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Chief Regulatory Officer, ICE
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July 6, 2021

Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Securities Exchange Act Release No. 91785 (May 6, 2021), 86 FR 26082 (May 12, 2021) (SR-NYSE-2021-05, SR-NYSEAMER-2021-04, SR-NYSEArca-2021-07, SR-NYSECHX-2021-01, SR-NYSENAT-2021-01) (the "Order")

Dear Ms. Countryman:

New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc. (together, the "Exchanges") submit this letter in response to the Securities and Exchange Commission's ("Commission") order instituting proceedings to determine whether to approve or disapprove the NYSE Exchanges' proposed rule changes to amend their colocation price lists to establish two additional partial cabinet solution ("PCS") bundles.¹

For the reasons set forth below and in the Proposals, the Exchanges respectfully request that the Commission approve the Proposals so that the Exchanges may respond to customer demand and market competition by offering 40 Gb PCS bundles similar to the ones currently being offered by the Exchanges' competitors.

¹ The NYSE Exchanges filed the proposals that are the subject of the Order on January 19, 2021 (the "Proposals"). The Proposals were published for comment in the Federal Register on February 5, 2021 and February 8, 2021. See Securities Exchange Act Release Nos. 91034 (February 1, 2021), 86 FR 8443 (February 5, 2021) (SR-NYSE-2021-05); 91035 (February 1, 2021), 86 FR 8449 (February 5, 2021) (SR-NYSEAMER-2021-04); 91036 (February 1, 2021), 86 FR 8440 (February 5, 2021) (SR-NYSECHX-2021-01); and 91037 (February 1, 2021), 86 FR 8424 (February 5, 2021) (SR-NYSENAT-2021-01); 91044 (February 2, 2021), 86 FR 8662 (February 8, 2021) (SR-NYSEArca-2020-08). On March 18, 2021, the Commission issued notices designating a longer period to consider the Proposals. See Securities Exchange Act Release Nos. 91357 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSE-2021-05); 91358 (March 18, 2021), 86 FR 15732 (March 24, 2021) (SR-NYSEAMER-2021-04); 91362 (March 18, 2021), 86 FR 15765 (March 24, 2021) (SR-NYSECHX-2021-01); and 91363 (March 18, 2021), 86 FR 15763 (March 24, 2021) (SR-NYSENAT-2021-01). Unless defined herein, capitalized terms herein have the same meaning as in the Proposals.

1. The Proposed Services and Fees

As described in the Proposals, the Exchanges currently offer four PCS bundles, Options A through D, which were added to the Exchanges' fee schedules in 2016.²

In August 2019, the Exchanges upgraded the 10 Gb LCN connections included in Options C and D from standard to LX connections.³ And, in May 2020, the Exchanges further upgraded at no additional cost Options C and D to each add two 10 Gb connections to the NMS Network, an alternate dedicated network connection that Users could use to access the NMS feeds for which the Securities Industry Automation Corporation ("SIAC") is engaged as the securities information processor ("SIP").⁴

The Exchanges propose to offer two additional PCS bundles to Users: Options E and F. Proposed Options E and F would be substantially similar to Options C and D, respectively, with the difference that each connection included in the proposed bundles would be 40 Gb instead of 10 Gb. Specifically, proposed Options E and F would include a 1 kW (Option E) or 2 kW (Option F) partial cabinet, one 40 Gb LCN connection, one 40 Gb IP network connection, two 40 Gb NMS Network connections, and either the Network Time Protocol Feed or the Precision Timing Protocol. The Exchanges propose that Users selecting the proposed Option E or F bundles would be charged the same initial charge of \$10,000 that currently applies to Options C and D, and would also be charged monthly recurring charges of \$18,000 for an Option E bundle and \$19,000 for an Option F bundle. The Exchanges also propose that Users that purchase Option E or F bundles on or before December 31, 2021 would receive a 50% reduction in the monthly recurring charges for the first 12 months.

2. The Order Fails to Provide Notice of the Grounds for Disapproval Under Consideration

When instituting proceedings, the Exchange Act obligates the Commission to provide "notice of the grounds for disapproval under consideration."⁵ The Commission's own

² See Securities Exchange Act Release Nos. 77072 (February 5, 2016), 81 FR 7394 (February 11, 2016) (SR-NYSE-2015-53); 77071 (February 5, 2016), 81 FR 7382 (February 11, 2016) (SR-NYSEMKT-2015-89); and 77070 (February 5, 2016), 81 FR 7401 (February 11, 2016) (SR-NYSEArca-2015-102).

