

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-88238; File No. SR-NYSEAMER-2020-10)

February 19, 2020

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on February 12, 2020, NYSE American LLC (“NYSE American” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to add wireless connectivity services that transport the market data of certain affiliates of the Exchange to the schedule of Wireless Connectivity Fees and Charges (the “Wireless Fee Schedule”). The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to add wireless connectivity services that transport market data of three Exchange affiliates, New York Stock Exchange LLC (“NYSE”), NYSE Arca, Inc. (“NYSE Arca”) and NYSE National, Inc. (“NYSE National”) to the Wireless Fee Schedule.<sup>4</sup> A market participant is not able to use the wireless connectivity services to connect to Exchange market data.

The wireless connections can be purchased by market participants in three data centers that are owned and operated by third parties unaffiliated with the Exchange: (1) Carteret, New Jersey, (2) Secaucus, New Jersey, and (3) Markham, Canada (collectively, the “Third Party Data Centers”). A market participant in a Third Party Data Center that purchases a wireless connection (“Wireless Market Data Connection”) receives connectivity to certain NYSE, NYSE Arca and NYSE National market data feeds (collectively, the “Selected Market Data”)<sup>5</sup>

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<sup>4</sup> The NYSE, NYSE Arca, NYSE National, and NYSE Chicago, Inc. are national securities exchanges that are affiliates of the Exchange (collectively, the “Affiliate SROs”). The wireless connectivity services described in this filing do not transport the market data of the Exchange or NYSE Chicago, Inc. The Exchange filed a proposed rule change that would establish the Wireless Fee Schedule. See SR-NYSEAmer-2020-05 (January 30, 2020). Should such filing be approved before the present filing, the changes to the Wireless Fee Schedule proposed herein would appear at the end of the Wireless Fee Schedule, after the text proposed in the January, 2020 filing. In such case, the Exchange will amend the present filing if required.

<sup>5</sup> In the Carteret and Secaucus Third Party Data Centers, a market participant may use a Wireless Market Data Connection to connect to the NYSE Integrated Feed data feed, the NYSE Arca Integrated Feed data feed, and the NYSE National Integrated Feed data feed.

distributed from the Mahwah, New Jersey data center. Customers that purchase a wireless connection to Selected Market Data are charged an initial and monthly fee for the service of transporting the Selected Market Data.

The Exchange does not believe that the present proposed change is a change to the “rules of an exchange”<sup>6</sup> required to be filed with the Commission under the Act. The definition of “exchange” under the Act includes “the market facilities maintained by such exchange.”<sup>7</sup> Based on its review of the relevant facts and circumstances, and as discussed further below, the Exchange has concluded that the Wireless Market Data Connections are not facilities of the Exchange within the meaning of the Act, and therefore do not need to be included in its rules.

The Exchange is making the current proposal solely because the Staff of the Commission has advised the Exchange that it believes the Wireless Market Data Connections are facilities of the Exchange and so must be filed as part of its rules.<sup>8</sup> The Staff has not set forth the basis of its conclusion beyond verbally noting that the Wireless Market Data Connections are provided by an affiliate of the Exchange and a market participant could use a Wireless Market Data Connection to connect to market data feeds of Affiliate SROs.<sup>9</sup>

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In the Markham, Canada Third Party Data Center, a market participant may use a Wireless Market Data Connection to connect to the NYSE BBO and Trades data feeds and the NYSE Arca BBO and Trades data feeds.

<sup>6</sup> See 15 USC §78c(a)(27) (defining the term “rules of an exchange”).

<sup>7</sup> 15 USC §78c(a)(1). See 15 USC §78c(a)(2) (defining the term “facility” as applied to an exchange).

<sup>8</sup> Telephone conversation between Commission staff and representatives of the Exchange, December 12, 2019.

<sup>9</sup> Id. The Commission has previously stated that services were facilities of an exchange subject to the rule filing requirements without fully explaining its reasoning. In 2010, the Commission stated that exchanges had to file proposed rule changes with respect to co-location because “[t]he Commission views co-location services as being a material aspect of the operation of the facilities of an exchange.” The Commission did not specify why it

The Exchange expects the proposed change to be operative 60 days after the present filing becomes effective.

