

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88538; File No. SR–NYSENAT–2020–05]

### Self-Regulatory Organizations; NYSE National, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed

April 1, 2020.

#### I. Introduction

On February 3, 2020, NYSE National, Inc. (“NYSE National” or “Exchange”) 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 establish fees for the NYSE National Integrated Feed. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the **Federal Register** on February 20, 2020.<sup>4</sup> Pursuant to Section 19(b)(3)(C) of the Act,<sup>5</sup> the Commission is hereby: (1) Temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (“Notice”). Comments received on the Notice are available on the Commission’s website at <https://www.sec.gov/comments/sr-nyssenat-2020-05/srnyssenat202005.htm>. The Commission notes that, on December 4, 2019, NYSE National filed a proposed rule change to establish fees for the NYSE National Integrated Feed that are identical to the fees proposed in this filing. See Securities Exchange Act Release No. 87797 (December 18, 2019), 84 FR 71025 (December 26, 2019) (SR–NYSENAT–2019–31). Comments received on SR–NYSENAT–2019–31 are available on the Commission’s website at <https://www.sec.gov/comments/sr-nyssenat-2019-31/srnyssenat201931.htm>. On January 31, 2020, the Commission temporarily suspended SR–NYSENAT–2019–31 and instituted proceedings to determine whether to approve or disapprove that proposed rule change. See Securities Exchange Act Release No. 88109, 85 FR 6982 (February 6, 2020) (“SR–NYSENAT–2019–31 OIP”). On February 3, 2020, NYSE National withdrew SR–NYSENAT–2019–31. See Securities Exchange Act Release No. 88118 (February 4, 2020), 85 FR 7611 (February 10, 2020).

<sup>5</sup> 15 U.S.C. 78s(b)(3)(C).

#### II. Description of the Proposed Rule Change

NYSE National proposes to establish fees for the NYSE National Integrated Feed, which became effective on February 3, 2020.<sup>6</sup> According to NYSE National, 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.<sup>7</sup> 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.<sup>8</sup> It also includes information about NYSE National’s best bid or offer at any given time.<sup>9</sup> NYSE National proposes the following fees for the NYSE National Integrated Feed:

- \$2,500 per month access fee, which would be charged (once per firm) to any data recipient that receives a data feed of the NYSE National Integrated Feed;<sup>10</sup>
- \$1,500 per month redistribution fee, which would be charged (once per redistributor account) to any redistributor<sup>11</sup> of the NYSE National Integrated Feed;
- \$10 per month professional per user fee and \$1 per month non-professional per user fee, which would apply to each display device that has access to the NYSE National Integrated Feed;<sup>12</sup>
- Non-display use<sup>13</sup> fees:

<sup>6</sup> Prior to February 3, 2020, NYSE National did not charge any fees for the NYSE National Integrated Feed. See Notice, *supra* note 4, at 9847.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> Data recipients that only use display devices to view NYSE National Integrated Feed data and do not separately receive a data feed would not be charged an access fee. See *id.* at 9848.

<sup>11</sup> A redistributor would be a vendor or 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. See *id.*

<sup>12</sup> See *id.*

<sup>13</sup> Non-display use would mean accessing, processing, or consuming the NYSE 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. See *id.* As proposed, 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 order pegging, price referencing for algorithmic trading or smart order routing, operations controls programs, investment analysis, order verification, surveillance programs, risk management, compliance, and portfolio management. See *id.* One, two, or three categories of non-display use may apply to a data recipient. See *id.* Moreover, data recipients that receive the NYSE National Integrated Feed for non-display use would be required to complete and submit a non-

○ \$5,000 per month category 1 non-display fee, which would apply when a data recipient’s non-display use of real-time market data is on its own behalf;

○ \$5,000 per month category 2 non-display fee, which would apply when a data recipient’s non-display use of real-time market data is on behalf of its clients;

○ \$5,000 per platform per month category 3 non-display fee (capped at \$15,000), which would apply when a data recipient’s non-display use of real-time market data is for the purpose of internally matching buy and sell orders within an organization, including matching customer orders on a data recipient’s own behalf and on behalf of its clients;<sup>14</sup>

• \$1,000 per month non-display use declaration late fee, which would apply to any data recipient that is paying an access fee for the NYSE National Integrated Feed and that fails to complete and submit the annual non-display use declaration by December 31 of the year, 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;<sup>15</sup> and