³ See Securities Exchange Act Release Nos. 86550 (August 1, 2019), 84 FR 38696 (August 7, 2019) (SR-NYSE-2019-41); 86548 (August 1, 2019), 84 FR 38704 (August 7, 2019) (SR-NYSEAMER-2019-28); 86547 (August 1, 2019), 84 FR 38708 (August 7, 2019) (SR-NYSEArca-2019-54); 86549 (August 1, 2019), 84 FR 38700 (August 7, 2019) (SR-NYSENAT-2019-17).

⁴ See Securities Exchange Act Release Nos. 88837 (May 7, 2020), 85 FR 28671 (May 13, 2020) (SR-NYSE-2019-46, SR-NYSE Amer-2019-34; SR-NYSEArca-2019-61, SR-NYSENAT-2019-19); and 88972 (May 29, 2020), 85 FR 34472 (June 4, 2020) (SR-NYSECHX-2020-18).

⁵ 15 U.S.C. 78s(b)(2)(B).

regulations reinforce this statutory notice command.⁶ This notice requirement serves important purposes: neither the Exchange, nor the public, should be forced to guess what the Commission believes may be lacking in a rule filing. Congress designed the notice requirement to ensure that interested parties know what issues are under consideration so that those issues can be fully addressed in the subsequent proceeding.

But the Order here leaves everyone guessing as to the Commission's concerns. The Commission's rote recitation in the Order of the content of the Proposals and the requirements of the Act⁷ does not satisfy the statutory and regulatory notice requirement

⁶ See 17 C.F.R. 201.700(b)(2) ("The grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission instituted the proceedings, including the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change or NMS plan filing.").

⁷ See Order, supra note 1, at 29606-07 ("Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"
- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to perfect the operation of a free and open market and a national market system" and "protect investors and the public interest," and not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers;" and
- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].").

(Internal footnote references omitted.) See also id. at 29607 ("As discussed in Section II above, the Exchanges make various arguments in support of the proposals, including that the proposed initial charge and proposed monthly charge of \$18,000 for Option E and \$19,000 for Option F are reasonable in relation to the fees charged for Options C and D, based on the work entailed to provide the services and supply the 40 Gb connections, and that the Exchanges are subject to significant competitive forces. The Commission believes that there are questions as to whether the Exchanges have provided sufficient information to demonstrate that the proposals, including the proposed fees, are consistent with the Act.").

because it offers no meaningful guidance on what, if anything, the Commission believes is lacking in the Filing. This defect renders the Order deficient.⁸

3. The Commission May Be Applying Improper Standards to the Rule Filing

The Exchanges find it concerning that although the Commission approved the introduction of PCS bundle Options A through D in 2016, the Commission has now instituted proceedings with respect to the current Proposals that merely propose to expand the PCS bundle options that would be available to Users. In approving Options A through D in 2016, the Commission determined as follows:

The Commission believes that the proposed rule change is consistent with Section 6(b)(4) of the Act. . . . With respect to the proposed Partial Cabinet Solution bundles in particular, the Commission also notes that all Users are subject to the same conditions and fees for the service selected; all Users are subject to the same limits on the number of Partial Cabinet Solution bundles and aggregate cabinet footprint; all Users that order a bundle on or before December 31, 2016 would have their monthly charges reduced by 50 percent for the first 12 months; and all Users that change their Partial Cabinet Solution bundles would not be charged a second initial charge but instead charged the difference, if any, between the initial charges.⁹

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⁸ The Commission's general and vague description of the issues under consideration leaves the Exchange and other stakeholders in the dark as to what "grounds for disapproval" are actually "under consideration" by the Commission. This undermines the purpose of the review process and violates the statute and the Commission's implementing regulations. Cf. Gerber v. Norton, 294 F.3d 173, 180 (D.C. Cir. 2002) (interpreting notice requirement in Endangered Species Act to mean that "opportunity for comment must be a meaningful opportunity"). In addition, although it would not cure the Commission's failure to provide sufficient notice when it issued the Order, the Commission must also provide non-conclusory and detailed reasoning in approving or disapproving the Proposals. In particular, were the Commission to disapprove the Proposals, it must provide a reasoned explanation for how and why the Proposals fail to satisfy particular statutory or regulatory standards. Indeed, this is "[o]ne of the most fundamental principles of administrative law." Sw. Airlines Co. v. Fed. Energy Regul. Comm'n, 926 F.3d 851, 855 (D.C. Cir. 2019). To satisfy this requirement, moreover, "conclusory statements" – of the type set forth in the Order – "will not do; an 'agency's statement must be one of reasoning.'" Amerijet Int'l, Inc. v. Pistole, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). As the D.C. Circuit has made clear in the rule filing context, it is incumbent on the Commission to explain how a "proposed rule change is [or is not] consistent with the requirements of [the Act] and the rules and regulations issued under [the Act] that are applicable to [the Exchange]." 15 U.S.C. 78s(b)(2)(C)(i)-(ii).

