



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78389; File No. SR-NYSEMKT-2016-15]

### **Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Amendment No. 2 to a Proposed Rule Change and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Change, as Modified by Amendment Nos. 1 and 2, Establishing Fees Relating to End Users and Amending the Definition of “Affiliate,” as well as Amending the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule to Reflect the Changes**

July 21, 2016

#### I. Introduction

On April 4, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the co-location section of the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule to establish fees relating to end users of certain co-location Users in the Exchange’s data center and to amend the definition of “Affiliate.” The Commission published the proposed rule change for comment in the Federal Register on April 22, 2016.<sup>3</sup> On April 29,

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

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

<sup>3</sup> See Securities Exchange Act Release No. 34- 77640 (April 18, 2016), 81 FR 23780 (“Notice”).

2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission received no comments on the proposed rule change.<sup>5</sup> On June 8, 2016, the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to July 21, 2016.<sup>6</sup> On June 24, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>7</sup>

The Commission is publishing this order to solicit comments on Amendment No. 2 from interested persons and to institute proceedings pursuant to Exchange Act Section 19(b)(2)(B) to determine whether to approve or disapprove the proposed rule change, as modified by Amendment Nos. 1 and 2.<sup>8</sup> Institution of proceedings does not indicate that the Commission has

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<sup>4</sup> Amendment No. 1 makes technical changes relating to the General Notes numbering and references in the Co-location section of the Fee Schedules. Because Amendment No. 1 is technical, the Commission is not soliciting comment thereon.

<sup>5</sup> The Commission received two comment letters on a companion filing, NYSE-2016-11 (the “NYSE companion filing”), filed by the Exchange’s affiliate, the New York Stock Exchange LLC (“NYSE”). See Letter from Michael Friedman, General Counsel and Chief Compliance Officer, Trillium, to Brent J. Fields, Secretary, Securities and Exchange Commission, dated May 13, 2016 (“Friedman Letter”), and Letter from Eero Pikat to Brent J. Fields, Secretary, Securities and Exchange Commission, dated, May 13, 2016 (“Pikat Letter”) (together, the “Comment Letters”).

In response to the Comment Letters, the NYSE submitted a response (“Response Letter”) and filed Amendment No. 2 to the NYSE companion filing. As they are relevant to the instant filing, the Comment Letters and Response Letter on the NYSE companion filing are discussed below.

<sup>6</sup> See Securities Exchange Act Release No. 34-77978 (June 2, 2016), 81 FR 36966.

<sup>7</sup> As more fully described below, in Amendment No. 2 the Exchange proposes that Rebroadcasting Users and Transmittal Users would not be charged for their first two Multicast End Users and Unicast End Users, respectively, and offers additional support for the proposal. Amendment No. 2 is available on the Commission’s website at <https://www.sec.gov/comments/sr-nysemkt-2016-15/nysemkt201615-2.pdf>. The Commission notes that in the comment file, Amendment No. 2 contains a cover page that erroneously refers to Amendment No. 1.

<sup>8</sup> 15 U.S.C. 78s(b)(2)(B).

reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as discussed below, the Commission seeks additional input on the proposed rule change, as modified by Amendment Nos. 1 and 2, and on the issues presented by the proposal.

## II. Description of the Proposal, as Modified by Amendment Nos. 1 and 2

The Exchange proposes to establish certain fees relating end users. Specifically, the Exchange proposes to amend the co-location section of the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule (collectively “Fee Schedules”) to (i) add the newly defined terms “Rebroadcasting User” and “Multicast End User;” as well as “Transmittal User” and “Unicast End User;” (ii) amend the definition of Affiliate; (iii) establish new reporting requirements applicable to Rebroadcasting Users and Transmittal Users; (iv) establish new fees applicable to Rebroadcasting Users and Transmittal Users; and (v) make certain related technical changes.<sup>9</sup>

The Exchange operates a data center in Mahwah, New Jersey (“data center”) from which it provides co-location services to Users.<sup>10</sup> The Exchange states that in the data center, information flows over existing network connections in two formats: multicast and unicast. Multicast is a format in which information is sent one-way from the Exchange to multiple recipients at once, similar to a radio broadcast, and is currently employed for the transmission of market data.<sup>11</sup> Users receiving market data through the multicast format can retransmit that data

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<sup>9</sup> See Notice, supra note 3, 81 FR at 23780; see also Amendment No. 1, supra note 4.

