

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77584; File No. SR-OPRA-2015-01]

### Options Price Reporting Authority; Notice of Filing and Immediate Effectiveness of Proposed Amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Amend Certain Provisions of the OPRA's Fee Schedule

April 12, 2016.

Pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 608 thereunder,<sup>2</sup> notice is hereby given that on September 22, 2015, the Options Price Reporting Authority ("OPRA") submitted to the Securities and Exchange Commission ("Commission") an amendment to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA Plan").<sup>3</sup> Effective January 1, 2016, the amendment revised the structure and the amount of OPRA's fees for "Non-Display" use of OPRA data. The Commission is publishing this notice to provide interested persons an opportunity to submit written comments on the OPRA Plan amendment.

#### I. Description and Purpose of the Plan Amendment

The purpose of the amendment is to amend the OPRA Fee Schedule to revise the structure and the amounts of OPRA fees for "Non-Display" use of OPRA Data. "Non-Display" use of OPRA data is use of the OPRA data for a purpose other than the display of the data to natural persons or in support of the display of the data or the internal or external redistribution of the data.

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

<sup>2</sup> 17 CFR 242.608.

<sup>3</sup> The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder (Formerly Rule 11Aa3-2). See Securities Exchange Act Release No. 17638 (March 18, 1981), 22 S.E.C. Docket 484 (March 31, 1981). The full text of the OPRA Plan is available at <http://www.opradata.com>. The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The fourteen participants to the OPRA Plan are BATS Exchange, Inc., BOX Options Exchange, LLC, Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, EDGX Exchange, Inc., International Securities Exchange, LLC, ISE Gemini, LLC, ISE Mercury, LLC, Miami International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, NYSE MKT LLC, and NYSE Arca, Inc.

OPRA first implemented "Non-Display Application Fees" in 2012.<sup>4</sup> At that time, OPRA defined the term "Non-Display Application" essentially as an application used for purposes of generating orders and/or quotations on an automated basis including any application that is used for "black box" trading, automated trading, algorithmic trading and/or program trading.<sup>5</sup> OPRA adopted those fees in response to two long-term trends in the use of OPRA market data. The first trend was the increasingly common use of OPRA market data for use in "Non-Display Applications." The second trend was the decline, which has persisted over many years, in the number of devices and User IDs<sup>6</sup> displaying OPRA data and subject to OPRA's Professional Subscriber Device-Based Fees. OPRA noted in its 2012 filing that, in 2004, an average of 223,000 devices and User IDs were reported to OPRA in each month of the year, and that, in 2011, an average of 164,000 devices and User IDs were reported to OPRA in each month of the year.<sup>7</sup>

<sup>4</sup> See Securities Exchange Act Release No. 67648 (August 14, 2012), 77 FR 49837 (August 17, 2012) (SR-OPRA-2012-04).

<sup>5</sup> The complete definition of the term "Non-Display Application" in File No. SR-OPRA-2012-04 is as follows: "A 'Non-Display Application' is an application used by a Professional Subscriber that: (i) Is capable of accessing OPRA market data, (ii) does not display the data in a form for direct use by a human being and (iii) is used for purposes of generating orders and/or quotations on an automated basis for purposes other than complying with the Rules of one or more of the OPRA Participant Exchanges. The term includes any application that is used for "black box" trading, automated trading, algorithmic trading and/or program trading. The term does not include any application that is used only to generate two-sided continuous quotations, in fulfillment of the obligation to act in a market-making capacity pursuant to the Rules of one or more of the OPRA Participant Exchanges, of a Professional Subscriber that has been designated by such Exchange or Exchanges to act as a dealer/specialist for all purposes under the Securities Exchange Act of 1934 and the Rules and Regulations thereunder. The term also does not include an application that is used solely to perform surveillance, risk management or portfolio management functions in support of a firm's trading operations."

<sup>6</sup> OPRA permits Professional Subscribers to count "User IDs" that are capable of receiving OPRA information as a surrogate for counting devices, and to pay fees based on the number of User IDs using the "Professional Subscriber Device-Based Fees" in OPRA's Fee Schedule. See OPRA's "Policies with respect to Device-Based Fees," available on the OPRA Web site, [www.opradata.com](http://www.opradata.com).

