

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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2024-39 and should be submitted on or before August 21, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁸

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100602; File No. SR-NYSE-2024-38]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Fees for the NYSE Aggregated Lite Data Feed

July 25, 2024.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act")² and Rule 19b-4 thereunder,³ notice is hereby given that on July 11, 2024, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The

Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to establish fees for the NYSE Aggregated Lite data feed. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the NYSE Proprietary Market Data Fees Schedule ("Fee Schedule") and establish fees for the NYSE Aggregated Lite ("NYSE Agg Lite") data feed,⁴ effective July 11, 2024.⁵

In summary, the NYSE Agg Lite is a NYSE-only frequency-based depth of book market data feed of the NYSE's limit order book for up to ten (10) price levels on both the bid and offer sides of the order book for securities traded on the Exchange and for which the Exchange reports quotes and trades under the Consolidated Tape Association ("CTA") Plan or the Nasdaq/UTP Plan. The NYSE Agg Lite is a compilation of limit order data that the Exchange provides to vendors and subscribers. The NYSE Agg Lite includes depth of book order data as

⁴ The proposed rule change establishing the NYSE Agg Lite data feed was immediately effective on February 27, 2024. See Securities Exchange Act Release No. 99689 (March 7, 2024), 89 FR 18466 (March 13, 2024) (SR-NYSE-2024-12) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE Aggregated Lite Market Data Feed).

⁵ The Exchange originally filed to amend the Fee Schedule on May 13, 2024 (SR-NYSE-2024-29). SR-NYSE-2024-29 was subsequently withdrawn and replaced by this filing.

well as security status messages. The security status message informs subscribers of changes in the status of a specific security, such as trading halts, short sale restriction, etc. In addition, the NYSE Agg Lite includes order imbalance information prior to the opening and closing of trading.

Background

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."⁶

While Regulation NMS has enhanced competition, it has also fostered a "fragmented" market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that "such competition can lead to the fragmentation of order flow in that stock."⁷ Indeed, cash equity trading is currently dispersed across 16 exchanges,⁸ numerous alternative trading systems,⁹ and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share (whether including or excluding auction volume).¹⁰

Proposed NYSE Agg Lite Data Feed Fees

To reflect the value of NYSE's market data, the Exchange proposes to establish the fees listed below for the NYSE Agg Lite data feed. The Exchange proposes

⁶ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7-10-04) (Final Rule) ("Regulation NMS").

⁷ See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

⁸ See Cboe U.S. Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share. See generally <https://www.sec.gov/fastanswers/divisionsmarketregm/exchangesshtml.html>.

⁹ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atstlist.htm>.

¹⁰ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

⁴⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

to charge fees for the same categories of market data use as its affiliated exchanges (namely, NYSE Arca, NYSE American and NYSE National) currently charge. The Exchange believes that adopting the same fee structure as its affiliated exchanges would reduce administrative burdens on market data subscribers that also currently subscribe to market data feeds from the Exchange's affiliates.

1. *Access Fee.* For the receipt of access to the NYSE Agg Lite data feed, the Exchange proposes to charge \$3,000 per month. This proposed Access Fee would be charged to any data recipient that receives the NYSE Agg Lite data feed. Data recipients that only use display devices to view NYSE Agg Lite market data and do not separately receive a data feed would not be charged an Access Fee. The proposed Access Fee would be charged only once per firm.

2. *User Fees.* The Exchange proposes to charge a Professional User Fee (Per User) of \$35 per month and a Non-Professional User Fee (Per User) of \$6 per month. These user fees would apply to each display device that has access to the NYSE Agg Lite data feed.

3. *Redistribution Fee.* For redistribution of the NYSE Agg Lite data feed, the Exchange proposes to establish a fee of \$250 per month. The proposed Redistribution Fee would be charged to any Redistributor of the NYSE Agg Lite data feed, which is defined to mean a vendor or any person that provides a real-time NYSE market data product externally to a data recipient that is not its affiliate or wholly-owned subsidiary, or to any system that an external data recipient uses, irrespective of the means of transmission or access. The proposed Redistribution Fee would be charged only once per Redistributor account. As an incentive to potential Redistributors to subscribe to the NYSE Agg Lite data feed, the Exchange proposes to waive the Access Fee and Redistribution Fee for a Redistributor if the Redistributor provides NYSE Agg Lite externally to at least one data feed recipient and reports such data feed recipient or recipients to the Exchange. For example, a Redistributor that subscribes to the NYSE Agg Lite data feed will have the Access Fee and Redistribution Fee waived if such Redistributor provides NYSE Agg Lite externally to at least one data feed recipient and reports such data feed recipient to the Exchange.

By targeting this proposed fee waiver to Redistributors that provide external distribution of NYSE Agg Lite, the Exchange believes that this would provide an incentive for Redistributors to make the NYSE Agg Lite market data

product available to its customers. Specifically, if a data recipient is interested in subscribing to NYSE Agg Lite and relies on a Redistributor to obtain market data products from the Exchange, that data recipient would need its Redistributor to subscribe to and redistribute NYSE Agg Lite. The Exchange believes that this proposed fee waiver for Redistributors of NYSE Agg Lite would provide an incentive for Redistributors to make NYSE Agg Lite available to their customers, which will increase the availability of the Exchange's market data products to a larger potential population of data recipients.

Further, the Exchange proposes to adopt a credit that would be applicable to Redistributors that provide external distribution of NYSE Agg Lite to Professional and Non-Professional Users. As proposed, such Redistributors would receive a credit equal to the amount of the monthly Professional User and Non-Professional User Fees for such external distribution, up to a maximum of the combination of the Access Fee and Redistribution Fee for NYSE Agg Lite that the Redistributor would otherwise be required to pay to the Exchange. For example, a Redistributor that reports external Professional Users and Non-Professional Users in a month totaling \$3,250 or more would receive a maximum credit of \$3,250 for that month, which could effectively reduce its monthly fee for access and redistribution to zero. If that same Redistributor were to report external User quantities in a month totaling \$600 of monthly usage, that Redistributor would receive a credit of \$600. The Exchange believes the proposed credit would provide Redistributors with an incentive to increase their redistribution of NYSE Agg Lite because the credit they would be eligible to receive would increase if they report additional external User quantities.

4. *Enterprise Fees.* The Exchange proposes to establish an enterprise license that will reduce Exchange fees and administrative costs for subscribers that disseminate NYSE Agg Lite. Subscribers that are broker-dealers will be able to distribute the NYSE Agg Lite data feed for display usage to an unlimited number of non-professional users for a monthly fee of \$20,000, with an opportunity to lower that fee to \$18,000 per month if they contract for twelve months of service in advance. Alternatively, subscribers that are broker-dealers will be able to distribute the NYSE Agg Lite data feed for display usage to an unlimited number of recipients (professional users and non-

professional users) for a monthly fee of \$25,000, with an opportunity to lower that fee to \$22,500 per month if they contract for twelve months of service in advance.

