

necessary bandwidth for the Premium NYSE Data Products and responding to any production issues.”<sup>89</sup> The Commission does not believe the Exchange has clearly explained why the same rationale would not apply to the Included Data Products. The Exchange has sought to justify this on the basis that the Premium NYSE Data Products are similar to any other service offered by the Exchange such as connectivity to Third Party Systems and DTCC.<sup>90</sup> The Commission however is concerned that these Premium NYSE Data Products are similar to the Included Data Products and therefore should not include different fee structures as they are the same offering by the Exchange within the contemplated purpose of co-location. The Commission seeks comment on whether charging fees for Included Data Products and Premium NYSE Data Products in a different manner is consistent with Section 6(b)(4) of the Act.

*Procedure: Request for Written Comments*

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposed rule change, as modified by Amendment Nos. 1 and 2. In particular, the Commission invites the written views of interested persons concerning whether the proposal, as modified by Amendment Nos. 1 and 2, is consistent with Sections 6(b)(4), (5), or (8)<sup>91</sup> or any other provision of the Act, or the rules and regulations thereunder. Although there does not appear to be any issue relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>92</sup> any request for an opportunity to make an oral presentation.<sup>93</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the

proposal, as modified by Amendment Nos. 1 and 2, should be approved or disapproved by December 12, 2016. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by December 27, 2016. In light of the concerns raised by the proposed rule change, as discussed above, the Commission invites additional comment on the proposed rule change, as modified by Amendment Nos. 1 and 2, as the Commission continues its analysis of the proposed rule change's consistency with Sections 6(b)(4), (5) and (8),<sup>94</sup> or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposed rule change, as modified by Amendment Nos. 1 and 2, in addition to any other comments they may wish to submit about the proposed rule change.

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-NYSE-2016-45 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. All submissions should refer to File No. SR-NYSE-2016-45. 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 No. SR-NYSE-2016-45, and should be submitted by December 12, 2016. Rebuttal comments should be submitted by December 27, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>95</sup>

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016-27896 Filed 11-18-16; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-79314; File No. SR-NYSEMKT-2016-101]

**Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Amending the Fees for NYSE MKT BBO and NYSE MKT Trades To Lower the Enterprise Fee**

November 15, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on November 1, 2016, 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 the fees for NYSE MKT BBO and NYSE MKT Trades to lower the Enterprise Fee. The proposed 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>95</sup> 17 CFR 200.30-3(a)(57).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>89</sup> See Amendment No. 2, *supra* note 8.

<sup>90</sup> See *id.*

<sup>91</sup> 15 U.S.C. 78f(b)(4), (b)(5) and (b)(8).

<sup>92</sup> 17 CFR 240.19b-4.

<sup>93</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

<sup>94</sup> 15 U.S.C. 78f(b)(4), (b)(5), and (b)(8).

## I. 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 the fees for NYSE MKT BBO and NYSE MKT Trades market data products,<sup>4</sup> as set forth on the NYSE MKT Equities Proprietary Market Data Fee Schedule ("Fee Schedule"). Specifically, the Exchange proposes to lower the Enterprise Fee. The Exchange proposes to make the fee change effective November 1, 2016.

The Exchange currently charges an enterprise fee of \$15,000 per month for an unlimited number of professional and non-professional users for each of NYSE MKT BBO and NYSE MKT Trades.<sup>5</sup> A single Enterprise Fee applies for clients receiving both NYSE MKT BBO and NYSE MKT Trades.<sup>6</sup> The Exchange proposes to lower the enterprise fee to \$3,000 per month.

As an example, under the current fee structure for per user fees, if a firm had 10,000 professional users who each received NYSE MKT Trades at \$1 per month and NYSE MKT BBO at \$1 per month, without the Enterprise Fee, the firm would be subject to \$20,000 per month in professional user fees. Under the current pricing structure, the charge would be capped at \$15,000 and effective November 1, 2016 it would be capped at \$3,000.