<sup>7</sup> See *supra* note 4, at n.9. The decline in the number of devices and User IDs displaying OPRA data and subject to OPRA's Professional Subscriber Device-Based Fees has continued: In 2014 an average of 148,400 devices and User IDs were reported to OPRA as receiving OPRA data in each month of the year, and OPRA projects that in 2015 an average of 136,600 devices and User IDs will be reported to OPRA as receiving OPRA data in each month of the year.

In 2014, the Consolidated Tape Association ("CTA") Plan and Consolidated Quotation ("CQ") Plan participants (collectively, the "CTA/CQ Plan Participants") proposed to amend the CTA Plan and the CQ Plan (collectively the "CTA/CQ Plans") to implement fees for Non-Display use of the market data disseminated pursuant to the CTA/CQ Plans.<sup>8</sup> At the same time, the operating committee (the "Nasdaq/UTP Plan Operating Committee") of the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (the "Nasdaq/UTP Plan") proposed to amend the Nasdaq/UTP Plan to implement fees for Non-Display use of the market data disseminated pursuant to the Nasdaq/UTP Plan.<sup>9</sup>

The OPRA Plan amendment comprehensively revised the structure of OPRA's Non-Display fees so that OPRA's fee structure parallels the Non-Display fee structures implemented by the CTA/CQ Plan Participants and the Nasdaq/UTP Plan Operating Committee. In addition, the OPRA Plan amendment revised the amounts of OPRA's Non-Display fees.

#### A. Description of the Concepts Underlying the CTA/CQ Plan and Nasdaq/UTP Plan Non-Display Fees; Comparison to the Current OPRA Structure; Revised OPRA Structure

##### 1. Definition of "Non-Display Use"

The CTA/CQ Plan Participants have defined the term "Non-Display Use," with respect to the market data disseminated pursuant to the CTA/CQ Plans as referring to "accessing, processing or consuming real-time Network A or Network B quotation information or last sale price information, whether delivered via direct and/or distributor data feeds, for a purpose other than in support of a data recipient's display or further internal or external redistribution."<sup>10</sup> The Nasdaq/UTP Plan Operating Committee has implemented a parallel definition of the term: "Non-Display use refers to accessing, processing or consuming data, whether received via direct and/or distributor Data Feeds, for a purpose other than solely facilitating the delivery of the data to

<sup>8</sup> See Securities Exchange Act Release No. 73278 (October 1, 2014), 79 FR 60536 (October 7, 2014) (SR-CTA/CQ-2014-03).

<sup>9</sup> See Securities Exchange Act Release No. 73279 (October 1, 2014), 79 FR 60522 (October 7, 2014) (File No. S7-24-89).

<sup>10</sup> See *supra* note 8, at 60538.

the Data Feed Recipient's display or for the purpose of further internally or externally redistributing the data."<sup>11</sup>

These definitions are broader than OPRA's prior definition of the term "Non-Display Application" which, as noted above, encompassed only "applications . . . used for purposes of generating orders and/or quotations on an automated basis. . . ." For example, the CTA/CQ Plan and Nasdaq/UTP definitions specifically include within their definitions of the term "Non-Display Use" use of their respective datasets for price referencing for smart order routing, operations control programs, investment analysis, order verification, surveillance programs, risk management, compliance and portfolio valuation purposes.<sup>12</sup>

The OPRA Plan amendment replaced the definition of "Non-Display Application" with a definition of the term "Non-Display Use" that parallels the definitions implemented by the CTA/CQ Plan Participants and the Nasdaq/UTP Plan Operating Committee. Specifically, the OPRA Plan amendment defined the term "Non-Display Use" as follows:

Non-Display Use refers to the accessing, processing or consuming by an OPRA data feed recipient (either an OPRA vendor or an OPRA professional subscriber) of OPRA market data received on a current basis, whether delivered via data feed directly from OPRA's processor and/or indirect data feed from an OPRA vendor, for a purpose other than in support of the data feed recipient's display or further internal or external redistribution. Non-Display Use includes, without limitation, trading (such as in a "black box" or a trading engine that performs automated trading, algorithmic trading or program trading, or generates arbitrage or quote generation and/or order pegging; price referencing for algorithmic trading; operations control programs; investment analysis; order verification; surveillance programs; risk management; compliance; and portfolio valuation.

