• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2014–97 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2014–97. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2014–97, and should be submitted on or before October 6, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–21872 Filed 9–12–14; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–72020; File No. SR–NYSEMKT–2014–72]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Fees for Non-Display Use of NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT BBO, and To Establish Fees for Non-Display Use of NYSE MKT Order Imbalances

September 9, 2014.

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 August 26, 2014, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') 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 its fees for non-display use of NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT BBO, and to establish fees for non-display use of NYSE MKT Order Imbalances, operative on September 1, 2014. 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 amend its non-display fees for NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT BBO, to establish such fees for NYSE MKT Order Imbalances, and to establish managed non-display services fees for NYSE MKT BBO, operative on September 1, 2014.[4]

The Exchange established the current non-display and managed non-display services fees for NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT BBO in April 2013.[5] The Exchange now proposes to change those fees and to establish similar fees for NYSE MKT Order Imbalances.

Under the proposal, non-display use would continue to mean accessing, processing, or consuming an Exchange data product delivered via direct and/or Redistributor[6] data feeds for a purpose other than in support of a data recipient's display or further internal or external redistribution (''Non-Display Use''). As is the case today, non-display and managed non-display services fees would 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.

The Exchange is proposing to expand the types of uses considered Non-Display Use to also include non-trading uses. In addition, the proposal would specify that Non-Display Use would include any trading use, rather than only certain types of trading, such as high frequency or algorithmic trading, as under the current fee structure. Under the proposal, examples of Non-Display Use would include any trading in any asset class, automated order or quote generation and/or order pegging, price referencing for algorithmic trading or smart order routing, operations control programs, investment analysis, order verification, surveillance programs, risk management, compliance, and portfolio management. The Exchange believes that non-trading uses benefit data recipients by allowing users to automate functions, achieving

[4] The Exchange's affiliates have submitted or will be submitting similar proposals. *See, e.g.,* SR–NYSE–2014–43.

[5] *See* Securities Exchange Act Release No. 69285 (April 3, 2013), 78 FR 21172 (April 9, 2013) (SR–NYSEMKT–2013–32) (''2013 Release'').

[6] ''Redistributor'' means a vendor or any person that provides a real-time NYSE data product to a data recipient or to any system that a data recipient uses, irrespective of the means of transmission or access.

greater speed and accuracy, and in turn, for example, reducing costs of labor to perform the functions manually. This approach would address the difficulties of monitoring and auditing different types of trading versus non-trading uses of the data and the burden of counting devices used for non-trading purposes under the current fees.

Proposed Changes to Non-Display Fees

The Exchange proposes to amend the fee structure applicable to Non-Display Use of NYSE MKT OpenBook, NYSE MKT BBO, and NYSE MKT Trades and to establish such fees for NYSE MKT Order Imbalance. Specifically, the Exchange proposes certain changes to the three categories of, and fees applicable to, data recipients. The Exchange also proposes corresponding changes to the Fee Schedule text to remove references to the current category descriptions.

Under the proposal, Category 1 Fees would apply when a data recipient's Non-Display Use of real-time market data is on its own behalf as opposed to use on behalf of its clients. This proposal represents an expansion of the application of Category 1 Fees, which currently apply solely to the Non-Display Use of real time market data for the purpose of principal trading, to usage of such data for non-trading purposes.

Under the proposal, Category 2 Fees would apply to a data recipient's Non-Display Use of real-time market data on behalf of its clients as opposed to on its own behalf. This proposal also represents an expansion of the application of Category 2 Fees, which currently apply solely to trading activities to facilitate a customer business, to usage of such data for non-trading purposes. As under the current fee, if a data recipient's use of Exchange market data is covered by Category 1 and Category 2, then the data recipient must pay both categories of fees.[7]

The Exchange believes its proposal to apply Category 1 Fees and Category 2 Fees to Non-Display Use of market data for non-trading purposes would address the difficulties of monitoring and auditing trading versus non-trading uses of the data and the burden of counting devices used for purposes of applying the per-device fees. As discussed in more detail in the 2013 Release,[8] the ability to accurately count devices and audit such counts creates administrative challenges for vendors, data recipients, and the Exchange.

