

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-92033; File Nos. SR-NYSE-2021-14, SR-NYSEAMER-2021-10, SR-NYSEArca-2021-13, SR-NYSECHX-2021-03, SR-NYSENAT-2021-04)

May 26, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Circuits for Connectivity Into and Out of the Data Center in Mahwah, New Jersey

I. Introduction

On February 12, 2021, New York Stock Exchange LLC (“NYSE”), NYSE American LLC (“NYSE American”), NYSE Arca, Inc. (“NYSE Arca”), NYSE Chicago, Inc. (“NYSE Chicago”), and NYSE National, Inc. (“NYSE National”) (collectively, the “Exchanges”) each filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend their schedule of Wireless Connectivity Fees and Charges (“Fee Schedule”) to (1) add circuits for connectivity into and out of the data center in Mahwah, New Jersey (“Mahwah Data Center”); (2) add services available to customers of the Mahwah Data Center that are not colocation Users; and (3) change the name of the Fee Schedule to “Mahwah Wireless, Circuits, and Non-Colocation Connectivity Fees and Charges.” The proposed rule changes were published for comment in the Federal Register on March 4, 2021.<sup>3</sup>

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release Nos. 91217 (February 26, 2021), 86 FR 12715 (March 4, 2021) (SR-NYSE-2021-14) (“Notice”); 91218 (February 26, 2021), 86 FR 12744 (March 4, 2021) (SR-NYSEAMER-2021-10); 91216 (February 26, 2021), 86 FR 12735 (March 4, 2021) (SR-NYSEArca-2021-13); 91219 (February 26, 2021), 86 FR 12724 (March 4, 2021) (SR-NYSECHX-2021-03); and 91215 (February 26, 2021), 86 FR 12752 (March 4, 2021) (SR-NYSENAT-2021-04) (collectively, the “Notices”).

On April 7, 2021, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to either approve the proposed rule changes, disapprove the proposed rule changes, or institute proceedings to determine whether to disapprove the proposed rule changes.<sup>5</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule changes.

## II. Description of the Proposed Rule Changes

The Exchanges propose to amend the Fee Schedule to add services (“NCL Services”) and related fees available to customers of the data center in Mahwah Data Center that are not colocation Users (“NCL Customers”), as well as circuits into and out of the Mahwah Data Center that are available to both colocation Users and NCL Customers.<sup>7</sup> The Exchanges also propose changing the name of the Fee Schedule from “Wireless Connectivity Fees and Charges” to “Mahwah Wireless, Circuits, and Non-Colocation Connectivity Fees and Charges.”<sup>8</sup> The

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Comments received on the Notices are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2021-14/srnyse202114.htm>. For ease of reference, citations to the Notice(s) are to the Notice for SR-NYSE-2021-14.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 91490 (April 7, 2021), 86 FR 19313 (April 13, 2021). The Commission designated June 2, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Notice, *supra* note 3, at 12715. For purposes of the Exchanges’ colocation services, a “User” means any market participant that requests to receive colocation services directly from the Exchanges. See *id.* at 12715 n.4 (citing Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40)). NCL Customers do not co-locate any equipment in the Mahwah Data Center. See *id.* at 12720 n.10.

<sup>8</sup> See *id.* at 12715-16.

Exchanges expect the proposed changes to be operative 60 days after the proposed rule changes become effective.<sup>9</sup>

The Exchanges state that they make the current proposals solely as a result of their determination that the Commission’s interpretations of the Act’s definitions of the terms “exchange”<sup>10</sup> and “facility”<sup>11</sup> apply to connectivity services described herein that are offered by entities other than the Exchanges.<sup>12</sup> The Exchanges state that they disagree with the Commission’s interpretations, deny the services covered herein are offerings of an “exchange” or a “facility” thereof, and have sought review of the Commission’s interpretations as expressed in the Wireless Approval Order in the Court of Appeals for the District of Columbia Circuit.<sup>13</sup>

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<sup>9</sup> See *id.* at 12716.

<sup>10</sup> See 15 U.S.C. 78c(a)(1) (“The term ‘exchange’ means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.”).

<sup>11</sup> See 15 U.S.C. 78c(a)(2) (“The term ‘facility’ when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.”).

<sup>12</sup> See Notice, *supra* note 3, at 12716; see also Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044 (October 21, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT-2020-08) (“Wireless Approval Order”).

<sup>13</sup> See Notice, *supra* note 3, at 12716; see also *Intercontinental Exchange, Inc. v. SEC*, No. 20-1470 (D.C. Cir. 2020).

A. Mahwah Circuits

According to the Exchanges, customers can connect into and out of the Mahwah Data Center using either wireless connections or wired fiber optic circuits.<sup>14</sup> Both ICE Data Services (“IDS”)<sup>15</sup> and third-party telecommunications service providers offer wired circuits into and out of the Mahwah Data Center.<sup>16</sup> The Exchanges propose to add to the Fee Schedule the circuit options offered by IDS to both colocation Users and NCL Customers to connect into and out of the Mahwah Data Center.<sup>17</sup>

Specifically, the Exchanges propose to amend the Fee Schedule to add two different types of circuits, each available in three different sizes, under the new heading “C. Mahwah Circuits.”<sup>18</sup> First, the Exchanges propose to amend the Fee Schedule to add “Optic Access” circuits, which are circuits that IDS operates and that customers can use to connect between the Mahwah Data Center and IDS access centers at six third-party owned data centers.<sup>19</sup> Second, the Exchanges propose to amend the Fee Schedule to add lower-latency Optic Low Latency circuits that IDS operates and that customers can use to connect between the Mahwah Data Center and

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<sup>14</sup> See id. at 12716.