• \$200 per month multiple data feed fee, which would apply to any data recipient that takes a data feed for a market data product in more than two locations, and would apply to each location, beyond the first two locations, where the data recipient receives a data feed.<sup>16</sup>

The access fees, professional user fees, and non-display fees would not apply to Federal agencies<sup>17</sup> that

display use declaration before they would be authorized to receive the feed. See *id.* at 9849. 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 NYSE National of the change by completing and submitting an updated declaration reflecting the change of use at the time of the change. See *id.*

<sup>14</sup> According to NYSE National, category 3 non-display fees would apply to non-display use in trading platforms, such as, but not limited to, alternative trading systems (“ATSS”), broker crossing networks, broker crossing systems not filed as ATSS, dark pools, multilateral trading facilities, exchanges, and systematic internalization systems. See *id.* at 9848–49.

<sup>15</sup> See *id.* at 9849.

<sup>16</sup> See *id.*

<sup>17</sup> The term “Federal agencies” as used in the proposed fee schedule would include all Federal agencies subject to the Federal Acquisition Regulation (“FAR”), as well as any Federal agency not subject to FAR that has promulgated its own procurement rules. See *id.* All Federal agencies that subscribe to the NYSE National real-time proprietary market data products would continue to be required to execute the appropriate subscriber agreement, which includes, among other things, provisions against the redistribution of data. See *id.*

subscribe to the products listed on the proposed fee schedule that includes such fees.<sup>18</sup>

Finally, first-time subscribers<sup>19</sup> would be eligible for a free trial by contacting NYSE National and would not be charged the access fee, the non-display fee, any applicable professional and non-professional user fee, and the redistribution fee for one calendar month for each of the products listed on the proposed fee schedule.<sup>20</sup> The free trial would be for the first full calendar month following the date a subscriber is approved to receive trial access to NYSE National market data.<sup>21</sup> As proposed, NYSE National would provide the one-month free trial for a particular product to each subscriber only once.<sup>22</sup>

### III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,<sup>23</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>24</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

NYSE National proposes to adopt fees for the NYSE National Integrated Feed and provides various arguments to support the proposal’s consistency with the Act. With respect to whether the proposed fees are reasonable, NYSE National states that exchanges in general function as platforms between consumers of market data and consumers of trading services, and that overall competition between exchanges will limit their overall profitability.<sup>25</sup> In connection with these arguments, NYSE

National also provides a report by Marc Rysman,<sup>26</sup> which finds that the introduction of the NYSE Integrated Feed in 2015 attracted more trading to NYSE by both subscribers and non-subscribers to the NYSE Integrated Feed,<sup>27</sup> and concludes that overall competition between exchanges will limit their overall profitability (not margins on any particular side of the platform).<sup>28</sup> According to NYSE National, given the conclusion in the Rysman Paper that exchanges are platforms for market data and transaction services, competition for order flow on the trading side of the platform acts to constrain the pricing of market data on the other side of the platform.<sup>29</sup>

In addition, NYSE National argues that, due to the ready availability of substitutes and the low cost to move order flow to the 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.<sup>30</sup> NYSE National argues that subscribing to the NYSE National Integrated Feed is optional, that its customers may choose to discontinue using the feed once the proposed fees are effective, and that any customers who choose to discontinue using the feed may choose to shift order flow away from NYSE National.<sup>31</sup> Similarly, NYSE National argues that its market data pricing is constrained by the availability of numerous substitute platforms offering competing proprietary market data products and trading services.<sup>32</sup>

In addition to its “platform”-based arguments, NYSE National presents an alternative competition-based argument, asserting that the NYSE National Integrated Feed is sold in a competitive

market.<sup>33</sup> NYSE National provides a report by Charles M. Jones,<sup>34</sup> which concludes that exchanges compete with each other in selling proprietary market data products, as well as with consolidated data feeds and with data provided by ATSs.<sup>35</sup> NYSE National also more specifically argues that NYSE National BBO (which includes best bid and offer information for NYSE National on a real-time basis), NYSE National Trades (which includes NYSE National last sale information on a real-time basis), and consolidated data feeds are substitutes for the NYSE National Integrated Feed and constrain NYSE National’s ability to charge supracompetitive prices for the feed.<sup>36</sup> In addition, NYSE National states that, since the date of filing of SR–NYSENAT–2019–31 and before the proposed fees went into effect on February 3, 2020, five subscribers to the NYSE National Integrated Feed (*i.e.*, nearly nine percent of the prior subscriber base) have cancelled their subscriptions due to the imminent imposition of the fees.<sup>37</sup> Moreover, NYSE National states that a sixth customer informed NYSE National that if NYSE National is permitted to impose the fees, the customer would cancel its subscription to the NYSE National Integrated Feed and instead subscribe to the NYSE National BBO feed.<sup>38</sup>

