



8011-01

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87797; File No. SR-NYSENAT-2019-31]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish Fees for the NYSE National Integrated Feed

December 18, 2019

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that, on December 4, 2019, NYSE National, Inc. (“NYSE National” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 establish fees for the NYSE National Integrated Feed. The proposed rule change is available on the Exchange’s website 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 adopt the NYSE National Proprietary Market Data Fee Schedule (“Fee Schedule”) and establish the fees for the NYSE National Integrated Feed.³ In summary, the NYSE National Integrated Feed is a NYSE National-only market data feed that provides vendors and subscribers on a real-time basis with a unified view of events, in sequence, as they appear on the NYSE National matching engine. The NYSE National Integrated Feed includes depth-of-book order data, last sale data, security status updates (*e.g.*, trade corrections and trading halts), and stock summary messages. Because the NYSE National Integrated Feed has a unified view of events, in sequence, it also includes information about the Exchange’s best bid or offer at any given time.

The Exchange currently does not charge any fees for the NYSE National Integrated Feed market data product.⁴

³ The proposed rule change establishing the NYSE National Integrated Feed was immediately effective on May 31, 2018. See Securities Exchange Act Release No. 83350 (May 31, 2018), 83 FR 26332 (June 6, 2018) (SR-NYSE-NAT-2018-09) (“NYSE National Integrated Feed Product Filing”). The NYSE National Integrated Feed Product Filing also established the NYSE National BBO and NYSE National Trades market data feeds.

⁴ The Exchange also currently does not charge any fees for the NYSE National BBO and NYSE National Trades market data products and proposes to adopt rule text on the Fee Schedule to reflect that there are no fees charged for NYSE National BBO and NYSE National Trades market data products.

Background

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁵

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”⁶ Equity trading is currently dispersed across 13 exchanges,⁷ 31 alternative trading systems,⁸ and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange has more than 18% market share (whether including or excluding auction volume).⁹

The recent growth of NYSE National’s market share demonstrates this competitive marketplace. Between February 2017 and mid-May 2018, NYSE National was non-operational, and therefore had 0% of market share. On May 21, 2018, NYSE National re-launched on its

⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (Final Rule) (“Regulation NMS Adopting Release”).

⁶ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Transaction Fee Pilot for NMS Stocks Final Rule) (“Transaction Fee Pilot”).

⁷ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangeshtml.html>.

⁸ See FINRA ATS Transparency Data, *available at* <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is *available at* <https://www.sec.gov/foia/docs/atlist.htm>.

⁹ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

current platform as an affiliated exchange of New York Stock Exchange, LLC (“NYSE”), NYSE Arca, Inc. (“NYSE Arca, Inc.”), and NYSE American LLC (“NYSE American”). Within four months, NYSE National began regularly executing 1% of consolidated trading volume. By August 2019, NYSE National began executing approximately 1.5% of consolidated trading volume on a more regular basis. By October 2019, the Exchange had 1.9% market share of executed volume of equity trades.¹⁰

As NYSE National’s transaction market share has increased, so has the value of its market data. For example, in May 2018, when NYSE National re-launched trading operations, the Exchange had 12 customers for its NYSE National Integrated Feed. As NYSE National’s market share has increased, the number of subscribers of the NYSE National Integrated Feed has steadily increased and as of October 2019, the Exchange has 56 customers that subscribe to the NYSE National Integrated Feed. In October 2019, customers of the NYSE National Integrated Feed account for over 99% of the executed trade volume on the Exchange.

Proposed NYSE National Integrated Feed Fees

To reflect the value of NYSE National’s market data, as correlated to the Exchange’s increased transaction volume market share, the Exchange proposes to establish the fees listed below for the NYSE National Integrated Feed, operative on February 3, 2020. The Exchange proposes to charge fees for the same categories of market data use as its affiliated exchanges (namely, NYSE, NYSE Arca, and NYSE American) currently charge. The Exchange believes that adopting the same fee structure as its affiliated exchanges would reduce administrative burdens on NYSE National market data subscribers that also currently subscribe to market data feeds from NYSE, NYSE Arca, or NYSE American.

¹⁰ See id.

1. Access Fee. For the receipt of access to the NYSE National Integrated Feed, the Exchange proposes to charge \$2,500 per month. This proposed Access Fee would be charged to any data recipient that receives a data feed of the NYSE National Integrated Feed. Data recipients that only use display devices to view NYSE National Integrated Feed market data and do not separately receive a data feed would not be charged an Access Fee. The proposed Access Fee is charged only once per firm.

2. Redistribution Fee. For redistribution of the NYSE National Integrated Feed, the Exchange proposes to establish a fee of \$1,500 per month. The proposed Redistribution Fee would be charged to any Redistributors of the NYSE National Integrated Feed, which is defined to mean a vendor or any person that provides a real-time NYSE National market data product externally to a data recipient that is not its affiliate or wholly-owned subsidiary, or to any system that an external data recipient uses, irrespective of the means of transmission or access. The proposed Redistribution Fee is charged only once per Redistributor account.

3. User Fees. The Exchange proposes to charge a Professional User Fee (Per User) of \$10 per month and a Non-Professional User Fee (Per User) of \$1 per month. These user fees would apply to each display device that has access to the NYSE National Integrated Feed.

4. Non-Display Use Fees. The Exchange proposes to establish non-display fees for the NYSE National Integrated Feed that are based on the non-display use categories charged by NYSE, NYSE Arca, NYSE American, the Consolidated Tape Association, and the UTP Plan for non-display use.¹¹ Non-display use would mean accessing, processing, or consuming the NYSE

¹¹ See Endnote 1 to the NYSE Proprietary Market Data Fees, available here: https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Fee_Schedule.pdf; Endnote 1 to the NYSE Arca Equities Proprietary Market Data Fees, available here: https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Equities_Fee_Schedule.pdf; Endnote 1 to the NYSE American LLC Equities Proprietary Market Data Fees, available

National Integrated Feed, delivered directly or through a Redistributor, for a purpose other than in support of a data recipient's display or further internal or external redistribution ("Non-Display Use"). Non-Display Use would include trading uses such as high frequency or algorithmic trading as well as any trading in any asset class, automated order or quote generation and/or order pegging, price referencing for algorithmic trading or smart order routing, operations control programs, investment analysis, order verification, surveillance programs, risk management, compliance, and portfolio management.

The Exchange proposes three categories of Non-Display Use of the NYSE National Integrated Feed and related fees applicable to each category. One, two, or three categories of Non-Display Use may apply to a data recipient.

- As proposed, the Category 1 Fee would be \$5,000 per month and would apply when a data recipient's Non-Display Use of the NYSE National Integrated Feed is on its own behalf, not on behalf of its clients.
- As proposed, Category 2 Fees would be \$5,000 per month and would apply to a data recipient's Non-Display Use of the NYSE National Integrated Feed on behalf of its clients.
- As proposed, Category 3 Fees would be \$5,000 per month and would apply to a

here:

https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Equities_Market_Data_Fee_Schedule.pdf; Endnote 8 to the Schedule of Market Data Charges for the Consolidated Tape Association, available here:

<https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Schedule%20of%20Market%20Data%20Charges%20-%20January%201,%202015.pdf>; and Non-Display Usage Fees as set forth in the UTP

Plan Fee Schedule and Non-Display Policy, available here:

<http://utpplan.com/DOC/Datapolicies.pdf>. See, e.g., Securities Exchange Act Release Nos. 69278 (April 2, 2013), 78 FR 20973 (April 8, 2013) (SR-NYSE-2013-25) and 72923 (Aug. 26, 2014), 79 FR 52079 (Sept. 2, 2014) (SR-NYSE-2014-43).

data recipient's Non-Display Use of the NYSE National Integrated Feed for the purpose of internally matching buy and sell orders within an organization, including matching customer orders for a data recipient's own behalf and/or on behalf of its clients. This category would apply to Non-Display Use in trading platforms, such as, but not restricted to, alternative trading systems ("ATs"), broker crossing networks, broker crossing systems not filed as ATs, dark pools, multilateral trading facilities, exchanges and systematic internalization systems. A data recipient will be charged \$5,000 per month for each platform on which it uses the Non-Display data internally to match buy and sell orders, up to a cap of \$15,000 per month; even if the data recipient uses the NYSE National Integrated Feed for more than three platforms, it will not pay more than \$15,000 for such Category 3 use per month.

