is also true with respect to options markets.

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.[26] 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 analysis of this topic in another rule filing.[27]

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 products is constrained by actual competition for the sale of proprietary data products, the joint product nature of exchange platforms, and the existence of alternatives to the Exchange's proprietary data.

The Existence of Actual Competition. The market for proprietary options data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary for the creation of proprietary data and strict pricing discipline to the proprietary products themselves. Numerous exchanges compete with each other for options trades and sales of options market data itself, providing virtually limitless opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own options market data. Proprietary options data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market.

Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary options data products and therefore constrain markets from overpricing proprietary market data. The U.S. Department of Justice has acknowledged the aggressive competition among exchanges, including for the sale of proprietary market data itself. In 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.'' [28] Similarly, the options markets

[22] *See* NASDAQ Rule 7023.

[23] *See, e.g.,* Exhibit E of CTA Plan dated July 25, 2012, Securities Exchange Act Release No. 69157 (Mar. 18, 2013), 78 FR 17946 (Mar. 25, 2013) (SR–CTA/CQ–2013–01).

[24] *See supra* nn.19–21.

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

[26] 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.

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

[28] 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.*

vigorously compete with respect to options data products.[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. In addition, in the case of products that are distributed through market data vendors, the market data vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Vendors will not elect to make available the Arca Options Products unless their customers request it, and data recipients with Professional End-Users 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 execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become. Further, data products are valuable to many end-users only insofar as they provide information that end-users expect will assist them in making trading decisions. In that respect, the Exchange believes that the Arca Options Products will offer options market data information that is useful for professionals in making trading decisions based on both display and non-display usage, the latter of which includes, as described above, high frequency trading, automated order and quote generation and order pegging, and price referencing for the purposes of algorithmic trading and smart order routing.

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.[30] 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.[31]

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 11 self-regulatory organization (''SRO'') options markets. One of the 11 just launched operations in December 2012; another one of the 11 SROs has announced plans to launch a second options exchange,[32] which would bring the total number of options SROs to 12. The Exchange believes that these new entrants demonstrate that competition is robust.

Each SRO market competes to produce transaction reports via trade executions. Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low

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

[30] *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.*

[31] *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.'').

[32] Press Release, SEC Publishes ISE's Form 1 Application for a Second Options Exchange (Mar. 5, 2013), available at *http://www.ise.com/assets/documents/AboutISE/PressRelease/CompanyNews/2013/20130305$SEC_Publishes_ISEs_Form_1_Application_for_a_Second_Options_Exchange.pdf.*

prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives. The large number of SROs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including but not limited to the Exchange; NYSE MKT LLC; Chicago Board Options Exchange, Incorporated; C2 Options Exchange, Incorporated; International Securities Exchange, LLC; NASDAQ; Phlx; BX; BATS Exchange, Inc. (''BATS''); and Miami International Securities Exchange LLC. Because market data users can thus find suitable substitutes for most proprietary market data products,[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 Arca Options 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 display fees are being reduced for data recipients with relatively larger numbers of Professional End-Users.

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. As noted above, a new options exchange launched in December 2012, and a 12th options exchange has filed for Commission approval to commence operations. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS, and Direct Edge. 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.[35]

Further, data products are valuable to certain end users only insofar as they provide information that end users expect will benefit them in their trading decisions. As noted above, non-display data can be particularly valuable for high frequency trading, automated order and quote generation and order pegging, and price referencing for the purposes of algorithmic trading and smart order routing, whereas display data can be used for monitoring real-time market conditions and trading activity. The Exchange believes the proposed fees will benefit customers by providing them with a clearer way to determine their fee liability for non-display devices and reduced prices for customers with larger numbers of display devices.

In establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary options data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

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

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 12 comments relating to non-display use. Exhibit 2 contains a copy of the notice soliciting comment, the Data Policies, the 12 comments received in alphabetical order, and an alphabetical listing of such comments.

Nine commenters[36] 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 Arca 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[37] 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[38] 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[39] stated that the proposed fees are excessive. The Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory for the reasons discussed in Section 3(b) above.

[33] *See supra* nn.19–21.

[34] *Id.*

[35] 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.

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

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

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

[39] Essex Radez LLC.

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)[40] of the Act and subparagraph (f)(2) of Rule 19b–4[41] 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)[42] 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–NYSEArca 2013–47 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–NYSEArca–2013–47. 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 publicly available. All submissions should refer to File Number SR–NYSEArca–2013–47 and should be submitted on or before June 6, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–11635 Filed 5–15–13; 8:45 am]

BILLING CODE 8011–01–P

[40] 15 U.S.C. 78s(b)(3)(A).

[41] 17 CFR 240.19b–4(f)(2).

[42] 15 U.S.C. 78s(b)(2)(B).

[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69552; File No. SR–CHX–2013–09]

Self Regulatory Organizations; Chicago Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule Governing the Anti-Money Laundering Compliance Program

May 10, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1], and Rule 19b–4[2] thereunder, notice is hereby given that on May 2, 2013, the Chicago Stock Exchange, Inc. (''CHX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''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

CHX proposes to amend its Anti-Money Laundering Compliance Program (the ''AMLCP''), effective May 2, 2013. The proposed rule change would clarify the frequency with which a Participant Firm must conduct independent testing of its AMLCP and would establish the qualifications of the person designated to perform AMLCP testing as well as provide guidelines for establishing the independence of the person performing the test. The text of this proposed rule change is available on the Exchange's Web site at *http://www.chx.com/rules/proposed_rules.htm*, 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, CHX 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 Statutory Basis for, the Proposed Rule Changes

1. Purpose

Financial institutions, including broker-dealers, must develop and implement Anti-Money Laundering (''AML'') programs pursuant to the Bank Secrecy Act (''BSA''),[3] as amended by Section 352 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (''PATRIOT Act'').[4] Consistent with Department of Treasury regulation 31 CFR 103.120 under the BSA, Exchange Article 6, Rule 12 requires that each Participant Firm develop and implement a written AMLCP that specifies the minimum requirement for these programs.

The AMLCP must include the development of internal policies, procedures and controls; the designation of a person to implement and monitor the day-to-day operations and internal controls of the program

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

[2] 17 CFR 240.19b–4.

[3] 31 U.S.C. 5311 *et seq.*

[4] Public Law 107–56, 115 Stat. 272 (2001).