executions to maintain low execution charges for their users.[27]

Further, data products are valuable to certain end users only insofar as they provide information that end users expect will assist them or their customers in tracking prices and market trends. The Exchange believes that the Digital Media Enterprise Fees, which will permit wider distribution of last sale information at a lower price, may encourage more vendors to choose to offer NYSE Trades or NYSE RRP over multiple communication devices and thereby benefit public investors and other market participants by providing them with more convenient ways to track prices and market trends during the course of the trading day. The Exchange further believes that only vendors that expect to derive a reasonable benefit from redistributing NYSE Trades and NYSE RRP data will choose to become redistributors and pay the attendant monthly fees.

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

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

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

[27] 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.

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) [28] of the Act and subparagraph (f)(2) of Rule 19b–4 [29] 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) [30] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2013–24 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2013–24. 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 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 offices of NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2013–24, and should be submitted on or before May 1, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–08324 Filed 4–9–13; 8:45 am]

BILLING CODE 8011–01–P

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f)(2).

[30] 15 U.S.C. 78s(b)(2)(B).

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69300; File No. SR–NYSEMKT–2013–31]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Certain Fees for the NYSE MKT Trades and NYSE MKT Realtime Reference Prices Market Data Products

Dated: April 4, 2013.

Pursuant to Section 19(b)(1) [1] of the Securities Exchange Act of 1934 (the ''Act'') [2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 21, 2013, 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.

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

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

[3] 17 CFR 240.19b–4.

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

The Exchange proposes to establish certain fees for the NYSE MKT Trades and NYSE MKT Realtime Reference Prices (''NYSE MKT RRP'') market data products. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to establish certain fees for the NYSE MKT Trades and NYSE MKT RRP market data products.

Background

Current NYSE MKT Trades Basic and Broadcast Fees

In 2010, the Securities and Exchange Commission (''SEC'' or the ''Commission'') approved the NYSE MKT Trades data feed and certain fees for it.[4] NYSE MKT Trades is a NYSE MKT-only market data feed that allows a vendor to redistribute on a real-time basis the same last sale information that the Exchange reports under the Consolidated Tape Association (''CTA'') Plan for inclusion in the CTA Plan's consolidated data streams and certain other related data elements. Specifically, NYSE MKT Trades includes the real-time last sale price, time, size, and bid/ask quotations for each security traded on the Exchange and a stock summary message. The stock summary message updates every minute and includes NYSE MKT's opening price, high price, low price, closing price, and cumulative volume for the security.

The Exchange currently charges NYSE MKT Trades data feed recipients an access fee of $750 per month, and a subscriber fee for professional subscribers of $10 per month per device, which may be counted, at the election of the vendor based on the number of ''Subscriber Entitlements'' [5] (collectively, these fees are referred to in this filing as ''NYSE MKT Trades basic fees''). In July 2012, the Exchange added a fee for distribution by television broadcasters (''Broadcast Fee''), which is $5,000 per month.[6] The television broadcast distribution method differs from the other distribution methods in that the data is available in a temporary, view-only mode on television screens.

Current NYSE MKT RRP Fees

The Exchange also offers NYSE MKT RRP.[7] NYSE MKT RRP is designed for Web site distribution and includes the real-time last sale price and time for each security traded on the Exchange as well as the stock summary message, but does not include the size of each trade or bid/ask quotations.

The Exchange currently charges a flat fee of $10,000 per month with no user-based fees for NYSE MKT RRP. For that fee, the vendor may provide NYSE MKT RRP to an unlimited number of the vendor's subscribers and customers without having to differentiate between professional subscribers and nonprofessional subscribers, without having to account for the extent of access to the data, and without having to report the number of users. As an alternative to the NYSE MKT RRP flat monthly fee, the Exchange offers an alternative fee of $.004 for each real-time reference price that a vendor disseminates to its customers (''per query fee''), which is capped at $10,000 per month, the same amount as the flat fee. In order to take advantage of the per-query fee, a vendor must document that it has the ability to measure accurately the number of queries and must have the ability to report aggregate query quantities on a monthly basis. The per-query fee is imposed on vendors, not end-users. There are currently no fees for NYSE MKT RRP that are specifically designed for television or mobile device distribution.

