

intended to bring greater clarity to the Exchange's Rules.

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

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act²⁷ and subparagraph (f)(6) of Rule 19b-4 thereunder.²⁸

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-ISE-2020-22 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-ISE-2020-22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet 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 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-ISE-2020-22 and should be submitted on or before July 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89065; File No. SR-NYSENAT-2020-05]

Self-Regulatory Organizations; NYSE National, Inc.; Request for Information and Additional Comment on a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed

June 12, 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")¹ and Rule 19b-4 thereunder,² 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.³ The proposed rule change was published for comment in the **Federal Register** on February 20, 2020.⁴ On April 1, 2020, the Division of Trading and Markets, for the Commission pursuant to delegated authority, temporarily suspended the proposed rule change and instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁵

II. Description of the Proposal and Comment Letters

NYSE National proposes to establish fees for the NYSE National Integrated Feed.⁶ 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.⁷ 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.⁸ It also includes information about NYSE

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 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).

⁵ See Securities Exchange Act Release No. 88538, 85 FR 19541 (April 7, 2020) ("Suspension Order").

⁶ The fees became effective on February 3, 2020. 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.

⁷ See *id.*

⁸ See *id.*

²⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁹ 17 CFR 200.30-3(a)(12).

National's best bid or offer at any given time.⁹ 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;¹⁰
- \$1,500 per month redistribution fee, which would be charged (once per redistributor account) to any redistributor¹¹ 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;¹²
- Non-display use¹³ fees:
 - \$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

⁹ See *id.*

¹⁰ 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.

¹¹ 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.*

¹² See *id.*

¹³ 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-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.*

within an organization, including matching customer orders on a data recipient's own behalf and on behalf of its clients;¹⁴

- \$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;¹⁵ 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.¹⁶

The access fees, professional user fees, and non-display fees would not apply to Federal agencies¹⁷ that subscribe to the products listed on the proposed fee schedule that includes such fees.¹⁸

Finally, first-time subscribers¹⁹ 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.²⁰ The free trial would be for the first full calendar month following the date a subscriber is approved to receive trial access to NYSE

¹⁴ 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.

¹⁵ See *id.* at 9849.

¹⁶ See *id.*

¹⁷ 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.*

¹⁸ 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.

¹⁹ 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.

²⁰ See *id.*

National market data.²¹ As proposed, NYSE National would provide the one-month free trial for a particular product to each subscriber only once.²²

In its proposal, NYSE National makes multiple arguments in support of the proposed fees. 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.²³ In connection with these arguments, NYSE National asserts 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,²⁴ and concludes that overall competition between exchanges will limit their overall profitability (not margins on any particular side of the platform).²⁵ According to NYSE National, exchanges are platforms for market data and transaction services and 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.²⁶

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.²⁷ 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

²¹ See *id.* at 9849–50.

²² See *id.* at 9850.

²³ See *id.* at 9852.

²⁴ See *id.* NYSE National provides a report by Marc Rysman to support these arguments. See Marc Rysman, *Stock Exchanges as Platforms for Data and Trading* (December 2, 2019) ("Rysman Paper"), available at <https://www.sec.gov/rules/sro/nyse/2020/34-88211-ex3b.pdf>. 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 Notice, *supra* note 4, 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.

²⁵ See Notice, *supra* note 4, at 9852 (citing Rysman Paper, *supra* note 24).

²⁶ See *id.* at 9853.

²⁷ See *id.*

using the feed may choose to shift order flow away from NYSE National.²⁸ 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.²⁹

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.³⁰ NYSE National asserts 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.³¹ More specifically, NYSE National states 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.³² In addition, NYSE National states that, since the date of filing of SR-NYSE-NAT-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.³³ 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.³⁴

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.³⁵ 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 to make it more broadly available, and that the non-display 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.³⁶ 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.³⁷

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,³⁸ 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.³⁹ 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.⁴⁰

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.⁴¹

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.⁴² 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.⁴³ 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.⁴⁴ 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).⁴⁵ 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.⁴⁶ 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.⁴⁷

⁴¹ See *id.*

⁴² 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-NYSE-NAT-2019-31 in stating that the proposal does not meet the requirements of the Act. See *id.* at 2. See also SR-NYSE-NAT-2019-31 OIP, *supra* note 4, at 6984-85 (describing the commenter's letter on SR-NYSE-NAT-2019-31); letter from Robert Toomey, Managing Director and Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, Commission, dated January 21, 2020, available at <https://www.sec.gov/comments/sr-nysenat-2019-31/srnysestat201931-6678406-204968.pdf>.