As proposed, the NYSE Agg Lite data feed may be distributed pursuant to the proposed market data enterprise license only for display usage and in the context of a brokerage relationship with a broker-dealer through such broker-dealer's own devices. Purchase of an enterprise license would eliminate per User subscriber fees for NYSE Agg Lite. Further, the Exchange proposes to waive the Access Fee and the Redistribution Fee for NYSE Agg Lite for Redistributors that pay either the Non-Professional Enterprise Fee or the Professional and Non-Professional Enterprise Fee. The Exchange believes the proposed fee waiver would provide an incentive for Redistributors to subscribe to the NYSE Agg Lite market data product at the enterprise level to reduce the fees it would pay to the Exchange and without having to report the number of users that receive the data feed from the Redistributor.

Subscribers that intend to purchase a market data enterprise license for at least twelve months may elect to purchase this product in advance for a monthly fee of \$18,000 for distribution of NYSE Agg Lite to an unlimited number of non-professional users, or \$22,500 per month for distribution to an unlimited number of professional users and non-professional users. This feature is intended to simplify cost projections and budgeting for both subscribers and the Exchange. Subscribers that elect not to purchase this particular feature will nevertheless be able to obtain all of the market data information offered by NYSE Agg Lite by paying the standard fee of \$20,000 per month for distribution of NYSE Agg Lite to an unlimited number of non-professional users, or \$25,000 per month for distribution to an unlimited number of professional users and non-professional users. Subscribers that elect to pay the monthly fee will be able to switch to the annual fee at any time, and those that elect to purchase the annual contract would be able to change to the monthly contract, with notice, at the end of the twelve-month period.

The Exchange believes that the proposed market data enterprise license will reduce exchange fees, lower administrative costs for subscribers, and help expand the availability of market information to investors, and thereby increase participation in financial markets.

5. *Non-Display Use Fees.* The Exchange proposes to establish non-

display fees for the NYSE Agg Lite data feed that are based on the non-display use categories charged by NYSE Arca, NYSE American, NYSE National, the CTA, and the UTP Plan for non-display use.¹¹ Non-display use would mean accessing, processing, or consuming the NYSE Agg Lite data feed delivered directly or through a Redistributor, for a purpose other than in support of a data recipient's display or further internal or external redistribution ("Non-Display Use"). Non-Display Use would include trading uses such as high frequency or algorithmic trading as well as any trading in any asset class, automated order or quote generation and/or order pegging, price referencing for algorithmic trading or smart order routing, operations control programs, investment analysis, order verification, surveillance programs, risk management, compliance, and portfolio management.

Under the proposal, for Non-Display Use of NYSE Agg Lite, there would be three categories of, and fees applicable, to data recipients. One, two, or three categories of Non-Display Use may apply to a data recipient.

- As proposed, the Category 1 Fee would be \$4,500 per month and would apply when a data recipient's Non-Display Use of the NYSE Agg Lite data feed is on its own behalf, not on behalf of its clients.

- As proposed, Category 2 Fees would be \$4,500 per month and would apply to a data recipient's Non-Display Use of the NYSE Agg Lite data feed on behalf of its clients.

- As proposed, Category 3 Fees would be \$4,500 per month and would apply to a data recipient's Non-Display Use of the NYSE Agg Lite data feed for the purpose of internally matching buy and sell orders within an organization, including matching customer orders for

a data recipient's own behalf and/or on behalf of its clients. This category would apply to Non-Display Use in trading platforms, such as, but not restricted to, alternative trading systems ("ATs"), broker crossing networks, broker crossing systems not filed as ATs, dark pools, multilateral trading facilities, exchanges and systematic internalization systems. A data recipient will be charged \$4,500 per month for each platform on which it uses the Non-Display data internally to match buy and sell orders, up to a cap of \$13,500 per month; even if the data recipient uses the NYSE Agg Lite data feed for more than three platforms, it will not pay more than \$13,500 for such Category 3 use per month.

The description of the three non-display use categories is set forth in the Fee Schedule in endnote 1 and that endnote would be referenced in the NYSE Agg Lite data feed fees on the Fee Schedule. The text in the endnote would remain unchanged.

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

6. *Non-Display Use Declaration Late Fee.* Data recipients that receive the NYSE Agg Lite data 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. Beginning in 2025, NYSE Agg Lite data feed recipients would be required to submit, by January 31 of each year, the Non-Display Use Declaration. The requirement to submit a Non-Display Use Declaration applies to all real-time NYSE data feed product recipients. The Exchange proposes to charge a Non-Display Use Declaration Late Fee of \$1,000 per month to any data recipient that pays an Access Fee for the NYSE Agg Lite data feed that has failed to timely complete and submit a Non-Display Use Declaration. Specifically, with respect to the Non-Display Use Declaration due by January 31 of each year, the Non-Display Use Declaration Late Fee would apply to data recipients that fail to complete and submit the Non-Display Use Declaration by the January 31 due date, and would apply beginning February 1 and for each month thereafter until the data recipient

has completed and submitted the annual Non-Display Use Declaration.

The proposed Non-Display Use Declaration Late Fee applicable to NYSE Agg Lite data feed would be set forth in endnote 2 on the Fee Schedule. As proposed, endnote 2 would be amended with the proposed addition of the following new text: "The Non-Display Declaration Late Fee will apply, beginning in 2025, to NYSE Aggregated Lite data recipients that fail to complete and submit the annual Non-Display Use Declaration by the January 31st due date, and applies beginning February 1st and for each month thereafter until the data recipient has completed and submitted the annual Non-Display use Declaration."

