

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-93810; File Nos. SR-NYSE-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, SR-NYSENAT-2021-23)

December 17, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Offer Wireless Connectivity to CME Group Data and Establish Associated Fees

I. Introduction

On November 3, 2021, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (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 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend their respective fee schedules to offer wireless connectivity to CME Group, Inc. (“CME Group”) market data (“CME Group Data”) and establish associated fees. Each proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule changes were published for comment in the Federal Register on November 18, 2021.<sup>4</sup> The Commission received no

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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> 15 U.S.C. 78s(b)(3)(A).

<sup>4</sup> See Securities Exchange Act Release Nos. 93563 (November 12, 2021), 86 FR 64561 (November 18, 2021) (SR-NYSE-2021-67) (“Notice”); 93561 (November 12, 2021), 86 FR 64580 (November 18, 2021) (SR-NYSEAMER-2021-43); 93564 (November 12, 2021), 86 FR 64570 (November 18, 2021) (SR-NYSEArca-2021-97); 93565 (November 12, 2021), 86 FR 64556 (November 18, 2021) (SR-NYSECHX-2021-17); and 93567 (November 12, 2021), 86 FR 64576 (November 18, 2021) (SR-NYSENAT-2021-23). For ease of reference, citations to the Notice(s) are to the Notice for SR-NYSE-2021-67.

comment letters on the proposals. Pursuant to Section 19(b)(3)(C) of the Act,<sup>5</sup> the Commission is hereby: (1) temporarily suspending File Nos. SR-NYSE-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, and SR-NYSEENAT-2021-23; and (2) instituting proceedings to determine whether to approve or disapprove File Nos. SR-NYSE-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, and SR-NYSEENAT-2021-23.

## II. Description of the Proposed Rule Changes

The Exchanges propose to amend their respective fee schedules regarding colocation services and fees to offer Users<sup>6</sup> wireless connectivity to CME Group Data for associated fees.<sup>7</sup> The proposed wireless connection would enable a User to receive CME Group Data<sup>8</sup> in the colocation center in the Mahwah, New Jersey data center (“Mahwah Data Center”).<sup>9</sup>

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

<sup>6</sup> For purposes of the Exchanges’ colocation services, a “User” means any market participant that requests to receive colocation services directly from the Exchanges. See Notice, supra note 4, at 64561 n.4 (citing Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40)).

<sup>7</sup> The Exchanges state that they expect the proposed rule change would become operative no later than March 31, 2022, and that they will announce the date that the wireless connectivity to CME Group Data will be available through a customer notice. See id. at 645621.

<sup>8</sup> The User would pay an unaffiliated third party separately for the data content. See id. at 64562.

<sup>9</sup> See id. The Exchanges state that Intercontinental Exchange, Inc. (“ICE”) operates the Mahwah Data Center through its ICE Data Services (“IDS”) business. The Exchanges themselves are indirect subsidiaries of ICE. According to the Exchanges, the proposed service would be provided by IDS pursuant to an agreement with a non-ICE entity, and IDS does not own the wireless network that would be used to provide the service. See id. at 64561 n.8.

The Exchanges state that the available CME Group Data would not include all possible CME Group data feeds.<sup>10</sup> Rather, the proposed wireless service would only provide connectivity to a selection of CME Group market data for which IDS determines there is User demand.<sup>11</sup> A User would then determine the symbols for which it would receive data, which could include data regarding some or all of the symbols for which IDS provides connectivity.<sup>12</sup>

The Exchanges state that they currently provide Users with wireless connections to eight market data feeds or combinations of feeds from third party markets (“Existing Third Party Data”), as well as wired connections to 43 market data feeds.<sup>13</sup> As with Existing Third Party Data, if a User purchased two wireless connections to CME Group data, it would pay two non-recurring initial charges.<sup>14</sup> Each of these wireless connections would include the use of one port for connectivity to CME Group Data.<sup>15</sup> If a User also connects to Existing Third Party Data, it would not be able to use the same port that it uses for connectivity to CME Group Data to

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<sup>10</sup> According to the Exchanges, there is limited bandwidth available on the wireless network to colocation and currently dozens of CME Group data feeds, so providing connectivity to all of these feeds would use a large amount of bandwidth. See id. at 64562.

<sup>11</sup> The Exchanges state that IDS similarly provides connectivity to a selection of data, rather than entire feeds, over a wireless connection to the Markham, Canada third party data center. See id. The Exchanges also state that they understand that the third parties providing wireless connectivity to CME Group market data to the Mahwah Data Center and other data centers in New Jersey follow a substantially similar model, offering connectivity to a selection of market data rather than entire feeds. See id. at 64562 n.10.