With respect to the other requirements under the Act, NYSE National argues that the proposed fees are equitably allocated and are not unfairly discriminatory because they would apply on an equal basis to all data recipients that choose to subscribe to the data in a manner that is subject to an applicable fee and because any differences among categories of users are justified.<sup>39</sup> Specifically, NYSE National argues that the professional and non-professional user fee structure has long been used by NYSE National to reduce the price of data to non-professional users and make it more broadly available, and that the non-display fee structure results in

<sup>18</sup> The proposed fee schedule lists NYSE National BBO, NYSE National Trades, and NYSE National Integrated Feed, and specifies that there would be no fees for NYSE National BBO and NYSE National Trades.

<sup>19</sup> A first-time subscriber would be any firm that has not previously subscribed to a particular product listed on the proposed fee schedule. *See* Notice, *supra* note 4, at 9849.

<sup>20</sup> *See id.*

<sup>21</sup> *See id.* at 9849–50.

<sup>22</sup> *See id.* at 9850.

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

<sup>24</sup> 15 U.S.C. 78s(b)(1).

<sup>25</sup> *See* Notice, *supra* note 4, at 9852.

<sup>26</sup> *See* Marc Rysman, *Stock Exchanges as Platforms for Data and Trading* (December 2, 2019) (“Rysman Paper”), available at <https://www.sec.gov/rules/sro/nysenat/2020/34-88211-ex3b.pdf>.

<sup>27</sup> *See* Notice, *supra* note 4, at 9852. NYSE National also states that, since May 2018, when NYSE National relaunched trading, it has observed a direct correlation between the steady increase of subscribers to the NYSE National Integrated Feed and the increase in NYSE National’s transaction market share volume over the same period. *See id.* at 9850. NYSE National states that, between May 2018 and October 2019, it has grown from 0% to nearly 2% market share of consolidated trading volume and, between May 2018 and November 2019, the number of NYSE National Integrated Feed subscribers increased from 12 to 57. *See id.* at 9847–48, 9852.

<sup>28</sup> *See id.* at 9852.

<sup>29</sup> *See id.* at 9853.

<sup>30</sup> *See id.*

<sup>31</sup> *See id.* at 9850, 9853.

<sup>32</sup> *See id.* at 9853.

<sup>33</sup> *See id.* at 9851.

<sup>34</sup> *See* Charles M. Jones, *Understanding the Market for U.S. Equity Market Data* (August 31, 2018) (“Jones Paper”), available at <https://www.sec.gov/rules/sro/nysenat/2020/34-88211-ex3a.pdf>.

<sup>35</sup> *See* Notice, *supra* note 4, at 9851. The Jones Paper also states that the market for order flow and the market for market data are closely linked, and that an exchange needs to consider the negative impact on its order flow if it raises the price of market data. *See id.*

<sup>36</sup> *See id.* at 9854.

<sup>37</sup> *See id.* at 9848.

<sup>38</sup> NYSE National states that six lost subscribers constitute 10.5 percent of the prior NYSE National Integrated Feed subscriber base. *See id.*

<sup>39</sup> *See id.* at 9856–58.

subscribers with greater uses of the data paying higher fees and subscribers with fewer uses of the data paying lower fees.<sup>40</sup> For similar reasons, and because it claims numerous substitute market data products are available, NYSE National argues that the proposed fees do not impose an unnecessary or inappropriate burden on competition.<sup>41</sup>

With respect to the redistribution fee, NYSE National argues that the proposed fee is reasonable because vendors that would be charged the proposed fee would profit by re-transmitting NYSE National's market data to their customers,<sup>42</sup> and that the proposed fee is equitable and not unfairly discriminatory because the fees would be charged on an equal basis to those vendors that choose to redistribute the feed.<sup>43</sup> Similarly, with respect to category 3 non-display fees, which would be charged to each trading platform on which the customer uses non-display data (capped at three platforms), NYSE National argues that the proposal is reasonable, equitable, and not unfairly discriminatory because such use of data is directly in competition with NYSE National and NYSE National should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible.<sup>44</sup>