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

7. *Multiple Data Feed Fee.* The Exchange proposes to establish a monthly fee, the "Multiple Data Feed Fee," that would apply to data recipients that take a data feed for a market data product in more than two locations. Data recipients taking the NYSE Agg Lite data feed in more than two locations would be charged \$200 per additional location per month. No new reporting would be required.¹²

8. *Three-Month Fee Waiver.* The Exchange currently provides a one-month free trial to any firm that subscribes to a particular NYSE market data product for the first time. Under the current one-month trial, a first-time subscriber is not charged the Access Fee, Non-Display Fee, any applicable Professional and Non-Professional User Fee and Redistribution Fee for one calendar month.¹³ The Exchange now proposes an additional three-month fee waiver for any Redistributor that subscribes to a particular NYSE market data product for the first time for external redistribution. As proposed, a first-time Redistributor would be any firm that has not previously subscribed to and externally redistributed a particular NYSE market data product

¹¹ See Endnote 1 to the NYSE Arca Equities Proprietary Market Data Fees, available here: https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Equities_Proprietary_Data_Fee_Schedule.pdf; Endnote 1 to the NYSE American LLC Equities Proprietary Market Data Fees, available here: https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Equities_Market_Data_Fee_Schedule.pdf; Endnote 1 to the NYSE National Equities Proprietary Market Data Fees, available here: https://www.nyse.com/publicdocs/nyse/data/NYSE_National_Market_Data_Fee_Schedule.pdf; Endnote 8 to the Schedule of Market Data Charges for the CTA, available here: <https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/ScheduleOfMarketDataCharges-January1,2015.pdf>; and Non-Display Usage Fees as set forth in the UTP Plan Fee Schedule and Non-Display Policy, available here: <http://utpplan.com/DOC/Datapolicies.pdf>. See, e.g., Securities Exchange Act Release Nos. 69278 (April 2, 2013), 78 FR 20973 (April 8, 2013) (SR-NYSE-2013-25) and 72923 (Aug. 26, 2014), 79 FR 52079 (Sept. 2, 2014) (SR-NYSE-2014-43).

¹² Data vendors currently report a unique Vendor Account Number for each location at which they provide a data feed to a data recipient. The Exchange considers each Vendor Account Number a location. For example, if a data recipient has five Vendor Account Numbers, representing five locations, for the receipt of the NYSE Agg Lite data feed, that data recipient will pay the Multiple Data Feed fee with respect to three of the five locations.

¹³ See Fee Schedule.

listed on the Fee Schedule. As proposed, a first-time Redistributor that subscribes to a particular NYSE market data product would not be charged the Access Fee and the Redistribution Fee for that product for three calendar months. Any other fees, including but not limited to, Non-Display Fee, any applicable Professional and Non-Professional User Fee, and Enterprise Fee would be billable after the first calendar month after a first-time Redistributor subscribes to a particular NYSE market data product. For example, a first-time Redistributor that chooses to subscribe to NYSE Agg Lite on July 24, 2024 would not be charged the Access Fee and the Redistribution Fee for the months of August, September, and October 2024. The proposed fee waiver would be for the three calendar months following the date a Redistributor is approved to receive access to the particular NYSE market data product. The Exchange would provide the three-month fee waiver for each particular product to each Redistributor once.

The Exchange believes that providing a three-month fee waiver to NYSE market data products listed on the Fee Schedule would enable potential Redistributors to determine whether a particular NYSE market data product provides value to their business models before fully committing to expend development and implementation costs related to the receipt of that product, and is intended to encourage increased use of the Exchange's market data products by defraying some of the development and implementation costs Redistributors would ordinarily have to expend before using a product. The proposed three-month fee waiver would also provide Redistributors with time to begin onboarding new clients prior to being liable to the Access Fee and the Redistribution Fee, allowing time to choose how to allocate costs and increase revenues to defray costs associated with providing a new feed to its customers.

Application of Proposed Fees

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

feed or any other similar products are attractively priced.

The Exchange believes the proposed rule change would provide an incentive both for data subscribers to subscribe to NYSE Agg Lite and for Redistributors to subscribe to the product for purposes of providing external distribution of NYSE Agg Lite. The Exchange believes that this proposed rule change also has the potential to attract new Redistributors for NYSE Agg Lite.

The proposed fee structure is not novel as it is based on the fee structure currently in place for the NYSE OpenBook feed. The Exchange is proposing fees for the NYSE Agg Lite data feed that are based on the existing fee structure and rates that data recipients already pay for the NYSE OpenBook feed. Specifically, the fees for the NYSE OpenBook feed—which like the NYSE Agg Lite data feed, includes depth of book and security status messages—consist of an Access Fee of \$5,000 per month, a Professional User Fee (Per User) of \$60 per month, a Non-Professional User Fee (Per User) of \$15 per month, Non-Display Fees of \$6,000 per month for each of Categories 1, 2 and 3, and a Redistribution Fee of \$3,000 per month. The Exchange also charges a Non-Display Use Declaration Late Fee of \$1,000 per month and a Multiple Data Feed Fee of \$200 per month for NYSE OpenBook.¹⁴

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁵ in general, and Sections 6(b)(4) and 6(b)(5) of the Act,¹⁶ in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

The Proposed Rule Change Is Reasonable

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market

forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁷

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

In fact, the legislative history indicates that the Congress intended that the market system “evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed” and that the SEC wield its regulatory power “in those situations where competition may not be sufficient,” such as in the creation of a “consolidated transactional reporting system.”¹⁸

The court agreed with the Commission's conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”¹⁹

More recently, the Commission confirmed that it applies a “market-based” test in its assessment of market data fees, and that under that test:

the Commission considers whether the exchange was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees. If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless there is a substantial countervailing basis to find that the terms of the rule violate the Act or the rules thereunder.²⁰

As discussed below, the Exchange believes that its proposed fees are constrained by competitive forces.

As the D.C. Circuit recognized in *NetCoalition I*, “[n]o one disputes that competition for order flow is fierce.”²¹ The court further noted that “no exchange possesses a monopoly, regulatory or otherwise, in the execution

¹⁷ See Regulation NMS Adopting Release, 70 FR 37495, at 37499.

¹⁸ *NetCoalition v. SEC*, 615 F.3d 525, 535 (D.C. Cir. 2010) (“*NetCoalition I*”) (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

¹⁹ *Id.* at 535.

²⁰ See Securities Exchange Act Release No. 34–90217 (October 16, 2020), 85 FR 67392 (October 22, 2020) (SR–NYSE/NAT–2020–05) (“National IF Approval Order”) (internal quotation marks omitted), quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008).

²¹ *NetCoalition I*, 615 F.3d at 544 (internal quotation omitted).

¹⁴ See NYSE Proprietary Market Data Fees at https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Fee_Schedule.pdf.