#### The Exchange and the ICE Affiliates

To understand the Exchange's conclusion that the Wireless Market Data Connections are not facilities of the Exchange within the meaning of the Act, it is important to understand the very real distinction between the Exchange and its corporate affiliates (the "ICE Affiliates"). The Exchange is an indirect subsidiary of Intercontinental Exchange, Inc. ("ICE"). Around the world, ICE operates seven regulated exchanges in addition to the Exchange and the Affiliate SROs, including futures markets, as well as six clearing houses. Among others, the ICE Affiliates are subject to the jurisdiction of regulators in the U.S., U.K., E.U., the Netherlands, Canada and Singapore.<sup>10</sup> In all, the ICE Affiliates include hundreds of ICE subsidiaries, including more than thirty that are significant legal entity subsidiaries as defined by Commission rule.<sup>11</sup>

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reached that conclusion. See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010), at note 76.

In addition, in 2014, the Commission instituted proceedings to determine whether to disapprove a proposed rule change by The NASDAQ Stock Market LLC ("Nasdaq") on the basis that Nasdaq's "provision of third-party market data feeds to co-located clients appears to be an integral feature of its co-location program, and co-location programs are subject to the rule filing process." Securities Exchange Act Release No. 72654 (July 22, 2014), 79 FR 43808 (July 28, 2014) (SR-NASDAQ-2014-034). In its order, the Commission did not explain why it believed that the provision of third party data was an integral feature of co-location, or if it believed that it was a facility of Nasdaq, although the Nasdaq filing analyzed each prong of the definition of facility in turn. See Securities Exchange Act Release No. 71990 (April 22, 2014), 79 FR 23389 (April 28, 2014) (SR-NASDAQ-2014-034).

<sup>10</sup> Intercontinental Exchange, Inc. Annual Report on Form 10-K for the year ended December 31, 2018, Exhibit 21.1 (filed February 7, 2019), at 15-16.

<sup>11</sup> Id. at Exhibit 21.1.

Through its ICE Data Services (“IDS”) business,<sup>12</sup> ICE operates the ICE Global Network, a global connectivity network whose infrastructure provides access to over 150 global markets, including the Exchange and Affiliate SROs, and over 750 data sources. All the ICE Affiliates are ultimately controlled by ICE, as the indirect parent company, but generally they do not control each other. In the present case, it is IDS, not the Exchange, that provides the Wireless Market Data Connections to market participants. The Exchange does not control IDS.

#### The Wireless Market Data Connections

As noted above, if a market participant in one of the Third Party Data Centers wishes to connect to one or more of the data feeds of the Affiliate SROs that make up the Selected Market Data,<sup>13</sup> it may opt to purchase a Wireless Market Data Connection to the data.

The Selected Market Data is generated at the Mahwah data center in the trading and execution systems of the NYSE, NYSE Arca and NYSE National (collectively, the “SRO Systems”). In each case, the NYSE, NYSE Arca or NYSE National, as applicable, files with the Commission for the Selected Market Data it generates, and the related fees.<sup>14</sup> The filed market

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<sup>12</sup> The IDS business operates through several different ICE Affiliates, including NYSE Technologies Connectivity, Inc., an indirect subsidiary of the NYSE.

<sup>13</sup> See note 5, supra for a list of the Selected Market Data available in each Third Party Data Center.

<sup>14</sup> See Securities Exchange Act Release Nos. 74128 (January 23, 2015), 80 FR 4951 (January 29, 2015) (SR-NYSE-2015-03) (notice of filing and immediate effectiveness of proposed rule change establishing the NYSE Integrated Feed data feed ); 76485 (November 20, 2015), 80 FR 74158 (November 27, 2015) (SR-NYSE-2015-57) (notice of filing and immediate effectiveness of a proposed rule change establishing fees for the NYSE Integrated Feed); 62181 (May 26, 2010), 75 FR 31488 (June 3, 2010) (SR-NYSE-2010-30) (order approving proposed rule change to establish the NYSE BBO service); 59290 (January 23, 2009), 74 FR 5707 (January 30, 2009) (SR-NYSE-2009-05) (notice of filing and immediate effectiveness of proposed rule change to introduce a pilot program for NYSE Trades); 59606 (March 19, 2009), 74 FR 13293 (March 26, 2009) (SR-NYSE-2009-04) (order approving proposed rule change to establish fees for NYSE Trades); 62188 (May 27, 2010), 75 FR 31484 (June 3, 2010) (SR-NYSEArca-2010-23) (order approving proposed rule change to modify the fees for NYSE Arca Trades, to

data fees apply to all Selected Market Data customers no matter what connectivity provider they use.