Under the proposal, Category 3 Fees would apply to data recipients' Non-Display Use of real-time market data for the purpose of internally matching buy and sell orders within an organization, including matching customer orders on a data recipient's own behalf and/or on behalf of its clients. This category would apply to Non-Display Use in trading platform(s), such as, but not restricted to, alternative trading systems (''ATSs''), broker crossing networks, broker crossing systems not filed as ATSs, dark pools, multilateral trading facilities, exchanges and systematic internalization systems. Currently, 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. The Exchange believes its proposed revision to its description of the data recipients to whom Category 3 Fees apply is more precise because it focuses on the functions of internally matching orders.

In addition, the Exchange is proposing to change the application of Category 3 Fees to data recipients that also use data for purposes that give rise to Category 1 and/or Category 2 Fees. Currently, a data recipient is not liable for Category 3 Fees for those market data products for which it is also paying Category 1 and/or Category 2 Fees.[9] Under the proposal, a data recipient's Non-Display Use of real-time market data for Category 3 purposes would require such data recipient to pay Category 3 Fees in addition to any Category 1 Fees or Category 2 Fees it is required to pay for Non-Display Use of market data.

There will continue to be no monthly or other reporting requirements for data recipients' Non-Display Use. However, the Exchange continues to reserve the right to audit data recipients' Non-Display Use of NYSE MKT market data products in accordance with the Exchange's vendor and subscriber agreements.

Data recipients that receive real-time NYSE MKT market data for Non-Display Use would be required to complete and submit a Non-Display Use Declaration before September 1, 2014. The Non-Display Use Declaration would replace the current declaration on the NYSE Euronext Non-Display Usage Declaration.[10] A firm subject to Category 3 Fees would be required to identify each platform that uses data on a Non-Display Use basis, such as ATSs and broker crossing systems not registered as ATSs, as part of the Non-Display Use Declaration. Beginning in 2016, data recipients would be required to submit, by January 31 of each year, a Non-Display Use Declaration. In addition, if a data recipient's use of real-time NYSE MKT market data changes at any time after the data recipient submits a Non-Display Use Declaration, the data recipient would be required to update it at the time of the change to reflect the change of use.

Proposed Changes to Fees for Managed Non-Display Services

The Exchange also proposes to change the fees for managed non-display services for NYSE MKT OpenBook and NYSE MKT Trades and establish managed non-display service fees for NYSE MKT BBO and NYSE MKT Order Imbalances. Managed non-display services fees would apply, as they do currently, where data recipients' non-display applications are hosted by an approved third party.[11] To be an approved third party, the third party must manage and control the access to real-time NYSE MKT market data for the data recipients' non-display applications and not allow for further internal distribution or external redistribution of the information.

The managed non-display services fee would only apply if a data recipient is receiving real-time NYSE MKT market data for Non-Display Use from a third party Redistributor[12] that is approved by the Exchange. As for the current managed non-display services fees, this Redistributor must manage and control the access to NYSE MKT OpenBook, NYSE MKT Trades, NYSE MKT BBO, and NYSE MKT Order Imbalances for these applications and may not allow their further internal distribution or external redistribution. The Redistributor of the managed non-display services and the data recipient must be approved under the Exchange's Global Data Products Unit-of-Count Policy.[13] If a data recipient receives NYSE MKT OpenBook, NYSE MKT Trades, NYSE MKT BBO, and NYSE MKT Order Imbalances from a Redistributor that is not approved by the Exchange, then the non-display fees

[7] *See* 2013 Release, *supra* note 5, at 21175.

[8] *See* 2013 Release, *supra* note 5, at 21174.

[9] *See* 2013 Release, *supra* note 5, at 21175.

[10] As described in more detail in the Statutory Basis section, in order to modulate the overall fee increase that could apply, if a firm subject to Category 3 Fees has more than three platforms, it would only be required to declare three platforms. If a data recipient only subscribes to products for which there are no non-display usage fees, *e.g.,* NYSE Realtime Reference Prices, then no declaration is required.

[11] *See* 2013 Release, *supra* note 5, at 21176.

[12] *See id.*

[13] The Unit-of-Count Policy is described in the 2013 Release, *supra* note 5, at note 10 and accompanying text.

would apply, and data recipients would not be liable for managed non-display fees for those market data products for which they pay non-display fees.