⁹ See Securities Exchange Act Release No. 77072 (February 5, 2016), 81 FR 7394, 7397 (February 11, 2016) (SR-NYSE-2015-53).

The Commission also finds the Exchange's proposal to offer Partial Cabinet Solution bundles consistent with Section 6(b)(5) of the Act. As noted, all Users seeking to purchase a Partial Cabinet Solution bundle would be subject to the same conditions. The Commission believes that the proposed Partial Cabinet Solution bundles are reasonably designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for co-location services, and therefore that they are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.¹⁰

Those findings apply equally to the services in the Proposals and, in its Order instituting proceedings, the Commission did not identify any basis on which to distinguish the PCS bundles approved in 2016 and those in the Proposals. Proposed Options E and F are reasonably designed, at the request of prospective customers, to make it more cost effective for customers that require 40 Gb connections but have minimal power or cabinet space demands.

In conversations with the Exchanges, staff of the Commission's Division of Trading and Markets has suggested that one thing that has changed since Options A through D were approved in 2016 was that in May 2019, the Division of Trading and Markets issued "Staff Guidance on SRO Rule Filings Relating to Fees" (the "Guidance").¹¹ The implication of this statement is that staff's standards for approving exchange fee filings have changed as a result of the Guidance. However, it is clear that the Exchanges do not have to meet the specific demands of the Guidance in their filings in order for the Commission to approve those filings. As then-Chairman Jay Clayton stated, the Guidance "is not a rule, regulation, or statement of the Commission."¹² Rather,

[t]he SRO rule filings related to fees addressed by the TM Staff Guidance are governed by Exchange Act Section 19(b), Exchange Act Rule 19b-4, and court decisions interpreting those provisions. Like all staff guidance, the TM Staff Guidance has no legal force or effect: as it states, it does not alter or amend applicable law, and it creates no new or additional obligations for SROs or the Commission.¹³

The Exchanges are therefore concerned that the Commission may be applying a misplaced assumption about the types of information necessary to satisfy the Exchange

¹⁰ See id.

¹¹ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

¹² Chairman Jay Clayton, Statement on Division of Trading and Markets Staff Fee Guidance (June 12, 2019), available at <https://www.sec.gov/news/public-statement/statement-division-trading-and-markets-staff-fee-guidance>.

¹³ Id. (footnote omitted).

Act's requirements. In particular, the Commission may be improperly demanding that the Exchanges provide cost data in connection with all rule filings, even where the Exchanges have demonstrated that sufficient competition exists. If so, such a demand would be unlawful. Neither the Exchange Act nor the Commission's regulations require presentation of cost data in connection with every rule filing. And any demand for cost data in cases where evidence of a competitive market exists would be substantively unjustified.

Of particular relevance is NetCoalition v. SEC.¹⁴ In that case, the D.C. Circuit held that an exchange can establish that its fees for market data products are fair and reasonable through either a cost-based analysis or a "market-based approach" that examines whether the exchange is subject to significant competitive forces in setting its fees.¹⁵ In other words, a cost-based analysis is separate and distinct from a market competition-based analysis. An exchange does not and should not have to demonstrate both – and here, the Exchange has provided ample evidence that the proposed services and their associated fees are constrained by competition.¹⁶ It would be inconsistent with NetCoalition I and the Commission's embrace of market-based pricing for the Commission to require the Exchange to also satisfy a rigorous cost-based analysis.¹⁷ Indeed, as basic rate regulation theory and economics explain, cost-based regulation is

¹⁴ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) ("NetCoalition I"). See also Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (approving proposed rule change to establish fees for a depth-of-book market data product).

¹⁵ NetCoalition I, 615 F.3d at 535.

¹⁶ See Point 4 below. See also Securities Exchange Act Release No. 90217 (October 16, 2020), 85 FR 67392, 67396 (October 22, 2020) (Order Approving a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed) (noting that "[t]he inquiry into whether a market for a product is competitive . . . focuses on . . . the product's elasticity of demand" (citing NetCoalition I, 615 F.3d at 542)).