<sup>15</sup> IDS operates through several different Intercontinental Exchange, Inc. (“ICE”) affiliates, including NYSE Technologies Connectivity, Inc., an indirect subsidiary of NYSE. The Exchanges themselves are indirect subsidiaries of ICE. See Wireless Approval Order, supra note 12, at 67045.

<sup>16</sup> See Notice, supra note 3, at 12716.

<sup>17</sup> See id.

<sup>18</sup> See id.

<sup>19</sup> These data centers include: (1) 111 Eighth Avenue, New York, NY; (2) 32 Avenue of the Americas, New York, NY; (3) 165 Halsey, Newark, NJ; (4) Secaucus, NJ (the “Secaucus Access Center”); (5) Carteret, NJ (the “Carteret Access Center”); and (6) Weehawken, NJ. Optic Access circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes. See id.

IDS's Secaucus Access Center or Carteret Access Center.<sup>20</sup> The Exchanges propose to add a chart to the Fee Schedule to include these circuits, setting forth each type of service and the associated amounts of initial plus monthly fees.<sup>21</sup>

B. Non-Colocation Services

The Exchanges propose to amend the Fee Schedule to add several services available to NCL Customers as well as several notes under the new heading "D. Non-Colocation ("NCL") Services."<sup>22</sup> According to the Exchanges, these are the services that IDS offers within the Mahwah Data Center that are not colocation services.<sup>23</sup>

1. IDS Network Ports

The Exchanges propose to amend the Fee Schedule to add services that IDS offers enabling NCL Customers to connect to the IDS Network in the Mahwah Data Center.<sup>24</sup> The Exchanges describe the "IDS Network" as a wide area network available in the Mahwah Data Center and other access centers.<sup>25</sup> The Exchanges propose to add a chart to the Fee Schedule

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<sup>20</sup> Optic Low Latency circuits are available in 1 Gb, 10 Gb, and 40 Gb sizes. See id.

<sup>21</sup> The proposed types of services and amounts of charges are as follows: Optic Access Circuit - 1 Gb (\$1,500 initial charge plus \$1,500 monthly charge); Optic Access Circuit - 10 Gb (\$5,000 initial charge plus \$2,500 monthly charge); Optic Access Circuit - 40 Gb (\$5,000 initial charge plus \$6,000 monthly charge); Optic Low Latency Circuit - 1 Gb (\$1,500 initial charge plus \$2,750 monthly charge); Optic Low Latency Circuit - 10 Gb (\$5,000 initial charge plus \$3,950 monthly charge); and Optic Low Latency Circuit - 40 Gb (\$5,000 initial charge plus \$8,250 monthly charge). See id.

<sup>22</sup> See id.

<sup>23</sup> See id.

<sup>24</sup> See id.

<sup>25</sup> See id.

setting forth and describing each type of IDS Network Port providing NCL Customers access to IDS's network,<sup>26</sup> along with the associated amounts of initial plus monthly fees.<sup>27</sup>

The Exchanges also propose to add to the Fee Schedule several notes regarding these services, which they state are based on General Notes 4, 5, and 6 of the Exchanges' Price List regarding colocation.<sup>28</sup> Specifically, the Exchanges propose to add the heading "NCL Notes" after the tables in the proposed section of the Fee Schedule titled "D. Non-Colocation ("NCL") Services."<sup>29</sup> Proposed Note 1, titled "Note 1: IDS Network," would establish that when an NCL Customer purchases access to the IDS Network, the NCL Customer would receive: (a) the ability to access the trading and execution systems of the Exchanges ("Exchange Systems") as

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<sup>26</sup> A port is connected to a circuit by using a cross connect. See id. at 12720; see also infra note 65 and accompanying text.

<sup>27</sup> The proposed types of services and the Exchanges' descriptions of them, along with the associated amounts of initial plus monthly fees, are as follows: NCL IDS Network Access - 10 Gb, a 10 Gb IDS Network port (\$10,000 initial charge plus \$15,250 monthly charge); and NCL IDS Network Access - 40 Gb, a 40 Gb IDS Network port (\$10,000 initial charge plus \$19,750 monthly charge). See Notice, supra note 3, at 12716-17.

<sup>28</sup> See id. at 12717.