<sup>10</sup> For purposes of the Exchange’s co-location services, a “User” means any market participant that requests to receive co-location services directly from the Exchange.

<sup>11</sup> See Notice, supra note 3, 81 FR at 23780.

to their customers.<sup>12</sup> Unicast format is a format that allows one-to-one communication, similar to a phone line, in which information is sent to and from the Exchange.<sup>13</sup>

#### Rebroadcasting Users/Multicast End Users

The Exchange proposes to add several new definitions to the Fee Schedules. The Exchange proposes to define a “Rebroadcasting User” as “a User that rebroadcasts to its customers data received from the Exchange in multicast format, unless such User normalizes the raw market data before sending it to its customers.”<sup>14</sup> The Exchange also proposes to define “Multicast End User” as “a customer of a Rebroadcasting User, or a customer of a Rebroadcasting User’s Multicast End User customer, to whom the Rebroadcasting User or its Multicast End User sends data received from the Exchange in multicast format, other than an Affiliate of the Rebroadcasting User.”<sup>15</sup> The Exchange notes that a Multicast End User may be, but is not required to be, a User or a Hosted Customer, and also that a customer of a Rebroadcasting User would be considered a Multicast End User, irrespective of whether it receives the data from a Rebroadcasting User or another Multicast End User.<sup>16</sup> Accordingly, as proposed, a Multicast End User is a recipient of raw Exchange market data that (i) originated from (but may not have been provided directly by) a User, provided such recipient is not an

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<sup>12</sup> See id.

<sup>13</sup> See id.

<sup>14</sup> See id. at 23781. Pursuant to the definition, the term “Rebroadcasting User” would exclude a User that “normalizes” (i.e., alters) raw market data before sending it a Multicast End User. The definition of Rebroadcasting User also would not apply to a User that rebroadcasts third party data, because that data is not received from the Exchange. See id.

<sup>15</sup> See id.

<sup>16</sup> See id.

Affiliate of the originating User.<sup>17</sup>

In addition, as originally proposed, the Exchange would assess a Rebroadcasting User with one or two connections, either directly or through another Multicast End User, to a Multicast End User, a \$1,700 monthly charge for the first two connections, and \$850 for each additional connection to that Multicast End User.<sup>18</sup> To assess the proposed fees accurately, a Rebroadcasting User would be required to report to the Exchange on a monthly basis the number of its Multicast End Users, and the number of connections it has to each.<sup>19</sup> As more fully discussed below, in Amendment No. 2, the Exchange proposes that a Rebroadcasting User would not be assessed a fee for its first two Multicast End Users.<sup>20</sup>

#### Transmittal Users/Unicast End Users

According to the Exchange, customers use unicast format to send messages related to orders or for clearing purposes.<sup>21</sup> A User may enable one or more of its customers to transmit messages in unicast format to and from the Exchange.<sup>22</sup> The Exchange proposes to define a “Transmittal User” as a User that enables its customers, or the customers of its customers, to transmit messages to and from the Exchange using the unicast format.<sup>23</sup> A “Unicast End User” would be a customer of a Transmittal User, or a customer of a Transmittal User’s Unicast End User customer, for whom the Transmittal User or its Unicast End User customer enables the

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<sup>17</sup> See id.

<sup>18</sup> See id.

<sup>19</sup> See id. at 23782.

<sup>20</sup> See Amendment No. 2, supra note 7.

<sup>21</sup> See Notice, supra note 3, 81 FR at 23781.

<sup>22</sup> See id. For example, a User that is a service bureau or extranet may use such connections to facilitate order routing and clearing by its customers. See id.

<sup>23</sup> See id.

transmission of messages to and from the Exchange in unicast format, other than a customer that (a) is an Affiliate of the Transmittal User or (b) sends all unicast transmissions through a floor participant, such as a floor broker.<sup>24</sup> Customers of a Transmittal User that send all unicast transmissions through a floor participant, such as a floor broker, would not be considered a Unicast End User even if such customer is enabled to use unicast format.<sup>25</sup> A Unicast End User may also enable one or more of their customers to transmit messages to and from the Unicast End User and thus such customers would also be considered a Unicast End User.<sup>26</sup> To assess the proposed fees accurately, a Transmittal User would be required to report to the Exchange on a monthly basis the number of its Unicast End Users, and the number of connections it has to each.<sup>27</sup>

As originally proposed, the Exchange would assess a Transmittal User with one or two connections, either directly or through another Unicast End User, to a Unicast End User, a \$1,500 monthly charge for the first two connections,<sup>28</sup> and \$750 for each additional connection to that Unicast End User.<sup>29</sup> As noted, there would be no charge to a Transmittal User for its connection to a customer submitting orders through a unicast connection to a floor participant.<sup>30</sup> As more fully discussed below, in Amendment No. 2, the Exchange proposes that a Transmittal

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<sup>24</sup> See id. A Unicast End User may be a User or a Hosted Customer. See id.