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(4), (5).

of order flow from broker dealers,” and that an exchange “must compete vigorously for order flow to maintain its share of trading volume.”²²

As noted above, while Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”²³ Indeed, today, equity trading is currently dispersed across 16 exchanges,²⁴ numerous alternative trading systems,²⁵ broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share.²⁶

Further, low barriers to entry mean that new exchanges may rapidly and inexpensively enter the market to compete with the Exchange. For example, since 2020, three new ones have entered the market: Long Term Stock Exchange (LTSE), which began operations as an exchange on August 28, 2020;²⁷ Members Exchange (MEMX), which began operations as an exchange on September 29, 2020;²⁸ and Miami International Holdings (MIAX), which began operations of its first equities exchange on September 29, 2020.²⁹

These low barriers enable existing exchange customers to disintermediate

and start their own exchanges if they think the prices charged for exchange proprietary market data products are too high. This is precisely the rationale behind the creation of MEMX, which was formed by some of the largest and most well capitalized financial firms that are also Exchange customers (including Bank of America, BlackRock, Charles Schwab, Citadel, Citi, E*Trade, Fidelity, Goldman Sachs, J.P. Morgan, Jane Street, Morgan Stanley, TD Ameritrade, and others).³⁰

For example, one of MEMX’s founding principles is that exchange proprietary market data prices are too high, and that MEMX will benefit its members by offering “[l]ower pricing on market data.”³¹ Nor is this a new phenomenon: exchange customers formed BATS to compete with incumbent exchanges and once registered as an exchange in 2008, BATS did not initially charge for market data. The BATS venture was a financial success for its founders, first through recouping their investment in its initial public offering and then in the subsequent sale of BATS to Cboe, which now charges for market data from those exchanges. Notably, MEMX has some of the same founding broker-dealer customers, leading some to dub MEMX “BATS 2.0.”³²

The fact that this cycle is viable and repeatable by entities that both trade on and compete with existing exchanges confirms that barriers to entry are low and that these markets are competitive and contestable.³³ And low barriers to

entry act as a market check on high prices.³⁴

In sum, the fierce competition thus constrains any exchange from pricing its market data at a supracompetitive price and constrains the Exchange in setting its fees at issue here.

More specifically, in setting fees for the NYSE Agg Lite data feed, the Exchange is constrained by the fact that, if its pricing is unattractive to customers, customers have their pick of an increasing number of alternatives to purchase similar data from instead of purchasing it from the Exchange. The existence of alternatives to the Exchange’s data product ensures that the Exchange cannot set unreasonable market data fees without suffering the negative effects of that decision in the fiercely competitive market for proprietary market data.

The Exchange notes that the NYSE Agg Lite is entirely optional. The Exchange is not required to make the NYSE Agg Lite available to any customers, nor is any customer required to purchase the NYSE Agg Lite market data feed. Unlike some other data products (e.g., the consolidated quotation and last-sale information feeds) that firms are required to purchase in order to fulfil regulatory obligations,³⁵ a customer’s decision whether to purchase any of the Exchange’s proprietary market data feeds, including the NYSE Agg Lite, is entirely discretionary. Most firms that choose to subscribe to the proprietary market data feeds from the Exchange, including NYSE Agg Lite, would do so for the primary goals of using it to increase their revenues, reduce their expenses, and in some instances to compete directly with the Exchange for order flow. Such firms are able to determine for themselves whether the NYSE Agg Lite data feed is necessary for their business needs, and if so, whether

²² *Id.*

²³ See Securities Exchange Act Release No. 61358, 75 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

²⁴ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

²⁵ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atstlist.htm>.

²⁶ See Cboe Global Markets, U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

²⁷ See LTSE Market Announcement: MA-2020-020, dated August 14, 2020, announcing LTSE production securities phase-in planned for August 28, available here: https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa0698e7_MA-2020-020_Production_Securities_Launching_August_28_-_Google_Docs.pdf and LTSE Market Announcement: MA-2020-025, available here: https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa069873_MA-2020-025.pdf.

²⁸ As of October 29, 2020, MEMX is trading all NMS symbols. See <https://info.memxtrading.com/trader-alert-20-10-memx-trading-symbols-update/>.

²⁹ See MIAX Pearl Press release, dated September 29, 2020, available here: https://www.miaxoptions.com/sites/default/files/alert-files/MIAX_Press_Release_09292020.pdf.

³⁰ MEMX Home Page (“Founded by members and investors, MEMX aims to drive simplicity, efficiency, and competition in equity markets.”), available at <https://memx.com/>.

³¹ MEMX home page, available at <https://memx.com/>.

³² See “MEMX turns up the heat on US stock exchanges,” *Financial Times*, January 9, 2019, available at <https://www.ft.com/content/4908c8b0-1418-11e9-a581-4ff78404524e>; see also “US equities exchanges: If you can’t beat them, join them,” *Euromoney*, February 13, 2019, available at <https://www.euromoney.com/article/b1d3tjby4p3y4v/us-equities-exchanges-if-you-cant-beat-them-join-them>.

³³ *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001) (recognizing that “[a]s a matter of law, courts have generally recognized that when a customer can replace the services of an external product with an internally-created system, this captive output (i.e. the self-production of all or part of the relevant product) should be included in the same market.”). In *SunGard*, the court rejected the Antitrust Division’s attempt to block SunGuard’s acquisition of the disaster recovery assets of Comdisco on the basis that the acquisition would “substantially lessen competition in the market for shared hot-site disaster recovery services,” when the evidence showed that “internal hot-sites” created by customers competed with the “external shared hot-site business” engaged in by the merging parties. *Id.* at 173–74, 187.

³⁴ *United States v. Baker Hughes*, 908 F.2d 981, 987 (1990) (“In the absence of significant barriers [to entry], a company probably cannot maintain supracompetitive pricing for any length of time.”); see also David S. Evans and Richard Schmalensee, *Markets with Two-Sided Platforms*, in 1 *Issues In Competition Law And Policy* 667, 685 (ABA Section of Antitrust Law 2008) (noting that exchange mergers in 2005 and 2006 were approved by competition authorities in part in reliance on planned and likely entry of other firms).

³⁵ The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. See *The Matter of the Application of Securities Industry and Financial Markets Association for Review of Actions Taken by Self-Regulatory Organizations*, Release Nos. 34–72182; AP–3–15350; AP–3–15351 (May 16, 2014). Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSs have chosen not to do so.

or not it is attractively priced. If the NYSE Agg Lite data feed does not provide sufficient value to firms based on the uses those firms may have for it, such firms may simply choose to conduct their business operations in ways that do not use the NYSE Agg Lite data feed.

Further, in the case of products that are also redistributed through market data vendors such as Bloomberg and Refinitiv, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Vendors may elect not to make NYSE Agg Lite available to its customers unless their customers request it, and customers will not elect to pay the proposed fees unless NYSE Agg Lite can provide value by sufficiently increasing revenues or reducing costs in the customer's business in a manner that will offset the fees. All of these factors operate as constraints on pricing proprietary data products.