When a market participant wants to connect to Selected Market Data, it requests a connection from the provider of its choice. All providers, including ICE Affiliates, may only provide the market participant with connectivity once the provider receives confirmation from the NYSE, NYSE Arca or NYSE National, as applicable, that the market participant is authorized to receive the requested Selected Market Data. Accordingly, when a market participant requests a Wireless Market Data Connection, IDS's first step is to obtain authorization.<sup>15</sup>

IDS's next step is to set up the Wireless Market Data Connection for the market participant. In the connection, IDS collects the Selected Market Data, then sends it over the Wireless Market Data Connection to the IDS access center located in the Third Party Data

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establish the NYSE Arca BBO service and related fees, and to provide an alternative unit-of-count methodology for those services); 59289 (January 23, 2009), 74 FR 5711 (January 30, 2009) (SR-NYSEArca-2009-06) (notice of filing and immediate effectiveness of proposed rule change to introduce a pilot program for NYSE Arca Trades); 59598 (March 18, 2009), 74 FR 12919 (March 25, 2009) (SR-NYSEArca-2009-05) (order approving proposed rule change to establish fees for NYSE Arca Trades); 65669 (November 2, 2011), 76 FR 69311 (November 8, 2011) (SR-NYSEArca-2011-78) (notice of filing and immediate effectiveness of proposed rule change offering the NYSE Arca Integrated Feed); 66128 (January 10, 2012), 77 FR 2331 (January 17, 2012) (SR-NYSEArca-2011-96) (notice of filing and immediate effectiveness of a proposed rule change establishing fees for NYSE Arca Integrated Feed); 83350 (May 31, 2018), 83 FR 26332 (June 6, 2018) (SR-NYSEArca-2018-09) (notice of filing and immediate effectiveness of proposed rule change establishing the NYSE National Integrated Feed data feed); and 87797 (December 18, 2019), 84 FR 71025 (December 26, 2019) (SR-NYSEArca-2019-31) (notice of filing and immediate effectiveness of proposed rule change to establish fees for the NYSE National Integrated Feed).

<sup>15</sup> When requesting authorization from the NYSE, NYSE Arca or NYSE National to provide a customer with Selected Market Data, the ICE Affiliate providing the Wireless Market Data Connection uses the same on-line tool as all data vendors.

Center. The customer connects to the Selected Market Data at the Third Party Data Center.<sup>16</sup>

The customer is charged by IDS an initial and monthly fee for the Wireless Market Data Connection. By contrast, IDS will not bill the customer for the Selected Market Data: the NYSE, NYSE Arca or NYSE National, as applicable, bill market data subscribers directly, irrespective of whether the market data subscribers receive the Selected Market Data over a Wireless Market Data Connection or from another connectivity provider.

Market participants in the Third Party Data Centers that want to connect to Selected Market Data have options, as other providers offer connectivity to Selected Market Data.<sup>17</sup> A market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. A market participant in any of the Third Party Data Centers or the Mahwah data center also may create a proprietary wireless market data connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

#### The Wireless Market Data Connections Are Not Facilities of the Exchange

##### *The Definition of “Exchange”*

The definition of “exchange” focuses on the exchange entity and what it does.<sup>18</sup>

The term “exchange” means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains,

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<sup>16</sup> A cable connects the IDS and customer equipment in the Markham Third Party Data Center. If the customer is located in either the Carteret or Secaucus Third Party Data Center, the customer buys a cross connect from IDS.

<sup>17</sup> The other providers obtain Selected Market Data from IDS at the Mahwah data center and send it over their own networks, fiber or wireless, to the Third Party Data Centers.

<sup>18</sup> 15 USC §78c(a)(1).

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.

If the “exchange” definition included all of an exchange’s affiliates, the “Exchange” would encompass a global network of futures markets, clearing houses, and data providers, and all of those entities worldwide would be subject to regulation by the Commission. That, however, is not what the definition in the Act provides.