<sup>25</sup> See id.

<sup>26</sup> See id. The Exchange notes that it is not aware of any customer of a Unicast End User that enables its customers to transmit messages, but if such a relationship did exist, the customer would also be considered a Unicast End User. See id.

<sup>27</sup> See id. at 23782.

<sup>28</sup> See id. at 23781.

<sup>29</sup> See id.

<sup>30</sup> See supra note 25 and accompanying text.

User would not be charged the proposed fee for its first two Unicast End Users.<sup>31</sup>

### Definition of Affiliate

The Exchange also proposes that the terms Multicast End User and Unicast End User would exclude an entity that is an Affiliate of its Rebroadcasting User or Transmittal User, respectively.<sup>32</sup> The Exchange proposes to amend its current definition of an Affiliate.<sup>33</sup> Under the new definition, an “Affiliate” of a User would be any other User or Hosted Customer that is under common control with, controls, or is controlled by, the first User, provided that: (1) an “Affiliate” of a Rebroadcasting User is any Multicast End User that is under common control with, controls, or is controlled by the Rebroadcasting User; and (2) an “Affiliate” of a Transmittal User is any Unicast End User that is under common control with, controls, or is controlled by the Transmittal User.<sup>34</sup> For purposes of this definition, “control” means ownership or control of 50% or greater.<sup>35</sup> The purpose of the amendment is to provide that an “Affiliate” relationship exists whenever two entities are under common control, regardless of which entity controls the other.<sup>36</sup>

### Exchange Support for Rebroadcasting Users/Transmittal User Fees

In its filing, the Exchange states that the proposed fees relate to additional connectivity and co-location services the Exchange provides to Rebroadcasting and Transmittal Users and

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<sup>31</sup> See Amendment No. 2, supra note 7.

<sup>32</sup> See id. at 23781. Users excluding Affiliates from their list of Multicast End Users or Unicast End Users may be required to certify to the Exchange the Affiliate status of such end user. See id. at 23782. The Exchange may ask Users that are neither Rebroadcasting Users or Transmittal Users to certify their status as ordinary Users. See id.

<sup>33</sup> See id. at 23781.

<sup>34</sup> See id.

<sup>35</sup> See id.

<sup>36</sup> See id.

would “fairly and equitably allocate the costs associated with maintaining the Data Center facility, hardware and equipment and related to personnel required for installation and ongoing monitoring, support and maintenance of such service among all Users.”<sup>37</sup> According to the Exchange, in the absence of the proposed end user fees, “no charges would be assessed related to the benefit that Multicast End Users and Unicast End Users receive from the services through the Rebroadcasting or Transmittal User from whom they receive data, and the Rebroadcasting or Transmittal Users would thus receive disproportionate benefits.”<sup>38</sup>

The Exchange represents that it incurs more costs on the account of Rebroadcasting and Transmittal Users;<sup>39</sup> some of these costs being indirect, including overhead and technology infrastructure, administrative, maintenance and operational costs,<sup>40</sup> and others being in form of direct network support.<sup>41</sup> Additionally, the Exchange notes that it has established automated retransmission facilities for Users to receive multicast transmissions.<sup>42</sup>

As noted, the Commission received two comment letters on the NYSE companion filing,

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<sup>37</sup> See id.

<sup>38</sup> See id.

<sup>39</sup> See id. at 23782.

<sup>40</sup> See id. The Exchange notes, that it has made network infrastructure improvements over the years and established administrative controls. See id.