<sup>29</sup> See id.

well as of the Global OTC System (“Global OTC”);<sup>30</sup> and (b) connectivity to any of the listed data products (“Included Data Products”)<sup>31</sup> that it selects.<sup>32</sup>

2. NCL Connectivity to Third Party Systems, Data Feeds, Testing and Certification Feeds, and DTCC

The Exchanges also propose to amend the Fee Schedule to provide for the connectivity services that IDS offers for NCL Customers to Third Party Systems, Third Party Data Feeds, third party testing and certification feeds, and DTCC (each as defined below).<sup>33</sup>

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<sup>30</sup> Proposed Note 1 states that when an NCL Customer purchases access to the IDS Network, it receives the ability to access the trading and execution systems of the NYSE, NYSE American, NYSE Arca, NYSE Chicago, and NYSE National (together, the Exchange Systems) as well as of Global OTC (the Global OTC System), subject, in each case, to authorization by the NYSE, NYSE American, NYSE Arca, NYSE Chicago, NYSE National, or Global OTC, as applicable. Proposed Note 1 also states that each Exchange listed above offers access to its Exchange Systems to its members and Global OTC offers access to the Global OTC System to its subscribers, such that an NCL Customer does not have to purchase a service that includes access to the IDS Network to obtain access to Exchange Systems or the Global OTC System. See id.

<sup>31</sup> Proposed Note 1 provides that these “Included Data Products” are as follows: NMS feeds – CTS, CQS, and OPRA; NYSE; NYSE American; NYSE American Options; NYSE Arca; NYSE Arca Options; NYSE Best Quote and Trades (BQT); NYSE Bonds; NYSE Chicago; and NYSE National. See id.

<sup>32</sup> Proposed Note 1 also states that when an NCL Customer purchases access to the IDS Network, it receives connectivity to any of the Included Data Products that it selects, subject to any necessary technical provisioning requirements, authorization, and licensing by the provider of the Included Data Feed. Fees for the Included Data Products are charged by the provider of such Included Data Products. An NCL Customer can change the Included Data Products to which it receives connectivity at any time, subject to authorization from the provider of such Included Data Product. Proposed note 1 also states that because access to the IDS Network is not the exclusive method to connect to the Included Data Products, an NCL Customer does not have to purchase a service that includes access to the IDS Network to connect to such Included Data Products. See id.

<sup>33</sup> The Exchanges state that they propose to adopt substantially similar services and fees as set forth in the Exchanges’ Price List regarding colocation. See id. (citing Securities Exchange Act Release No. 80311 (March 24, 2017), 82 FR 15749 (March 30, 2017) (SR-NYSE-2016-45)).

a. Connectivity to Third Party Systems

The Exchanges propose to specify in the Fee Schedule services that IDS offers NCL Customers to access the trading and execution services of Third Party markets and other content service providers (“Third Party Systems”) for a fee.<sup>34</sup> According to the Exchanges, NCL Customers connect to Third Party Systems over the IDS Network.<sup>35</sup> The Exchanges state that IDS charges a monthly recurring fee for connectivity to a Third Party System, which the Exchanges propose to add to their Fee Schedule.<sup>36</sup> The Exchanges propose to add a chart to the Fee Schedule setting forth a description of each type of connectivity service to Third Party Systems over the IDS Network, along with the associated amount of monthly fees per connection.<sup>37</sup>

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<sup>34</sup> See id.

<sup>35</sup> The Exchanges state that in order to obtain access to a Third Party System, an NCL Customer enters into an agreement with the relevant third-party content service provider, pursuant to which the third-party content service provider charges the NCL Customer for access to the Third Party System. When such services are requested, IDS establishes a connection between the NCL Customer and the relevant third party content service provider over the IDS Network. IDS charges the NCL Customer for the connectivity to the Third Party System. An NCL Customer only receives, and is only charged by IDS for, connectivity to each Third Party System for which the customer enters into an agreement with the third-party content service provider. According to the Exchanges, neither the Exchanges nor IDS has an affiliation with the providers of the Third Party Systems. Establishing an NCL Customer’s access to a Third Party System does not give either IDS or the Exchanges any right to use the Third Party Systems. Connectivity to a Third Party System does not provide access or order entry to the Exchange’s execution system, and an NCL Customer’s connection to a Third Party System is not through the Exchange’s execution system. See id.

<sup>36</sup> Specifically, when an NCL Customer requests access to a Third Party System, IDS identifies the applicable third-party market or other content service provider and the bandwidth connection it requires. See id.

<sup>37</sup> The Exchanges propose the following monthly fees per connection: 1Mb (\$200 per connection monthly charge); 3Mb (\$400 per connection monthly charge); 5Mb (\$500 per connection monthly charge); 10Mb (\$800 per connection monthly charge); 25Mb (\$1,200 per connection monthly charge); 50Mb (\$1,800 per connection monthly charge); 100Mb



The Exchanges also propose to add Note 2, titled “Note 2: Third Party Systems,” to the section of the Fee Schedule titled “D. Non-Colocation (“NCL”) Services,” which would provide that when an NCL Customer purchases a connection that includes access to Third Party Systems, it receives access to Third Party Systems it selects subject to any technical provisioning requirements, authorization, and licensing from such Third Party System.<sup>38</sup> Proposed Note 2 also provides that fees for the Third Party Systems are charged by the provider of such Third Party System.<sup>39</sup> In addition, proposed Note 2 states that the Exchanges are not the exclusive method to connect to Third Party Systems.<sup>40</sup>

b. Connectivity to Third Party Data Feeds

The Exchanges propose to specify in the Fee Schedule connectivity services that IDS offers NCL Customers to connect to data feeds from third-party markets and other content

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(\$2,500 per connection monthly charge); 200Mb (\$3,000 per connection monthly charge); and 1Gb, \$3,500 per connection monthly charge. See id. at 12717-18.