In setting the proposed fees for the NYSE Agg Lite data feed, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish reasonable fees. The proposed fees are therefore reasonable because in setting them, the Exchange is constrained by the availability of numerous substitute market data products. The Commission has been clear that substitute products need not be identical, but only substantially similar to the product at hand.³⁶

The NYSE Aggregated Lite market data feed is subject to significant competitive forces that constrain its pricing. Specifically, the NYSE Agg Lite data feed competes head-to-head with similar market data products currently

offered by the four U.S. equities exchanges operated by Cboe Exchange, Inc.—Cboe BZX Exchange, Inc. (“BZX”), Cboe BYX Exchange, Inc. (“BYX”), Cboe EDGA Exchange, Inc. (“EDGA”), and Cboe EDGX Exchange, Inc. (“EDGX”), each of which offers a market data product called BZX Summary Depth, BYX Summary Depth, EDGA Summary Depth and EDGX Summary Depth, respectively (collectively, the “Cboe Summary Depth”).³⁷ Similar to Cboe Summary Depth, NYSE Agg Lite can be utilized by vendors and subscribers to quickly access and distribute aggregated order book data. As noted above, NYSE Agg Lite, similar to Cboe Summary Depth, would provide aggregated depth per security, including the bid, ask and share quantity for orders received by NYSE, except unlike Cboe Summary Depth, which provides aggregated depth per security for up to five price levels, NYSE Agg Lite would provide aggregated depth per security for up to ten price levels on both the bid and offer sides of the NYSE limit order book as well as auction imbalance data.

The specific fees that the Exchange proposes for the NYSE Agg Lite data feed are reasonable for the following additional reasons.

Overall. The Exchange believes that the proposed fees for the NYSE Agg Lite data feed are reasonable because they represent the value of receiving the data on an aggregated basis. The Exchange believes that providing vendors and subscribers with the option to subscribe to a market data product that integrates a subset of data from existing products and where such aggregated data is published at a pre-defined interval, thus lowering bandwidth, infrastructure and operational requirements, would allow vendors and subscribers to choose the best solution for their specific business needs.

The Exchange believes the proposed fees for the NYSE Agg Lite data feed are also reasonable when compared to fees for comparable products, such as the Cboe Summary Depth.³⁸ Additionally, the Exchange is proposing fees for the NYSE Agg Lite data feed that are based on the existing fee structure that data recipients already pay for the NYSE's

other market data products. The Exchange believes that adopting the same fee structure would reduce administrative burdens on NYSE data subscribers that also currently subscribe to market data feeds from NYSE.

Access Fee. The Exchange believes that the proposed monthly Access Fee of \$3,000 for the NYSE Aggregated Lite data feed is reasonable because it is comparable to the fees charged by BZX, BYX, EDGA, and EDGX, each of which charges between \$2,500 per month to \$5,000 per month for both Internal Distribution and External Distribution of the Cboe Summary Depth market data product.³⁹

User Fees. The Exchange believes that having separate Professional and Non-Professional User fees for the NYSE Agg Lite data feed is reasonable because it will make the product more affordable and result in greater availability to Professional and Non-Professional Users. Setting a modest Non-Professional User fee is reasonable because it provides an additional method for Non-Professional Users to access the NYSE Agg Lite data feed by providing the same data that is available to Professional Users. The proposed monthly Professional User Fee (Per User) of \$35 and monthly Non-Professional User Fee (Per User) of \$6 are reasonable because they are comparable to user fees generally charged by exchanges. For example, NYSE charges a monthly Professional User Fee (Per User) of \$60 and a monthly Non-Professional User Fee (Per User) of \$15 for the NYSE OpenBook feed.⁴⁰ Although the proposed User Fees for Professional and Non-Professional Users are higher than those charged by BZX, BYX, EDGA and EDGX, the Exchange notes that User fees are only a subset of the total fees that vendors and subscribers pay and the lower fees proposed to access and redistribute NYSE Agg Lite would provide such market data recipients with a more affordable alternative to existing substitutes offered by the Exchange and its competitors.

Redistribution Fees. The Exchange believes that it is reasonable to charge redistribution fees because vendors receive value from redistributing the data in their business products for their customers. The Exchange believes that charging a Redistribution Fee is reasonable because the vendors that would be charged such a fee profit by re-transmitting the Exchange's market data to their customers. This fee would be charged only once per month to each

³⁶ For example, in the National IF Approval Order, the Commission recognized that for some customers, the best bid and offer information from consolidated data feeds may function as a substitute for the NYSE National Integrated Feed product, which contains order by order information. See National IF Approval Order, *supra* note 20, at 67397 [release p. 21] (“[I]nformation provided by NYSE National demonstrates that a number of executing broker-dealers do not subscribe to the NYSE National Integrated Feed and executing broker-dealers can otherwise obtain NYSE National best bid and offer information from the consolidated data feeds.” (internal quotations omitted)).

³⁷ See BZX Rule 11.22(m) BZX Summary Depth; BYX Rule 11.22(k) BYX Summary Depth; EDGA Rule 13.8(f) EDGA Summary Depth; and EDGX Rule 13.8(f) EDGX Summary Depth. The Cboe Summary Depth offered by BZX, BYX, EDGA and EDGX are each a data feed that offers aggregated two-sided quotations for all displayed orders for up to five (5) price levels and contains the individual last sale information, market status, trading status and trade break messages.

³⁸ See https://cdn.cboe.com/resources/membership/US_Market_Data_Product_Price_List.pdf.

³⁹ *Id.*

⁴⁰ See Fee Schedule.

vendor account that redistributes the NYSE Agg Lite data feed, regardless of the number of customers to which that vendor redistributes the data. The Exchange believes the proposed monthly Redistribution Fee of \$250 for the NYSE Agg Lite data feed is reasonable because it is nominal and lower than the fees charged by BZX, BYX, EDGA and EDGX, each of which charges considerably more for both Internal Distribution and External Distribution of the Cboe Summary Depth market data feed.⁴¹

Enterprise Fees. The Exchange believes the proposed enterprise license is reasonable because it would reduce exchange fees, lower administrative costs for subscribers that are broker-dealers and help expand the availability of market information to investors, and thereby increase participation in financial markets. Subscribers that are broker-dealers would be able to disseminate the NYSE Agg Lite data feed for display usage to an unlimited number of non-professional users for a monthly fee of \$20,000, or \$18,000 if they contract for twelve months of service in advance. Alternatively, subscribers that are broker-dealers would be able to disseminate the NYSE Agg Lite data feed for display usage to an unlimited number of professional users and non-professional users for a monthly fee of \$25,000, or \$22,500 if they contract for twelve months of service in advance. The proposed enterprise license would result in lower fees for subscribers able to reach the largest audience of investors, including retail investors. Discounts for broader dissemination of market data information have routinely been adopted by exchanges and permitted by the Commission as equitable allocations of reasonable dues, fees and charges.⁴²

Non-Display Use Fees. The Exchange believes that the proposed Non-Display Use fees reflect the value of the non-display data use to data recipients, which purchase such data on an entirely voluntary basis. Non-display data can be used by data recipients for a wide variety of uses, including proprietary and agency trading and smart order routing, as well as by data recipients that operate order matching and execution platforms. Non-display data also can be used for a variety of non-trading purposes that indirectly support

trading, such as risk management and compliance. Although some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce a recipient's costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs, thereby benefiting recipients. The Exchange believes that charging for non-trading uses is reasonable because data recipients can derive substantial value from such uses, for example, by automating tasks so that they can be performed more quickly and accurately and less expensively than if they were performed manually.