⁴³ See SIFMA Letter, *supra* note 42, at 2.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

²⁸ See *id.* at 9850, 9853.

²⁹ See *id.* at 9853.

³⁰ See *id.* at 9851.

³¹ See *id.* NYSE National provides a report by Charles M. Jones to support these arguments. 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>. 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.*

³² See Notice, *supra* note 4, at 9854.

³³ See *id.* at 9848.

³⁴ NYSE National states that six lost subscribers constitute 10.5 percent of the prior NYSE National Integrated Feed subscriber base. See *id.*

³⁵ See *id.* at 9856-58.

³⁶ See *id.* at 9856-57.

³⁷ See *id.* at 9858-59.

³⁸ See *id.* at 9854.

³⁹ See *id.* at 9856-57.

⁴⁰ See *id.* at 9855-58.

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.⁴⁸ This commenter questions whether third parties can compete with NYSE National in offering data related to activity on NYSE National.⁴⁹ 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.⁵⁰ 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).⁵¹ This commenter also states that NYSE National should update and further elaborate on information about the remaining subscribers.⁵²

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.⁵³

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.⁵⁴ 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.⁵⁵ Finally, this commenter objects to NYSE National's platform-based arguments, stating that the supply and demand functions for order flow and market data are separate.⁵⁶

III. Request for Information and Additional Comment

The Commission must determine on a factual record whether NYSE National has established by a preponderance of the record that its proposed fees: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;⁵⁷ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;⁵⁸ and (3) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁵⁹

The Commission believes that there are significant unresolved questions about whether NYSE National has produced sufficient factual support to satisfy its burden to demonstrate that its proposed fees meet the standards set forth in the Act. Under Commission Rule of Practice 700(b)(3), NYSE National has the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder."⁶⁰ 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,⁶¹ and any failure of an SRO to provide this level of 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.⁶²

In seeking additional information and comment, the Commission intends to further consider whether NYSE National has met its burden to establish that the proposed fees for the NYSE National Integrated Feed are consistent with the regulatory requirements applicable to a national securities exchange.

1. Are the proposed fees constrained by competition?

As noted above, in support of the proposed fees, NYSE National asserts that exchanges function as platforms between consumers of market data and consumers of trading services, and that competition among exchanges will limit their overall profitability (not margins on any particular side of the platform).⁶³ According to NYSE National, exchanges are platforms for market data and transaction services, and 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.⁶⁴ In connection with this platform theory-based argument, the Commission believes that it does not have sufficient information to make an affirmative finding that the rule change is consistent with the Act and the rules and regulations thereunder. The Commission believes that additional information from NYSE National would assist the Commission's analysis of whether NYSE National has met its burden under the Act. The Commission recognizes that there are various combinations of factual information and analysis that NYSE National could provide to establish the presence of sufficient competitive forces or otherwise to meet its burden under the Act.

The Commission further believes that with regard to NYSE National's platform theory-based arguments, some or all of the following information, including in combination with other information,

⁶¹ See *id.*

⁶² See *id.* Moreover, as is the case with a proposed rule change under Section 19(b)(2) of the Act, the Commission must make an affirmative finding to approve any fee filing for which it has instituted proceedings to determine whether the proposed rule change is consistent with the Act.

⁶³ See Notice, *supra* note 4, at 9852 (citing Rysman Paper, *supra* note 24).

⁶⁴ See *id.* at 9853.

⁴⁸ 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/srnyssenat201931-6663540-203934.pdf>.

⁴⁹ See Healthy Markets Letter, *supra* note 48, 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.

⁵⁰ 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.

⁵¹ See *id.* at 5–6.

⁵² See *id.* at 6.

⁵³ See *id.* at 8–9.

⁵⁴ See *id.* at 9.

⁵⁵ See *id.*

⁵⁶ See *id.* at 9–10.

⁵⁷ 15 U.S.C. 78f(b)(4).

⁵⁸ 15 U.S.C. 78f(b)(5).

⁵⁹ 15 U.S.C. 78f(b)(8).

⁶⁰ 17 CFR 201.700(b)(3).

would assist its analysis of whether NYSE National has met its burden:

- An explanation of NYSE National's characterization that market data and transaction services are the two sides of the exchange platform, including whether there are any other sides of the exchange platform (*e.g.*, connectivity; listings, for an exchange that lists securities) and, if so, whether the other sides of the exchange platform should also be considered in analyzing the proposed fees.