Finally, with respect to the non-display use declaration late fee and the multiple data feed fee, NYSE National claims that these fees are reasonable, equitable, and not unfairly discriminatory because they would offset NYSE National's administrative burdens and costs associated with incorrect billing, late payments, and tracking data usage locations.<sup>45</sup>

The Commission received comment letters that express concerns regarding the proposed rule change. One commenter states that NYSE National fails to provide the necessary information for the Commission to determine whether the proposed fees meet the requirements of the Act.<sup>46</sup> This

commenter argues that the NYSE National Integrated Feed is not subject to competitive forces because there are no available substitutes to NYSE National's depth-of-book product.<sup>47</sup> This commenter also argues that competition for order flow under the "platform theory" does not constrain the cost of market data, but instead results in supra-monopoly prices for market data products.<sup>48</sup> In addition, this commenter argues that NYSE National makes an unpersuasive attempt to show an elasticity of demand for the NYSE National Integrated Feed (*i.e.*, in response to the fee increase, 5 of the 57 subscribers notified NYSE National of their intent to cancel their subscriptions before the fees went into effect).<sup>49</sup> Moreover, this commenter argues that exchanges have yet to show an increase (or decrease) in trading volume after reducing (or increasing) a respective exchange's price of market data, and that NYSE National does not state the anticipated impact on order flow from losing subscribers to the NYSE National Integrated Feed.<sup>50</sup> Finally, the commenter argues that, because it believes competitive forces have not constrained the cost of market data, NYSE National should provide additional information on cost.<sup>51</sup>

Another commenter also states that the information provided by NYSE National is not adequate to establish that the proposed fees are consistent with the Act and Commission rules.<sup>52</sup> This commenter questions whether third parties can compete with NYSE National in offering data related to activity on NYSE National.<sup>53</sup> This commenter also questions NYSE National's assertion that market participants have a meaningful ability to

choose whether or not to connect to the NYSE National Integrated Feed and believes instead that many market participants must buy the feed.<sup>54</sup> This commenter acknowledges that NYSE National provides the number of customers that discontinued using the NYSE National Integrated Feed in response to the proposed fees, but expresses concern that NYSE National has not provided any relevant information about these customers (*e.g.*, why they subscribed to the NYSE National Integrated Feed in the first place; whether they were proprietary trading firms, agency brokers, or data vendors; and whether and how often they sent orders to NYSE National).<sup>55</sup> This commenter also states that NYSE National should update and further elaborate on information about the remaining subscribers.<sup>56</sup>

Moreover, this commenter argues that NYSE National's discussions regarding the reasonableness of the proposed fees (*i.e.*, the comparison to similar fees charged by affiliated exchanges, the nature of the market for order flow, the availability of other data options, and the lack of a relation between the proposed fees and the costs of production) do not support a finding that the proposed fees are reasonable.<sup>57</sup> This commenter also states that NYSE National does not provide any information about the costs of production for the NYSE National Integrated Feed, the expected revenue NYSE National projects to generate from the proposed fees, the impact of the proposed fees on subscribers, the competition between subscribers and non-subscribers, and whether the proposed fees would be equitably allocated and would not impose any undue burden on competition.<sup>58</sup> In addition, the commenter states that NYSE National does not provide any information about the latency difference between the NYSE National Integrated Feed and the consolidated data feed or other methods of transmitting data.<sup>59</sup> Finally, this commenter objects to NYSE National's platform-based arguments, stating that the supply and demand

SIFMA, to Vanessa Countryman, Secretary, Commission, dated January 21, 2020, available at <https://www.sec.gov/comments/sr-nysenat-2019-31/srnysenat201931-6678406-204968.pdf>.

<sup>47</sup> See SIFMA Letter, *supra* note 46, at 2.

<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See *id.*

<sup>52</sup> See letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Vanessa Countryman, Office of the Secretary, Commission, dated March 12, 2020 ("Healthy Markets Letter"). See also SR-NYSENAT-2019-31 OIP, *supra* note 4, at 6984 (describing the commenter's letter on SR-NYSENAT-2019-31); letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Vanessa Countryman, Office of the Secretary, Commission, dated January 16, 2020, available at <https://www.sec.gov/comments/sr-nysenat-2019-31/srnysenat201931-6663540-203934.pdf>.

<sup>53</sup> See Healthy Markets Letter, *supra* note 52, at 6-8. This commenter states that NYSE National controls who, under what terms, and when anyone other than NYSE National can obtain order-related information about NYSE National. See *id.* at 7.