A data recipient of real-time NYSE MKT market data through an approved Redistributor would continue to have no reporting requirements. However, a Redistributor would be required to report to NYSE MKT on a monthly basis the data recipients that are receiving real-time NYSE MKT market data through the Redistributor's managed non-display service and the real-time NYSE MKT market data that such data recipients are receiving through such service. This monthly reporting requirement would be new, though the Exchange currently has the right to audit data recipients' non-display use of NYSE MKT market data products in accordance with the Exchange's vendor and subscriber agreements.

Comparison of Current Fees to Proposed Fees

The chart below compares the proposed changes to current monthly fees:

Data feed	Current fee	Proposed fee
NYSE MKT OpenBook Non-Display Category 1	$1,500	$2,000.
NYSE MKT OpenBook Non-Display Category 2	1,500	$2,000.
NYSE MKT OpenBook Non-Display Category 3	1,500	$2,000.
NYSE MKT OpenBook Managed Non-Display	500	$750.
NYSE MKT BBO Non-Display Category 3	500	$500, capped at $1,500.
NYSE MKT BBO Managed Non-Display	n/a	$150.
NYSE MKT TradesManaged Non Display	400	$600.
NYSE MKT Order Imbalances Category 1	n/a	$500.
NYSE MKT Order Imbalances Category 2	n/a	$500.
NYSE MKT Order Imbalances Category 3	n/a	$500, capped at $1,500.
NYSE MKT Order Imbalances Managed Non-Display	n/a	$100.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[14] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[15] in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

The Exchange believes that charging for non-trading uses is reasonable because data recipients can derive substantial value from such uses, for example, by automating tasks so that they can be performed more quickly and accurately and less expensively than if they were performed manually. The Exchange also notes that The NASDAQ Stock Market (''NASDAQ'') and NASDAQ OMX PHLX (''Phlx'') do not make any distinction in their non-display use fees between trading or non-trading uses, and as such, the proposed change will harmonize the Exchange's approach with those exchanges. Finally, the Exchange notes that eliminating the trading versus non-trading distinction would substantially simplify fee calculations and ease administrative burdens for the Exchange.

After further experience, the Exchange also believes that it is more equitable and not unfairly discriminatory to eliminate the distinction for non-trading versus trading uses in light of the significant value of both types of uses. The Exchange notes that because non-display fees are flat fees, the expansion to cover non-trading uses could only result in a fee increase for a data recipient that is using the data solely for non-trading purposes and is only subject to per-device fees; at this time, the Exchange has not identified such a data recipient. Based on data available to the Exchange, all data recipients use the data for at least one trading purpose, and therefore the changes to the fees that they will pay under the proposal would not be due to the elimination of the distinction between trading and non-trading uses. The Exchange further notes that based on Non-Display Use Declarations submitted to date, some users have declared no Non-Display Use, and as such the proposed changes would have no impact on them.

The Exchange believes that it is reasonable to require annual submissions of the Non-Display Use Declaration so that the Exchange will have current and accurate information about the use of its market data products and can correctly assess fees for the uses of those products. The annual submission requirement is equitable and not unfairly discriminatory because it will apply to all users.

The Exchange believes that requiring Redistributors to provide monthly reports of data recipients that are receiving the managed non-display service is reasonable because as a matter of practice, the Exchange already has been requiring such reporting pursuant to its right under the vendor and subscriber agreements to request such information, and there is no indication that this has been burdensome for Redistributors. The reporting requirement is equitable and not unfairly discriminatory because it will apply to all Redistributors and help to ensure that ultimate data recipients are receiving data in accordance with the Exchange's rules.

The Exchange believes that the proposed fee increases of $1,000 [sic] per month for each of Categories 1, 2, and 3 for NYSE MKT OpenBook and NYSE MKT Trades are reasonable. In establishing the non-display fees in April 2013, the Exchange set its fees substantially below comparable fees charged by certain of its competitors.[16] After gaining further experience with its new display/non-display fee structure, the Exchange believes that the proposed fees better reflect the significant value of the non-display data to data recipients, which purchase such data on an entirely voluntary basis. Non-display data can be used by data recipients for a wide variety of profit-generating purposes, including proprietary and agency trading and smart order routing, as well as by data recipients that operate order matching and execution platforms that compete directly with the Exchange for order flow. The data also can be used for a variety of non-trading purposes that indirectly support trading, such as risk management and compliance. While some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce the recipient's costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs,

[14] 15 U.S.C. 78f(b).