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

The Exchange believes that it is reasonable to segment the fee for non-display use into these three categories. As noted above, the uses to which customers can put the NYSE Agg Lite data feed are numerous and varied, and the Exchange believes that charging separate fees for these separate categories of use is reasonable because it reflects the actual value the customer derives from the data, based upon how many categories of use the customer makes of the data. Segmenting the fees for non-display data in this way avoids the unreasonable result of customers that make only limited non-display use of the data paying the same fees as customers that use the data for numerous different purposes.

The Exchange believes that the proposed fees of \$4,500 per month for each of Categories 1, 2, and 3 is reasonable. These fees are comparable to non-display use fees generally charged by exchanges. For example, the fees for Non-Display Use of NYSE OpenBook for Categories 1, 2 and 3 is \$6,000 per

month.⁴³ The Exchange believes that the proposed fees directly and appropriately reflect the value of using non-display data in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.

The Exchange believes that it is reasonable to cap non-display use fees for Category 3 at \$13,500 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE Agg Lite data feed.

The proposed Non-Display Use fees for the NYSE Agg Lite data feed are also reasonable because they take into account the value of receiving the data for Non-Display Use on an integrated basis. The Exchange believes that the proposed fees directly and appropriately reflect the value of using the NYSE Agg Lite data feed on a non-display basis in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.⁴⁴

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

The Exchange believes that it is reasonable to impose a late fee in connection with the submission of the Non-Display Use Declaration. In order to correctly assess fees for the non-display use of the NYSE Agg Lite data feed, the Exchange needs to have current and accurate information about the use of the NYSE Agg Lite data feed. The failure of data recipients to submit the Non-Display Use Declaration on

⁴³ See Fee Schedule.

⁴⁴ See also Exchange Act Release No. 69157, March 18, 2013, 78 FR 17946, 17949 (March 25, 2013) (SR-CTA/CQ-2013-01) (“[D]ata feeds have become more valuable, as recipients now use them to perform a far larger array of non-display functions. Some firms even base their business models on the incorporation of data feeds into black boxes and application programming interfaces that apply trading algorithms to the data, but that do not require widespread data access by the firm’s employees. As a result, these firms pay little for data usage beyond access fees, yet their data access and usage is critical to their businesses.”).

⁴¹ See *supra*, note 38.

⁴² For example, the Commission has permitted pricing discounts for market data under Nasdaq Rules 7023(c) and 7047(b). See also Securities Exchange Act Release No. 82182 (November 30, 2017), 82 FR 57627 (December 6, 2017) (SR-NYSE-2017-60) (changing an enterprise fee for NYSE BBO and NYSE Trades).

time leads to potentially incorrect billing and administrative burdens, including tracking and obtaining late Non-Display Use Declarations and correcting and following up on payments owed in connection with late Non-Display Use Declarations. The purpose of the late fee is to incent data recipients to submit the Non-Display Use Declaration promptly to avoid the administrative burdens associated with the late submission of Non-Display Use Declarations.

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

Three-Month Fee Waiver. The Exchange believes the proposal to waive the Access Fee and the Redistribution Fee for the NYSE Agg Lite data feed to new Redistributors for three calendar months is reasonable because it would enable potential Redistributors to determine whether a particular NYSE market data product provides value to their business models before fully committing to expend development and implementation costs related to the receipt of that product, and is intended to encourage increased use of the Exchange's market data products by defraying some of the development and implementation costs Redistributors would ordinarily have to expend before using a product. The proposed fee waiver would also allow Redistributors to become familiar with the feed and determine whether it suits their needs without incurring fees. Making a new market data product available without charging a fee for three months is consistent with offerings of other exchanges. For example, BZX offers subscribers of BZX Summary Depth a three-month credit for external distribution, which is akin to the three-

month fee waiver proposed by the Exchange.⁴⁵

For all of the foregoing reasons, the Exchange believes that the proposed fees for the NYSE Agg Lite data feed are reasonable.

The Proposed Fees Are Equitably Allocated

The Exchange believes the proposed fees for the NYSE Agg Lite data feed are allocated fairly and equitably among the various categories of users of the feed, and any differences among categories of users are justified.

Overall. The Exchange believes that the proposed fees are equitably allocated because they will apply to all data recipients that choose to subscribe to the NYSE Agg Lite data feed. Any subscriber or vendor that chooses to subscribe to the NYSE Agg Lite data feed is subject to the same Fee Schedule, regardless of what type of business they operate or the use they plan to make of the data feed. Subscribers and vendors are not required to purchase the NYSE Agg Lite data feed and may choose to receive the data on the NYSE Agg Lite data feed regardless of what type of business they operate or the use they plan to make of the data feed.

Access Fee. The Exchange believes the proposed monthly Access Fee of \$3,000 for the NYSE Agg Lite data feed is equitably allocated because it would be charged on an equal basis to all data recipients that receive a data feed of the NYSE Agg Lite data feed, regardless of what type of business they operate or the use they plan to make of the data feed.

User Fees. The Exchange believes that the fee structure differentiating Professional User fees (\$35 per month per user) from Non-Professional User fees (\$6 per month per user) for display device access to the NYSE Agg Lite data feed is equitable. This structure has long been used by the Exchange to reduce the price of data to Non-Professional Users and make it more broadly available.⁴⁶ Offering the NYSE Agg Lite data feed to Non-Professional Users with the same data as is available to Professional Users

results in greater equity among data recipients. These user fees would be charged uniformly to all display devices that have access to the NYSE Agg Lite data feed.

Redistribution Fees. The Exchange believes the proposed monthly fee of \$250 for redistributing the NYSE Agg Lite data feed is equitably allocated because it would be charged on an equal basis to those Redistributors that choose to redistribute the feed.