The Exchange proposes to adopt the description of the three non-display use categories in the Fee Schedule in proposed endnote 1 on the Fee Schedule.¹²

Data recipients that receive the NYSE National Integrated Feed for Non-Display Use would be required to complete and submit a Non-Display Use Declaration before they would be authorized to receive the feed. A firm subject to Category 3 Fees would be required to identify each platform that uses the NYSE National Integrated Feed for a Category 3 Non-Display Use basis, such as ATs and broker crossing systems not registered as ATs, as part of the Non-Display Use Declaration.

5. Non-Display Use Declaration Late Fee. Data recipients that receive the NYSE National Integrated Feed for Non-Display Use would be required to complete and submit a Non-

¹² See Fee Schedule, proposed endnote 1.

Display Use Declaration before they would be authorized to receive the feed. NYSE National Integrated Feed data recipients would be required to submit, by December 31 of each year, the Non-Display Use Declaration. The requirement to submit a Non-Display Use Declaration would apply to all real-time NYSE National data feed product recipients. The Exchange proposes to charge a Non-Display Use Declaration Late Fee of \$1,000 per month to any data recipient that pays an Access Fee for the NYSE National Integrated Feed that has failed to timely complete and submit a Non-Display Use Declaration. Specifically, with respect to the Non-Display Use Declaration due by December 31 of each year, the Non-Display Use Declaration Late Fee would apply to data recipients that fail to complete and submit the Non-Display Use Declaration by the December 31 due date, and would apply beginning January 1 and for each month thereafter until the data recipient has completed and submitted the annual Non-Display Use Declaration.

The proposed Non-Display Use Declaration Late Fee would be set forth in endnote 2 on the Fee Schedule. Proposed endnote 2 would provide that a data recipient that pays an Access Fee and that fails to timely complete and submit a Non-Display Use Declaration must pay the Non-Display Use Declaration Late Fee.¹³ Proposed endnote 2 to the Fee Schedule would also provide that the annual Non-Display Use Declaration would be due by December 31 of each year.

Finally, proposed endnote 2 would provide that the Non-Display Use Declaration Late Fee would apply to data recipients that fail to complete and submit the annual Non-Display Use Declaration by the December 31 due date, and would apply beginning January 1 of each year and for each month thereafter until the data recipient has completed and submitted the annual Non-Display Use Declaration.

¹³ See Fee Schedule, proposed endnote 2.

In addition, if a data recipient's use of the NYSE National Integrated Feed data changes at any time after the data recipient submits a Non-Display Use Declaration, the data recipient must inform the Exchange of the change by completing and submitting at the time of the change an updated declaration reflecting the change of use.

6. Multiple Data Feed Fee. The Exchange proposes to establish a monthly fee, the "Multiple Data Feed Fee," that would apply to data recipients that take a data feed for a market data product in more than two locations. Data recipients taking the NYSE National Integrated Feed in more than two locations would be charged \$200 per additional location per month. No new reporting would be required.¹⁴

7. Fee Waiver for Federal Agencies. The Exchange proposes to adopt rule text in the Fee Schedule with respect to Federal agencies that subscribe to the NYSE National Integrated Feed. The proposed rule would provide that market data fees would not apply to any Federal agency for their use of NYSE National real-time proprietary market data products. The term "Federal agency" as used in the Fee Schedule would include all Federal agencies subject to the Federal Acquisition Regulation (FAR),¹⁵ as well as any Federal agency not subject to FAR that has promulgated its own procurement rules.¹⁶ More specifically, the Exchange proposes to

¹⁴ Data vendors currently report a unique Vendor Account Number for each location at which they provide a data feed to a data recipient. The Exchange considers each Vendor Account Number a location. For example, if a data recipient has five Vendor Account Numbers, representing five locations, for the receipt of the NYSE National Integrated Feed product, that data recipient will pay the Multiple Data Feed fee with respect to three of the five locations.

¹⁵ FAR is the principal set of rules governing the process by which the U.S. federal government purchases goods and services.

¹⁶ See 48 CFR 2.101. FAR defines "Federal agency" as "any executive agency or any independent establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, the Architect of the Capitol, and any activities under the Architect's direction)." "Executive agency" is defined as "an executive department, a military department, or any independent establishment within the meaning

specify that access fees, professional user fees and non-display fees would not apply to Federal agencies for those products to which those fees apply.¹⁷ The proposed fee waiver is designed to allow the Exchange to provide Federal agencies with NYSE National real-time proprietary market data products at no cost in support of Federal agencies' regulatory responsibilities. With the adoption of the proposed fee waiver, the Exchange is not waiving any other contractual rights, and all Federal agencies that subscribe to NYSE National real-time proprietary market data products will be required to execute the appropriate subscriber agreement, which includes, among other things, provisions against the redistribution of data.

8. One-Month Free Trial. Finally, the Exchange proposes a one-month free trial for any firm that subscribes to a particular NYSE National market data product for the first time. As proposed, a first-time subscriber would be any firm that has not previously subscribed to a particular NYSE National market data product listed on the Fee Schedule. As proposed, a first-time subscriber of a particular NYSE National market data product would not be charged the Access Fee, Non-Display Fee, any applicable Professional and Non-Professional User Fee, and Redistribution Fee for that product for one calendar month. For example, a firm that currently subscribes to NYSE National BBO for free would be eligible to receive a free one-month trial of the NYSE National Integrated Feed, whether in a display-only format or for non-display use. On the other hand, if a firm pays an Access Fee and receives the NYSE National Integrated Feed for non-display use, it would not be eligible to receive a free one-month trial of the NYSE National Integrated Feed in a display-only format (or vice-versa). The proposed free trial would be for the first full calendar month following the date a subscriber is approved to receive trial access to the

of 5 U.S.C. 101, 102, and 104(1), respectively, and any wholly owned Government corporation within the meaning of 31 U.S.C. 9101.”

¹⁷ Currently, pursuant to this proposed rule change, the NYSE National Integrated Feed is the only product to which fees would apply.

particular NYSE National market data product. The Exchange would provide the one-month free trial for each particular product to each subscriber once.

The Exchange believes that providing a one-month free trial to NYSE National market data products listed on the Fee Schedule would enable potential subscribers to determine whether a particular NYSE National market data product provides value to their business models before fully committing to expend development and implementation costs related to the receipt of that product, and is intended to encourage increased use of the Exchange's market data products by defraying some of the development and implementation costs subscribers would ordinarily have to expend before using a product.

Application of Proposed Fees

The Exchange is not required to make the NYSE National Integrated Feed available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase the NYSE National Integrated Feed. Firms that choose to purchase the NYSE National Integrated Feed do so for the primary goals of using it to increase their revenues, reduce their expenses, and in some instances to compete directly with the Exchange (including for order flow). Those firms are able to determine for themselves whether or not the NYSE National Integrated Feed or any other similar products are attractively priced.

The Exchange produces and disseminates the NYSE National Integrated Feed as part of its market data offerings to support its transaction execution services. Since May 2018, when NYSE National relaunched trading, the Exchange has observed a direct correlation between the steady increase of subscribers to the NYSE National Integrated Feed and the increase in the Exchange's transaction market share volume over the same period.