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

[16] *See* 2013 Release, *supra* note 5, at 21176.

thereby benefiting end users. The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using non-display data in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.[17]

The fee increases are also reasonable in that they support the Exchange's efforts to regularly upgrade systems to support more modern data distribution formats and protocols as technology evolves. For example, the Exchange has begun to make its proprietary data products available over both its existing distribution channel as well as the XDP protocol.

Charging a separate fee for Category 3 data recipients that already pay a fee under Category 1 or 2 is reasonable because it eliminates what is effectively a discount for such data recipients under the current Fee Schedule and results in a more equitable allocation of fees to users that derive a benefit from a Category 3 use, and as such is not unfairly discriminatory. The current fee can be viewed as having an effective non-display fee cap of $3,000 for NYSE MKT OpenBook, $2,000 for NYSE MKT Trades, and $1,000 for NYSE MKT BBO while the proposed fee would have an effective non-display fee cap of $10,000 for NYSE MKT OpenBook, $7,500 for NYSE MKT Trades, and $2,500 for NYSE MKT BBO. The Exchange believes that the proposed fees (and their associated caps) more closely correspond to the value that Category 3 recipients derive from the various uses of the data, some of which are operating various types of alternative trading venues that directly compete for order flow with the Exchange. Limiting the fees in Category 3 to no more than three trading platforms is reasonable because it modulates the size of the fee increase for certain recipients as compared to what they pay under the current fee structure, in much the same manner as the current fee does by limiting the non-display fees to a maximum of two categories. The Exchange does not believe that it will be burdensome for Category 3 recipients to determine, or the Exchange to audit, whether a recipient has one, two, three or more separate platforms.

The proposed non-display fees for NYSE MKT Order Imbalances are reasonable because they reflect the valuable non-display uses of this data feed for recipients and will be easier for the Exchange to administer than counting devices, as is required under the current Fee Schedule. The fees are equitable and not unfairly discriminatory because they will apply to all data recipients that choose to subscribe to the NYSE MKT Order Imbalances feed.

The proposed monthly fees of $150 for NYSE MKT BBO managed non-display data and $100 for NYSE MKT Order Imbalances managed non-display data are reasonable because they are less than other managed non-display fees charged by the Exchange for other managed non-display products as well as by other exchanges for comparable products.[18] The fees are also equitable and not unfairly discriminatory because they will apply to all data recipients that choose to subscribe to the feeds.

The proposed NYSE MKT OpenBook and NYSE MKT Trades managed non-display fees are reasonable because they remain less than the comparable fees for other exchanges' similar products.[19] These managed non-display fees also are equitable and not unfairly discriminatory because they will apply to all data recipients that choose to subscribe to the feeds.

The fees are also competitive with offerings by other exchanges, which structure and set their fees in a variety of ways. For example, NASDAQ professional subscribers pay monthly fees for non-display usage based upon direct access to NASDAQ Level 2, NASDAQ TotalView,[20] or NASDAQ OpenView, which range from $300 per month for customers with one to 10 subscribers to $75,000 for customers with 250 or more subscribers.[21] NASDAQ also offers an enterprise license for its last sale data at $50,000 per month.[22] In addition, 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.[23] 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 per month for its BX TotalView data feed.[24] NASDAQ and Phlx also both offer managed non-display data solutions at higher overall fees than the Exchange proposes to charge.[25]

The Exchange also notes that all of the products described herein are entirely optional. The Exchange is not required to make these proprietary data products available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase any of the products. Firms that do purchase non-display products do so for the primary goals of using them to increase revenues, reduce expenses, and in some instances compete directly with the Exchange for order flow; those firms are able to determine for themselves whether any specific product such as these are attractively priced or not.

Firms that do not wish to purchase the data at the new prices have a wide variety of alternative market data products from which to choose,[26] or if the non-display data products do not provide sufficient value to firms as offered based on the uses those firms have or planned to make of them, such firms may simply choose to conduct their business operations in ways that do not require those data products. The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best

[17] *See also* Exchange Act Release No. 69157, March 18, 2013, 78 FR 17946, 17949 (March 25, 2013) (SR–CTA/CQ–2013–01) (''[D]ata feeds have become more valuable, as recipients now use them to perform a far larger array of non-display functions. Some firms even base their business models on the incorporation of data feeds into black boxes and application programming interfaces that apply trading algorithms to the data, but that do not require widespread data access by the firm's employees. As a result, these firms pay little for data usage beyond access fees, yet their data access and usage is critical to their businesses.'').