Under the proposed enterprise fee, the firm would pay a flat fee of \$3,000 for

an unlimited number of professional and non-professional users for both products. As is the case currently, a data recipient that pays the enterprise fee would not have to report the number of such users on a monthly basis.<sup>7</sup> However, every six months, a data recipient must provide the Exchange with a count of the total number of natural person users of each product, including both professional and non-professional users.

#### 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 Sections 6(b)(4) and 6(b)(5) of the Act,<sup>9</sup> 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 proposed fee change is also equitable and not unfairly discriminatory because it would apply to all data recipients that choose to subscribe to NYSE MKT BBO and NYSE MKT Trades.

The proposed enterprise fees for NYSE MKT BBO and NYSE MKT Trades are reasonable because they could result in a fee reduction for data recipients with a large number of professional and nonprofessional users, as described in the example above. If a data recipient has a smaller number of professional users of NYSE MKT BBO and/or NYSE MKT Trades, then it may continue to use the per user fee structure. By reducing prices for data recipient with a large number of professional and non-professional users, the Exchange believes that more data recipients may choose to offer NYSE MKT BBO and NYSE MKT Trades, thereby expanding the distribution of this market data for the benefit of investors. The Exchange also believes that offering an enterprise fee expands the range of options for offering NYSE MKT BBO and NYSE MKT Trades and allows data recipients greater choice in selecting the most appropriate level of data and fees for the professional and non-professional users they are servicing.

The Exchange notes that NYSE MKT BBO and NYSE MKT Trades are entirely optional. The Exchange is not required to make NYSE MKT BBO and NYSE

MKT Trades available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase NYSE MKT BBO and NYSE MKT Trades. Firms that do purchase NYSE MKT BBO and NYSE MKT Trades do so for the primary goals of using them to increase revenues, reduce expenses, and in some instances compete directly with the Exchange (including for order flow); those firms are able to determine for themselves whether NYSE MKT BBO and NYSE MKT Trades or any other similar products are attractively priced or not.<sup>10</sup>

Firms that do not wish to purchase NYSE MKT BBO and NYSE MKT Trades have a variety of alternative market data products from which to choose,<sup>11</sup> or if NYSE MKT BBO and NYSE MKT Trades do not provide sufficient value to firms as offered based on the uses those firms have or planned to make of it, such firms may simply choose to conduct their business operations in ways that do not use NYSE MKT BBO and NYSE MKT Trades or use them at different levels or in different configurations. The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations.<sup>12</sup>

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

<sup>4</sup> See Securities Exchange Act Release Nos. 61936 (April 16, 2010), 74 [sic] FR 21088 (April 22, 2010) (SR-NYSEAmex-2010-35) (notice—NYSE MKT BBO and NYSE MKT Trades) and 62187 (May 27, 2010), 75 FR 31500 (June 3, 2010) (SR-NYSEAmex-2010-35) (approval order—NYSE MKT BBO and NYSE MKT Trades).

<sup>5</sup> See Securities Exchange Act Release No. 76906 (January 14, 2016), 81 FR 3500 (January 21, 2016) (SR-NYSEMKT-2016-04).

<sup>6</sup> See Securities Exchange Act Release No. 70212 (August 15, 2013), 78 FR 51775 (August 21, 2013) (SR-NYSEMKT-2013-69).

<sup>7</sup> Professional users currently are subject to a per display device count. See Securities [sic] Act Release No. 73986 (January 5, 2015), 80 FR 1444 (January 9, 2015) (SR-NYSEMKT-2014-113).

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

<sup>9</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>10</sup> See, e.g., Proposing Release on Regulation of NMS Stock Alternative Trading Systems, Securities Exchange Act Release No. 76474 (Nov. 18, 2015) (File No. S7-23-15). See also, "Brokers Warned Not to Steer Clients' Stock Trades Into Slow Lane," Bloomberg Business, December 14, 2015 (Sigma X dark pool to use direct exchange feeds as the primary source of price data).

<sup>11</sup> See NASDAQ Rule 7047 (Nasdaq Basic) and BATS [sic] Rule 11.22 (BATS TOP and Last Sale).