Based on the reported usage of the NYSE National Integrated Feed, the Exchange

believes that its data subscribers use the order-by-order detail information available in this market data product to make trading decisions that directly benefit the transaction services that the Exchange offers. Specifically, subscribers of the NYSE National Integrated Feed represent firms that provide over 99% of the Exchange's executed transaction volume. More than half of the feed's subscribers overall (*i.e.*, 33 of 56) report "Category 1" non-display use of the NYSE National Integrated Feed, which means that they use the data for trading on their own behalf. This figure confirms that a substantial portion of the NYSE National Integrated Feed's subscribers have analyzed whether it is in their business interest to use the feed for their own trading, and have concluded that it is.

The 56 current subscribers to the NYSE National Integrated Feed would be impacted by this proposed rule change. The scope of the fee impact for each data recipient would depend on that data recipient's use of the data. Based on current usage, at least 33 firms would be subject to Category 1 Non-Display Use fees, at least 14 firms would be subject to Category 2 Non-Display Use fees, and at least 10 firms would be subject to Category 3 Non-Display Use fees. Because the product has not been previously subject to fees, the Exchange does not know the full impact of the proposed fees on current data recipients because subscribers may choose to reduce or eliminate their use of data.

The Exchange determined the level of the fees to charge for the NYSE National Integrated Feed based on the value of the Exchange's transaction services. As noted above, over an 18-month period, NYSE National has grown from 0% to nearly 2% market share of consolidated trading volume. During that same period, the Exchange has had a steady increase in the number of subscribers to the NYSE National Integrated feed.

The proposed fee structure is not novel as it is based on the fee structure currently in

place for the NYSE American Integrated Feed.¹⁸ Both NYSE American and NYSE National trade all NMS Stocks. As noted above, in October 2019, NYSE National had 1.9% market share; for that same month, NYSE American had 0.29% market share.¹⁹ Even though NYSE National's market share is several times higher than NYSE American's, the Exchange is proposing fees for the NYSE National Integrated Feed that are based on the existing fee structure and rates that data recipients already pay for the NYSE American Integrated Feed. Specifically, the fees for the NYSE American Integrated Feed—which like the NYSE National Integrated Feed, includes top of book, depth of book, trades, and security status messages—consist of an Access Fee of \$2,500 per month, a Professional User Fee (Per User) of \$10 per month, a Non-Professional User Fee (Per User) of \$2 per month, Non-Display Fees of \$5,000 per month for each of Categories 1, 2 and 3, and a Redistribution Fee of \$1,500 per month. NYSE American also charges a Non-Display Use Declaration Late Fee of \$1,000 per month and a Multiple Data Feed Fee of \$200 per month.²⁰

The Exchange anticipates that there may be current data recipients of the NYSE National Integrated Feed that have subscribed only because it is free and may choose to discontinue using the product once the fees are implemented. A data recipient that chooses to discontinue the NYSE National Integrated Feed may also choose to shift order flow away from the Exchange. In

¹⁸ See Securities Exchange Act Release Nos. 76525 (November 25, 2015), 80 FR 75148 (December 1, 2015) (SR-NYSEMKT-2015-95) (Notice of filing and immediate effectiveness of proposed rule change to establish fees for NYSE MKT Integrated Feed), and 76975 (January 26, 2016), 81 FR 5139 (February 1, 2016) (SR-NYSEMKT-2016-11) (Notice of filing and immediate effectiveness of proposed rule change amending the fees for NYSE MKT Integrated Feed to add a Multiple Data Feed Fee).

¹⁹ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

²⁰ See NYSE American LLC Equities Proprietary Market Data Fees at https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Equities_Market_Data_Fee_Schedule.pdf.

today's competitive environment, if data recipients were to both discontinue the product and shift order flow away from the Exchange, the Exchange would reevaluate the fees and potentially file a separate proposed rule change to amend its fees. However, in advance of implementing the proposed fees, the Exchange cannot estimate with precision the impact of the proposed fees on the Exchange's transaction services business or the number of NYSE National Integrated Feed subscribers.

Although the Exchange is proposing to make this proposed rule change operative on February 3, 2020, it is making this filing now because the Exchange believes it is appropriate to provide market participants with early notice of these proposed changes, so that they can begin determining whether the value of the NYSE National Integrated Feed to their businesses is such that they will choose to continue using the product once it is no longer provided for free. The Exchange believes that market participants should be able to begin such determinations before the Exchange begins charging fees (which is also consistent with the free trial period proposed in this filing).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,²¹ in general, and Sections 6(b)(4) and 6(b)(5) of the Act,²² 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 Rule Change Is Reasonable

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. The

²¹ 15 U.S.C. 78f(b).

²² 15 U.S.C. 78f(b)(4), (5).

Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”²³

With respect to market data, the decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC upheld the Commission’s reliance on the existence of competitive market mechanisms to evaluate the reasonableness and fairness of 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.”²⁴

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.’”²⁵

²³ See Regulation NMS Adopting Release, 70 FR 37495, at 37499.

²⁴ NetCoalition v. SEC, 615 F.3d 525, 535 (D.C. Cir. 2010) (“NetCoalition I”) (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

²⁵ Id. at 535.

In this competitive marketplace, the Exchange’s executed trading volume has grown from 0% market share to nearly 2% market share in less than two years and the Exchange believes that it is reasonable to begin charging fees for the NYSE National Integrated Feed.

1. The Proposed Fees Are Constrained by Significant Competitive Forces

a. Exchange Market Data Is Sold in a Competitive Market

In 2018, Charles M. Jones, the Robert W. Lear Professor of Finance and Economics of the Columbia University School of Business, conducted an analysis of the market for equity market data in the United States. He canvassed the demand for both consolidated and exchange proprietary market data products and the uses to which those products were put by market participants, and reported his conclusions in a paper annexed hereto.²⁶ Among other things, Professor Jones concluded that:

- “The market [for exchange market data] is characterized by robust competition: exchanges compete with each other in selling proprietary market data products. They also compete with consolidated data feeds and with data provided by alternative trading systems (‘ATs’). Barriers to entry are very low, so existing exchanges must also take into account competition from new entrants, who generally try to build market share [as NYSE National has done with its Integrated Feed] by offering their proprietary market data products for free for some period of time.”²⁷

²⁶ See Exhibit 3A, Charles M. Jones, Understanding the Market for U.S. Equity Market Data, August 31, 2018 (hereinafter “Jones Paper”).

²⁷ Id. at 2.

- “Although there are regulatory requirements for some market participants to use consolidated data products, there is no requirement for market participants to purchase any proprietary market data product for regulatory purposes.”²⁸
- “There are a variety of data products, and consumers of equity market data choose among them based on their needs. Like most producers, exchanges offer a variety of market data products at different price levels. Advanced proprietary market data products provide greater value to those who subscribe. As in any other market, each potential subscriber takes the features and prices of available products into account in choosing what market data products to buy based on its business model.”²⁹
- “Exchange equity market data fees are a small cost for the industry overall: the data demonstrates that total exchange market data revenues are orders of magnitude smaller than (i) broker-dealer commissions, (ii) investment bank earnings from equity trading, and (iii) revenues earned by third-party vendors.”³⁰
- “For proprietary exchange data feeds, the main question is whether there is a competitive market for proprietary market data. More than 40 active exchanges and alternative trading systems compete vigorously in both the market for order flow and in the market for market data. The two are closely linked: an exchange needs to consider the negative impact on its order flow if it raises the price of its market data. Furthermore, new entrants have been frequent over the past 10 years or so, and these venues often give market data away for free, [again, as NYSE

28

Id.

29

Id.

30

Id.

National has done with its Integrated Feed] serving as a check on pricing by more established exchanges. These are all the standard hallmarks of a competitive market.”³¹

Professor Jones’ conclusions are consistent with the demonstration of the competitive constraints on the pricing of market data demonstrated by analysis of exchanges as platforms for market data and trading services, as shown below.

b. Exchanges that Offer Market Data and Trading Services Function as Two-Sided Platforms

An exchange may demonstrate that its fees are constrained by competitive forces by showing that the platform theory of competition applies.