The Exchange and the Affiliate SROs fall squarely within the Act’s definition of an “exchange”: they each provide a market place to bring together purchasers and sellers of securities and perform with respect to securities the functions commonly performed by a stock exchange.

That is not true for the non-exchange ICE Affiliates. Those ICE Affiliates do not provide such a marketplace or perform “with respect to securities the functions commonly performed by a stock exchange,” and therefore they are not an “exchange” or part of the “Exchange” for purposes of the Act. Accordingly, in conducting its analysis, the Exchange does not automatically collapse the ICE Affiliates into the Exchange. The Wireless Market Data Connections are also not part of the Exchange, as they are services, and as such cannot be part of an “organization, association or group of persons” with the Exchange.

In Rule 3b-16 the Commission further defined the term “exchange” under the Act, stating that:<sup>19</sup>

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<sup>19</sup> 17 CFR § 240.3b-16(a).



(a) An organization, association, or group of persons shall be considered to constitute, maintain, or provide “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 those terms are used in section 3(a)(1) of the Act . . . if such organization, association, or group of persons:

(1) Brings together the orders for securities of multiple buyers and sellers;  
and

(2) Uses established, non-discretionary methods (whether by providing a trading facility or by setting rules) under which such orders interact with each other, and the buyers and sellers entering such orders agree to the terms of a trade.

The non-exchange ICE Affiliates do not bring “together orders for securities of multiple buyers and sellers,” and so are not an “exchange” or part of the “Exchange” for purposes of Rule 3b-16. Indeed, it is not possible to use a Wireless Market Data Connection to effect a transaction on the Exchange. Rather, they are one-way connections away from the Mahwah data center.

The relevant question, then, is whether the Wireless Market Data Connections are “facilities” of the Exchange.

*The Definition of “Facility”*

The Act defines a “facility”<sup>20</sup> as follows:

The term “facility” when used with respect to an exchange includes [1] its premises, [2] tangible or intangible property whether on the premises or not, [3]

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<sup>20</sup> 15 USC §78c(a)(2).

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 [4] any right of the exchange to the use of any property or service.

In 2015 the Commission noted that whether something is a “facility” is not always black and white, as “any determination as to whether a service or other product is a facility of an exchange requires an analysis of the particular facts and circumstances.”<sup>21</sup> Accordingly, the Exchange understands that the specific facts and circumstances of the Wireless Market Data Connections must be assessed before a determination can be made regarding whether or not they are facilities of the Exchange.<sup>22</sup>

The first prong of the definition is that “facility,” when used with respect to an exchange, includes “its premises.” That prong is not applicable in this case, because the Wireless Market Data Connections are not premises of the Exchange. The term “premises” is generally defined as

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<sup>21</sup> Securities Exchange Act Release No. 76127 (October 9, 2015), 80 FR 62584 (October 16, 2015) (SR-NYSE-2015-36), at note 9 (order approving proposed rule change amending Section 907.00 of the Listed Company Manual). See also 79 FR 23389, supra note 9, at note 4 (noting that that the definition of the term “facility” has not changed since it was originally adopted) and 23389 (stating that the SEC “has not separately interpreted the definition of ‘facility’”).

<sup>22</sup> As with the definition of “exchange,” the ICE Affiliates do not automatically fall within the definition of a “facility.” The definition focuses on ownership and the right to use properties and services, not corporate relationships. Indeed, if the term “exchange” in the definition of a facility included “an exchange and its affiliates,” then the rest of the functional prongs of the facility definition would be meaningless. Fundamental rules of statutory construction dictate that statutes be interpreted to give effect to each of their provisions, so as not to render sections of the statute superfluous.

referring to an entity's building, land, and appurtenances.<sup>23</sup> The wireless network that runs from the Mahwah data center to the Third Party Data Centers, much of which is actually owned, operated and maintained by a non-ICE entity,<sup>24</sup> is not the premises of the Exchange. The portion of the Mahwah data center where the "exchange" functions are performed--i.e. the SRO Systems that bring together purchasers and sellers of securities and perform with respect to securities the functions commonly performed by a stock exchange--could be construed as the "premises" of the Exchange, but the same is not true for a wireless network that is almost completely outside of the Mahwah data center.