<sup>38</sup> See id. at 12718.

<sup>39</sup> See id.

<sup>40</sup> Proposed Note 2 would further provide that these “The Third Party Systems” are as follows: American Trading Group (ATG); BM&F Bovespa; Boston Options Exchange (BOX), Canadian Securities Exchange (CSE); Cboe BYX Exchange (CboeBYX), Cboe BZX Exchange (CboeBZX), Cboe EDGA Exchange (CboeEDGA), and Cboe EDGX Exchange (CboeEDGX); Cboe Exchange (Cboe) and Cboe C2 Exchange (C2); Chicago Mercantile Exchange (CME Group); Credit Suisse; Euronext Optiq Cash and Derivatives Unicast (EUA); Euronext Optiq Cash and Derivatives (Production); Investor Exchange (IEX); ITG TriAct Matchnow; Long Term Stock Exchange (LTSE); Members Exchange (MEMX); MIAX Options, MIAX PEARL Options, MIAX PEARL Equities, and MIAX Emerald; Morgan Stanley; Nasdaq; NASDAQ Canada (CXC, CXD, CX2); NASDAQ ISE; Neo Aequitas; NYFIX Marketplace; Omega; OneChicago; OTC Markets Group; TD Ameritrade; and TMX Group. See id.

service providers (“Third Party Data Feeds”) for a fee.<sup>41</sup> According to the Exchanges, NCL Customers connect to Third Party Data Feeds over the IDS Network.<sup>42</sup>

The Exchanges state that IDS charges a monthly recurring fee for connectivity to each Third Party Data Feed.<sup>43</sup> Third Party Data Feed providers may charge redistribution fees.<sup>44</sup> The Exchanges propose that, when IDS is charged a redistribution fee by the Third Party Data Feed provider, IDS would pass through the charge to the NCL Customer, without change to the fee.<sup>45</sup>

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<sup>41</sup> See id.

<sup>42</sup> The Exchanges state that IDS receives Third Party Data Feeds from multiple national securities exchanges and other content service providers at the Mahwah Data Center, and provides connectivity to that data to NCL Customers for a fee. According to the Exchanges, in order to connect to a Third Party Data Feed, an NCL Customer enters into a contract with the relevant third-party market or other content service provider, pursuant to which the content service provider charges the NCL Customer for the Third Party Data Feed. IDS receives the Third Party Data Feed over its fiber optic network and, after the data provider and NCL Customer enter into an agreement and IDS receives authorization from the data provider, IDS retransmits the data to the NCL Customer over the NCL Customer’s IDS Network port. IDS charges the NCL Customer for the connectivity to the Third Party Data Feed. An NCL Customer only receives, and is only charged for, connectivity to the Third Party Data Feeds for which it entered into contracts. With the exception of the IDS, ICE, and Global OTC feeds, neither the Exchanges nor IDS has any affiliation with the sellers of the Third Party Data Feeds. The Exchanges and IDS have no right to use the Third Party Data Feeds other than as a redistributor of the data. The Third Party Data Feeds do not provide access or order entry to the Exchange’s execution system. With the exception of the ICE feed, the Third Party Data Feeds do not provide access or order entry to the execution systems of the third party generating the feed. The Exchanges further represent that IDS receives Third Party Data Feeds via arms-length agreements and has no inherent advantage over any other distributor of such data. See id.

<sup>43</sup> The monthly recurring fee is per Third Party Data Feed, with the exception that the monthly recurring fee for the ICE Data Services Consolidated Feeds (including the ICE Data Services Consolidated Feed Shared Farm feeds), Vela – SuperFeeds, and MSCI feeds vary by the bandwidth of the connection. According to the Exchanges, depending on its needs and bandwidth, an NCL Customer may opt to receive all or some of the Third Party Data Feeds. See id.

<sup>44</sup> See id.

<sup>45</sup> The fee would be labeled as a pass-through of a redistribution fee on the NCL Customer’s invoice. See id.

In addition, the Exchanges propose they it would not charge NCL Customers that are third-party markets or content providers for connectivity to their own feeds, as the Exchanges maintain that such parties generally receive their own feeds for purposes of diagnostics and testing.<sup>46</sup> The Exchanges propose to add a chart to the Fee Schedule setting forth a description of each type of connectivity service to Third Party Feeds over the IDS Network, along with the associated amount of monthly fees.<sup>47</sup>

The Exchanges also propose to add Note 3, titled “Note 3: Third Party Systems,” to the section of the Fee Schedule titled “D. Non-Colocation (“NCL”) Services.”<sup>48</sup> Proposed Note 3

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<sup>46</sup> See id.