As the United States Supreme Court recognized in Ohio v. American Express, platforms are firms that act as intermediaries between two or more sets of agents, and typically the choices made on one side of the platform affect the results on the other side of the platform via externalities, or “indirect network effects.”³² Externalities are linkages between the different sides of a platform such that one cannot understand pricing and competition for goods or services on one side of the platform in isolation; one must also account for the influence of the other sides. As the Supreme Court explained:

To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. . . . Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If the participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of

³¹ Id. at 39-40.

³² Ohio v. American Express, 138 S. Ct. 2274, 2280-81 (2018).

declining demand. . . . Two-sided platforms therefore must take these indirect network effects into account before making a change in price on either side.³³

The Exchange and its affiliated exchanges have long maintained that they function as platforms between consumers of market data and consumers of trading services. Proving the existence of linkages between the two sides of this platform requires an in-depth economic analysis of both public data and confidential exchange data about particular customers' trading activities and market data purchases. Exchanges, however, are prohibited from publicly sharing details about these specific customer activities and purchases. For example, pursuant to Exchange Rule 7.41, transactions executed on the Exchange are processed anonymously.

The Exchange and its affiliated exchanges have retained a third-party expert, Marc Rysman, Professor of Economics at Boston University, to analyze how platform economics applies to stock exchanges' sale of market data products and trading services, and to explain how this affects the assessment of competitive forces affecting the exchanges' data fees.³⁴ Professor Rysman was able to analyze exchange data that is not otherwise publicly available in a manner that is consistent with the exchanges' confidentiality obligations to its customers. As shown in his paper, Professor Rysman surveyed the existing economic literature analyzing stock exchanges as platforms between market data and trading activities, and explained the types of linkages between market data access and trading activities that must be present for an exchange to function as a platform. In addition, Professor Rysman undertook an empirical analysis of customers' trading activities within the NYSE group of exchanges in reaction to NYSE's

³³ Id. at 2281.

³⁴ See Exhibit 3B, Marc Rysman, Stock Exchanges as Platforms for Data and Trading, December 2, 2019 (hereinafter "Rysman Paper"), ¶ 6.

introduction in 2015 of the NYSE Integrated Feed, a full order-by-order depth of book data product similar to the NYSE National Integrated Feed that is the subject of this fee filing.³⁵

Professor Rysman’s analysis of this confidential firm-level data shows that firms that purchased the NYSE Integrated Feed market data product after its introduction were more likely to route orders to NYSE as opposed to one of the other NYSE-affiliated exchanges, such as NYSE Arca or NYSE American.³⁶ Moreover, Professor Rysman shows that the same is true for firms that did not subscribe to the NYSE Integrated Feed: the introduction of the NYSE Integrated Feed led to more trading on NYSE (as opposed to other NYSE-affiliated exchanges) by firms that did not subscribe to the NYSE Integrated Feed.³⁷ This is the sort of externality that is a key characteristic of a platform market.³⁸

From this empirical evidence, Professor Rysman concludes:

- “[D]ata is more valuable when it reflects more trading activity and more liquidity-providing orders. These linkages alone are enough to make platform economics necessary for understanding the pricing of market data.”³⁹
- “[L]inkages running in the opposite direction, from data to trading, are also very likely to exist. This is because market data from an exchange reduces uncertainty about the likelihood, price, or timing of execution for an order on that exchange.

³⁵ See Securities Exchange Act Release Nos. 74128 (January 23, 2015), 80 FR 4951 (January 29, 2015) (SR-NYSE-2015-03) (Notice of filing and immediate effectiveness of proposed rule change to establish NYSE Integrated Feed) and 76485 (November 20, 2015), 80 FR 74158 (November 27, 2015) (SR-NYSE-2015-57) (Notice of filing and immediate effectiveness of proposed rule change to establish fees for the NYSE Integrated Feed).

³⁶ Rysman Paper ¶¶ 80-90.

³⁷ Id. ¶¶ 91-93.

³⁸ Id. ¶ 91.

³⁹ Id. ¶ 95.

This reduction in uncertainty makes trading on that exchange more attractive for traders that subscribe to that exchange’s market data. Increased trading by data subscribers, in turn, makes trading on the exchange in question more attractive for traders that do not subscribe to the exchange’s market data.”⁴⁰

- The “mechanisms by which market data makes trading on an exchange more attractive for subscribers to market data . . . apply to a wide assortment of market data products, including BBO, order book, and full order-by-order depth of book data products at all exchanges.”⁴¹
- “[E]mpirical evidence confirms that stock exchanges are platforms for data and trading.”⁴²
- “The platform nature of stock exchanges means that data fees cannot be analyzed in isolation, without accounting for the competitive dynamics in trading services.”⁴³
- “Competition is properly understood as being between platforms (i.e., stock exchanges) that balance the needs of consumers of data and traders.”⁴⁴
- “Data fees, data use, trading fees, and order flow are all interrelated.”⁴⁵
- “Competition for order flow can discipline the pricing of market data, and vice-

40 Id. ¶ 96.

41 Id.

42 Id. ¶ 97.

43 Id. ¶ 98.

44 Id.

45 Id.

versa.”⁴⁶

- “As with platforms generally, overall competition between exchanges will limit their overall profitability, not margins on any particular side of the platform.”⁴⁷

The Exchange has observed a similar correlation in connection with its offering of the NYSE National Integrated Feed. Since May 2018, when the Exchange re-launched trading, the number of subscribers of the NYSE National Integrated Feed has grown from 12 to 56. Over this same period, the Exchange has increased market share from 0% to nearly 2%. The Exchange therefore believes that its proposed fees for the NYSE National Integrated Feed are subject to platform-based competitive constraints on pricing.

c. Exchange Market Data Fees Are Constrained by the Availability of Substitute Platforms

Professor Rysman’s conclusions that exchanges function as platforms for market data and transaction services mean that exchanges do not set fees for market data products without considering, and being constrained by, the effect the fees will have on the order-flow side of the platform. As the D.C. Circuit recognized in NetCoalition I, “[n]o one disputes that competition for order flow is fierce.”⁴⁸ The court further noted that “no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers,” and that an exchange “must compete vigorously for order flow to maintain its share of trading volume.”⁴⁹

Similarly, the Commission itself has recognized that the market for trading services in

⁴⁶ Id.

⁴⁷ Id. ¶ 100.

⁴⁸ NetCoalition I, 615 F.3d at 544 (internal quotation omitted).

⁴⁹ Id.

NMS stocks has become “more fragmented and competitive.”⁵⁰ The Commission’s Division of Trading and Markets has also recognized that with so many “operating equities exchanges and dozens of ATSS, there is vigorous price competition among the U.S. equity markets and, as a result, [transaction] fees are tailored and frequently modified to attract particular types of order flow, some of which is highly fluid and price sensitive.”⁵¹ Indeed, today, equity trading is currently dispersed across 13 exchanges,⁵² 31 alternative trading systems,⁵³ and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange has more than 18% market share.⁵⁴

Further, low barriers to entry mean that new exchanges may rapidly and inexpensively enter the market and offer additional substitute platforms to compete with the Exchange.⁵⁵ In addition to the 13 presently-existing exchanges, three new ones are expected to enter the market in 2020: Long Term Stock Exchange (LTSE), which has been approved as an equities exchange

⁵⁰ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18).

⁵¹ Commission Division of Trading and Markets, Memorandum to EMSAC, dated October 20, 2015, available here: <https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf>.

⁵² See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangeshtml.html>.

⁵³ See FINRA ATS Transparency Data, *available at* <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is *available at* <https://www.sec.gov/foia/docs/atlist.htm>.