<sup>54</sup> See *id.* at 4-5. According to this commenter, if one set of market participants has access to a faster, richer data set, then those without that information will not be as competitive and may not be able to quote or otherwise route orders in a manner that could effectively achieve best execution. See *id.* at 8.

<sup>55</sup> See *id.* at 5-6.

<sup>56</sup> See *id.* at 6.

<sup>57</sup> See *id.* at 8-9.

<sup>58</sup> See *id.* at 9.

<sup>59</sup> See *id.*

<sup>40</sup> See *id.* at 9856-57.

<sup>41</sup> See *id.* at 9858-59.

<sup>42</sup> See *id.* at 9854.

<sup>43</sup> See *id.* at 9856-57.

<sup>44</sup> See *id.* at 9855-58.

<sup>45</sup> See *id.*

<sup>46</sup> See letter from Ellen Greene, Managing Director, Equities & Options Market Structure, Securities Industry and Financial Markets Association ("SIFMA"), to Vanessa Countryman, Secretary, Commission, dated March 11, 2020 ("SIFMA Letter"). This commenter also refers to the comment letter it submitted on SR-NYSENAT-2019-31 in stating that the proposal does not meet the requirements of the Act. See *id.* at 2. See also SR-NYSENAT-2019-31 OIP, *supra* note 4, at 6984-85 (describing the commenter's letter on SR-NYSENAT-2019-31); letter from Robert Toomey, Managing Director and Associate General Counsel,

functions for order flow and market data are separate.<sup>60</sup>

When exchanges file their proposed rule changes with the Commission, including fee filings like NYSE National's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.<sup>61</sup> The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."<sup>62</sup>

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;<sup>63</sup> (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>64</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>65</sup>

In temporarily suspending NYSE National's proposed rule change, the Commission intends to further consider whether the proposal to establish fees for the NYSE National Integrated Feed is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>66</sup>

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and

otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.<sup>67</sup>

#### IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>68</sup> and 19(b)(2)(B) of the Act<sup>69</sup> to determine whether NYSE National's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>70</sup> the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether NYSE National has demonstrated how its proposed fees are consistent with 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>71</sup>
- Whether NYSE National has demonstrated how its proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers";<sup>72</sup> and
- Whether NYSE National has demonstrated how its proposed fees are

<sup>67</sup> For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

<sup>68</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>69</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>70</sup> *Id.* 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, or if the exchange consents to the longer period. *See id.*

<sup>71</sup> 15 U.S.C. 78f(b)(4).

<sup>72</sup> 15 U.S.C. 78f(b)(5).

consistent with 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>73</sup>

As discussed in Section III above, NYSE National made various arguments in support of its proposal and the Commission received comment letters that expressed concerns regarding the proposal, including in particular that NYSE National did not provide sufficient information to establish that the proposed fees are consistent with the Act and the rules thereunder.

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."<sup>74</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>75</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>76</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>77</sup>

#### V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by April 28, 2020. Rebuttal comments should be submitted by May 12, 2020. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and

<sup>73</sup> 15 U.S.C. 78f(b)(8).

<sup>74</sup> 17 CFR 201.700(b)(3).

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

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

<sup>60</sup> *See id.* at 9–10.

<sup>61</sup> *See* 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

<sup>62</sup> *See id.*

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

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

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

<sup>66</sup> *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>78</sup>

The Commission asks that commenters address the sufficiency and merit of NYSE National's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

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

#### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSENAT-2020-05 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 No. SR-NYSENAT-2020-05. The file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal

<sup>78</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants 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 an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

office of NYSE National. 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 publicly available. All submissions should refer to File No. SR-NYSENAT-2020-05 and should be submitted on or before April 28, 2020. Rebuttal comments should be submitted by May 12, 2020.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(3)(C) of the Act,<sup>79</sup> that File No. SR-NYSENAT-2020-05, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>80</sup>

**J. Matthew DeLesDernier**,  
Assistant Secretary.

[FR Doc. 2020-07231 Filed 4-6-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88532; File No. 4-443]

### Joint Industry Plan; Order Approving Amendment No. 5 to the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options To Adopt a Penny Interval Program

April 1, 2020.