Enterprise Fees. The Exchange believes the proposed enterprise license is equitably allocated because it would be available on an equal basis to all subscribers that are broker-dealers, each of whom would benefit from reduced exchange fees and from lower administrative costs. Moreover, the specific feature of the proposed enterprise license that will allow subscribers to lower fees by subscribing to a twelve-month contract is also an equitable allocation because all subscribers will have the same option of choosing between the stability of a fixed, lower rate, and the more flexible option of maintaining the ability to change market data products after a month of service. Subscribers will be free to move from the monthly to the annual rate at any time, or from annual to a monthly fee, with notice, at the expiration of the twelve-month period.

Non-Display Use Fees. The Exchange believes the proposed Non-Display Use fees are equitably allocated because they would require subscribers to pay fees only for the uses they actually make of the data. As noted above, non-display data can be used by data recipients for a wide variety of purposes (including trading, risk management, and compliance) as well as purposes that reduce the recipient's costs by automating certain functions. The Exchange believes that it is equitable to charge non-display data subscribers a \$4,500 fee for each category of use they make of such data—namely, using the data on their own behalf (Category 1), on behalf of their clients (Category 2), and to internally match buy and sell orders within an organization (Category 3)—because this fee structure results in subscribers with greater uses of the data paying higher fees, and subscribers with fewer uses of the data paying lower fees. This segmented fee structure is also equitable because no subscriber of non-display data would be charged a fee for a category of use in which it did not actually engage.

The Exchange believes that it is equitable to cap non-display use fees for Category 3 at \$13,500 per month per data recipient, because a higher monthly fee may potentially dissuade

⁴⁵ See e.g., Securities Exchange Act Release No. 94432 (March 16, 2022), 87 FR 16277 (March 22, 2022) (SR-ChoeBZX-2022-015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Applicable to Various Market Data Products).

⁴⁶ See, e.g., Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131) (establishing the \$15 Non-Professional User Fee (Per User) for NYSE OpenBook); Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983), 48 FR 34552 (July 29, 1983) (establishing Non-Professional fees for CTA data); NASDAQ BX Equity 7 Pricing Schedule, Section 123.

competitors from buying the NYSE Agg Lite data feed.

Non-Display Use Declaration Late Fee. The Exchange believes that the proposed fee of \$1,000 per month for a late Non-Display Use Declaration is equitably allocated because it applies to any data recipient that pays an Access Fee for the NYSE Agg Lite data feed but has failed to complete and submit a Non-Display Use Declaration. In addition, the Exchange believes that it is equitable to charge a late fee to subscribers who fail to timely submit their Non-Display Use Declarations because their failure to do so leads to potentially incorrect billing and administrative burdens on the part of the Exchange. The Exchange believes it is equitable to defray these administrative costs by imposing a late fee only on subscribers' whose declarations were late, as opposed to all subscribers.

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

Three-Month Fee Waiver. The Exchange believes the proposal to waive the Access Fee and the Redistribution Fee for the NYSE Agg Lite data feed to new Redistributors for three calendar months is equitable because it would apply to any first-time Redistributor, regardless of the use they plan to make of the feed. As proposed, any first-time Redistributor of the NYSE Agg Lite data feed would not be charged the Access Fee and the Redistribution Fee for three calendar months. The Exchange believes it is equitable to restrict the availability of this three-month fee waiver to Redistributors that have not previously subscribed to and redistributed the NYSE Agg Lite data feed, since customers who are current or previous subscribers of the feed are already familiar with it and are able to determine whether it suits their needs.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the NYSE Agg Lite data feed are equitably allocated.

The Proposed Fees Are Not Unfairly Discriminatory

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

Overall. The Exchange believes that the proposed fees are not unfairly discriminatory because they would apply to all data recipients that choose to subscribe to the NYSE Agg Lite data feed. Any subscriber, including Redistributor, that chooses to subscribe to the NYSE Agg Lite data feed is subject to the same Fee Schedule, regardless of what type of business they operate or the use they plan to make of the data feed. Subscribers, including Redistributors, may choose to receive the data on the NYSE Agg Lite data feed regardless of what type of business they operate or the use they plan to make of the data feed.

Access Fee. The Exchange believes the proposed monthly Access Fee of \$3,000 for the NYSE Agg Lite data feed is not unfairly discriminatory because it would be charged on an equal basis to all data recipients that receive a data feed of the NYSE Agg Lite, regardless of what type of business they operate or the use they plan to make of the data feed.

User Fees. The Exchange believes that the fee structure differentiating Professional User fees (\$35 per month per user) from Non-Professional User fees (\$6 per month per user) for display device access to the NYSE Agg Lite data feed is not unfairly discriminatory. This structure has long been used by the Exchange to reduce the price of data to Non-Professional Users and make it more broadly available.⁴⁷ Offering the NYSE Agg Lite data feed to Non-Professional Users with the same data as is available to Professional Users results in greater equity among data recipients. These user fees would be charged uniformly to all display devices that have access to the NYSE Agg Lite data feed.

Redistribution Fees. The Exchange believes the proposed monthly fee of \$250 for redistributing the NYSE Agg Lite data feed is not unfairly discriminatory because it would be charged on an equal basis to those

Redistributors that choose to redistribute the feed.

Enterprise Fees. The Exchange believes the proposed enterprise license will not unfairly discriminate between customers, issuers, brokers or dealers. The Act does not prohibit all distinctions among customers, but only discrimination that is unfair, and it is not unfair discrimination to charge those subscribers that are able to reach the largest audiences of investors, including retail investors, a lower fee for incremental investors in order to encourage the widespread distribution of market data. This principle has been repeatedly endorsed by the Commission, as evidenced by the approval of enterprise licenses for other market data products.⁴⁸ Moreover, the proposed enterprise license will be subject to significant competition, and that competition will ensure that there is no unfair discrimination. Each subscriber will be able to accept or reject the license depending on whether it will or will not lower costs for that particular subscriber, and, if the license is not sufficiently competitive, the Exchange may lose market share. The proposed enterprise license will compete with other enterprise licenses of the Exchange, underlying fee schedules promulgated by the Exchange, and enterprise licenses and fee structures implemented by other exchanges. As such, it is a voluntary product for which market participants can readily find substitutes. Accordingly, the Exchange is constrained from introducing a fee that would be inequitable or unfairly discriminatory.