NYSE MKT RRP was created to allow distribution of a last sale data product for reference purposes on Web sites at a low cost that would facilitate distribution to millions of retail investors and relieve vendors of administrative burdens.[8] NYSE MKT RRP is an alternative to delayed prices and is not intended for use in trading decisions.[9] As such, distribution of NYSE MKT RRP is subject to certain requirements. Specifically, vendors may not provide NYSE MKT RRP in a context in which a trading or order routing decision can be implemented unless CTA data is available in an equivalent manner, must label NYSE MKT RRP as NYSE MKT-only data, and must provide a hyperlinked notice similar to the one provided for CTA delayed data.[10]

New Digital Media Offerings

The Exchange recently created a new version of NYSE MKT Trades, NYSE MKT Trades Digital Media, which will allow market data vendors, television broadcasters, Web site and mobile device service providers, and others to distribute the product to their customers for viewing via television, Web site, and mobile devices.[11] The NYSE MKT Trades Digital Media product includes access to the real-time last sale price, time, and size for each security traded on the Exchange as well as the stock summary message, but does not include access to the bid/ask quotation that is included with NYSE MKT Trades product under the basic fees or Broadcast Fee. Vendors may not provide the NYSE MKT Trades Digital Media product in a context in which a trading or order routing decision can be implemented unless CTA data is available in an equivalent manner, must label the product as NYSE MKT-only data, and must provide a hyperlinked notice similar to the one provided for CTA delayed data.

The Exchange also will offer NYSE MKT RRP Digital Media so that NYSE MKT RRP will be available for distribution in the same manner as NYSE MKT Trades Digital Media, via television, Web site, and mobile devices. The data elements of NYSE MKT RRP (last sale price, time, and stock summary message) will remain unchanged from today's NYSE MKT RRP product offering.

The Exchange has established these Digital Media products in recognition of

[4] *See* Securities Exchange Act Release No. 62187 (May 27, 2010), 75 FR 31500 (June 3, 2010) (SR–NYSEAmex–2010–35).

[5] *See id.* at 31501.

[6] *See* Securities Exchange Act Release No. 67438 (July 13, 2012), 77 FR 42535 (July 19, 2012) (SR–NYSEMKT–2012–19).

[7] *See* Securities Exchange Act Release No. 61403 (Jan. 22, 2010), 75 FR 4598 (Jan. 28, 2010) (SR–NYSEAmex–2009–85).

[8] *Id.*

[9] *Id.*

[10] *See* Securities Exchange Act Release No. 61144 (Dec. 10, 2009), 74 FR 67275, 67276–77 (Dec. 18, 2009) (SR–NYSEAmex–2009–85).

[11] *See* SR–NYSEMKT–2013–30.

the demand for a more seamless and easier-to-administer data distribution model that takes into account the expanded variety of media and communication devices that investors utilize today. For example, a television broadcaster could display the NYSE MKT Trades data during market-related television programming and on its Web site and allow its viewers to view the data via their mobile devices, creating a more seamless distribution model that will allow investors more choice in how they receive and view market data.

Proposed Digital Media Fees

The NYSE MKT Trades Digital Media Enterprise Fee will be $5,000 per month, and the NYSE MKT RRP Digital Media Enterprise Fee will be $2,500 per month. The Exchange notes that the NYSE MKT RRP Digital Media Enterprise Fee is lower than NYSE MKT Trades Digital Media Enterprise Fee because it does not include trade size data. Vendors that pay these fees will not be required to pay an access fee, but they will be required to pay the redistribution fees as described below. As with the current NYSE MKT RRP product and the Broadcast Fee, a vendor paying the Digital Media Enterprise Fee may deliver the NYSE MKT Trades and NYSE MKT RRP data to an unlimited number of television, Web site, and mobile device viewers without having to differentiate between professional subscribers and nonprofessional subscribers, without having to account for the extent of access to the data, and without having to report the number of users.