<sup>47</sup> The proposed descriptions of these services and associated amount of monthly fees are as follows: BM&F Bovespa (\$3,000); Boston Options Exchange (BOX) (\$1,000); Canadian Securities Exchange (CSE) (\$1,000); Cboe BZX Exchange (CboeBZX) and Cboe BYX Exchange (CboeBYX) (\$2,000); Cboe EDGX Exchange (CboeEDGX) and Cboe EDGA Exchange (CboeEDGA)(\$2,000); Cboe Exchange (Cboe) and Cboe C2 Exchange (C2) (\$2,000); CME Group (\$3,000); Euronext Optiq Compressed Cash (\$900); Euronext Optiq Compressed Derivatives (\$600); Euronext Optiq Shaped Cash (\$1,200); Euronext Optiq Shaped Derivatives (\$900); Financial Industry Regulatory Authority (FINRA) (\$500); Global OTC (\$100); ICE Data Services Consolidated Feed ≤ 100 Mb (\$200); ICE Data Services Consolidated Feed > 100 Mb to ≤1 Gb (\$500); ICE Data Services Consolidated Feed > 1 Gb (\$1,000); ICE Data Services Consolidated Feed Shared Farm ≤ 100Mb (\$200); ICE Data Services Consolidated Feed Shared Farm > 100 Mb to ≤ 1 Gb (\$500); ICE Data Services Consolidated Feed Shared Farm > 1 Gb (\$1,000); ICE Data Services - ICE TMC (\$200); ICE Data Services PRD (\$200); ICE Data Services PRD CEP (\$400); Intercontinental Exchange (ICE) (\$1,500); Investors Exchange (IEX) (\$1,000); ITG TriAct Matchnow (\$1,000); Members Exchange (MEMX) (\$3,000); MIAX Emerald (\$3,500); MIAX Options/MIAX PEARL Options (\$2,000); MIAX PEARL Equities (\$2,500); Montréal Exchange (MX) (\$1,000); MSCI 5 Mb (\$500); MSCI 25 Mb (\$1,200); NASDAQ Stock Market (\$2,000); NASDAQ OMX Global Index Data Service (\$100); NASDAQ UQDF & UTDF (\$500); NASDAQ Canada (CXC, CXD, CX2) (\$1,500); NASDAQ ISE (\$1,000); Neo Aequitas (\$1,200); Omega (\$1,000); OneChicago (\$1,000); OTC Markets Group (\$1,000); Vela – SuperFeed <500 Mb (\$250); Vela – SuperFeed >500 Mb to <1.25 Gb (\$800); Vela – SuperFeed >1.25 Gb (\$1,000); and TMX Group (\$2,500). See id. at 12718-19.

<sup>48</sup> See id. at 12719.

would provide that pricing for data feeds from third party markets and other service providers (Third Party Data Feeds) is for connectivity only, which is subject to any technical provisioning requirements, authorization, and licensing from the provider of the data feed, and is over the IDS Network.<sup>49</sup> Proposed Note 3 would also state that fees for Third Party Data Feeds are charged by the provider of such data feeds,<sup>50</sup> as well as that IDS is not the exclusive method to connect to Third Party Data Feeds.<sup>51</sup>

c. Connectivity to Third Party Data Testing and Certification Feeds

The Exchanges propose to specify in the Fee Schedule that NCL Customers may obtain connectivity to third-party testing and certification feeds.<sup>52</sup> According to the Exchanges, certification feeds are used to certify that an NCL Customer conforms to any of the relevant content service provider's requirements for accessing Third Party Systems or receiving Third Party Data Feeds, while testing feeds would provide NCL Customers an environment in which to conduct tests with non-live data.<sup>53</sup> The Exchanges state that such feeds, which are solely used for certification and testing and do not carry live production data, are available over the IDS

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<sup>49</sup> See id.

<sup>50</sup> Proposed Note 3 further provides that Third Party Data Feed providers may charge redistribution fees, and that when IDS is charged a redistribution fee, IDS passes the charge through to the customer, without change to the fee. The fee is labeled as a pass-through of a redistribution fee on the customer's invoice. Proposed Note 3 also states that IDS does not charge third party markets or content providers for connectivity to their own feeds. See id.

<sup>51</sup> See id.

<sup>52</sup> See id.

<sup>53</sup> See id.

Network.<sup>54</sup> The Exchanges propose to add a \$100 monthly recurring charge per feed for connectivity to Third Party Testing and Certification Feeds to the Fee Schedule.<sup>55</sup>

d. Connectivity to DTCC

The Exchanges propose to specify in the Fee Schedule services that IDS provides to connect NCL Customers to Depository Trust & Clearing Corporation (“DTCC”) for clearing, fund transfer, insurance, and settlement services.<sup>56</sup> IDS charges the NCL Customer for the connectivity to DTCC.<sup>57</sup> The Exchanges propose to add a \$500 monthly recurring charge for a 5 Mb connection to DTCC and a \$2,500 monthly recurring charge for a 10 Mb connection to DTCC to the Fee Schedule.<sup>58</sup>

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<sup>54</sup> The Exchanges state that connectivity to third party testing and certification feeds would be subject to any technical provisioning requirements, authorization, and licensing from the provider of the data feed; fees for such feeds are charged by the provider of the feed; and the Exchanges are not the exclusive method to connect to third-party testing and certification feeds. See id.

<sup>55</sup> See id.