¹⁷ NetCoalition I does state in passing that costs might be relevant to a determination of the reasonableness of fees, but that statement appears to have been based on the record in that case (which did not contain direct evidence of proprietary data product competition and platform competition) as well as the questionable assumption that "in a competitive market, the price of a product is supposed to approach its marginal cost." NetCoalition I, 615 F.3d at 537. But the economic theory that "price equals marginal cost" has limited real-world application outside of agricultural commodity products. As highlighted by Professor Kenneth Elzinga, "[f]ew firms fit the textbook definition of perfect competition," and in fact, marginal-cost pricing in "technology-driven industries . . . is neither feasible nor desirable." Kenneth G. Elzinga & David E. Mills, The Lerner Index of Monopoly Power: Origins and Uses, 101 Am. Econ. Rev. 558, 560 (2011). Moreover, the statement in NetCoalition I simply reflects the reality that, in a competitive marketplace, market forces should work to ensure that firms cannot engage in supra-competitive pricing, whereas the question at issue here is not whether or how prices should bear some relationship to costs, but whether market forces or a rate regulator should make that determination.

simply unnecessary in a competitive market because market forces – rather than rate regulators – will help to ensure competitive pricing.

Instead, the Exchanges looked to the Act, Rule 19b-4, and relevant court decisions, including NetCoalition I in assessing the information it provided in the Proposals. Based on their review, the Exchanges believe that the Proposals provide sufficient information demonstrating that the proposed rule changes are consistent with the Act. Nevertheless, by this letter, the Exchanges are supplementing the Proposals with additional information.

4. The Market for the Proposed Services Is Competitive, with Substitute Services Available from Third-Party Providers

In the Proposals, the Exchanges amply demonstrated the existence of competition in the markets for the proposed services, and explained that substitutes for the proposed services are readily available from third-party providers.

Specifically, the Exchanges explained that they propose to offer Options E and F in order to compete with bundled services that are offered to customers by the Exchanges' Hosting Users.¹⁸ Hosting Users are third parties that pay a monthly fee to the Exchanges in exchange for permission to subdivide cabinets and resell those partial cabinets, along with other services, to customers. In this way, Hosting Users are third parties that offer services in direct competition with the Exchanges themselves.

The Exchanges understand, from conversations with Users and potential customers, that Hosting Users generally sell services to customers via bundles ("Hosting User Bundles") that include cabinet space and space on shared LCN, IP, and NMS network connections. For instance, a Hosting User that has purchased 40 Gb LCN, IP, and NMS network connections from the Exchange is free to create bundled services for specific customers that include those 40 Gb connections, along with other services, such as cabinet space and cross-connections. The Exchanges understand from conversations with Users and potential customers that Hosting User Bundles generally provide end users with a similar service to that of the Exchanges' PCS bundles.

There is a major difference, however, between these Hosting User Bundles and the PCS bundles that the Exchanges offer. While the Exchanges are currently limited to the four Options that have been approved by the Commission, Hosting Users are free to create a wide array of bespoke bundles of services for specific customers, charging whatever fees those customers will pay, without having to file such services with the Commission. Because the Hosting Users are not required to pre-clear such bundles with the Commission, they have unfettered freedom to compete with each other in the market for partial cabinet bundled services.

The Exchanges have verified that approximately 10% of Users in colocation are Hosting Users capable of selling such bundles to customers. The Exchanges have further verified that all of the current Hosting Users have 40 Gb connections to the LCN, IP, and

¹⁸ See, e.g., Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40).

NMS Networks, meaning that they could readily offer bundled services that include such 40 Gb connections for customers. Moreover, based on conversations with Users and potential customers, the Exchanges believe that at least one of the Hosting Users currently does offer a Hosting User Bundle that includes 40 Gb connections.

Until the Exchanges are able to offer PCS bundles to end users that include such 40 Gb connections, the Exchanges will be unable to effectively compete with the Hosting Users that provide such services. The Exchanges believe that 40 Gb connections are increasingly considered the industry standard, with more customers opting for 40 Gb connections instead of 10 Gb connections. In addition, the Exchanges understand that smaller customers – such as those who might qualify for a PCS – often prefer to normalize all of their equipment to one connection size, meaning that if they have 40 Gb connections elsewhere on their network, they are uninterested in adding 10 Gb connections such as those available in the Exchanges' existing PCS options. Moreover, 10 Gb connections simply lack sufficient bandwidth to meet some customers' needs. For instance, options market data from NYSE American and NYSE Arca generally exceeds 10 Gb, meaning that a User cannot access that data without a 40 Gb connection.

