

proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>12</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>13</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that it believes that waiver of the 30-day operative delay is appropriate because the Commission has already approved the adoption of the new MPL Order type. In addition, the Exchange stated that it has not yet implemented the MPL Order out of concern that the existing rule text would limit the opportunities for execution. By waiving the operative delay, the Exchange would be able to expeditiously make MPL Orders, including MPL-ALO Orders, available to member organizations in a manner that is consistent with existing Rule 72, thereby enhancing order execution opportunities for all member organizations. Thus, the Exchange believes that the proposed rule change would protect investors and the public interest because it would enable all interest that is eligible to interact at a price point to be considered for a trade with an MPL-ALO Order. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposed rule change to be operative upon filing.<sup>14</sup>

Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

<sup>11</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>14</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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)<sup>15</sup> of the Act to determine whether the proposed rule 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2014-07 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-2014-07. 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

<sup>15</sup> 15 U.S.C. 78s(b)(2)(B).

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-2014-07 and should be submitted on or before March 4, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014-02876 Filed 2-10-14; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71483; File No. SR-NYSEArca-2014-12]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending the Fees for NYSE ArcaBook

February 5, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 27, 2014, 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 amend the fees for NYSE ArcaBook. The Exchange proposes to implement the fee changes effective February 1, 2014. The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

**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 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 Change*

1. Purpose

The Exchange proposes to amend the fees for NYSE ArcaBook. The Exchange

proposes to implement the fee changes effective February 1, 2014.

NYSE ArcaBook is a real-time market data product that is a compilation of all limit orders resident in the NYSE Arca limit order book.<sup>3</sup> The Exchange charges the following monthly display fees for NYSE ArcaBook:

Access fee .....	\$750
Redistribution Fee .....	\$1,500
Subscriber Fees .....	Tape A & B Securities (including ETFs) Professional: \$15 Non-professional: \$5. Tape C Securities (excluding ETFs) Professional: \$15 Non-professional: \$5. Non-professional Fee Cap: \$20,000.

The Exchange proposes to increase the monthly access fee from \$750 to \$2,000 and to offer Tape A and B Securities (including ETFs) and Tape C Securities (excluding ETFs) for a single monthly fee of \$40 for professional subscribers and \$10 for non-professional subscribers for display use. The Exchange would no longer offer separate pricing for the Tape C Securities (excluding ETFs) data. The Exchange has determined not to separately offer the Tape C option in order to have greater ease of management. The Exchange also notes that it has not increased NYSE ArcaBook access fees or the subscriber fees for display use since they were originally proposed in 2006.<sup>4</sup>

The Exchange proposes to make a technical change to remove the operative date for the NYSE ArcaBook redistribution fee, but does not otherwise propose any changes to the NYSE ArcaBook redistribution fee, non-professional fee cap, or non-display fees at this time. The Exchange notes that the access fee applies to all users of NYSE ArcaBook, regardless of whether they elect display, non-display, and/or managed non-display use.

The Exchange further believes that the proposed rule change is consistent with the market-based approach of the Securities and Exchange Commission ("Commission"). The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (DC Cir. 2010), upheld reliance by the 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.'" <sup>5</sup>

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for proprietary market data and that the Commission can rely upon such evidence in concluding that the fees proposed in this filing are the product of competition and therefore satisfy the relevant statutory standards.<sup>6</sup> In addition, the existence of alternatives to NYSE ArcaBook, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach.<sup>7</sup> The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.<sup>8</sup>

<sup>3</sup> See SR-NYSEArca-2014-07.

<sup>4</sup> See Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770 (Dec. 9, 2008) (SR-NYSEArca-2006-21).

<sup>5</sup> *NetCoalition*, 615 F.3d at 535.

<sup>6</sup> 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.

<sup>7</sup> *NetCoalition*, 615 F.3d at 536.

<sup>8</sup> The Exchange believes that cost-based pricing would be impractical because it would create

enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, and as described below, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even

in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's Web site at <http://www.sec.gov/rules/concept/s72899/buck1.htm>.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and Sections 6(b)(4) and 6(b)(5) of the Act,<sup>10</sup> in particular, in that it provides an equitable allocation of reasonable fees among its members, issuers, and other persons using its facilities and is not designed to permit unfair discrimination among customers, issuers, brokers, or dealers. The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act<sup>11</sup> in that it is consistent with (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets; and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>12</sup> which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

The Exchange believes that the proposed subscriber fees for display use of NYSE ArcaBook are reasonable because they are less than subscriber fees that are currently being charged for a comparable product by at least one other exchange.<sup>13</sup> The Exchange believes that the proposed subscriber fees are equitable and not unfairly discriminatory because the fee structure of differentiated professional and non-professional fees has long been used by the Exchange for other products, by other exchanges for their products, and by the CTA and CQ Plans in order to make data more broadly available to retail customers.<sup>14</sup> The Exchange further believes that continuing to offer NYSE ArcaBook to non-professional users with the same data available to

professional users results in greater equity among data recipients.