<sup>12</sup> See FINRA Regulatory Notice 15-46, "Best Execution," November 2015.

practices that constitute the U.S. national market system for trading equity securities.”<sup>13</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 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 proprietary market data would be so complicated that it could not be done practically or offer any significant benefits.<sup>14</sup>

In addition, the Exchange believes that the proposed fees are reasonable when compared to fees for comparable products offered by at least one other exchange. For example, Bats BYX Exchange (“BYX”) charges an enterprise fee of \$10,000 per month for each of BYX Top and BYX Last Sale, which includes best bid and offer and last sale

<sup>13</sup> *NetCoalition*, 615 F.3d at 535.

<sup>14</sup> The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties and 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/572899/buck1.htm>.

data, respectively.<sup>15</sup> The Exchange is proposing enterprise fees that are less than the fees currently charged by BYX.

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.”<sup>16</sup>

Moreover, competitive markets for listings, order flow, executions, and

<sup>15</sup> See Market Data Fees at [https://www.batstrading.com/support/fee\\_schedule/byx/](https://www.batstrading.com/support/fee_schedule/byx/).

<sup>16</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/atr/speeches/2011/at-speech-110516.html>; see also Complaint in *U.S. v. Deutsche Borse AG and NYSE Euronext*, Case No. 11–cv–2280 (D.C. Dist.) ¶ 24 (“NYSE and Direct Edge compete head-to-head . . . in the provision of real-time proprietary equity data products.”).

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.”<sup>17</sup> 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 trading systems, and more than 250 broker-dealers.<sup>18</sup>

If an exchange succeeds in competing 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 in light of the diminished content and data products offered by competing venues may become 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 also redistributed through market data vendors, such as Bloomberg and Thompson Reuters, the vendors

<sup>17</sup> 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>.

<sup>18</sup> 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.

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 NYSE MKT BBO or NYSE MKT Trades unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE MKT BBO and NYSE MKT Trades 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 of 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 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.

Other market participants have noted that proprietary market data and trade executions are joint products of a joint platform and have common costs.<sup>19</sup> 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.<sup>20</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 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

<sup>19</sup> See Securities Exchange Act Release No. 72153 (May 12, 2014), 79 FR 28575, 28578 n.15 [sic] (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 (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).

<sup>20</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.”).

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 13 equities self-regulatory organization (“SRO”) markets, as well as various forms of alternative trading systems (“ATs”), 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 Facilities compete to attract transaction reports from the non-SRO venues.

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 Global Markets (“Bats”) and Direct Edge, which previously operated as ATs and obtained exchange status in 2008 and 2010, respectively, provided certain market data at no charge on their Web sites in order to attract more order flow, and used revenue rebates from resulting additional executions to maintain low execution charges for their users.<sup>21</sup> 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, ATs, and internalizing broker-dealers that

<sup>21</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.

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, including but not limited to the Exchange, New York Stock Exchange LLC, NYSE Arca, Inc. ("NYSE Arca"), NASDAQ, Bats [sic], 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 [sic] 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. Indeed, in the case of NYSE MKT BBO and NYSE MKT Trades, the data provided through these products appears both in (i) real-time core data products offered by the Securities Information Processors (SIPs) for a fee, and (ii) free SIP data products with a 15-minute time delay, and finds a close substitute in similar products of competing venues.<sup>22</sup> 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.

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. A proliferation of dark pools and other ATSS operate profitably with fragmentary share of consolidated market volume.

In determining the proposed changes to the fees for the NYSE MKT BBO and NYSE MKT Trades, 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)<sup>23</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>24</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 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)<sup>25</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-101 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-NYSEMKT-2016-101. 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-NYSEMKT-2016-101 and should be submitted on or before December 12, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

**Brent J. Fields,**  
*Secretary.*

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<sup>23</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>24</sup> 17 CFR 240.19b-4(f)(2).

<sup>25</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>26</sup> 17 CFR 200.30-3(a)(12).

<sup>22</sup> See *supra* note 15.