Non-Display Use Fees. The Exchange believes the proposed Non-Display Use fees are not unfairly discriminatory because they would require subscribers for non-display use to pay fees only for the categories of use they actually make of the data. As noted above, non-display data can be used by data recipients for a wide variety of purposes (including trading, risk management, and compliance) as well as purposes that reduce the recipient's costs by automating certain functions. The Exchange believes that it is not unfairly discriminatory to charge non-display data subscribers a \$4,500 per month fee for each category of use they make of such data—namely, using the data on

⁴⁸ See e.g., Securities Exchange Act Release No. 83751 (July 31, 2018), 83 FR 38428 (August 6, 2018) (SR-NASDAQ-2018-058) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower Fees and Administrative Costs for Distributors of Nasdaq Basic, Nasdaq Last Sale, NLS Plus and the Nasdaq Depth-of-Book Products Through a Consolidated Enterprise License).

⁴⁷ *Id.*

their own behalf (Category 1), on behalf of their clients (Category 2), and to internally match buy and sell orders within an organization (Category 3)—because this fee structure results in subscribers with greater uses for the data paying higher fees, while subscribers with fewer uses of the data pay lower fees. This segmented fee structure is not unfairly discriminatory because no subscriber of non-display data would be charged a fee for a category of use in which it did not actually engage.

The Exchange believes that it is not unreasonably discriminatory to cap non-display use fees for Category 3 at \$13,500 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE Agg Lite data feed.

Non-Display Use Declaration Late Fee. The Exchange believes that the proposed fee of \$1,000 per month for a late Non-Display Use Declaration is not unfairly discriminatory because it applies to any data recipient that pays an Access Fee for the NYSE Agg Lite data feed but has failed to complete and submit a Non-Display Use Declaration. In addition, the Exchange believes that it is not unfairly discriminatory to charge a late fee to subscribers who fail to timely submit their Non-Display Use Declarations because their failure to do so leads to potentially incorrect billing and administrative burdens on the part of the Exchange. Nor is it unfairly discriminatory for the Exchange to defray these administrative costs by imposing a late fee only on subscribers' whose declarations were late, as opposed to all subscribers.

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

Three-Month Fee Waiver. The Exchange believes the proposal to waive the Access Fee and the Redistribution

Fee for the NYSE Agg Lite data feed to new Redistributors for three months is not unfairly discriminatory because it would apply to any first-time Redistributor, regardless of the use they plan to make of the feed. As proposed, any first-time Redistributor of the NYSE Agg Lite data feed would not be charged the Access Fee and the Redistribution Fee for three calendar months. The Exchange believes it is not unfairly discriminatory to restrict the availability of this three-month fee waiver to Redistributors that have not previously subscribed to the NYSE Agg Lite data feed, since Redistributors who are current or previous subscribers of the feed are already familiar with it and are able to determine whether it suits their needs.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the NYSE Agg Lite data feed are not unfairly discriminatory.

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

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

Intramarket Competition. The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants. As noted above, the proposed fees would apply to all subscribers, including Redistributors, of the NYSE Agg Lite data feed, and customers may not only choose whether to subscribe to the feed at all, but also may tailor their subscription to include only the products offered by the Exchange that they deem suitable for their business needs. The Exchange also believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue market on competition. As shown above, to the extent that particular proposed fees apply to only a subset of subscribers (e.g., Category 2 fees apply only to those making non-display use on behalf of clients; late fees apply only to customers who fail to timely submit their declarations), those distinctions are not unfairly discriminatory and do not unfairly burden one set of customers over another. To the contrary, by tailoring the proposed fees in this manner, the Exchange believes that it has eliminated the potential burden on competition that might result from unfairly asking subscribers to pay fees for services they did not use, or late fees they did not actually incur.

Intermarket Competition. The Exchange believes that the proposed fees do not impose a burden on competition or on other SROs that is not necessary or appropriate. In setting the proposed fees, the Exchange is constrained by the availability of numerous substitute platforms also offering market data products, and low barriers to entry mean new exchanges are frequently introduced. In setting fees for the NYSE Agg Lite data feed, the Exchange is constrained by the fact that if its pricing for the NYSE Agg Lite data feed is unattractive to customers, customers will have their pick of an increasing number of alternative market data products to purchase instead of purchasing the Exchange's products.

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

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

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

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)⁴⁹ of the Act and paragraph (f) thereunder. 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

⁴⁹ 15 U.S.C. 78s(b)(3)(A).

investors, or otherwise in furtherance of the purposes of the Act.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2024-38 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-NYSE-2024-38. 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2024-38 and should be submitted on or before August 21, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁰

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100592; File No. SR-PHLX-2024-37]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Fees for Its Expanded Co-Location Services

July 25, 2024.

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 July 23, 2024, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to establish fees for its expanded co-location services, as described further below.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on August 15, 2024.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose³

The Exchange filed a proposal to expand its co-location services by offering new cabinet, power, and power distribution unit options in the Exchange's expanded data center.⁴ As described in that filing, the Exchange's current data center ("NY11") in Carteret, NJ is undergoing an expansion ("NY11-4") in response to demand for power and cabinets. The purpose of this proposed rule change is to establish fees for the expanded co-location services. Specifically, the Exchange proposes to establish (i) a monthly fee for Ultra High Density Cabinets, (ii) an installation fee for cabinets in NY11-4, (iii) fees for power installation in NY11-4, and (iv) fees for power distribution unit options in NY11-4.

Ultra High Density Cabinet

Currently, co-location customers have the option of obtaining cabinets of various sizes and power densities. Co-location customers may obtain a Half Cabinet,⁵ a Low Density Cabinet with power density less than or equal to 2.88 kilowatts ("kW"), a Medium Density Cabinet with power density greater than 2.88 kW and less than or equal to 5 kW, a Medium-High Density Cabinet with power density greater than 5 kW and less than or equal to 7 kW, a High Density Cabinet with power density greater than 7 kW and less than 10 kW, and a Super High Density Cabinet with power density greater than 10 kW and less than or equal to 17.3 kW.

The Exchange filed a proposal to introduce a new cabinet choice in NY11-4, an "Ultra High Density Cabinet," with power density greater than 10 kW and less than or equal to 15 kW.⁶ The Ultra High Density Cabinet option will only be offered in NY11-4 because of the power configuration necessary for such cabinets, which is not possible or available in other portions of the data center due to

³ The Exchange initially filed the proposed pricing change on July 15, 2024 (SR-PHLX-2024-34). The instant filing replaces SR-PHLX-2024-34, which was withdrawn on July 23, 2024.

⁴ See Securities Exchange Act Release No. 34-100559 (July 18, 2024) (SR-PHLX-2024-32) (not yet published).

⁵ Half cabinets are not available to new subscribers. See General 8, Section 1(a).

⁶ *Supra* note 4.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁵⁰ 17 CFR 200.30-3(a)(12).