For NYSE MKT Trades, the television-only $5,000 Broadcast Fee option will no longer be available. For NYSE MKT RRP, web-only distribution for $10,000 per month will no longer be available. The Exchange does not believe that any customers would elect these options in light of the broader distribution offered with the new Digital Media Enterprise Fees and the substantially lower price for NYSE MKT RRP Digital Media.

The Exchange will continue to offer the $.004 per query fee for NYSE MKT RRP to any vendor that so chooses, but the Exchange proposes to reduce the cap to $2,500, the same amount as the NYSE MKT RRP Digital Media Enterprise Fee. Vendors and subscribers receiving NYSE MKT Trades via traditional distribution methods, e.g. a Bloomberg terminal or a broker-dealer customer Web site that permits order entry, will not be eligible for Digital Media Enterprise Fees and will continue to pay NYSE MKT Trades basic fees.

Redistribution Fees

The Exchange also proposes to charge a redistribution fee of $750 per month for NYSE MKT Trades and $1,500 per month for NYSE MKT RRP.[12] The redistribution fees will apply regardless of whether the customer is eligible for the Digital Media Enterprise Fees or NYSE MKT Trades basic fees.

Operative Date

The Digital Media Enterprise Fees will be operative on April 1, 2013 and the redistribution fees will be operative on May 1, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[13] in general, and Sections 6(b)(4) and 6(b)(5) of the Act,[14] 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 NYSE MKT Trades Digital Media Enterprise Fee of $5,000 per month and NYSE MKT RRP Digital Media Enterprise Fee of $2,500 per month are reasonable because they will offer a means for vendors to more widely distribute NYSE MKT Trades and NYSE MKT RRP data to investors for informational purposes at the same cost (in the case of NYSE MKT Trades) or a lower cost (in the case of NYSE MKT RRP) than is available today. Currently, NYSE MKT Trades can be distributed via television for a $5,000 monthly fee, but that fee does not include Web site or mobile device distribution. NYSE MKT RRP can be distributed over Web sites for a $10,000 monthly fee, but that fee does not include television or mobile device distribution. The Exchange believes that the proposed Digital Media Enterprise Fees are reasonable because in certain instances they are less than the fees charged by another exchange for a similar product.[15] The Exchange also believes that it is reasonable to charge more for NYSE MKT Trades Digital Media than NYSE MKT RRP Digital Media because the former includes trade size data. The Exchange believes that the price reduction for NYSE MKT RRP coupled with the broader distribution options will make the product more attractive and result in its greater availability to investors. The Exchange believes that reducing the cap for the per query fee from $10,000 to $2,500 is reasonable because it will be equal to the proposed monthly NYSE MKT RRP Digital Media Enterprise Fee. The Exchange believes that reducing the cap for the per query fee is equitable and not unfairly discriminatory because it is designed to ensure that vendors that elect the per query fee do not pay more for real-time reference price data than vendors that pay a flat fee for unlimited use.

The proposed Digital Media Enterprise Fees also are equitable and not unfairly discriminatory because they will be applied uniformly to market data vendors, television broadcasters, Web site and mobile service providers, or any other person that distributes the data on the basis described in this filing. The Exchange believes that it is appropriate to offer a lower cost fee structure that is designed to facilitate broader media distribution of the NYSE MKT Trades and NYSE MKT RRP data for informational purposes because it will benefit investors generally. Moreover, the value of the data distributed generally in the media for informational purposes differs from when it is distributed in manner in which it can immediately be utilized for trading decisions. The Exchange believes that the data is more valuable in that latter context, and as such, it is fair and equitable to have differential pricing for it.

In establishing the Digital Media Enterprise Fees, the Exchange recognizes that there is demand for a more seamless and easier-to-administer data distribution model that takes into account the expanded variety of media and communication devices that investors utilize today. As is the case with the current NYSE MKT RRP product and the Broadcast Fee, the Exchange believes that the Digital Media Enterprise Fee will be easy to administer because vendors that purchase it will not have to differentiate between professional subscribers and nonprofessional subscribers, account for the extent of access to the data, or report the number of users; this is a significant reduction in vendors' administrative burdens and is a significant value to vendors. For example, a television broadcaster could display the NYSE MKT Trades Digital Media data during market-related television programming and on its Web site and allow its

[12] A redistributor is a vendor or any other person that provides an NYSE MKT data product to a data recipient or to any system that a data recipient uses, irrespective of the means of transmission or access.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4), (5).