## 2. Three Categories of Non-Display Use and Fee Basis for Non-Display Use in Each Category

The CTA/CQ Plan Participants and the Nasdaq/UTP Plan Operating Committee have each established three "categories" of Non-Display Use. Using the nomenclature established by the CTA/CQ Plan Participants, the three categories are as follows:

Category 1 applies when a data recipient makes non-display uses of real time market data on its own behalf.

Category 2 applies when a data recipient makes non-display uses of real time market data on behalf of its clients.

Category 3 applies when a data recipient makes non-display uses of real time market data for the purpose of internally matching buy and sell orders within the data feed recipient. Category 3 includes matching buy and sell orders on a data recipient's own behalf and/or on behalf of its clients. Category 3 includes, but is not restricted to, use in trading platform(s), such as exchanges, alternative trading systems ("ATs"), broker crossing networks, broker crossing systems not filed as ATs, dark pools, multilateral trading facilities, and systematic internalization systems.<sup>13</sup>

The OPRA Plan amendment adopted the three categories of Non-Display Use that have been implemented by the CTA/CQ Plans and the Nasdaq/UTP Plan.

For the first two of these categories of Non-Display Use ("Category 1" and "Category 2" in the CTA/CQ nomenclature), the CTA/CQ Plan Participants and the Nasdaq/UTP Plan Operating Committee have established fees on an "Enterprise" basis, so that a recipient of the market data pays only one "Category 1" fee if it makes any Non-Display Use of the market data in Category 1, and only one "Category 2" fee if it makes any Non-Display Use of the market data in Category 2.<sup>14</sup> The OPRA Plan amendment adopted fees for Category 1 Non-Display Use and Category 2 Non-Display Use that are also on an "Enterprise" basis.<sup>15</sup>

For the third of these categories of Non-Display Use ("Category 3" in the CTA/CQ nomenclature), the CTA/CQ Plan Participants and the Nasdaq/UTP Plan Operating Committee have established fees on a "per platform"

<sup>13</sup> See *supra* note 8, at 60538 (CTA/CQ Plan). The Nasdaq/UTP Plan Operating Committee has established the same three categories, identical in substance, but using a somewhat different vocabulary: the Nasdaq/UTP Plan refers to its fee for its counterpart to CTA/CQ Category 1 as the "Non-Display fee for Internal Use"; for its counterpart to CTA/CQ Category 2 as the "Non-Display Fee for External Use"; and for its counterpart to CTA/CQ Category 3 as the "Non-Display Fee for Electronic Trading Systems." See *supra* note 9, at 60525. To the extent that the nomenclatures used by the CTA/CQ Plan Participants and the Nasdaq/UTP Plan Operating Committee are different, OPRA's amendment tracks the CTA/CQ nomenclature.

<sup>14</sup> See *supra* note 8, at 60538 (CTA/CQ Plans); see *supra* note 9, at 60525–26 (Nasdaq/UTP Plan).

<sup>15</sup> OPRA included a footnote in its revised Fee Schedule to state that the wholly-owned subsidiaries of a data feed recipient are within the definition of the term "Enterprise" as applied to the data feed recipient. This is consistent with the way in which OPRA addresses questions relating to affiliate relationships generally, as is stated in Section 1 ("Contracting on behalf of Affiliates") of OPRA's "Policies with respect to Device-Based Fees", available on OPRA's Web site, [www.opradata.com](http://www.opradata.com).

basis. That is, a recipient of the market data is required to pay a fee for Category 3 Non-Display Use on each "platform" that is used for internally matching buy and sell orders.<sup>16</sup> The OPRA Plan amendment adopted fees for Category 3 Non-Display Use that are also on a "per platform" basis. Tracking the CTA/CQ Plan and Nasdaq/UTP Plan definitions, the OPRA Plan amendment defined the term "Platform" as follows: "A "Platform" is a platform for internally matching buy and sell orders. Matching buy and sell orders includes matching customer orders on a data recipient's own behalf and/or on behalf of its clients. The term 'Platform' includes, but is not restricted to, exchanges, alternative trading systems (ATs), broker crossing networks, broker crossing systems not filed as ATs, dark pools, multilateral trading facilities, and systematic internalization systems."