<sup>56</sup> According to the Exchanges, in order to connect to DTCC, an NCL Customer enters into a contract with DTCC, pursuant to which DTCC charges the NCL Customer for the services provided. IDS receives the DTCC feed over its fiber optic network and, after DTCC and the NCL Customer entered into the services contract and IDS received authorization from DTCC, IDS provides connectivity to DTCC to the NCL Customer over the NCL Customer’s IDS Network port. The Exchanges state that connectivity to DTCC does not provide access or order entry to the Exchanges’ execution systems, and an NCL Customer’s connection to DTCC is not through the Exchanges’ execution systems. See id. at 12719-20.

<sup>57</sup> The Exchanges state that connectivity to DTCC is subject to any technical provisioning requirements, authorization, and licensing from DTCC; fees for such feeds are charged by DTCC; and IDS is not the exclusive provider to connect to DTCC feeds. See id. at 12720.

<sup>58</sup> See id.

### 3. NCL NMS Network Ports

The Exchanges propose to amend the Fee Schedule to add services that IDS currently offers enabling NCL Customers to connect to the NMS feeds for which the Securities Industry Automation Corporation is engaged as the securities information processor (the “NMS Network”) in the Mahwah Data Center.<sup>59</sup> The Exchanges propose to add a chart to the Fee Schedule setting forth and describing each type of NCL NMS Network Port providing NCL Customers access to the NCL NMS Network, along with the associated amounts of initial plus monthly fees.<sup>60</sup>

The Exchanges also propose to add Note 4, titled “Note 4: NMS Network,” to the section of the Fee Schedule titled “D. Non-Colocation (“NCL”) Services,” establishing that when an NCL Customer purchases an NMS Network port, it has the option of receiving the NMS feeds over the NMS Network.<sup>61</sup> Proposed Note 4 would provide that when an NCL Customer purchases access to the NMS Network, upon its request, it will receive connectivity to any of the NMS feeds that it selects, subject to any necessary technical provisioning requirements, authorization, and licensing from the provider of such NMS feed.<sup>62</sup> Proposed Note 4 would also state that fees for the NMS feeds are charged by the provider of such NMS feed.<sup>63</sup>

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<sup>59</sup> See id.

<sup>60</sup> The Exchanges propose a \$10,000 initial charge plus \$11,000 monthly charge for a 10 Gb NCL NMS Network port, and a \$10,000 initial charge plus \$18,000 monthly charge for a 40 Gb NCL NMS Network port. See id.

<sup>61</sup> See id.

<sup>62</sup> Proposed Note 4 would further provide that these NMS feeds are as follows: CTS; CQS; and OPRA. See id.

<sup>63</sup> See id.

4. NCL Cross Connect

The Exchanges propose to amend the Fee Schedule to specify fiber cross connect services that IDS offers NCL Customers for an initial and monthly charge.<sup>64</sup> A cross connect is used to connect a circuit to a port, the Exchanges state, and NCL Customers use such cross connects to connect from the IDS Network or NMS Network to a circuit connecting outside the Mahwah Data Center.<sup>65</sup> According to the Exchanges, the proposed fees for this service would be identical to the fees for the corresponding service in colocation.<sup>66</sup> The Exchanges propose to add a \$500 initial charge plus a \$600 monthly charge to furnish and install one NCL Cross Connect to the Fee Schedule.<sup>67</sup>

5. NCL Expedite Fee

The Exchanges propose to amend the Fee Schedule to specify optional services that IDS offers NCL Customers to expedite the completion of services purchased or ordered by the NCL Customer, for which IDS charges an “Expedite Fee.”<sup>68</sup> If an NCL Customer wishes to obtain NCL Services earlier than the expected completion date, the NCL Customer may pay the

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<sup>64</sup> See id. According to the Exchanges, because NCL Customers do not co-locate any equipment in the Mahwah Data Center, they generally require fewer fiber cross connects than colocation Users. Hence, the Exchanges do not propose amending the Fee Schedule to include bundles of 6, 12, 18, or 24 cross connects as are available to colocation Users. See id. at 12720 n.10.

<sup>65</sup> See id. at 12720.

<sup>66</sup> See id.

<sup>67</sup> See id.

<sup>68</sup> According to the Exchanges, the proposed fees would be similar to the “Expedite Fee” applicable to Users in colocation. See id. (citing Securities Exchange Act Release No. 67666 (August 15, 2012), 77 FR 50742 (August 22, 2012) (SR-NYSE-2012-18)).

Expedite Fee.<sup>69</sup> The Exchanges propose to add a \$4,000 per request charge for expedited installation/completion of a customer’s NCL service to the Fee Schedule.<sup>70</sup>

6. NCL Change Fee

The Exchanges propose to amend the Fee Schedule to specify the “Change Fee” that IDS charges an NCL Customer if the NCL Customer requests a change to one or more existing NCL Services that IDS has already established or completed for the NCL Customer.<sup>71</sup> The Exchanges propose to add a \$950 per request charge to change an NCL service that has already been installed/completed for a customer to the Fee Schedule.<sup>72</sup>

C. Fee Schedule Name

Finally, the Exchanges propose change the name of the Fee Schedule from “Wireless Connectivity Fees and Charges” to “Mahwah Wireless, Circuits, and Non-Colocation

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<sup>69</sup> The Exchanges state that the time saved would vary depending on the type(s) of service(s) ordered, but the Expedite Fee would always be a flat \$4,000, allowing the NCL Customer to determine if the expected time savings warrants payment of the fee. See id.