- Information sufficient to assess whether aggregate profit margins, returns on assets, or other metrics indicate the presence of competition. In discussing these metrics, it may be relevant to discuss whether and, if so, to what extent some of NYSE National's business lines would cross-subsidize its other business lines with the proposed fees in place. For example, NYSE National could compute operating profit margins and returns on assets for the entirety of NYSE National and for each of its business lines (including proprietary market data products, consolidated market data products, market connectivity services, and transaction services) for a period when the proposed fees were in place (*e.g.*, for the period from February 3, 2020 to the date of the Suspension Order). NYSE National could also estimate projected operating profit margins and returns on assets for the entirety of NYSE National and for each of its business lines (including proprietary market data products, consolidated market data products, market connectivity services, and transaction services) for a period in the second half of 2020 (*e.g.*, for the third calendar quarter of 2020), with the assumption that the proposed fees are in place during that period.⁶⁵ Accordingly, explaining the methodology for computing profit margins, returns on assets, or any other metrics provided (including the methodology for allocating expenses and assets to business lines and among the affiliated exchanges under the NYSE Group⁶⁶)

⁶⁵ NYSE National may seek confidential treatment for such projected financial information, or other information requested in this order. The Commission anticipates that such information will remain non-public subject to federal law.

⁶⁶ The Commission notes that NYSE National, New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc., NYSE American LLC, and NYSE Chicago, Inc. are all, directly or indirectly, wholly-owned subsidiaries of NYSE Group, Inc. ("NYSE Group"). The methodology for allocating expenses across affiliated exchanges under the NYSE Group would enable the Commission to assess how an analysis of NYSE National may be different from its affiliated exchanges because it is a smaller exchange that is part of a larger exchange group. In this context, infrastructure and other NYSE National expenses may be cross-subsidized from investments

and supporting any assumptions that it may need to make (such as assumptions underlying its treatment of costs of revenues and assumptions needed to project financials) may be necessary for the metrics to be meaningful.

- Any other information to support the argument that competition between exchanges will limit the overall profitability of NYSE National and meaningfully constrain NYSE National's ability to price its proprietary market data products at supracompetitive prices. In particular, NYSE National should consider providing empirical support substantiating its claims. For example, because NYSE National supported its arguments with information relating to NYSE and the NYSE Integrated Feed,⁶⁷ such empirical support could include the financial information specified above for NYSE before and after specific increases or decreases in the NYSE Integrated Feed fees. To the extent that NYSE National argues that competition from other exchanges on the trading side meaningfully constrains the pricing on the market data side (or other applicable sides) of the platform, it could produce disaggregated (*i.e.*, by business line) profit-margin and return-on-assets information in order to establish that it has met its burden under the Act.

- An explanation of whether platform-based competition functions differently for an exchange with a smaller market share (*e.g.*, NYSE National) as compared to an exchange with a larger market share (*e.g.*, NYSE) and if so, an explanation of any differences.

- NYSE National may provide other data to substantiate its platform theory-based argument, including the claims that competition among exchanges will limit the overall profitability of NYSE National's platform and 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.

As noted above, in addition to its platform theory-based arguments, NYSE National argues that 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.⁶⁸ NYSE National argues that subscribing to the NYSE National Integrated Feed is optional, that its customers may choose

and services provided by the other NYSE Group exchanges. To the extent that this is the case, NYSE National should explain how this potentially affects the analysis and computation of its expenses, profit margins, and returns-on-assets.

⁶⁷ See Rysman Paper, *supra* note 24.

⁶⁸ See Notice, *supra* note 4, at 9853.

to discontinue using the feed once the proposed fees are effective, and that any customer who chooses to discontinue using the feed may choose to shift order flow away from NYSE National.⁶⁹ The Commission believes that some or all of the following information (including in combination with other information) would inform the Commission's analysis of these arguments:

- For periods that would provide meaningful comparisons (*e.g.*, each completed calendar quarter of 2019 and 2020, and for each full month from November 2019 to date): (1) The number of NYSE National Integrated Feed customers and the market participant type of each customer (*e.g.*, ATS, broker-dealer, market data vendor, any other specified type of market participant); (2) the total number of unique clients, and the average number of unique clients per customer, under each of the proposed fees (*i.e.*, each product code as used by NYSE National) (calculated separately for the group of customers that discontinued using the NYSE National Integrated Feed after the proposed fees became effective ("discontinued NYSE National customers"), the group of customers that continued using the NYSE National Integrated Feed after the proposed fees became effective ("continued NYSE National customers"), and others (*e.g.*, customers that discontinued using the NYSE National Integrated Feed before the proposed fees became effective, customers that started using the NYSE National Integrated Feed after the proposed fees became effective)); and (3) the aggregate dollar trading volume for customers and firms on NYSE National and the average dollar trading volume per customer or firm on NYSE National (calculated separately for discontinued NYSE National customers, continued NYSE National customers, and others (*e.g.*, customers that discontinued using the NYSE National Integrated Feed before the proposed fees became effective, customers that started using the NYSE National Integrated Feed after the proposed fees became effective, firms that have not used the NYSE National Integrated Feed)). The Commission believes that this type of information would inform the Commission's analysis of NYSE National's argument that customers who choose to discontinue using the NYSE National Integrated Feed may choose to shift order flow away from NYSE National.

- Other specific, factual information that demonstrates that customers may choose to discontinue using an

⁶⁹ See *id.* at 9850, 9853.

exchange proprietary depth-of-book market data feed in response to a new fee or fee increase, and that the customers who choose to discontinue using the market data feed also shift order flow away from such exchange. For example, because NYSE National supported its arguments with information relating to the NYSE Integrated Feed,⁷⁰ NYSE National could provide the following information, calculated before and after specific increases in the NYSE Integrated Feed fees: (1) The number of NYSE Integrated Feed customers and the market participant type of each customer; (2) the total number of unique clients, and the average number of unique clients per customer, under each fee (*i.e.*, each product code as used by NYSE) (calculated separately for the group of customers that discontinued using the NYSE Integrated Feed after the fee was initially imposed or after the fee increase (“discontinued NYSE customers”), the group of customers that continued using the NYSE Integrated Feed after the fee was initially imposed or after the fee increase (“continued NYSE customers”), and others); and (3) the aggregate dollar trading volume for customers and firms on NYSE and the average dollar trading volume per customer or firm on NYSE (calculated separately for discontinued NYSE customers, continued NYSE customers, and others). This type of information would inform the Commission’s analysis of whether NYSE National has met its burden to demonstrate that customers who choose to discontinue using a depth-of-book market data feed also shift order flow away from the exchange offering the feed.

- NYSE National may provide other data to substantiate its claim that customers may choose to discontinue using the NYSE National Integrated Feed once the proposed fees are effective, and that customers who choose to discontinue using the feed may choose to shift order flow away from NYSE National.

2. Are there substitutes for the NYSE National Integrated Feed?

The Commission also believes that additional information regarding NYSE National’s substitution-based arguments would assist the Commission in its analysis of whether NYSE National has met its burden under the Act. The Commission believes that some or all of the following information (including in combination with other information) would further inform the Commission’s

analysis of NYSE National’s substitution-based arguments:

- Information regarding how many of the five original subscribers that cancelled their NYSE National Integrated Feed subscription subsequently started using the NYSE National BBO or NYSE National Trades feed, or any other proprietary market data feed, and the market participant type of each of these five subscribers.

- Information regarding how many additional customers discontinued (or notified NYSE National of their intention to discontinue) using the NYSE National Integrated Feed after the proposed fees were implemented on February 3, 2020, how many of these customers subsequently started (or notified NYSE National of their intention to start) using the NYSE National BBO or NYSE National Trades feed, or any other proprietary market data feed, and the market participant type of each of these customers.

- NYSE National may provide other data to substantiate its substitution-based arguments.

The Commission believes that responses to some or all of these requests would inform the Commission’s analysis of NYSE National’s argument that the NYSE National Integrated Feed is sold in a competitive market and that other market data feeds are substitutes for the NYSE National Integrated Feed.

3. Are the fees reasonable, equitable, and not unfairly discriminatory?

The Commission believes that additional information from NYSE National could inform the Commission’s analysis of the allocation of the proposed fees to different types of market participants (*e.g.*, whether most of the fees are borne by a particular type of customer and whether such an outcome would result in an inequitable allocation of the fees or render the fees unfairly discriminatory). For example, some or all of the following information (including in combination with other information) could meaningfully inform the Commission’s analysis:

- In addition to the customer, unique client, and dollar trading volume information discussed in Item 1 above,⁷¹ NYSE National could provide

⁷¹ NYSE National states that, based on usage at the time of the filing of SR-NYSE-NAT-2019-31, at least 34 firms would be subject to category 1 non-display fees, at least 14 firms would be subject to category 2 non-display fees, and at least 10 firms would be subject to category 3 non-display fees. See Notice, *supra* note 4, at 9850. However, NYSE National does not provide the same usage information for each of the other proposed fees (*e.g.*, the number of professional users and non-professional users).