<sup>12</sup> The Exchanges state that they would not have visibility into which portion of the CME Group Data a given User receives. See id. at 64562.

<sup>13</sup> See id.

<sup>14</sup> See id.

<sup>15</sup> A User would not pay a fee for the use of such port. See id.

connect to such Existing Third Party Data,<sup>16</sup> and would receive the use of one port for connectivity to Existing Third Party Data.<sup>17</sup>

For each wireless connection to CME Group Data, the Exchanges propose to charge a User a \$5,000 non-recurring initial charge and a monthly recurring charge of \$6,000.<sup>18</sup>

### III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,<sup>19</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>20</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

In support of the proposed fees, the Exchanges generally argue that they are reasonable, equitable, and not unfairly discriminatory because use of the proposed services is completely

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<sup>16</sup> See id.

<sup>17</sup> See id. at 64562 n.11. The Exchanges state that a User that connects to both CME Group Data and Existing Third Party Data would accordingly have at least two ports, and would not be separately charged for such ports. See id. at 64562. In addition, a User may purchase additional ports. See id. at 64562 n.11.

<sup>18</sup> See id. at 64562. As specified in the Exchanges’ respective fee schedules, a User that incurs colocation fees for a particular colocation service pursuant thereto would not be subject to colocation fees for the same colocation service charged by the other Exchanges. See id. at 64561 n.4

<sup>19</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>20</sup> 15 U.S.C. 78s(b)(1).

voluntary and alternatives to them are available.<sup>21</sup> The Exchanges maintain that they operate in a highly competitive market in which exchanges and other vendors (e.g., Hosting Users<sup>22</sup>) offer colocation services as a means to facilitate the trading and other market activities of those market participants who believe that colocation enhances the efficiency of their operations.<sup>23</sup> The Exchanges maintain that fees charged for co-location services are constrained by active competition for the order flow of, and other business from, such market participants.<sup>24</sup> The Exchanges argue that Users that do not opt to use the Exchange's proposed wireless connection would still be able to obtain CME Group market data using other methods; namely, from another User, a third party wireless connection, or through an IDS or third party fiber connection.<sup>25</sup>

Regarding third party wireless connections, the Exchanges assert that, based on the information available to them, at least one market participant provides wireless connectivity to CME Group market data in the Mahwah Data Center, and does so at the same or similar speed as the proposed connection to CME Group Data and at the same or similar cost.<sup>26</sup> According to the Exchanges, before entering the Mahwah Data Center, the proposed wireless connection would lead to a pole that is owned by a third party and is not on the grounds on the Mahwah Data

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<sup>21</sup> See Notice, supra note 4, at 64563-65.

<sup>22</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, e.g., Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40).

<sup>23</sup> See Notice, supra note 4, at 64563.

<sup>24</sup> See id. at 64565.

<sup>25</sup> See id. at 64563.

<sup>26</sup> See id.

Center, from where a fiber connection would then lead into the Mahwah Data Center.<sup>27</sup> Upon entering the grounds of the Mahwah Data Center, the proposed connection to CME Group Data and the existing third party wireless connection to CME Group Data would follow the same route within the Mahwah Data Center: both would enter through a meet me room, connect to equipment in colocation, and then connect to any Users that are customers.<sup>28</sup> The Exchanges state that therefore they do not believe that IDS has an advantage over the third party in providing the proposed connectivity.<sup>29</sup>

In addition, the Exchanges state that IDS already offers fiber connections to CME Group market data to Users, and believe that at least two third party market participants also offer such fiber connections to CME Group market data.<sup>30</sup> The Exchanges moreover state that a User may create a proprietary wireless connection or connect through another User in order to connect to CME Group market data, and believe that at least two market participants already provide wireless connectivity to CME Group market data to other data centers in New Jersey.<sup>31</sup>

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<sup>27</sup> See id.

<sup>28</sup> See id.

<sup>29</sup> See id.

<sup>30</sup> See id. According to the Exchanges, market participants' considerations in determining what connectivity to purchase may include latency; the amount of network uptime; the equipment that the network uses; the cost of the connection; and the applicable contractual provisions. See id. The Exchanges state that wireless messages have lower latency than messages travelling through fiber optics. The Exchanges also state that, as a general rule, wireless networks have less uptime than fiber networks. See id. at 64562. In this regard, the Exchanges claim that fiber network connections may be more attractive to some market participants, as they are more reliable and less susceptible to weather conditions. See id. at 64563.