The proposed access fee for NYSE ArcaBook also is reasonable because it is less than or equal to access fees that are currently charged by other exchanges for comparable products.<sup>15</sup> The Exchange believes that the proposed access fee for NYSE ArcaBook is equitable and not unfairly discriminatory because it will be charged uniformly to vendors and subscribers that elect to offer NYSE ArcaBook, whether for display, non-display, and/or managed non-display use.

The Exchange has not raised the subscriber fees for display use of NYSE ArcaBook or access fees for NYSE ArcaBook since the fees were originally proposed more than seven years ago, in 2006.<sup>16</sup> During this time period, the Exchange has enhanced NYSE ArcaBook through delivery upgrades, and the bandwidth to support NYSE ArcaBook has increased fivefold. The Exchange believes that the new fees are fair and reasonable in light of its ongoing effort to improve the delivery technology for market data.

The Exchange also notes that the use of NYSE ArcaBook is entirely optional. Firms have a wide variety of alternative market data products from which to choose.<sup>17</sup> Moreover, the Exchange is not required to make these proprietary data products available or to offer any specific pricing alternatives to any customers. 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*

In accordance with Section 6(b)(8) of the Act,<sup>18</sup> 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 (1) the inherent contestability of the market for

proprietary data and actual competition for the sale of such data, (2) the joint product nature of exchange platforms, and (3) the existence of alternatives to proprietary data.

*The Existence of Actual Competition.* The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to 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 2011, 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."<sup>19</sup>

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" 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."<sup>20</sup>

<sup>19</sup> 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/at/speeches/2011/at-speech-110516.html>.

<sup>20</sup> Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14,

Continued

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>11</sup> 15 U.S.C. 78k-1.

<sup>12</sup> See 17 CFR 242.603.

<sup>13</sup> The NASDAQ Stock Market LLC ("NASDAQ") offers NASDAQ Level 2 with NASDAQ OpenView for a monthly fee of \$51 per professional subscriber for NASDAQ, NYSE, and NYSE MKT issues (\$45 for NASDAQ issues plus \$6 for NYSE and NYSE MKT issues) and \$10 per non-professional subscriber for NASDAQ, NYSE, and NYSE MKT issues (\$9 for NASDAQ issues plus \$1 for NYSE and NYSE MKT issues). See NASDAQ Rule 7023(b).

<sup>14</sup> See, e.g., Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983) (establishing non-professional fees for CTA data); NASDAQ Rules 7023(b), 7047.

<sup>15</sup> The Exchange's affiliate, NYSE, charges a monthly access fee of \$5,000 for its NYSE OpenBook product. See Securities Exchange Act Release No. 69278 (Apr. 2, 2013), 78 FR 20973 (Apr. 8, 2013) (SR-NYSE-2013-25). In addition, NASDAQ charges a monthly access fee for NASDAQ Level 2 of \$3,000 for NASDAQ, NYSE, and NYSE MKT issues (\$2,000 direct access fee for NASDAQ issues plus \$1,000 direct access fee for NYSE and NYSE MKT issues). See NASDAQ Rule 7019(b).

<sup>16</sup> See Securities Exchange Act Release No. 54597 (Oct. 12, 2006), 71 FR 62029 (Oct. 20, 2006) (SR-NYSEArca-2006-21).

<sup>17</sup> See *supra* notes 13 and 15.

<sup>18</sup> 15 U.S.C. 78f(b)(8).

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 NYSE ArcaBook unless their subscribers request it, and subscribers will not elect to purchase it unless it 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.<sup>21</sup> 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.<sup>22</sup>

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,

<sup>21</sup> 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 Securities Exchange Act Release Nos. 71217 (Dec. 31, 2013), 79 FR 875, 877 (Jan. 7, 2014) (SR-NASDAQ-2013-162) and 70945 (Nov. 26, 2013), 78 FR 72740, 72741 (Dec. 3, 2013) (SR-NASDAQ-2013-142) (“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.”).

<sup>22</sup> 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.”).

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 14 equities self-regulatory organization (“SRO”) markets, as well as internalizing broker-dealers (“BDs”) and various forms of alternative trading systems (“ATs”), 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, or 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 ATs 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, NYSE MKT, NASDAQ OMX, BATS, and Direct Edge.

The fact that proprietary data from ATs, 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

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.

products,<sup>23</sup> 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 subscriber and access fees for NYSE ArcaBook are generally lower than or the same as the subscriber and access fees charged by other exchanges such as NYSE and NASDAQ for comparable products.<sup>24</sup>

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, 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.<sup>25</sup>

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 that only vendors and subscribers that expect to derive a reasonable benefit from the ArcaBook will choose to 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 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*

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

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>26</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>27</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2014-12 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-2014-12. 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-NYSEArca-2014-12 and should be submitted on or before March 4, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014-02874 Filed 2-10-14; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-71491; File No. SR-Phlx-2014-06]

### **Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Pricing for SPY Options**

February 5, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on January 29, 2014, 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, II, and III, below, which Items have been

<sup>28</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>23</sup> See *supra* notes 13-15.

<sup>24</sup> *Id.*

<sup>25</sup> 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.

<sup>26</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>27</sup> 17 CFR 240.19b-4(f)(2).