[18] NASDAQ offers a Managed Data Solution that assesses a monthly Managed Data Solution Administration fee of $1,500 and monthly Subscriber fees of $60 for non-professionals to $300 for professionals. *See* NASDAQ Rule 7026(b). Phlx charges a monthly Managed Data Solution Administration fee of $2,000 and a monthly Subscriber fee of $500. The monthly License fee is in addition to the monthly Distributor fee of $3,500 (for external usage), and the $500 monthly Subscriber fee is assessed for each Subscriber of a Managed Data Solution. *See* Securities Exchange Act Release No. 70748 (October 23, 2013), 78 FR 64569 (October 29, 2013) (SR–Phlx–2013–105).

[19] *See id.*

[20] NASDAQ disseminates its Net Order Imbalance Indicator for the NASDAQ Opening and Closing Crosses and NASDAQ IPO/Halt Cross as part of the TotalView product.

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

[22] *See* NASDAQ Rule 7039(b).

[23] Alternatively, Phlx charges each professional subscriber $40 per month. *See* Section IX of the Phlx Pricing Schedule.

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

[25] *See supra* note 188 [sic].

[26] *See supra* notes 18–24. Because NYSE MKT BBO and NYSE MKT Trades are subsets of the consolidated core data offered by the CTA and CQS, customers may choose to purchase those consolidated data products or free delayed data instead.

execution obligations.[27] Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSs have chosen not to do so.[28]

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.''' [29]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for proprietary market data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards. In addition, the existence of alternatives to these data products, such as 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 select such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically or offer any significant benefits.[30]

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

The Existence of Actual Competition

The market for proprietary data products is currently competitive and inherently contestable because there is fierce competition for the inputs necessary for the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with one another for listings and order flow and sales of market data itself, providing ample opportunities for entrepreneurs who wish to compete in any or all of those areas, including producing and distributing their own market data. Proprietary data products are produced and distributed by each individual exchange, as well as other entities, in a vigorously competitive market. Indeed, the U.S. Department of Justice (''DOJ'') (the primary antitrust regulator) has expressly acknowledged the aggressive actual competition among exchanges, including for the sale of proprietary market data. In 2011, the DOJ stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.'' [31]

Moreover, competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. Broker-dealers send their order flow and transaction reports to multiple venues, rather than providing them all to a single venue, which in turn reinforces this competitive constraint. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex'' with ''trading volume . . . dispersed among many highly automated trading centers that compete for order flow in the same stocks'' and ''trading centers offer[ing] a wide range of services that are designed to attract different types of market participants with varying trading needs.'' [32] More recently, SEC Chair Mary Jo White has noted that competition for order flow in exchange-listed equities is ''intense'' and divided among many trading venues, including exchanges, more than 40 alternative

[27] *See* In the Matter of the Application of Securities Industry And Financial Markets Association For Review of Actions Taken by Self-Regulatory Organizations, Release Nos. 34–72182; AP–3–15350; AP–3–15351 (May 16, 2014).

[28] For example, Goldman Sachs Execution and Clearing, L.P. has disclosed that it does not use proprietary market data in connection with Sigma X, its ATS. *See* response to Question E3, available at *http://www.goldmansachs.com/media-relations/in-the-news/current/pdf-media/gsec-order-handling-practices-ats-specific.pdf.* By way of comparison, IEX has disclosed that it uses proprietary market data feeds from all registered stock exchanges and LavaFlow ECN. *See http://www.iextrading.com/about/.*

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

[30] 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.*

[31] 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.*

[32] Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010) (File No. S7–02–10). This Concept Release included data from the third quarter of 2009 showing that no market center traded more than 20% of the volume of listed stocks, further evidencing the dispersal of and competition for trading activity. *Id.* at 3598. Data available on ArcaVision show that from June 30, 2013 to June 30, 2014, no exchange traded more than 12% of the volume of listed stocks by either trade or dollar volume, further evidencing the continued dispersal of and fierce competition for trading activity. *See https://www.arcavision.com/Arcavision/arcalogin.jsp.*

trading systems, and more than 250 broker-dealers.[33]

If an exchange succeeds in its competition for quotations, order flow, and trade executions, then it earns trading revenues and increases the value of its proprietary market data products because they will contain greater quote and trade information. Conversely, if an exchange is less successful in attracting quotes, order flow, and trade executions, then its market data products may be less desirable to customers using them in support of order routing and trading decisions in light of the diminished content; data products offered by competing venues may become correspondingly more attractive. Thus, competition for quotations, order flow, and trade executions puts significant pressure on an exchange to maintain both execution and data fees at reasonable levels.