#### I. Introduction

On July 18, 2019, BOX Exchange LLC; Cboe BZX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe Exchange, Inc.; Cboe EDGX Exchange, Inc.; Miami International Securities Exchange, LLC; MIAX Emerald, LLC; MIAX PEARL, LLC; Nasdaq BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; NYSE American, LLC; NYSE Arca, Inc. (collectively, "Exchanges"); and The Options Clearing Corporation ("OCC") (together with the OCC, "Plan Sponsors") filed with the Securities and Exchange Commission ("Commission") pursuant to Section 11A(a)(3) of the Securities Exchange Act

<sup>79</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>80</sup> 17 CFR 200.30-3(a)(57) and (58).

of 1934 ("Act")<sup>1</sup> and Rule 608 thereunder,<sup>2</sup> a proposal to amend the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (the "Plan").<sup>3</sup> Amendment No. 5 was published for comment in the **Federal Register** on December 17, 2019.<sup>4</sup>

The Commission received no comment letters regarding the Amendment. This order approves Amendment No. 5 to the Plan.

#### II. Description of the Amendment

##### A. Background

In January 2007, the Commission approved rules that allowed the six registered options exchanges that then existed to begin quoting certain multiply listed options classes overlying thirteen stocks and Exchange Traded Funds ("ETFs") in penny increments pursuant to a six-month Penny Pilot

<sup>1</sup> 15 U.S.C. 78k-1(a)(3).

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

<sup>3</sup> See Letter from BOX Exchange LLC, CBOE BZX Exchange, Inc., CBOE Exchange, Inc., CBOE C2 Exchange, Inc., CBOE EDGX Exchange, Inc., Miami International Securities Exchange, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, NASDAQ BX, Inc., NASDAQ GEMX, LLC, NASDAQ ISE, LLC, NASDAQ MRX, LLC, NASDAQ PHLX, LLC, The NASDAQ Stock Market LLC, NYSE American, LLC, NYSE Arca, Inc., and the OCC, to Vanessa Countryman, Secretary, Commission, dated July 18, 2019. ("Amendment No. 5"). On July 6, 2001, the Commission approved the Plan, which was proposed by the American Stock Exchange LLC, Chicago Board Options Exchange, Incorporated, International Securities Exchange LLC, OCC, Philadelphia Stock Exchange, Inc., and Pacific Exchange, Inc. See Securities Exchange Act Release No. 44521, 66 FR 36809 (July 13, 2001). See also Securities Exchange Act Release Nos. 49199 (February 5, 2004), 69 FR 7030 (February 12, 2004) (adding Boston Stock Exchange, Inc. as a Plan Sponsor); 57546 (March 21, 2008), 73 FR 16393 (March 27, 2008) (adding The Nasdaq Stock Market, LLC as a Plan Sponsor); 61528 (February 17, 2010), 75 FR 8415 (February 24, 2010) (adding BATS Exchange, Inc. as a Plan Sponsor); 63162 (October 22, 2010), 75 FR 66401 (October 28, 2010) (adding C2 Options Exchange Incorporated as a Plan Sponsor); 66952 (May 9, 2012), 77 FR 28641 (May 15, 2012) (adding BOX Options Exchange LLC as a Plan Sponsor); 67327 (June 29, 2012), 77 FR 40125 (July 6, 2012) (adding Nasdaq OMX BX, Inc. as a Plan Sponsor); 70765 (October 28, 2013), 78 FR 65739 (November 1, 2013) (adding Topaz Exchange, LLC as a Plan Sponsor); 70764 (October 28, 2013), 78 FR 65733 (November 1, 2013) (adding Miami International Securities Exchange, LLC as a Plan Sponsor); 76822 (January 1, 2016), 81 FR 1251 (January 11, 2016) (adding EDGX Exchange, Inc. as a Plan Sponsor); 77323 (March 8, 2016), 81 FR 13433 (March 14, 2016) (adding ISE Mercury, LLC as a Plan Sponsor); 79897 (January 30, 2017), 82 FR 9263 (February 3, 2017) (adding MIAX PEARL, LLC as a Plan Sponsor); and 85228 (March 1, 2019), 84 FR 8355 (March 7, 2019) (adding MIAX Emerald, LLC as a Plan Sponsor). The full text of the Plan is available at: [https://www.theocc.com/components/docs/clearing/services/options\\_listing\\_procedures\\_plan.pdf](https://www.theocc.com/components/docs/clearing/services/options_listing_procedures_plan.pdf).

<sup>4</sup> See Securities Exchange Act Release No. 87681 (December 9, 2019), 84 FR 68960 ("Notice").