⁵⁴ See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

⁵⁵ See Jones Paper at 10-11.

but is not yet operational;⁵⁶ Members Exchange (MEMX), which has recently filed its application to be approved as a registered equities exchange;⁵⁷ and Miami International Holdings (MIAX), which has announced its plan to introduce equities trading on an existing registered options exchange.⁵⁸

Given Professor Rysman’s conclusion that exchanges are platforms for market data and trading, this fierce competition for order flow on the trading side of the platform acts to constrain, or “discipline,” the pricing of market data on the other side of the platform.⁵⁹ And due to the ready availability of substitutes and the low cost to move order flow to those substitute trading venues, an exchange setting market data fees that are not at competitive levels would expect to quickly lose business to alternative platforms with more attractive pricing.⁶⁰ Although the various exchanges may differ in their strategies for pricing their market data products and their transaction fees for trades—with some offering market data for free along with higher trading costs, and others charging more for market data and comparatively less for trading—the fact that exchanges are platforms ensures that no exchange makes pricing decisions for one side of its platform without considering, and being constrained by, the effects that price will have on the other side of the platform.

⁵⁶ See Securities Exchange Act Release No. 85828 (May 10, 2019) (File No. 10-234) (Findings, Opinion, and Order of the Commission in the Matter of the Application of Long Term Stock Exchange, Inc. for Registration as a National Securities Exchange).

⁵⁷ See Securities Exchange Act Release No. 87436 (October 31, 2019) (File No. 10-237) (Notice of filing of application of MEMX LLC for registration as a national securities exchange under Section 6 of the Act).

⁵⁸ See Press Release of Miami International Holdings Inc., dated May 17, 2019, available here: https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_05172019.pdf.

⁵⁹ Rysman Paper ¶ 98.

⁶⁰ See Jones Paper at 11.

In sum, the fierce competition for order flow thus constrains any exchange from pricing its market data at a supracompetitive price, and constrains the Exchange here in setting its fees for the NYSE National Integrated Feed.

The proposed fees are therefore reasonable because in setting them, the Exchange is constrained by the availability of numerous substitute platforms offering market data products and trading. Such substitutes need not be identical, but only substantially similar to the product at hand.

More specifically, in setting fees for the NYSE National Integrated Feed, the Exchange is constrained by the fact that, if its pricing across the platform is unattractive to customers, customers have their pick of an increasing number of alternative platforms to use instead of the Exchange. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish reasonable fees. The existence of numerous alternative platforms to the Exchange's platform ensures that the Exchange cannot set unreasonable market data fees without suffering the negative effects of that decision in the fiercely competitive market in which it operates as a platform.

d. NYSE National Integrated Feed is an Optional Market Data Product

Subscribing to the NYSE National Integrated Feed is entirely optional. The Exchange is not required to make the NYSE National Integrated Feed available to any customers, nor is any customer required to purchase the NYSE National Integrated Feed. Unlike some other data products (*e.g.*, the consolidated quotation and last-sale information feeds) that firms are required to purchase in order to fulfil regulatory obligations,⁶¹ a customer's decision whether to purchase

⁶¹ The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. See In the Matter of the Application of Securities Industry and Financial Markets Association for Review of Actions Taken by

the NYSE National Integrated Feed is entirely discretionary. Most firms that choose to subscribe to the NYSE National Integrated Feed do so for the primary goals of using it to increase their revenues, reduce their expenses, and in some instances to compete directly with the Exchange for order flow. Such firms are able to determine for themselves whether the NYSE National Integrated Feed is necessary for their business needs, and if so, whether or not it is attractively priced. If the NYSE National Integrated Feed does not provide sufficient value to firms based on the uses those firms may have for it, such firms may simply choose to conduct their business operations in ways that do not use the NYSE National Integrated Feed.⁶² If they do not choose to use the NYSE National Integrated Feed, they could also choose not to direct order flow to the Exchange.

But even if such firms determine that the fees for NYSE National Integrated Feed are too high, customers can access much of the same data on the NYSE National Integrated Feed for free by subscribing to the NYSE National BBO feed (which includes best-bid-and-offer information for NYSE National on a real-time basis) and NYSE National Trades (which includes last-sale information on a real-time basis), both of which are offered at no cost. NYSE National top-of-book quotation information and last-sale information is also available on the consolidated SIP feeds. In this way, the NYSE National BBO, NYSE National Trades, and SIP data products are all substitutes for a significant portion of the data available on the NYSE National Integrated Feed. The availability of these substitute products constrains the Exchange's ability to charge supracompetitive prices for the NYSE National Integrated Feed.

Self-Regulatory Organizations, Release Nos. 34-72182; AP-3-15350; AP-3-15351 (May 16, 2014). Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSS have chosen not to do so.

⁶² See generally Jones Paper at 8, 10-11.

The only content available on NYSE National Integrated Feed that is not available on these other products is the order-by-order look at the NYSE National book, which provides information about depth of book on the Exchange. The Exchange has been a vocal advocate for the creation of a “SIP Premium” product that would include depth-of-book information on the consolidated market data feeds.⁶³ Future products such as SIP Premium would include not only integrated depth-of-book information from NYSE National, but all other exchanges as well, and would further constrain the Exchange’s ability to price NYSE National Integrated Feed at a supracompetitive price.

Further, in the case of products that are also redistributed through market data vendors such as Bloomberg and Refinitiv, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Currently, only one vendor redistributes the NYSE National Integrated Feed. Even in the absence of fees for the NYSE National Integrated Feed, vendors have not elected to make available the NYSE National Integrated Feed and likely will not unless their customers request it, and customers will not elect to pay the proposed fees unless the NYSE National Integrated Feed 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.

In setting the proposed fees for the NYSE National Integrated Feed, the Exchange

⁶³ See NYSE, “Stock Quotes and Trade Data: One Size Doesn’t Fit All” (August 22, 2019), posted at <https://www.nyse.com/equities-insights#20190822>.

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 reasonable fees. The existence of alternatives to the Exchange's platform and the continued availability of the Exchange's separate data feeds for free ensure that the Exchange cannot set unreasonable fees 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.

2. The Proposed Fees Are Reasonable

The specific fees that the Exchange proposes for the NYSE National Integrated Feed are reasonable for the following additional reasons.

Overall. The Exchange believes that the proposed fees for the NYSE National Integrated Feed are reasonable because they represent not only the value of the data available from the NYSE National BBO and NYSE National Trades data feeds but also the value of receiving the data on an integrated basis. Receiving the data on an integrated basis provides greater efficiencies and reduced errors for vendors and subscribers that currently choose to integrate the data themselves after receiving it from the Exchange. Some vendors and subscribers may not have the technology or resources to integrate separate data feeds in a timely and/or efficient manner, and thus the integration feature of the product may be valuable to them.

The Exchange believes the proposed fees for the NYSE National Integrated Feed are also reasonable when compared to fees for comparable products, such as the NYSE American

Integrated Feed.⁶⁴ Even though NYSE National's market share is several times higher than NYSE American's, the Exchange is proposing fees for the NYSE National Integrated Feed that are based on the existing fee structure and rates that data recipients already pay for the NYSE American Integrated Feed. The Exchange believes that adopting the same fee structure as its affiliated exchanges would reduce administrative burdens on NYSE National data subscribers that also currently subscribe to market data feeds from NYSE, NYSE Arca, or NYSE American.

Access Fee. The Exchange believes that it is reasonable to charge access fees because of the value of the data to data recipients in their profit-generating activities. The Exchange believes that the proposed monthly Access Fee of \$2,500 for the NYSE National Integrated Feed is reasonable because it is comparable to the monthly access fee for the NYSE American Integrated Feed, which is also \$2,500.⁶⁵

Redistribution Fees. The Exchange believes that it is reasonable to charge redistribution fees because vendors receive value from redistributing the data in their business products for their customers. The Exchange believes that charging a Redistribution Fee is reasonable because the vendors that would be charged such a fee profit by re-transmitting the Exchange's market data to their customers. This fee would be charged only once per month to each vendor account that redistributes the NYSE National Integrated Feed, regardless of the number of customers to which that vendor redistributes the data. Currently, there is only one vendor that redistributes the NYSE National Integrated Feed. Accordingly, this proposed fee would have limited impact. The Exchange believes the proposed monthly Redistribution Fee of \$1,500 for the NYSE

⁶⁴ See NYSE American Integrated Feed, <https://www.nyse.com/market-data/real-time/integrated-feed>.