<sup>41</sup> See id. The Exchange states that when an issue arises, the Exchange and Rebroadcasting User or Transmittal User conduct a review to determine the cause of an issue, with the participation of the relevant Multicast or Unicast End User. The Exchange states that when the User is a Rebroadcasting User or Transmittal User, identifying the issue and providing the needed network support becomes more complicated because each of the entities involved has its own infrastructure and administration. By contrast, for Affiliates, the Exchange states that they typically act as one entity, with one infrastructure, one administration, and one network support group, making the network support effectively similar to supporting one entity. See id.

<sup>42</sup> See id.

which are likewise applicable to this filing.<sup>43</sup> These commenters expressed concern about the effect of the Rebroadcasting User fees that would be passed on to them as Multicast End Users consuming Exchange market data. One of these commenters states that it should not have to pay fees to help support the co-location infrastructure because it is not co-located.<sup>44</sup> This commenter states that for compliance purposes, a registered broker-dealer has no choice but to “consume depth-of-book market data” and that if the proposed fee is passed through, the commenter will have no choice but to accept it.<sup>45</sup> The other commenter states that the proposal provides “no evidence to support [the Exchange’s] claim that its costs are higher to support the customers of subvendors.”<sup>46</sup> This commenter states that the fees are “assigned only to vendors’ customers who buy data from [the Exchange’s] competitors” and is “[b]y definition... anti-competitive.”<sup>47</sup> According to this commenter, the fees are introduced “solely for the purpose of protecting market data revenue.”<sup>48</sup>

In the Response Letter, the NYSE states that the Comment Letters have “not provided any credible argument why the [...] proposal is not consistent with the requirements of the Act.”<sup>49</sup> The NYSE emphasizes that the proposal “compares the support the Exchange provides to Rebroadcasting Users to the support required by Users that are not Rebroadcasting Users,”<sup>50</sup>

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<sup>43</sup> See supra note 5.

<sup>44</sup> See Friedman Letter, supra note 5, at 1-2.

<sup>45</sup> See id. at 1-3.

<sup>46</sup> See Pikat Letter, supra note 5, at 1.

<sup>47</sup> See id.

<sup>48</sup> See id.

<sup>49</sup> See Response Letter, supra note 5, at 3.

<sup>50</sup> See id. at 7.

and states that the proposal will not impact market data revenue.<sup>51</sup> The NYSE states that “a market participant has additional options outside of co-location for connecting to Exchange market data” and that the commenters “ignor[e] the basic fact that the Exchange voluntarily allows Rebroadcasting Users to provide services out of the Exchange’s co-location facility.”<sup>52</sup> The NYSE further argues that it “would be illogical to argue...that just because Rebroadcasting Users provide services that overlap with services offered by the Exchange, the Exchange cannot charge the Rebroadcasting Users for the Exchange’s services.”<sup>53</sup> The NYSE states that it “generally provides more direct support to Rebroadcasting Users than other Users” and highlights the fact that a larger Rebroadcasting User made “between 3.8 and 4.25 times as many calls as Users with similar power usage, and 4.25 to 8.5 times as many calls as Users with a similar number of cabinets.”<sup>54</sup>

#### Amendment No. 2

In Amendment No. 2, the Exchange offers additional justification for the proposed rule change. In Amendment No. 2, the Exchange proposes that a Rebroadcasting User not be charged a fee for its first two Multicast End Users, and similarly that a Transmittal User not be charged a fee for its first two Unicast End Users.<sup>55</sup> The Exchange states that it reviewed customer calls for assistance between June 1, 2015 and June 7, 2016, and compared the number of calls by Users it

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<sup>51</sup> See id. at 4.

<sup>52</sup> See id. at 6.

<sup>53</sup> See id. The Exchange also argues that “Rebroadcasting Users are not direct competitors of the Exchange’s co-location services...[since] for example, the Exchange does not provide Users with hardware such as routers or switches, and does not offer managed services.” See id.

<sup>54</sup> See id. at 7-8. The NYSE also states that its proposed fees follow a similar example set by the Nasdaq Stock Market’s Extranet Access Fee. See id. at 9.