[15] The NASDAQ Stock Market offers proprietary last sale data products for distribution over the Internet and television under alternative fee schedules that are subject to a maximum fee is $50,000 per month. *See* NASDAQ Rule 7039(b).

viewers to view the data via their mobile devices, creating a more seamless distribution model that will allow investors more choice in how they receive and view market data, all without having to account for and/or measure who accesses the data and how much they do so. By easing administration, broadening distribution channels, and, in the case of NYSE MKT RRP, reducing prices, the Exchange believes that more vendors will choose to offer NYSE MKT Trades and NYSE MKT RRP, thereby expanding the distribution of market data for the benefit of investors.

The proposed redistribution fees also are reasonable because they are comparable to other redistribution fees charged by the Exchange as well as other exchanges.[16] The Exchange believes it is reasonable to charge redistribution fees because vendors receive value from redistributing the data in their business products for their customers. The redistribution fees also are equitable and not unfairly discriminatory because they will be charged on an equal basis only to those vendors that choose to redistribute the data.

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 the Commission's reliance 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.' '' [17]

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that there is substantial evidence of competition in the marketplace for data and that the Commission can rely upon such evidence in concluding that the fees established in this filing are the product of competition and therefore satisfy the relevant statutory standards.[18] In addition, the existence of alternatives to NYSE MKT Trades and NYSE MKT RRP, including real-time consolidated data, free delayed consolidated data, and proprietary last sale data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives.

As the *NetCoalition* decision noted, the Commission is not required to undertake a cost-of-service or ratemaking approach, and the Exchange incorporates by reference into this proposed rule change its affiliate's analysis of this topic in another rule filing.[19]

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. An exchange's ability to price its proprietary data feed products is constrained by (1) Actual competition for the sale of proprietary market data products, (2) the existence of inexpensive real-time consolidated data and free delayed consolidated data, and (3) the inherent contestability of the market for proprietary last sale data and the joint product nature of exchange platforms.

The Existence of Actual Competition

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

Competitive markets for listings, order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products and therefore constrain markets from overpricing proprietary market data. The U.S. Department of Justice also has acknowledged the aggressive competition among exchanges, including for the sale of proprietary market data itself. In announcing that the bid for NYSE Euronext by NASDAQ OMX Group Inc. and IntercontinentalExchange Inc. had been abandoned, Assistant Attorney General Christine Varney stated that exchanges ''compete head to head to offer real-time equity data products. These data products include the best bid and offer of every exchange and information on each equity trade, including the last sale.'' [20]

It is common for broker-dealers to further exploit this recognized competitive constraint by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. As a 2010 Commission Concept Release noted, the ''current market structure can be described as dispersed and complex'' with ''trading volume * * * dispersed among many highly automated trading centers that compete for order flow in the same stocks'' and ''trading centers offer[ing] a wide range of services that are designed to attract different types of market participants with varying trading needs.'' [21]

[16] For example, the Exchange and NYSE Arca, Inc. (''NYSE Arca'') charge redistribution fees of $2,000 per month for certain proprietary options market data products. *See* Securities Exchange Act Release Nos. 68005 (Oct. 9, 2012), 77 FR 63362 (Oct. 16, 2012) (SR–NYSEArca–2012–106), and 68004 (Oct. 9, 2012), 77 FR 62582 (Oct. 15, 2012) (SR–NYSEMKT–2012–49). NYSE Arca charges a $3,000 per month redistribution fee for the NYSE Arca Integrated Feed. *See* Securities Exchange Act Release No. 66128 (Jan. 10, 2012), 77 FR 2331 (Jan. 17, 2012) (SR–NYSEArca–2011–96). The Options Price Reporting Authority's Fee Schedule, available at *http://www.opradata.com/pdf/fee_schedule.pdf,* includes an ''Internet Service Only'' redistribution fee ($650/month) and standard redistribution fee ($1,500/month).