<sup>31</sup> See id.

The Exchanges also argue that the proposed pricing is reasonable because it would allow the Exchanges to defray or cover the costs associated with offering Users a wireless connection to CME Group Data, while providing Users the benefit of receiving CME Group Data within colocation and with a lower latency over fiber optic options.<sup>32</sup> In this regard, the Exchanges further claim that in order to offer the proposed wireless connection to CME Group Data, they must provide, maintain, and operate the Mahwah Data Center facility hardware and technology infrastructure.<sup>33</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 that alternatives to them are available.<sup>34</sup> The Exchanges also argue that proposed services would be available to all Users on an equal basis, and that all Users that voluntarily select wireless connections to CME Group Data would be charged the same amount for the same services.<sup>35</sup>

Lastly, the Exchanges argue that the proposed rule changes do not impose an unnecessary or inappropriate burden on competition, likewise contending that the proposed services are voluntary and that alternatives to them are available.<sup>36</sup> The Exchanges reiterate their argument that they operate in a highly competitive market in which exchanges and other vendors offer colocation services as a means to facilitate the trading and other market activities of those market

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<sup>32</sup> See id. at 64563-64. With respect to the proposed non-recurring charge when a User initially purchases a wireless connection to CME Group Data, the Exchanges also state that the costs associated with installing wireless connections are incrementally higher than those associated with installing fiber optics-based solutions. See id. at 64564.

<sup>33</sup> See id.

<sup>34</sup> See id. at 64564-65.

<sup>35</sup> See id.

<sup>36</sup> See id. at 64565.

participants who believe that colocation enhances the efficiency of their operations.<sup>37</sup> According to the Exchanges, the proposals do not affect competition among national securities exchanges or among members of the Exchanges, but rather between IDS and its commercial competitors.<sup>38</sup>

When exchanges file their proposed rule changes with the Commission, including fee filings, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.<sup>39</sup> The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."<sup>40</sup>

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;<sup>41</sup> (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>42</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>43</sup>

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<sup>37</sup> See id.

<sup>38</sup> See id.

<sup>39</sup> See 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

<sup>40</sup> See id.

<sup>41</sup> 15 U.S.C. 78f(b)(4).

<sup>42</sup> 15 U.S.C. 78f(b)(5).

<sup>43</sup> 15 U.S.C. 78f(b)(8).



In temporarily suspending the Exchanges' proposed rule changes, the Commission intends to further consider whether the proposed fees for wireless connectivity to CME Group Data are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>44</sup>

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.<sup>45</sup>

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

In addition to temporarily suspending the proposals, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>46</sup> and 19(b)(2)(B) of the Act<sup>47</sup> to determine whether the Exchanges' proposed rule changes should be approved or disapproved.

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<sup>44</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

<sup>45</sup> For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>46</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>47</sup> 15 U.S.C. 78s(b)(2)(B).

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>48</sup> the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how their proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;<sup>49</sup>
- Whether the Exchanges have demonstrated how their proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>50</sup> and
- Whether the Exchanges have demonstrated how their proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities

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<sup>48</sup> Id. Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

<sup>49</sup> 15 U.S.C. 78f(b)(4).

<sup>50</sup> 15 U.S.C. 78f(b)(5).

exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”<sup>51</sup>

As discussed in Section III above, the Exchanges made various arguments in support of their proposals. The Commission believes that there are questions as to whether the Exchanges have provided sufficient information to demonstrate that the proposed fees are consistent with the Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”<sup>52</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>53</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>54</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that 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

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<sup>51</sup> 15 U.S.C. 78f(b)(8).

<sup>52</sup> 17 CFR 201.700(b)(3).

<sup>53</sup> See id.

<sup>54</sup> See id.

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; as well as any other provision of the Act, or the rules and regulations thereunder.<sup>55</sup>

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [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]. 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>56</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 proposed rule changes are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

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<sup>55</sup> See 15 U.S.C. 78f(b)(4), (5), and (8).

<sup>56</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).

- 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-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, SR-NYSENAT-2021-23 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 Nos. SR-NYSE-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, and SR-NYSENAT-2021-23. The file number 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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-2021-67, SR-

NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, and SR-NYSEENAT-2021-23 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].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>57</sup> that File Nos. SR-NYSE-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, and SR-NYSEENAT-2021-23, be and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>58</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>57</sup> 15 U.S.C. 78s(b)(3)(C).

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