As is the case with respect to the CTA/CQ Non-Display Use fees and the Nasdaq/UTP Non-Display Use fees, an OPRA data recipient may use OPRA data for one, two or all three categories and therefore be subject to non-display fees for one, two or all three categories. For example, if a broker-dealer uses OPRA data to run compliance programs for the firm (Category 1), to conduct investment analysis on behalf of its customers (Category 2), and to operate an ATS that matches buy and sell orders (Category 3), then the firm would be required to pay OPRA non-display use fees in respect of all three categories.

## B. Non-Display Use Reporting Requirements

In order to minimize the administrative burden associated with their Non-Display Use fees, the CTA/CQ Plan Participants and the Nasdaq/UTP Plan Operating Committee do not impose monthly reporting requirements in respect of their Non-Display Use fees, and instead require each recipient of a real-time data feed to make an initial declaration with respect to its Non-Display Use of their respective datasets, a declaration with respect to any changes in its Non-Display Use of their respective datasets, and an annual declaration of its non-display use.<sup>17</sup> OPRA included a note in its Fee Schedule to state that it will require reporting on the same basis. OPRA will audit data feed recipients' Non-Display Use of market data in accordance with the terms of its applicable agreements and ordinary auditing practices, and

<sup>16</sup> See *supra* note 8, at 60538 (CTA/CQ Plans); see *supra* note 9, at 60525 (Nasdaq/UTP Plan).

<sup>17</sup> See *supra* note 8, at 60539 (CTA/CQ Plans); see *supra* note 9, at 60526 (Nasdaq/UTP Plan).

<sup>11</sup> See *supra* note 9, at 60525.

<sup>12</sup> See *supra* note 8, at 60538 (CTA/CQ Plan); and see *supra* note 9, at 60526 (Nasdaq/UTP Plan).

will charge Non-Display Use fees in instances in which it determines that Non-Display Use has not been accurately declared.

### C. Fees for Non-Display Use

The OPRA Plan amendment adopted fees for Non-Display Use as follows: A monthly fee of \$2,000/Enterprise for Category 1 Non-Display Use; a monthly fee of \$2,000/Enterprise for Category 2 Non-Display Use; and a monthly fee of \$2,000/Platform for Category 3 Non-Display Use.

By way of comparison: The CTA/CQ Plan Participants have established separate monthly Non-Display Fees for Network A of \$2,000 for last sale prices plus \$2,000 for quotation information in each of the three categories of use, and Non-Display Fees for Network B of \$1,000 for last sale prices plus \$1,000 for quotation information in each of the three categories of use;<sup>18</sup> and the Nasdaq/UTP Plan Operating Committee has established a monthly fee for the data disseminated pursuant to the Nasdaq/UTP Plan of \$3,500 for each of the three categories of use.<sup>19</sup>

Prior to the OPRA Plan amendment, 59 OPRA data feed recipients were paying OPRA's "Non-Display Application Fee," which, as described above, was applicable only to any "application used for purposes of generating orders and/or quotations on an automated basis."<sup>20</sup> Because the definition of "Non-Display Use" is broader than OPRA's prior definition of the term "Non-Display Application," OPRA expects the number of data feed recipients that will be subject to Category 1 Non-Display fees to be greater than the number of data feed recipients paying the prior Non-Display Application Fee; OPRA's best estimate is that approximately double the number of data feed recipients currently paying OPRA's Non-Display Application Fee—approximately 120 data feed recipients—will be subject to Category 1 Non-Display fees. Further, OPRA's best estimate is that approximately half of those data feed recipients—approximately 60 data feed recipients—will also be subject to "Category 2" Non-Display fees. If these estimates are accurate, then the new fee structure would generate approximately \$4,300,000 in annualized revenue to

OPRA, representing an increase of approximately \$3,200,000 over the annualized revenues that OPRA previously received from the Non-Display Application Fee.<sup>21</sup>

If OPRA's estimate of its annualized revenue from its revised Non-Display fees is accurate, the additional annualized revenue will represent approximately a 4.7% increase in OPRA's total revenues for the year 2014. In terms of a perspective over a longer term, the additional annualized revenue will also represent approximately a 4.7% increase in OPRA's total revenues for the year 2008, approximately a 0.6% increase per year for each year since 2008.