<sup>55</sup> See Amendment No. 2, supra note 7.

believes to be Rebroadcasting Users to the number of calls by a representative sample of other Users.<sup>56</sup> Consistent with the NYSE statements in the Response Letter, the Exchange states that “a comparison of calls by the larger Rebroadcasting User showed that the larger Rebroadcasting User made between 3.8 and 4.25 times as many calls as Users with similar power usage, and 4.25 to 8.5 times as many calls as Users with similar numbers of cabinets. Indeed, such Rebroadcasting User made 20 more calls than the five largest Users combined.”<sup>57</sup>

The Exchange adds that it believes that Rebroadcasting Users that have only one or two Multicast End Users are an exception to the general statement that the Exchange has a greater administrative burden and incurs greater operational costs to support Rebroadcasting Users.<sup>58</sup> The Exchange further states that it does not have visibility into the number of Unicast End Users that individual Transmittal Users have, but believes that it is reasonable to extrapolate that a Transmittal User that has only one or two Unicast End Users may not need more network support than other Users.<sup>59</sup> Accordingly, the Exchange believes it is reasonable to not charge a Transmittal User a fee for its first two Unicast End Users.<sup>60</sup> Finally, the Exchange states that its proposal is analogous to the Nasdaq Stock Market’s Extranet Access Fee.<sup>61</sup>

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<sup>56</sup> See id.

<sup>57</sup> See Response Letter, supra note 5, at 8; see also Amendment No. 2, supra note 7.

<sup>58</sup> See Amendment No. 2, supra note 7.

<sup>59</sup> See Amendment No. 2, supra note 7.

<sup>60</sup> See id.

<sup>61</sup> The Exchange cites Nasdaq Stock Market Rule 7025 and Securities Exchange Act Release No. 74040 (January 13, 2015), 80 FR 2460 (January 16, 2015) (SR-NASDAQ-2015-003), and states: “Extranet providers that establish a connection with Nasdaq to offer direct access connectivity to market data feeds are assessed a monthly access fee of \$1,000 per recipient Customer Premises Equipment (“CPE”) Configuration. A CPE Configuration is any line, circuit, router package, or other technical configuration used by an extranet provider to provide a direct access connection to Nasdaq market data feeds to a recipient's site. No extranet access fee is charged for connectivity to market data feeds

III. Proceedings to Determine Whether to Approve or Disapprove File No. SR-NYSEMKT-2016-15 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>62</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the following grounds for disapproval that are under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,”<sup>63</sup>
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers,

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containing only consolidated data.)” See id.

<sup>62</sup> 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. See id.

<sup>63</sup> 15 U.S.C. 78f(b)(4).

brokers, or dealers,”<sup>64</sup> and

- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”<sup>65</sup>

As discussed above, the Exchange states that the proposed end user fees applicable to Rebroadcasting Users and Transmittal Users would “fairly and equitably allocate the costs associated with maintaining the Data Center facility, hardware and equipment and related to personnel required for installation and ongoing monitoring, support and maintenance of such service among all Users.”<sup>66</sup> Although the Exchange notes that it has expended a variety of resources in connection with the support of Rebroadcasting Users and Transmittal Users, such as technology infrastructure, maintenance and operational costs, it does not explain – with one exception – how those expenditures do not equally benefit all Users.<sup>67</sup> The Exchange does take the position that it “generally provides more direct support to Rebroadcasting Users and Transmittal Users than other Users, typically in the form of network support” and that “[b]ased on its experience ... when the User is a Rebroadcasting User or Transmittal User, pinpointing the issue and providing the needed network support becomes more difficult because each entity involved has its own infrastructure and administration.”<sup>68</sup> The only evidence the Exchange provides in support of its assertion, however, is call log data showing that a single large Rebroadcasting User made substantially more customer assistance calls to the Exchange than

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<sup>64</sup> 15 U.S.C. 78f(b)(5).

<sup>65</sup> 15 U.S.C. 78f(b)(8).

<sup>66</sup> See note 37 supra and accompanying text.

<sup>67</sup> See Notice, supra note 3, 81 FR at 23783.

<sup>68</sup> See id. at 23784.

other Users over a certain period.<sup>69</sup> The Commission is concerned that such data may not be sufficient to demonstrate that the proposed new end user fees are reasonable, equitably allocated and not unfairly discriminatory, as required by the Act. In addition, to the extent the Exchange is focused on more directly recovering the costs of network support, it has not explained why it has not proposed to do so more precisely, such as by imposing a fee per customer service call, rather than by targeting a subset of customers of co-located Users regardless of their network support needs.