The Exchanges proposed Options E and F in direct response to customer interest. One current customer of the Exchanges specifically requested that the Exchanges begin offering PCS bundle options that include 40 Gb connections so that the customer could purchase its connections directly from the Exchanges instead of having to contract with a new service provider (i.e., a Hosting User) for just this one service. Upon learning that the Commission had extended its time to consider these Proposals, this potential customer informed the Exchanges that due to the delay in the Exchanges' ability to establish PCS bundles with 40 Gb connections, it planned to contract instead with a Hosting User that already offers such a bundle. This is clear evidence that the bundles offered by Hosting Users are substitutable with the proposed services in the Proposals.¹⁹

Nor is acquiring a partial cabinet from a Hosting User the only way that a customer could acquire services that are substitutable with those in the Proposals. Alternatively, a customer could buy a partial cabinet from the Exchanges without any network connectivity, and then cross-connect to a Hosting User for access to its 40 Gb network connections. This option would have slightly longer latency than a partial cabinet bundle from a Hosting User or a PCS bundle from the Exchanges, but it is a substantially similar²⁰ service, and might appeal to customers with less latency sensitivity. As a further alternative, a customer could simply buy a partial cabinet as well as the 40G connections from the Exchanges at the Exchanges' regular prices, without the lower pricing or the qualification restrictions that would apply to the bundled options in the Proposals.

¹⁹ The Commission has recognized that products may be substantially similar to be considered substitutable, and do not need to be identical or equivalent. See Guidance, supra note 11, section III.B.

²⁰ Id.

All of the foregoing demonstrate that substitutes to the proposed PCS bundles are available to customers from other providers. Because such substitutes exist, the Exchanges would be unable to impose supra-competitive pricing for their services without causing customers to shift their business to the other providers of similar services.

In this context, the market – not the Commission – should decide whether the fees that the Exchanges have proposed for Options E and F are reasonable. In the Proposals, the Exchanges justified their proposal to charge \$4,000 more in monthly recurring charges for Option E as compared with Option C, and \$4,000 more in monthly recurring charges for Option F as compared with Option D, as “reflect[ing] the fact that the Exchange[s] will have to supply multiple 40 Gb connections in the Option E and F bundles, as opposed to the 10 Gb connections included in the Option C and D bundles.” This stands to reason: the 40 Gb connections are simply more expensive products, and thus cost more for the Exchanges to supply than 10 Gb connections. But in this competitive market, with at least five Hosting Users able to create bespoke customer bundles containing 40 Gb connections, as well as the possibility for customers to create their own “bundles” by purchasing a partial cabinet from the Exchanges and cross-connecting to a Hosting User’s 40 Gb connections, the Exchanges’ costs in supplying the proposed bundles are simply irrelevant.²¹ Where substitutable services exist, if the Exchanges price their proposed bundles at a higher level than customers are willing to pay, the customers will vote with their feet and seek 40 Gb connections from one of the Exchanges’ competitors.

In sum, the Proposals clearly demonstrate the existence of competition from third parties that can and do provide substitutes for the services in the Proposals.

5. Disapproval of the Proposal Would Harm Competition

As detailed above, the competitive market for partial cabinet bundles that contain 40 Gb connections is already hobbled by the fact that Hosting Users can provide such bundles, while the Exchanges themselves cannot. As noted, such Hosting Users are not regulated by the Commission, and are free to negotiate individual rates, increase prices, or favor some customers with faster connections. The Exchanges’ proposal, in contrast, would establish transparent, consistent pricing for two defined PCS bundles with 40 Gb connections, thereby increasing the number of competitors providing such services and possibly disciplining the Hosting Users’ tailored pricing practices.

Additionally, the Commission may have lost sight of the fact that, like the existing PCS bundles, proposed Options E and F are designed to make it more cost effective for Users with minimal power or cabinet space demands to take advantage of the option for colocation services. Without the availability of Options E and F, Users that would find those options useful for their business needs would be forced to use an alternative provider of substitute services, or to forego the bundle option entirely and purchase from the Exchanges a partial cabinet, 40 Gb connections, and cross-connects, all for much higher fees than the proposed fees for Options E and F.

²¹ NetCoalition I, 615 F.3d at 535.

Where the Commission has already determined, in 2016, that partial cabinet solution bundles aimed at customers with minimal power or cabinet space demands are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest,²² it makes no sense that the Commission would find the current Proposals to be inconsistent with the Act.

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For the foregoing reasons and the reasons stated in the Proposals, the Exchanges request that the Proposals be approved.

Respectfully submitted,



Elizabeth K. King

cc: Honorable Gary Gensler, Chair
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
David Saltiel, Acting Director, Division of Trading and Markets

²² See Securities Exchange Act Release No. 77072 (February 5, 2016), 81 FR 7394, 7397 (February 11, 2016) (SR-NYSE-2015-53).