Looking at the additional annualized revenue in another way, the estimated increase in revenue will represent less than two years of revenue lost by OPRA due to decreases in the number of Devices/User IDs that are subject to OPRA's Professional Subscriber Device-Based Fees.<sup>22</sup> When OPRA implemented its "Non-Display Application" fee in 2012, it stated that it believed that the use of Non-Display Applications by active trading firms was resulting, and would continue to result, in a significant reduction in the number of devices and user IDs that are reported to it,<sup>23</sup> and OPRA anticipated that the Non-Display Application fees would substantially offset the reduction in revenue from Professional Subscriber Device-Based Fees. OPRA believes that it has indeed been the case that Non-Display Use of OPRA data by active trading firms is a major reason for the reductions in the number of devices and user IDs that are reported to OPRA, and OPRA anticipates that the trend of reductions in the number of Devices/UserIDs will continue as it has for the past eight years. It has not been the case

<sup>21</sup> OPRA is not estimating any "net" revenue derived from "Category 3" Non-Display Fees (for non-display use in connection with providing a two-sided trading platform). The OPRA Participant Exchanges are subject to Category 3 Non-Display Fees, but this revenue does not represent net revenue available to OPRA and its Participant Exchanges for collecting, consolidating, processing and disseminating OPRA data. Other than the OPRA Participant Exchanges, OPRA is aware of only one other two-sided trading platform that may be subject to "Category 3" fees. That platform would generate \$24,000 in annualized Category 3 Non-Display Fees, a number that does not meaningfully change OPRA's estimates of total revenue and increased revenue resulting from the proposed Non-Display fee structure.

<sup>22</sup> The average number of Devices/User IDs in 2013 was 151,400. As noted above (see footnote 7), OPRA projects an average of 136,600 devices/User IDs in 2015, representing a decrease of 14,800 Devices/User IDs and a decrease in OPRA's 2015 revenues (at a monthly rate of \$28.50 per device/User ID) of approximately \$5,000,000.

<sup>23</sup> See *supra* note 8, at 60538.

that the Non-Display Application fees have substantially offset the reduction in revenue resulting from the continuing reductions in the number of devices and user IDs that are reported to OPRA. OPRA anticipates that the "Non-Display Use" fees will offset future decreases in its revenues from Professional Subscriber Device-Based Fees to a greater extent than have OPRA's Non-Display Application fees.

The text of the amendment to the OPRA Plan is available at OPRA, the Commission's Public Reference Room, on OPRA's Web site at <http://opradata.com>, and on the Commission's Web site at [www.sec.gov](http://www.sec.gov).

## II. Implementation of the OPRA Plan Amendment

Pursuant to paragraph (b)(3)(i) of Rule 608 of Regulation NMS under the Act, OPRA designated this amendment as establishing or changing fees or other charges collected on behalf of all of the OPRA participants in connection with access to or use of OPRA facilities. OPRA put the revised Non-Display Application Fees into effect as of January 1, 2016.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the OPRA Plan amendment is consistent with the Act.<sup>24</sup> 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 No. SR-OPRA-2015-01 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.

<sup>24</sup> Pursuant to Rule 608(b)(3)(iii) of Regulation NMS, the Commission may summarily abrogate an immediately effective NMS Plan amendment within sixty days of its filing and require refiling and approval of the amendment if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Securities Exchange Act of 1934. See 17 CFR 242.608(b)(3)(iii). The abrogation period for the OPRA Plan amendment has expired. Interested persons may nevertheless submit written comments on the OPRA Plan amendment.

<sup>18</sup> See *supra* note 8, at 60538.

<sup>19</sup> See *supra* note 9, at 60526.