In addition, in the case of products that are distributed through market data vendors, such as Bloomberg and Thompson Reuters, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Vendors will not elect to make available the NYSE MKT products described herein unless their customers request them, and customers will not elect to pay the proposed increased fees for non-display uses unless the non-display uses of these data products can provide value by sufficiently increasing revenues or reducing costs in the customer's business in a manner that will offset the fees. All of these factors 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, proprietary 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 availability and quality, and price and distribution of their data products. Without a platform to post quotations, receive orders, and execute trades, exchange data products would not exist.

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 platform for posting quotes, accepting orders, and executing transactions 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 generally view the costs of transaction executions and market data as a unified cost of doing business with the exchange. A broker-dealer will only choose to direct orders to an exchange if the revenue from the transaction exceeds its cost, including the cost of any market data that the broker-dealer chooses to buy in support of its order routing and trading decisions. If the costs of the transaction are not offset by its value, then the broker-dealer may choose instead not to purchase the product and trade away from that exchange. There is substantial evidence of the strong correlation between order flow and market data purchases. For example, in May 2014 more than 80% of the transaction volume on each of NYSE, NYSE Arca, and NYSE MKT was executed by market participants that purchased one or more proprietary market data products. A super-competitive increase in the fees for either executions or market data would create a risk of reducing an exchange's revenues from both products.

Other market participants have noted that proprietary market data and trade executions are joint products of a joint platform and have common costs.[34] 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.[35]

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 because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, and system 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.

As noted above, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 12 equities self-regulatory organization (''SRO'') markets, as well as various forms of ATSs, including dark pools and electronic communication networks (''ECNs''), and internalizing broker-dealers. SRO markets compete to attract order flow and produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting

[33] Mary Jo White, Enhancing Our Equity Market Structure, Sandler O'Neill & Partners, L.P. Global Exchange and Brokerage Conference (June 5, 2014) (available on the Commission Web site), citing Tuttle, Laura, 2014, ''OTC Trading: Description of Non-ATS OTC Trading in National Market System Stocks,'' at 7–8.

[34] *See* Securities Exchange Act Release No. 72153 (May 12, 2014), 79 FR 28575, 28578 n.15 (May 16, 2014) (SR–NASDAQ–2014–045) (''[A]ll 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 No. 62907 (September 14, 2010), 75 FR 57314, 57317 (September 20, 2010) (SR–NASDAQ–2010–110), and Securities Exchange Act Release No. 62908 (September 14, 2010), 75 FR 57321, 57324 (September 20, 2010) (SR–NASDAQ–2010–111).

[35] *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.'').

Facilities compete to attract transaction reports from the non-SRO venues.[36]

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 trading platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. For example, BATS and Direct Edge, which previously operated as ATSs and obtained exchange status in 2008 and 2010, respectively, have provided 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.[37] Similarly, LavaFlow ECN provides market data to its subscribers at no charge.[38] 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.[39]

Existence of Alternatives

The large number of SROs, ATSs, and internalizing broker-dealers that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, ATS, and broker-dealer is currently permitted to produce and sell proprietary data products, and many currently do or have announced plans to do so, including but not limited to the Exchange, NYSE, NYSE Arca, NASDAQ OMX, BATS, and Direct Edge.