⁶⁵ See NYSE American LLC Equities Proprietary Market Data Fees at https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Equities_Market_Data_Fee_Schedule.pdf.

National Integrated Feed is reasonable because it is comparable to the monthly Redistribution Fee for NYSE American Integrated Feed, which is also \$1,500, and the monthly External Distributor Fee for Nasdaq BX, Inc.'s ("Nasdaq BX") BX TotalView Product, which is also \$1,500.⁶⁶

User Fees. The Exchange believes that having separate Professional and Non-Professional User fees for the NYSE National Integrated Feed is reasonable because it will make the product more affordable and result in greater availability to Professional and Non-Professional Users. Setting a modest Non-Professional User fee is reasonable because it provides an additional method for Non-Professional Users to access the NYSE National Integrated Feed by providing the same data that is available to Professional Users. The proposed monthly Professional User Fee (Per User) of \$10 and monthly Non-Professional User Fee (Per User) of \$1 are reasonable because they are comparable to per user fees for the NYSE American Integrated Feed. The monthly Professional User Fee (Per User) for the NYSE American Integrated Feed is \$10, and the monthly Non-Professional User Fee (Per User) for the NYSE American Integrated Feed is \$2.⁶⁷

Non-Display Use Fees. The Exchange believes the proposed Non-Display Use fees are reasonable, because they reflect the value of the data to the data recipients in their profit-generating activities and do not impose the burden of counting non-display devices.

The Exchange believes that the proposed Non-Display Use fees reflect the significant value of the non-display data use to data recipients, which purchase such data on an entirely voluntary basis. Non-display data can be used by data recipients for a wide variety of profit-

⁶⁶ See Section 119(a) of Nasdaq BX Equity 7 Pricing Schedule.

⁶⁷ See NYSE American LLC Equities Proprietary Market Data Fees at https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Equities_Market_Data_Fee_Schedule.pdf.

generating purposes, including proprietary and agency trading and smart order routing, as well as by data recipients that operate order matching and execution platforms that compete directly with the Exchange for order flow. The data also can be used for a variety of non-trading purposes that indirectly support trading, such as risk management and compliance. Although some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce a recipient's costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs, thereby benefiting recipients. The Exchange believes that charging for non-trading uses is reasonable because data recipients can derive substantial value from such uses, for example, by automating tasks so that can be performed more quickly and accurately and less expensively than if they were performed manually.

Previously, the non-display use data pricing policies of many exchanges required customers to count, and the exchanges to audit the count of, the number of non-display devices used by a customer. As non-display use grew more prevalent and varied, however, exchanges received an increasing number of complaints about the impracticality and administrative burden associated with that approach. In response, the Exchange and its affiliated exchanges developed a non-display use pricing structure that does not require non-display devices to be counted or those counts to be audited, and instead looks merely at the three following categories of potential use of non-display data: use of the data on the customer's own behalf (Category 1), use on behalf of clients (Category 2), and use to internally match buy and sell orders within an organization (Category 3).

The Exchange believes that it is reasonable to segment the fee for non-display use into these three categories. As noted above, the uses to which customers can put the NYSE National

Integrated Feed are numerous and varied, and the Exchange believes that charging separate fees for these separate categories of use is reasonable because it reflects the actual value the customer derives from the data, based upon how many categories of use the customer makes of the data. Segmenting the fees for non-display data in this way avoids the unreasonable result of customers that make only limited non-display use of the data paying the same fees as customers that use the data for numerous different revenue-generating and cost-saving purposes.

The Exchange believes that the proposed fees of \$5,000 per month for each of Categories 1, 2, and 3 is reasonable. These fees are comparable to the NYSE American Integrated Feed fees for non-display use for the different categories of use, which is also \$5,000 per category.⁶⁸ The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using non-display data in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.

The Exchange also believes that, regarding Category 3 fees, it is reasonable to charge \$5,000 per month for each trading platform on which the data recipient uses the Non-Display data, because such use of the data is directly in competition with the Exchange and the Exchange should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible. The Exchange believes that it is reasonable to cap such fees for Category 3 use at \$15,000 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE National Integrated Feed for use by their trading platforms.

The proposed Non-Display Use fees for the NYSE National Integrated Feed are also

⁶⁸ See id.

reasonable because they take into account the extra value of receiving the data for Non-Display Use on an integrated basis. The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using the NYSE National Integrated Feed on a non-display basis in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.⁶⁹

Non-Display Use Declaration Late Fee. The Exchange believes that it is reasonable to require annual submissions of the Non-Display Use Declaration so that the Exchange will have current and accurate information about the use of the NYSE National Integrated Feed and can correctly assess fees for the uses of the NYSE National Integrated Feed. Requiring annual submissions of such declarations is reasonable because it also allows users to re-assess their own usage each year.

The Exchange believes that it is reasonable to impose a late fee in connection with the submission of the Non-Display Use Declaration. In order to correctly assess fees for the non-display use of the NYSE National Integrated Feed, the Exchange needs to have current and accurate information about the use of the NYSE National Integrated Feed. The failure of data recipients to submit the Non-Display Use Declaration on time leads to potentially incorrect billing and administrative burdens, including tracking and obtaining late Non-Display Use Declarations and correcting and following up on payments owed in connection with late Non-

⁶⁹ See also Exchange Act Release No. 69157, March 18, 2013, 78 FR 17946, 17949 (March 25, 2013) (SR-CTA/CQ-2013-01) (“[D]ata feeds have become more valuable, as recipients now use them to perform a far larger array of non-display functions. Some firms even base their business models on the incorporation of data feeds into black boxes and application programming interfaces that apply trading algorithms to the data, but that do not require widespread data access by the firm’s employees. As a result, these firms pay little for data usage beyond access fees, yet their data access and usage is critical to their businesses.”).

Display Use Declarations. The purpose of the late fee is to incent data recipients to submit the Non-Display Use Declaration promptly to avoid the administrative burdens associated with the late submission of Non-Display Use Declarations.

Multiple Data Feed Fee. The Exchange believes that it is reasonable to require data recipients to pay a modest additional fee for taking a data feed for a market data product in more than two locations, because such data recipients can derive substantial value from being able to consume the product in as many locations as they want. In addition, there are administrative burdens associated with tracking each location at which a data recipient receives the product. The Multiple Data Feed Fee is designed to encourage data recipients to better manage their requests for additional data feeds and to monitor their usage of data feeds. The proposed fee is designed to apply to data feeds received in more than two locations so that each data recipient can have one primary and one backup data location before having to pay a multiple data feed fee.

Fee Waiver for Federal Agencies. The Exchange believes the proposal to not charge the access fees, display fees for professional users, and non-display fees associated with its proprietary market data products to customers that are Federal agencies is reasonable because it is designed to facilitate federal government regulation without giving an undue advantage to one set of commercial users over another. The Exchange believes that it is reasonable to assess no fees to Federal agencies that subscribe to the Exchange's proprietary market data products because Federal agencies do not use the Exchange's proprietary market data for commercial gain, but only for regulatory purposes.

One-Month Free Trial. The Exchange believes the proposal to provide the NYSE National Integrated Free to new customers free-of-charge for their first subscription month is reasonable because it would allow vendors and subscribers to become familiar with the feed and

determine whether it suits their needs without incurring fees. Making a new market data product available for free for a trial period is consistent with offerings of other exchanges. For example, Nasdaq BX offers new subscribers of BX TotalView a 30-day waiver of user fees.⁷⁰

No Charge Until February 3, 2020. The Exchange believes it is reasonable to continue to make the NYSE National Integrated Feed available free of charge through February 3, 2020 because providing it at no charge would continue to provide an opportunity for vendors and subscribers to determine whether the NYSE National Integrated Feed suits their needs without incurring fees. As noted above, other exchanges provide or have provided market data products free for a certain period of time.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the NYSE National Integrated Fee are reasonable.