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

[18] Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'') amended paragraph (A) of Section 19(b)(3) of the Act, 15 U.S.C. 78s(b)(3), to make clear that all exchange fees for market data may be filed by exchanges on an immediately effective basis.

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

[20] 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.*

[21] 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–

In addition, in the case of products that are distributed through market data vendors, the market data vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Internet portals, such as Google, impose price discipline by providing only data that they believe will enable them to attract ''eyeballs'' that contribute to their advertising revenue. Similarly, television broadcasters and Web site and mobile device service providers will not elect to make available NYSE MKT Trades or NYSE MKT RRP unless they believe it will help them attract or maintain viewers/customers for their television, Web site, or mobile device offerings. All of these operate as constraints on pricing proprietary data products.

Joint Platform

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade executions are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of their data products. The more trade executions a platform does, the more valuable its market data products become.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's broker-dealer customers view the costs of transaction executions and market data as a unified cost of doing business with the exchange.

Other market participants have noted that the liquidity provided by the order book, trade execution, core market data, and non-core market data are joint products of a joint platform and have common costs.[22] 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.[23]

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products. Thus, because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of both of obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 12 equities self-regulatory organization (''SRO'') markets, as well as internalizing broker-dealers (''BDs'') and various forms of alternative trading systems (''ATSs''), including dark pools and electronic communication networks (''ECNs''). Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

Existence of Alternatives

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

The fact that proprietary data from ATSs, BDs, and vendors can bypass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products. Second, because a single order or transaction report can appear in an SRO proprietary

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.

[22] *See* Securities Exchange Act Release No. 62887 (Sept. 10, 2010), 75 FR 57092, 57095 (Sept. 17, 2010) (SR–Phlx–2010–121); Securities Exchange Act Release No. 62907 (Sept. 14, 2010), 75 FR 57314, 57317 (Sept. 20, 2010) (SR–NASDAQ–2010–110); and Securities Exchange Act Release No. 62908 (Sept. 14, 2010), 75 FR 57321, 57324 (Sept. 20, 2010) (SR–NASDAQ–2010–111) (''all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.''); *see also* August 1, 2008 Comment Letter of Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX Group, Inc., Statement of Janusz Ordover and Gustavo Bamberger (''because market data is both an input to and a byproduct of executing trades on a particular platform, market data and trade execution services are an example of 'joint products' with 'joint costs.'''), attachment at pg. 4, *available at www.sec.gov/comments/34-57917/3457917-12.pdf.*

[23] *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.'').

product, a non-SRO proprietary product, or both, the amount of data available via proprietary products is greater in size than the actual number of orders and transaction reports that exist in the marketplace. Because market data users can thus find suitable substitutes for most proprietary market data 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.

Moreover, consolidated data provides two additional measures of pricing discipline for proprietary data products that are a subset of the consolidated data stream. First, the consolidated data is widely available in real-time at $1 per month for non-professional users. Second, consolidated data is also available at no cost with a 15- or 20-minute delay. Because consolidated data contains marketwide information, it effectively places a cap on the fees assessed for proprietary data (such as last sale data) that is simply a subset of the consolidated data. The mere availability of low-cost or free consolidated data provides a powerful form of pricing discipline for proprietary data products that contain data elements that are a subset of the consolidated data by highlighting the optional nature of proprietary products.

Those competitive pressure imposed by available alternatives are evident in the Exchange's proposed pricing. The Digital Media Enterprise Fees, which will permit broader distribution at the same price (in the case of NYSE MKT Trades) or a lower price (in the case of NYSE MKT RRP) than is available today, also are lower than the maximum fee for a similar product offered by another exchange[24] and lower than the television distribution fee charged by CTA.[25] The proposed redistribution fees also are comparable to the Exchange's and another exchange's similar fees.[26]

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. Today, BATS and Direct Edge provide certain market data at no charge on their Web sites in order to attract more order flow, and use revenue rebates from resulting additional executions to maintain low execution charges for their users.[27]

Further, data products are valuable to certain end users only insofar as they provide information that end users expect will assist them or their customers in tracking prices and market trends. The Exchange believes that the Digital Media Enterprise Fees, which will permit wider distribution of last sale information at either the same or a lower price, may encourage more vendors to choose to offer NYSE MKT Trades or NYSE MKT RRP over multiple communication devices and thereby benefit public investors and other market participants by providing them with more convenient ways to track prices and market trends during the course of the trading day. The Exchange further believes that only vendors that expect to derive a reasonable benefit from redistributing NYSE MKT Trades and NYSE MKT RRP data will choose to become redistributors and pay the attendant monthly fees.