The fact that proprietary data from ATSs, internalizing broker-dealers, 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. By way of example, BATS and NYSE Arca both published proprietary data on the Internet before registering as exchanges. 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. For example, with respect to NYSE MKT Trades and NYSE MKT BBO, the data appears in both the real-time core data offered by the SIPs for a fee and free SIP data that is offered on a 15-minute time delay. With respect to NYSE MKT Trades, NYSE MKT BBO, NYSE MKT OpenBook, and NYSE MKT Order Imbalances, a close substitute product is offered by several competitors.[40] Because market data users can find suitable substitutes for most proprietary market data products, a market that overprices its market data products stands a high risk that users may substitute another source of market 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 are generally lower than the maximum non-display fees charged by other exchanges such as NASDAQ, Phlx, and BX for comparable products.[41]

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid and inexpensive. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island, RediBook, Attain, TrackECN, BATS Trading and Direct Edge. As noted above, BATS launched as an ATS in 2006 and became an exchange in 2008, while Direct Edge began operations in 2007 and obtained exchange status in 2010. As noted above, LavaFlow ECN provides market data to its subscribers at no charge.[42]

In establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of numerous alternatives to the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient 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)[43] of the Act and subparagraph (f)(2) of Rule 19b–4[44] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[45] of the Act to determine whether the proposed rule

[36] FINRA's Alternative Display Facility also receives over-the-counter trade reports that it sends to CTA.

[37] 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.

[38] *See* "LavaFlow—ADF Migration," available at *https://www.lavatrading.com/news/pdf/LavaFlow_ADF_Migration.pdf.*

[39] The Exchange notes that a small number of Category 3 non-display data recipients could be using the market data strictly for competitive purposes (*e.g.,* other exchanges and ATSs) or for business purposes unrelated to trading or investment (*e.g.,* Internet portals that wish to attract "eyeballs" to their pages primarily generate advertising revenue for themselves). The Exchange does not believe that the proposed fees will impose any unnecessary burden on these competitors or other businesses.

[40] *See supra* notes 188–244 [sic]. With respect to order imbalances, the Exchange further notes that other venues trade NYSE listed securities before the Exchange's opening cross at 9:30 a.m., and therefore indicative price information is available through these venues.

[41] *Id.*

[42] *See supra* note 38.

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

[44] 17 CFR 240.19b–4(f)(2).

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

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–NYSEMKT–2014–72 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEMKT–2014–72. 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 Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEMKT–2014–72 and should be submitted on or before October 6, 2014.

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

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–21866 Filed 9–12–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–73021; File No. SR–NYSE–2014–47]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the New York Stock Exchange LLC Price List To Provide That the Monthly DMM Credit for Certain Securities Be Prorated to the Number of Trading Days in a Month That a Security Is Assigned to a DMM

September 9, 2014.

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 August 25, 2014, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Price List to provide that the monthly DMM credit for certain securities will be prorated to the number of trading days in a month that a security is assigned to a DMM. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

The Exchange proposes to amend its Price List to provide that the monthly DMM credit for certain securities will be prorated to the number of trading days in a month that a security is assigned to a DMM.

On March 2, 2014, the Exchange adopted a new monthly credit for DMMs for each security that has a consolidated average daily volume (''ADV'') of less than 250,000 shares during the billing month in any month in which the DMM meets the Less Active Securities Quoting Requirement.[4] The flat dollar credit supplements the DMM credit in securities that do not trade actively and is applicable to all Exchange-listed securities regardless of price.[5]

The Exchange proposes to revise the Price List to provide that the rebate would be prorated to the number of trading days in a month that a stock is assigned to a DMM. The Exchange believes it is appropriate to prorate the rebate to the number of trading days that a stock is assigned to a DMM to ensure that the monthly rebate has a nexus to the time for which a DMM has affirmative obligations for that stock pursuant to Rule 104. For example, if a stock is assigned to more than one DMM unit within a month, such as when a stock is transferred temporarily from one DMM to another and then returned to the original DMM, the Exchange does not believe that it is appropriate that both DMMs that were assigned that stock in a given month should both be eligible for the full monthly rebate. Similarly, if a stock begins trading at the Exchange mid-month, such as because of an initial public offering or transfer of a listed security from another exchange, the Exchange does not believe

---

[46] 17 CFR 200.30–3(a)(12).

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

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

[3] 17 CFR 240.19b–4.

[4] The DMM meets the ''Less Active Securities Quoting Requirement'' when a security has a consolidated ADV of less than 1,000,000 shares per month in the previous month and a stock price of $1.00 or more, and the DMM quotes at the NBBO in the applicable security at least 15% of the time in the applicable month.

[5] *See* Securities Exchange Act Release No. 71684 (March 11, 2014), 79 FR 14758 (March 17, 2014).