The Proposed Fees Are Equitably Allocated

The Exchange believes the proposed fees for the NYSE National Integrated Feed are allocated fairly and equitable among the various categories of users of the feed, and any differences among categories of users are justified.

Overall. The Exchange believes that the proposed fees are equitably allocated because they will apply to all data recipients that choose to subscribe to the NYSE National Integrated Feed. Any subscriber or vendor that chooses to subscribe to the NYSE National Integrated Feed is subject to the same Fee Schedule, regardless of what type of business they operate or the use they plan to make of the data feed. Subscribers and vendors may choose to continue to receive some or all of the data on the NYSE National Integrated Feed through the existing separate feeds for free, or they can choose to pay for the NYSE National Integrated Feed in order to receive

⁷⁰ See Section 123(a)(4) of Nasdaq BX's Equity 7 Pricing Schedule.

integrated data, or they or they can choose a combination of the two approaches, thereby allowing each vendor or subscriber to choose the best business solution for itself.

Access Fee. The Exchange believes the proposed monthly Access Fee of \$2,500 for the NYSE National Integrated Feed is equitably allocated because it would be charged on an equal basis to all data recipients that receive a data feed of the NYSE National Integrated Feed, regardless of what type of business they operate or the use they plan to make of the data feed.

Redistribution Fees. The Exchange believes the proposed monthly fee of \$1,500 for redistributing the NYSE National Integrated Feed is equitably allocated because it would be charged on an equal basis to those vendors that choose to redistribute the feed.

User Fees. The Exchange believes that the fee structure differentiating Professional User fees (\$10 per month per user) from Non-Professional User fees (\$1 per month per user) for display device access to the NYSE National Integrated Feed is equitable. This structure has long been used by the Exchange to reduce the price of data to Non-Professional Users and make it more broadly available.⁷¹ Offering the NYSE National Integrated Feed to Non-Professional Users with the same data as is available to Professional Users results in greater equity among data recipients. These user fees would be charged uniformly to all display devices that have access to the NYSE National Integrated Feed.

Non-Display Use Fees. The Exchange believes the proposed Non-Display Use fees are equitably allocated because they would require subscribers to pay fees only for the uses they actually make of the data. As noted above, non-display data can be used by data recipients for a

⁷¹ See, e.g., Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131) (establishing the \$15 Non-Professional User Fee (Per User) for NYSE OpenBook); Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983), 48 FR 34552 (July 29, 1983) (establishing Non-Professional fees for CTA data); NASDAQ BX Equity 7 Pricing Schedule, Section 123.

wide variety of profit-generating purposes (including trading, risk management, and compliance) as well as purposes that do not directly generate revenues but nonetheless substantially reduce the recipient's costs by automating certain functions. The Exchange believes that it is equitable to charge non-display data subscribers a \$5,000 fee for each category of use they make of such data—namely, using the data on their own behalf (Category 1), on behalf of their clients (Category 2), and to internally match buy and sell orders within an organization (Category 3)—because this fee structure results in subscribers with greater uses of the data paying higher fees, and subscribers with fewer uses of the data paying lower fees. This segmented fee structure is also equitable because no subscriber of non-display data would be charged a fee for a category of use in which it did not actually engage.

The Exchange also believes that, regarding Category 3 fees, it is equitable to charge \$5,000 per month for each trading platform on which the data recipient uses the Non-Display data, because such use of the data is directly in competition with the Exchange and the Exchange should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible. The Exchange believes that it is equitable to cap such fees for Category 3 use at \$15,000 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE National Integrated Feed for use by their trading platforms.

Non-Display Use Declaration Late Fee. The Exchange believes that the proposed fee of \$1,000 per month for a late Non-Display Use Declaration is equitably allocated because it applies to any data recipient that pays an Access Fee for the NYSE National Integrated Feed but has failed to complete and submit a Non-Display Use Declaration. In addition, the Exchange believes that it is equitable to charge a late fee to subscribers who fail to timely submit their Non-

Display Use Declarations because their failure to do so leads to potentially incorrect billing and administrative burdens on the part of the Exchange. The Exchange believes it is equitable to defray these administrative costs by imposing a late fee only on subscribers' whose declarations were late, as opposed to all subscribers.

Multiple Data Feed Fee. The Exchange believes that the \$200 per month per location fee to data recipients taking the NYSE National Integrated Feed in more than two locations is equitable because it would apply to all such customers, regardless of what type of business they operate or the use they make of the data feed. In addition, the Exchange believes that it is equitable to charge a fee to subscribers for taking a data feed in more than two locations because there are administrative burdens on the part of the Exchange associated with tracking each location at which a data recipient receives the product. The Exchange believes that it is equitable for it to defray these administrative costs by imposing a modest fee only on subscribers who seek to take the feed in more than two locations, as opposed to all subscribers.

Fee Waiver for Federal Agencies. The Exchange believes that the proposal to not charge the access fees, display fees for professional users, and non-display fees associated with its proprietary market data products to customers that are Federal agencies is equitable because it is designed to facilitate federal government regulation without giving an undue advantage to one set of commercial users over another. The Exchange believes that it is equitable to waive fees for Federal agencies that subscribe to the Exchange's proprietary market data products because Federal agencies do not use the Exchange's proprietary market data for commercial gain, but only for regulatory purposes.

One-Month Free Trial. The Exchange believes the proposal to provide the NYSE National Integrated Feed to new customers free-of-charge for their first subscription month is

equitable because it applies to any first-time subscriber, regardless of the use they plan to make of the feed. As proposed, any first-time subscriber of the NYSE National Integrated Feed would not be charged the Access Fee, Non-Display Fee, any applicable Professional and Non-Professional User Fee, and Redistribution Fee for one calendar month. The Exchange believes it is equitable to restrict the availability of this one-month free trial to customers that have not previously subscribed to the NYSE National Integrated Feed, since customers who are current or previous subscribers of the feed are already familiar with it and whether it suits their needs.

No Charge Until February 3, 2020. The Exchange believes that the proposal to continue to make the NYSE National Integrated Feed available free of charge through February 3, 2020 is equitable because it applies equally to all customers.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the NYSE National Integrated Fee are equitably allocated.

The Proposed Fees Are Not Unfairly Discriminatory

The Exchange believes the proposed fees for the NYSE National Integrated Feed are not unfairly discriminatory because any differences in the application of the fees are based on meaningful distinctions between customers, and those meaningful distinctions are not unfairly discriminatory between customers.

Overall. The Exchange believes that the proposed fees are not unfairly discriminatory because they would apply to all data recipients that choose to subscribe to the NYSE National Integrated Feed. Any vendor or subscriber that chooses to subscribe to the NYSE National Integrated Feed is subject to the same Fee Schedule, regardless of what type of business they operate or the use they plan to make of the data feed. Vendors and subscribers may choose to continue to receive some or all of the data on the NYSE National Integrated Feed through the

existing separate feeds for free, or they can choose to pay for the NYSE National Integrated Feed in order to receive integrated data, or they or they can choose a combination of the two approaches, thereby allowing each vendor or subscriber to choose the best business solution for itself.

Access Fee. The Exchange believes the proposed monthly Access Fee of \$2,500 for the NYSE National Integrated Feed is not unfairly discriminatory because it would be charged on an equal basis to all data recipients that receive a data feed of the NYSE National Integrated Feed, regardless of what type of business they operate or the use they plan to make of the data feed.

Redistribution Fees. The Exchange believes the proposed monthly fee of \$1,500 for redistributing the NYSE National Integrated Feed is not unfairly discriminatory because it would be charged on an equal basis to those vendors that choose to redistribute the feed.