<sup>70</sup> See id.

<sup>71</sup> The Exchanges state that several of the proposed services that would be added to the Fee Schedule include an initial fee in addition to an ongoing monthly fee. These initial fees are related to IDS’s initial cost of establishing or installing a particular service for the NCL Customer. IDS charges a fee of \$950 per order if the NCL Customer requests a change to one or more existing NCL Services that IDS has already established or completed for the NCL Customer. According to the Exchanges, this is similar to the “Change Fee” applicable to Users in colocation. For example, the initial installation of an IDS Network connection would include establishing and configuring market data services requested by the NCL Customer, which would be covered by the initial install fee. However, if the NCL Customer requests that IDS establish and configure additional market data services for its IDS Network connection, the NCL Customer would be charged a one-time Change Fee of \$950 for that request. If an NCL Customer orders two or more services at one time (for example, through submitting an order form requesting multiple services), the NCL Customer would be charged a one-time Change Fee of \$950, which would cover the multiple services. See id. at 12720-21.

<sup>72</sup> See id. at 12721.



Connectivity Fees and Charges,” since the Fee Schedule will no longer be limited to wireless services.<sup>73</sup>

### III. Exchanges’ Justification and Comments Received

The Exchanges generally argue that the proposed rule changes are reasonable, equitable, and not unfairly discriminatory because use of the proposed services is completely voluntary and alternatives to them are available.<sup>74</sup> According to the Exchanges, IDS operates in a highly competitive market in which exchanges, third party telecommunications providers, Hosting Users,<sup>75</sup> and other third-party vendors offer connectivity services as a means to facilitate the trading and other market activities of market participants.<sup>76</sup> With these proposals, the Exchanges assert that market participants would have more choices with respect to the form and price of the services they use, allowing market participants to select the services and connectivity options that better suit their needs, thereby helping them tailor their connectivity operations to the requirements of their businesses.<sup>77</sup> In any case, the Exchanges state that there are currently few

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<sup>73</sup> See id.

<sup>74</sup> See id.

<sup>75</sup> “Hosting” is a service offered by a User to another entity in the User’s space within the Mahwah Data Center. The Exchanges allow Users to act as Hosting Users for a monthly fee. See id. (citing Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40)).

<sup>76</sup> See id. In this regard, the Exchanges maintain that most of the third-party telecommunications providers that provide circuits do so at fees lower than those proposed herein, and that most NCL Customers and colocation Users use such third party telecommunication circuits into and out of the Mahwah Data Center. See id. at 12722.

<sup>77</sup> See id. at 12723. More generally, the Exchanges maintain that market participants consider various factors in determining which connectivity options to choose, including latency; bandwidth size; amount of network uptime; the equipment that the network uses; the cost of the connection; and the applicable contractual provisions. See id. at 12722.

NCL Customers, and thus expect that the impact of the proposals would be minimal.<sup>78</sup>

With respect to the competitive environment, the Exchanges maintain generally that the proposed rule changes are reasonable because the proposed fees are constrained by competition.<sup>79</sup> In this regard, the Exchanges argue that the proposed services are voluntary and available to all market participants on an equal basis.<sup>80</sup> In addition, the Exchanges provide some cost-based justifications throughout for why the proposals are reasonable, claiming that offering the proposed services requires the provision, maintenance, and operation of the Mahwah Data Center, including the installation, monitoring, support, and maintenance of the proposed services.<sup>81</sup> The Exchanges also assert that various of the proposed changes to the Fee Schedule would provide market participants with greater transparency and clarity.<sup>82</sup>

The Exchanges argue that the proposals provide for an equitable allocation of fees and are not unfairly discriminatory, again contending that the proposed services are voluntary and available to all market participants on an equal basis.<sup>83</sup> The Exchanges claim that the proposed rule changes do not apply differently to distinct types or sizes of market participants, but rather apply to all market participants equally, and state that the Fee Schedule would be applied uniformly to all market participants.<sup>84</sup>

Lastly, the Exchanges argue that the proposed rule changes do not impose an unnecessary

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<sup>78</sup> See id. at 12721.

<sup>79</sup> See id. at 12721-22.

<sup>80</sup> See id. at 12721.

<sup>81</sup> See id. at 12721-23.

<sup>82</sup> See id. at 12722.

<sup>83</sup> See id. at 12723.

<sup>84</sup> See id.

or inappropriate burden on competition because there are numerous other third parties that provide circuits and connectivity at the Mahwah Data Center, with whom IDS competes for the provision of such services to customers.<sup>85</sup> According to the Exchanges, the proposals do not affect competition among national securities exchanges or among members of the Exchanges, but rather the Exchanges' filing of the proposals puts IDS at a competitive disadvantage relative to its commercial competitors that are not subject to filing requirements of Section 19(b) of the Act.<sup>86</sup>

The Commission has received one comment letter regarding the proposed rule changes.<sup>87</sup> This commenter argues that the Exchanges have failed to demonstrate that the proposed rule changes are consistent with the Act.<sup>88</sup> The commenter asserts that the proposals are not transparent as to whether they are only prospective, or whether and to what extent they cover services and fees that are already in effect.<sup>89</sup>

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<sup>85</sup> See id. at 12724.