<sup>20</sup> Of the 59 OPRA data feed recipients, seven were paying the \$7500/month "Enterprise" rate. The new fees represent a fee reduction for these data feed recipients, and for a few OPRA data feed recipients that are reporting five or more Non-Display Applications. For the remaining data feed recipients, the new fees represent a fee increase.

All submissions should refer to File Number SR-OPRA-2015-01. 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 OPRA Plan amendment that are filed with the Commission, and all written communications relating to the OPRA Plan amendment 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 OPRA. 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-OPRA-2015-01 and should be submitted on or before May 9, 2016.

By the Commission.

**Robert W. Errett,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77593; File No. SR-ISE-2016-09]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees

April 12, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act" or "Exchange Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 1, 2016, the International Securities Exchange, LLC

(the "Exchange" or "ISE") 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

ISE proposes to amend the Schedule of Fees as described in more detail below. The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.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 Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 purpose of this proposed rule change is to amend the Schedule of Fees to modify the Regular Order Fee for Responses to Crossing Orders in Select<sup>3</sup> and Non-Select Symbols and Fee for Non-Select Symbols.

The Exchange proposes the following two fee changes. First, the Exchange proposes to change the Fee for Responses to Crossing Orders in Select and Non-Select Symbols for all members from \$0.47 per contract to \$0.50 per contract. Next, the Exchange proposes to change the Fees in Non-Select Symbols charged to Non-ISE Market Maker ("FarMM"),<sup>4</sup> Firm

<sup>3</sup> "Select Symbols" are options overlying all symbols listed on the ISE that are in the Penny Pilot Program.

<sup>4</sup> A Non-ISE Mercury Market Maker, or Far Away Market Maker ("FARMM"), is a market maker as defined in Section 3(a)(38) of the Securities Exchange Act of 1934, as amended ("Exchange

Proprietary<sup>5</sup>/Broker-Dealer,<sup>6</sup> and Professional Customer<sup>7</sup> from \$0.50 per contract to \$0.72 per contract.

###### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>8</sup> in general, and Section 6(b)(4) of the Act,<sup>9</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities.

The Exchange believes that the proposed fee increases are reasonable and equitable as the proposed fees are set at levels that the Exchange believes will continue to be attractive to market participants that trade on ISE. Moreover, the proposed fees are competitive with fees charged by other options exchanges and remain attractive to members for this reason. For example, ISE's proposed Fee for Responses to Crossing Orders in Select Symbols is the same as ISE Mercury's Fee for Responses to Crossing Orders (excluding Market Makers) in Penny Symbols.<sup>10</sup> Further, ISE's proposed Fee for Responses to Crossing Orders in Non-Select Symbols is less than ISE Mercury's Fee for Responses to Crossing Orders (excluding Market Makers) in Non-Penny Symbols.<sup>11</sup> Additionally, the Regular Order Non-Select Symbol Fee of \$0.72 is less than the Electronic, Non-Penny Classes fee of \$0.75 charged by the Chicago Board Options Exchange.<sup>12</sup>

The Exchange also notes that the proposed Fees for Responses to Crossing Orders are not unfairly discriminatory because they apply equally to all members. Additionally, the Exchange further notes that for the Non-Select Symbol Fee, Priority Customers will continue to be charged no fee, while other market participants will continue to pay a fee. The Exchange does not believe that this is unfairly discriminatory as a Priority Customer is by definition not a broker or dealer in

Act"), registered in the same options class on another options exchange.

<sup>5</sup> A Firm Proprietary order is an order submitted by a member for its own proprietary account.

<sup>6</sup> A Broker-Dealer order is an order submitted by a member for a non-member broker-dealer account.

<sup>7</sup> A Professional Customer is a person who is not a broker/dealer and is not a Priority Customer.

<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> See ISE Mercury Fee Schedule, Regular Order Fees and Rebates, Table 2 at [http://www.ise.com/assets/mercury/documents/OptionsExchange/legal/fee/Mercury\\_Fee\\_Schedule.pdf](http://www.ise.com/assets/mercury/documents/OptionsExchange/legal/fee/Mercury_Fee_Schedule.pdf).

<sup>11</sup> *Id.*

<sup>12</sup> See CBOE Fee Schedule, Equity Options Rate Table, Transaction Fee Per Contract at <http://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf>.

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

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