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

[24] *See supra* n.15.

[25] *See* CTA Plan dated July 1, 2012, Exhibit E, Schedule A–1 at n.6 (television distribution fee capped at $125,000 per month in 2010, with certain increases permitted thereafter) *available at http://www.nyxdata.com/CTA.*

[26] *See supra* n.16.

[27] 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.

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)[28] of the Act and subparagraph (f)(2) of Rule 19b–4[29] 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)[30] of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2013–31 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEMKT–2013–31. 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

[28] 15 U.S.C. 78s(b)(3)(A).

[29] 17 CFR 240.19b–4(f)(2).

[30] 15 U.S.C. 78s(b)(2)(B).

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 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 offices of NYSE. 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–2013–31, and should be submitted on or before May 1, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–08326 Filed 4–9–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69303; File No. SR–NYSEArca–2013–33]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade the International Bear ETF Under NYSE Arca Equities Rule 8.600

April 4, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 21, 2013, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. On April 3, 2013, the Exchange filed Amendment No. 1 to the proposed rule change.[4] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

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

The Exchange proposes to list and trade the following under NYSE Arca Equities Rule 8.600 (''Managed Fund Shares''): International Bear ETF. 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 list and trade shares (''Shares'') of the following under NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares:[5] International Bear ETF (''Fund'').[6] The Shares will be offered by AdvisorShares Trust (the ''Trust''), a statutory trust organized under the laws of the State of Delaware and registered with the Securities and Exchange Commission (the ''Commission'') as an open-end management investment company.[7] The investment adviser to the Fund is AdvisorShares Investments, LLC (the ''Adviser''). The Fund will have a sub-adviser (''Sub-Adviser'') that provides day-to-day portfolio management of the Fund. Foreside Fund Services, LLC (the ''Distributor'') is the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon (the ''Administrator'') serves as the administrator, custodian, transfer agent and fund accounting agent for the Fund.

Commentary .06 to Rule 8.600 provides that, if the investment adviser to the investment company issuing Managed Fund Shares is affiliated with a broker-dealer, such investment adviser shall erect a ''fire wall'' between the investment adviser and the broker-dealer with respect to access to information concerning the composition and/or changes to such investment company portfolio. In addition, Commentary .06 further requires that personnel who make decisions on the open-end fund's portfolio composition must be subject to procedures designed to prevent the use and dissemination of material nonpublic information regarding the open-end fund's portfolio.[8] Commentary .06 to Rule

[31] 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] In Amendment No. 1, the Exchange made certain technical changes to the proposed rule change, including the substitution of the phrase ''transact in'' for the word ''purchase'' in the following sentence on page 5 of this Notice: ''The Fund may transact in equity securities traded in the U.S. on registered exchanges or, in the case of American Depositary Receipts, the over-the-counter market.''

[5] A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act'') organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment adviser consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

[6] The Commission has approved listing and trading on the Exchange of a number of actively managed funds under Rule 8.600. *See, e.g.,* Securities Exchange Act Release Nos. 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR–NYSEArca–2010–79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 63802 (January 31, 2011), 76 FR 6503 (February 4, 2011) (SR–NYSEArca–2010–118) (order approving Exchange listing and trading of the SiM Dynamic Allocation Diversified Income ETF and SiM Dynamic Allocation Growth Income ETF); and 65468 (October 3, 2011), 76 FR 62873 (October 11, 2001) [sic] (SR–NYSEArca–2011–51) (order approving Exchange listing and trading of TrimTabs Float Shrink ETF).

[7] The Trust is registered under the 1940 Act. On October 19, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–157876 and 811–22110) (''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812–13677) (''Exemptive Order'').

[8] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (the ''Advisers Act''). As a

Continued