<sup>86</sup> See id. at 12723-24.

<sup>87</sup> Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC ("IEX") to Vanessa Countryman, Secretary, Commission, dated March 25, 2021 ("IEX Letter").

<sup>88</sup> See id. at 1, 4-5. The commenter also disputes the Exchanges' assertion that the proposed services are not offerings of an "exchange" or a "facility" thereof. See id. at 2; see also supra notes 10-13 and accompanying text.

<sup>89</sup> This commenter states that it is important for providing informed comment on the proposals that the Exchanges be clear as to whether they are seeking retroactive approval of offerings and fees that are already in effect, and if so, understanding their history. The commenter states that the Exchanges should at a minimum explain: which fees are already in effect and how long have they been in effect; if previously charged by an entity other than IDS, by which entity, and what the purpose was for the change in entity; and if any specific fees have increased, what the dates and amounts of the increases were, as well as the reasons for such increases. See IEX Letter at 2.

This commenter further argues that the Exchanges' competition- and cost-based justifications for the proposals amount to conclusory assertions.<sup>90</sup> The commenter maintains that the Exchanges do not specifically assert that other service providers can offer the ability to transmit data or messages into or out of the Mahwah Data Center as quickly and efficiently as IDS can.<sup>91</sup> With respect to competition, the commenter states that the Exchanges should explain the following: who the other competing providers are and which, if any of them, provide all of the same functionality as is provided by IDS in terms of access to exchange systems, third market systems, and market data; how the fees for the services compare to the prices charged by competing providers for the same or similar services; and whether competing providers have the ability to provide services that are equivalent to the services in terms of latency or other characteristics, and if so, the basis for that conclusion (and if not equivalent, what differences there are and how they affect the question of whether the fees charged are fair and reasonable).<sup>92</sup> The commenter also notes the Exchanges' claim that third-party providers of circuits in the Mahwah Data Center charge lower fees than IDS, and argues that this raises the question of why IDS is able to charge more and what benefits IDS may be able to provide that third parties cannot.<sup>93</sup>

Moreover, the commenter argues that the Exchanges have not provided any quantitative or other specific information to support their argument that fees for the proposed services are reasonable because of the need to recover data center costs.<sup>94</sup> The commenter states that the

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<sup>90</sup> See id. at 3.

<sup>91</sup> See id. at 4.

<sup>92</sup> See id.

<sup>93</sup> See id.; see also supra note 76.

<sup>94</sup> See IEX Letter at 3.

following information would be relevant with respect to the Exchanges' cost-based arguments: which cost components the Exchanges believe are relevant to the services and why; the amount of those costs over some specified period of recent time (e.g., during the last year); and how those costs compare to the amount of fees from the services that has been collected or is expected to be collected over the same time period.<sup>95</sup>

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Changes

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the Exchanges' proposed rule changes should be approved or disapproved.<sup>96</sup> Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>97</sup> 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

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<sup>95</sup> See id.

<sup>96</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>97</sup> Id. Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”<sup>98</sup>

- 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;”<sup>99</sup> 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].”<sup>100</sup>

As discussed in Section III above, the Exchanges made various arguments in support of the proposals and the Commission received a comment letter that expressed concerns regarding the proposals, including that the Exchanges did not provide sufficient information to establish that the proposals are consistent with the Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization [‘SRO’] that proposed the rule change.”<sup>101</sup> The

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<sup>98</sup> 15 U.S.C. 78f(b)(4).

<sup>99</sup> 15 U.S.C. 78f(b)(5).

<sup>100</sup> 15 U.S.C. 78f(b)(8).

<sup>101</sup> 17 CFR 201.700(b)(3).

description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.<sup>102</sup> Any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>103</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act;<sup>104</sup> as well as any other provision of the Act, or the rules and regulations thereunder.

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should

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<sup>102</sup> See id.

<sup>103</sup> See id.

<sup>104</sup> See 15 U.S.C. 78f(b)(4), (5), and (8).

be submitted by [insert date 35 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>105</sup>

The Commission asks that commenters address the sufficiency and merit of the Exchanges' statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposals are consistent with the Act.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Nos. SR-NYSE-2021-14, SR-NYSEAMER-2021-10, SR-NYSEArca-2021-13, SR-NYSECHX-2021-03, SR-NYSENAT-2021-04 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.

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<sup>105</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).



All submissions should refer to File Nos. SR-NYSE-2021-14, SR-NYSEAMER-2021-10, SR-NYSEArca-2021-13, SR-NYSECHX-2021-03, and SR-NYSENAT-2021-04. The file numbers should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchanges. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make publicly available. All submissions should refer to File Nos. SR-NYSE-2021-14, SR-NYSEAMER-2021-10, SR-NYSEArca-2021-13, SR-NYSECHX-2021-03, and SR-NYSEENAT-2021-04 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>106</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>106</sup> 17 CFR 200.30-3(a)(57).