Furthermore, the proposed fees would not apply to all end users of Rebroadcasting Users and Transmittal Users. For example, they would not apply to end users that are Affiliates of a Rebroadcasting User or a Transmittal User. While the Exchange asserts that “[i]n its experience, entities that are Affiliates typically act as one entity, with one infrastructure, one administration, and one network support group,” so that “the Exchange is effectively supporting one entity, irrespective of how many Affiliate end users are involved,”<sup>70</sup> the Exchange provides no evidence to support its implication that Rebroadcasting Users and Transmittal Users with Affiliate end users require less Exchange resources than those with non-Affiliate end users. In addition, the proposed fees would not apply with respect to the first two end users of a Rebroadcasting User or a Transmittal User.<sup>71</sup> While the Exchange expresses its belief that, “based on the information available to it, Rebroadcasting Users [or Transmittal Users] that have only one or two [end users] are an exception to the general statement that the Exchange has a greater administrative burden and incurs greater operational costs to support Rebroadcasting Users [or Transmittal Users],”<sup>72</sup> it

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<sup>69</sup> See Amendment No. 2, supra note 7.

<sup>70</sup> See Notice, supra note 3, 81 FR at 23784.

<sup>71</sup> See Amendment No. 2, supra note 7.

<sup>72</sup> See id.

offers no evidence in support of this belief. Finally, the proposed fees would not apply to Unicast End Users that send all unicast transmissions through a floor participant, such as a floor broker. In this case, the Exchange does not justify the exception on the basis of the Exchange resources required to support this type of end user, but rather because it “would encourage sending orders to Floor brokers for execution, thereby encouraging displayed liquidity” and “promoting public price discovery ... which benefits all market participants.”<sup>73</sup> The Exchange, however, provides no evidence to support the proposition that Unicast End Users submitting all of their orders through floor brokers provide more displayed liquidity or otherwise improve the market quality of the Exchange more than other types of Unicast End Users. Accordingly, the Commission is concerned that the Exchange has not demonstrated that the exceptions to its proposed new end user fees are reasonable, equitably allocated and not unfairly discriminatory, as required by the Act.

Finally, the Commission is concerned that the Exchange has not demonstrated that its proposal does not impose an unnecessary or inappropriate burden on competition. The Exchange asserts that it meets this statutory standard because “it operates in a highly-competitive market in which market participants can readily favor competing venues if, for example, they deem fee levels at a particular venue to be excessive or if they determine that another venue’s products and services are more competitive than on the Exchange.”<sup>74</sup> In response to a commenter’s concern that the proposal could have an anti-competitive impact on vendors and their customers, the Exchange takes the position that Rebroadcasting Users like vendors “are not direct competitors

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<sup>73</sup> See Notice, supra note 3, 81 FR at 23785.

<sup>74</sup> See id. The Exchange cites several additional justifications that closely mirror those, noted above, that support its assertion that its proposed fees are reasonable, equitably allocated and not unfairly discriminatory.

of the Exchange’s co-location services,” because “[w]hile both offer connectivity to Exchange market data, Rebroadcasting Users provide their customers services that the Exchange’s co-location service does not,” such as hardware (*e.g.*, routers and switches) and fully-managed services.<sup>75</sup> The Exchange, however, does not clearly explain why the imposition of additional per-customer fees on co-located vendors and other redistributors of market data and connectivity services is not an unnecessary or inappropriate burden on competition with the Exchange’s direct offering of such products, even if those redistributors offer other ancillary services.

For all of the foregoing reasons, the Commission believes that questions are raised as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; and not impose an unnecessary or inappropriate burden on competition.<sup>76</sup>

#### IV. 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>77</sup> or any other provision of the Act, or the rules and regulations thereunder.

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<sup>75</sup> See Response Letter, supra note 5, at 6.

<sup>76</sup> 15 U.S.C. 78f(b)(4), (b)(5), and (b)(8).

<sup>77</sup> 15 U.S.C. 78f(b)(4), (b)(5) and (b)(8).

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>78</sup> any request for an opportunity to make an oral presentation.<sup>79</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 [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. 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>80</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:

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<sup>78</sup> 17 CFR 240.19b-4.

<sup>79</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 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>80</sup> 15 U.S.C. 78f(b)(4), (b)(5) and (b)(8).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEMKT-2016-15 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-NYSEMKT-2016-15. This file number should be included on the subject line if e-mail 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 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-NYSEMKT-2016-15, and should be submitted by **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments

should be submitted by **[INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>81</sup>

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

**BILLING CODE 8011-01p**

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<sup>81</sup> 17 CFR 200.30-3(a)(57).

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