User Fees. The Exchange believes that the fee structure differentiating Professional User fees (\$10 per month per user) from Non-Professional User fees (\$1 per month per user) for display device access to the NYSE National Integrated Feed is not unfairly discriminatory. This structure has long been used by the Exchange to reduce the price of data to Non-Professional Users and make it more broadly available.⁷² Offering the NYSE National Integrated Feed to Non-Professional Users with the same data as is available to Professional Users results in greater equity among data recipients. These user fees would be charged uniformly to all display devices that have access to the NYSE National Integrated Feed.

Non-Display Use Fees. The Exchange believes the proposed Non-Display Use fees are

⁷² See e.g., Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131) (establishing the \$15 Non-Professional User Fee (Per User) for NYSE OpenBook). See e.g., Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983), 48 FR 34552 (July 29, 1983) (establishing nonprofessional fees for CTA data); NASDAQ BX Equity 7 Pricing Schedule, Section 123.

not unfairly discriminatory because they would require subscribers for non-display use to pay fees only for the categories of use they actually make of the data. As noted above, non-display data can be used by data recipients for a wide variety of profit-generating purposes (including trading, risk management, and compliance) as well as purposes that do not directly generate revenues but nonetheless substantially reduce the recipient's costs by automating certain functions. The Exchange believes that it is not unfairly discriminatory to charge non-display data subscribers a \$5,000 fee for each category of use they make of such data—namely, using the data on their own behalf (Category 1), on behalf of their clients (Category 2), and to internally match buy and sell orders within an organization (Category 3)—because this fee structure results in subscribers with greater uses for the data paying higher fees, while subscribers with fewer uses of the data pay lower fees. This segmented fee structure is not unfairly discriminatory because no subscriber of non-display data would be charged a fee for a category of use in which it did not actually engage.

The Exchange also believes that, regarding Category 3 fees, it is not unreasonably discriminatory to charge \$5,000 per month for each trading platform on which the data recipient uses the Non-Display data, because such use of the data is directly in competition with the Exchange and the Exchange should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible. The Exchange believes that it is not unreasonably discriminatory to cap such fees for Category 3 use at \$15,000 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE National Integrated Feed for use by their trading platforms.

Non-Display Use Declaration Late Fee. The Exchange believes that the proposed fee of \$1,000 per month for a late Non-Display Use Declaration is not unfairly discriminatory because

it applies to any data recipient that pays an Access Fee for the NYSE National Integrated Feed but has failed to complete and submit a Non-Display Use Declaration. In addition, the Exchange believes that it is not unfairly discriminatory to charge a late fee to subscribers who fail to timely submit their Non-Display Use Declarations because their failure to do so leads to potentially incorrect billing and administrative burdens on the part of the Exchange. Nor is it unfairly discriminatory for the Exchange to defray these administrative costs by imposing a late fee only on subscribers' whose declarations were late, as opposed to all subscribers.

Multiple Data Feed Fee. The Exchange believes that the \$200 per month per location fee to data recipients taking the NYSE National Integrated Feed in more than two locations is not unfairly discriminatory because it would apply to all such customers, regardless of what type of business they operate or the use they make of the data feed. In addition, the Exchange believes that it is not unfairly discriminatory to charge a fee to subscribers for taking a data feed in more than two locations because there are administrative burdens on the part of the Exchange associated with tracking each location at which a data recipient receives the product. The Exchange believes that it is not unfairly discriminatory for it to defray these administrative costs by imposing a modest fee only on subscribers who seek to take the feed in more than two locations, as opposed to all subscribers.

Fee Waiver for Federal Agencies. The Exchange believes that the proposal to not charge the access fees, display fees for professional users, and non-display fees associated with its proprietary market data products to customers that are Federal agencies is not unreasonably discriminatory because it is designed to facilitate federal government regulation without giving an undue advantage to one set of commercial users over another. The Exchange believes that it is not unfairly discriminatory to waive fees for Federal agencies that subscribe to the Exchange's

proprietary market data products because Federal agencies do not use the Exchange's proprietary market data for commercial gain, but only for regulatory purposes.

One-Month Free Trial. The Exchange believes the proposal to provide the NYSE National Integrated Feed to new customers free-of-charge for their first subscription month is not unfairly discriminatory because it applies to any first-time subscriber, regardless of the use they plan to make of the feed. As proposed, any first-time subscriber of the NYSE National Integrated Feed would not be charged the Access Fee, Non-Display Fee, any applicable Professional and Non-Professional User Fee, and Redistribution Fee for one calendar month. The Exchange believes it is not unfairly discriminatory to restrict the availability of this one-month free trial to customers that have not previously subscribed to the NYSE National Integrated Feed, since customers who are current or previous subscribers of the feed are already familiar with it and whether it suits their needs.

No Charge Until February 3, 2020. The Exchange believes that the proposal to continue to make the NYSE National Integrated Feed available free of charge through February 3, 2020 is not unfairly discriminatory because it applies equally to all customers.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the NYSE National Integrated Fee are not unfairly discriminatory.

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

The Exchange does not believe that the proposed fees will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition. The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants. As noted above, the proposed fee schedule would apply to all subscribers of the NYSE National Integrated

Feed, and customers may not only choose whether to subscribe to the feed at all, but may tailor their subscriptions by choosing particular uses of the feed but not others (*e.g.*, Category 1 only versus all three categories; display device access only versus non-display use).

The Exchange also believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue market on competition. As shown above, to the extent that particular proposed fees apply to only a subset of subscribers (*e.g.*, Category 2 fees apply only to those making non-display use on behalf of clients; late fees apply only to customers who fail to timely submit their declarations), those distinctions are not unfairly discriminatory and do not unfairly burden one set of customers over another. To the contrary, by tailoring the proposed fees in this manner, the Exchange believes that it has eliminated the potential burden on competition that might result from unfairly asking subscribers to pay fees for services they did not use, or late fees they did not actually incur.

Intermarket Competition. The Exchange believes that the proposed fees do not impose a burden on competition or on other SROs that is not necessary or appropriate. As demonstrated above and in Professor Rysman's attached [sic] paper, exchanges are platforms for market data and trading. In setting the proposed fees, the Exchange was constrained by the availability of numerous substitute platforms also offering market data products and trading, and low barriers to entry mean new exchange platforms are frequently introduced. The fact that exchanges are platforms ensures that no exchange can make pricing decisions for one side of its platform without considering, and being constrained by, the effects that price will have on the other side of the platform. In setting fees for the NYSE National Integrated Feed, the Exchange is constrained by the fact that, if its pricing across the platform is unattractive to customers, customers will have its pick of an increasing number of alternative platforms to use instead of the

Exchange. Given this intense competition between platforms, no one exchange's market data fees can impose an unnecessary burden on competition, and the Exchange's proposed fees do not do so here.

In addition, the Exchange believes that the proposed fees do not impose a burden on competition or on other exchanges that is not necessary or appropriate because of the availability of numerous substitute market data products. Many other exchanges offer proprietary data feeds like the NYSE National Integrated Feed, supplying depth of book order data, last sale data, security status updates, stock summary messages, and the exchange's best bid and offer at any given time, on a real-time basis. Because market data users can find suitable substitute feeds, an exchange that overprices its market data products stands a high risk that users may substitute another platform, in which case the platform would stand to lose both market data and trading fees. These competitive pressures ensure that no one exchange's market data fees can impose an unnecessary burden on competition, and the Exchange's proposed fees do not do so here.

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)⁷³ of the Act and subparagraph (f)(2) of Rule 19b-4⁷⁴ 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

⁷³ 15 U.S.C. 78s(b)(3)(A).

⁷⁴ 17 CFR 240.19b-4(f)(2).

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)⁷⁵ 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NYSENAT-2019-31 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSENAT-2019-31. 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

⁷⁵ 15 U.S.C. 78s(b)(2)(B).

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, 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSENAT-2019-31, and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁶

J. Matthew DeLesDernier,

Assistant Secretary.

⁷⁶ 17 CFR 200.30-3(a)(12).

[FR Doc. 2019-27730 Filed: 12/23/2019 8:45 am; Publication Date: 12/26/2019]