projections of the same customer and unique client information (with the assumption that the proposed fees are in place, and including the methodology for and assumptions underlying such projections) for the uncompleted calendar quarters of 2020 up to the third calendar quarter of 2020. The Commission believes that this type of information would inform the Commission’s analysis of the impact of the proposed fees on different groups of market participants, including because this type of information would allow the Commission to compare: (1) The number of discontinued NYSE National customers against the number of continued NYSE National customers and the number of other customers; and (2) the total and average number of unique clients and the aggregate and average dollar trading volume across these three groups of customers.

- NYSE National may provide other data to substantiate its claims that the proposed fees are equitably allocated, are not unfairly discriminatory, and do not impose an unnecessary or inappropriate burden on competition.

With respect to the redistribution fee, as noted above, 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,⁷² and that the proposed fee is equitable and not unfairly discriminatory because the fee would be charged on an equal basis to those vendors that choose to redistribute the feed.⁷³ 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.⁷⁴ The Commission believes its analysis of the proposed redistribution fee and category 3 non-display fees would benefit from a fuller explanation, with supporting facts, of why these fees, which are applied specifically to NYSE National’s competitors, would not be unfairly discriminatory toward those competitors or impose an unnecessary or inappropriate burden on competition.

⁷² See *id.* at 9854.

⁷³ See *id.* at 9856–57.

⁷⁴ See *id.* at 9855–58.

⁷⁰ See Rysman Paper, *supra* note 24.

Finally, as noted above, 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.⁷⁵ The Commission again believes that its analysis would benefit from a fuller explanation, with supporting facts, of NYSE National's "administrative burdens" and "administrative costs" associated with these activities. The Commission believes that such information would inform the Commission's analysis of the non-display use declaration late fee and the multiple data feed fee.

4. General Request for Comment

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. For example, the Commission believes that its analysis may benefit from comment, including, where relevant, any specific data, statistics, or studies, on the following:

- Do the proposed fees represent an equitable allocation of reasonable fees, not permit unfair discrimination, and not impose any unnecessary or inappropriate burden on competition? Please explain and provide supporting information.
- Are the proposed fees constrained by robust competition? Please explain and provide supporting information.
- Are NYSE National's characterization of platform competition and characterization of market data and transaction services as two sides of an exchange platform correct? Are there any other sides of an exchange platform (e.g., connectivity, listing) and should these other sides be considered in analyzing the proposed fees?
- Should the question of whether the NYSE National Integrated Feed fees are constrained by competitive forces be analyzed using any separate methodology not discussed in the proposal (i.e., other than substitution and platform competition)? If so, please explain such methodology.
- Does an analysis of the total market data revenue from NYSE National's parent company demonstrate or support NYSE National's assertion that the market for proprietary market data products is characterized by robust

competition?⁷⁶ Why or why not? Should other data, such as operating profit margins and returns on assets for the entirety of NYSE National and for each of its business lines (including proprietary market data products, consolidated market data products, market connectivity services, and transaction services), also be analyzed in order to evaluate NYSE National's assertion? Why or why not?

- Does an analysis of the effect of the introduction of the NYSE Integrated Feed on trading volume on NYSE demonstrate or support NYSE National's assertions that platform economics applies to exchanges' sale of proprietary market data products and trading services and that platform competition effectively constrains the pricing of those data products?⁷⁷ Why or why not?

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File 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

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 July 10, 2020.

By the Commission.

Eduardo A. Aleman,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89071; File No. SR-GEMX-2020-15]

Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the GEMX Disciplinary Rules in General 5 To Incorporate by Reference The Nasdaq Stock Market LLC's Series 8000 and 9000 Rules

June 15, 2020.

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 June 10, 2020, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 amend the GEMX Disciplinary Rules in General 5 to incorporate by reference The Nasdaq Stock Market LLC's ("Nasdaq") Series 8000 and 9000 Rules, currently located under the General 5 title of the Nasdaq rulebook,³ instead of the BX Rules, which the Exchange currently incorporates by reference.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqgemx.cchwallstreet.com/>,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87778 (December 17, 2019), 84 FR 70590 (December 23, 2019) (SR-NASDAQ-2019-098).

⁷⁵ See *id.*

⁷⁶ See Jones Paper, *supra* note 31.

⁷⁷ See Rysman Paper, *supra* note 24.