The second prong of the definition of "facility" provides that a facility includes the exchange's "tangible or intangible property whether on the premises or not." The Wireless Market Data Connections are not the property of the Exchange: they are services. The underlying wireless network is owned by ICE Affiliates and a non-ICE entity. As noted, the Act does not automatically collapse affiliates into the definition of an "exchange." A review of the facts set forth above shows that there is a real distinction between the Exchange and its ICE Affiliates with respect to the Wireless Market Data Connections, and so something owned by an ICE Affiliate is not owned by the Exchange.

The third prong of the definition of "facility" provides that a facility includes  
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

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<sup>23</sup> See, e.g., definition of "premises" in Merriam-Webster Dictionary, at <https://www.merriam-webster.com/dictionary/premises>, and Cambridge English Dictionary, at <https://dictionary.cambridge.org/us/dictionary/english/premises>.

<sup>24</sup> A non-ICE entity owns, operates and maintains the wireless network between the Mahwah data center and the Carteret and Secaucus Third Party Data Centers pursuant to a contract between the non-ICE entity and an ICE Affiliate.

other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange).<sup>25</sup>

This prong does not capture the Wireless Market Data Connections because the Exchange does not have the right to use the Wireless Market Data Connections to effect or report a transaction on the Exchange. ICE Affiliates and a non-ICE entity own and maintain the wireless network underlying the Wireless Market Data Connections, and ICE Affiliates, not the Exchange, offer and provide the Wireless Market Data Connections to customers. The Exchange does not know whether or when a customer has entered into an agreement for a Wireless Market Data Connection and has no right to approve or disapprove of the provision of a Wireless Market Data Connection, any more than it would if the provider was a third party.<sup>26</sup> It does not put the Selected Market Data content onto the Wireless Market Data Connections or send it to customers. A market participant cannot use a Wireless Market Data Connection to connect to Exchange market data. When a customer terminates a Wireless Market Data Connection, the Exchange does not consent to the termination.

In fact, it is not possible to use a Wireless Market Data Connection to effect a transaction on the Exchange: they are one-way connections away from the Mahwah data center. Customers cannot use them to send trading orders or information of any sort to the SRO Systems, and the Exchange does not use them to send confirmations of trades. Instead, Wireless Market Data Connections solely carry Selected Market Data, which does not include Exchange market data.

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<sup>25</sup> 15 USC §78c(a)(2).

<sup>26</sup> The relevant Affiliate SRO provides confirmation to IDS that a customer is authorized to receive the relevant Selected Market Data, as noted above, but does not know how or where that customer receives it. If the customer is already taking the relevant Selected Market Data through another medium or at a different site, IDS does not need to seek approval from the relevant Affiliate SRO.

The Exchange believes the example in the parenthetical in the third prong of the definition of “facility” cannot be read as an independent prong of the definition. Such a reading would ignore that the parentheses and the word “including” clearly indicate that “any system of communication to or from an exchange . . . maintained by or with the consent of the exchange” is explaining the preceding text. By its terms, the parenthetical is providing a non-exclusive example of the type of property or service to which the prong refers, and does not remove the requirement that there must be a right to use the premises, property or service to effect or report a transaction on an exchange. It is making sure the reader understands that “facility” includes a ticker system that an exchange has the right to use, not creating a new fifth prong to the definition. In fact, if the “right to use” requirement were ignored, every communication provider that connected to an exchange, including any broker-dealer system and telecommunication network, would become a facility of that exchange so long as the exchange consented to the connection, whether or not the connection was used to trade or report a trade, and whether or not the exchange had any right at all to the use of the connection.

The fourth prong of the definition provides that a facility includes “any right of the exchange to the use of any property or service.” As described above, the Exchange does not have the right to use the Wireless Market Data Connections. Instead, the Wireless Market Data Connections are used by market participants who decide to use that service.

Accordingly, for all the reasons discussed above, the wireless connectivity to Selected Market Data provided by ICE Affiliates is not a facility of the Exchange.

The legal conclusion that the Wireless Market Data Connections are not facilities of the Exchange is strongly supported by the facts. The Wireless Market Data Connections are neither necessary for, nor integrally connected to, the operations of the Exchange. They are one-way

connections away from the Mahwah data center. A market participant cannot use a Wireless Market Data Connection to send trading orders or information to the SRO Systems or to connect to Exchange market data. In this context, IDS simply acts as a vendor, selling connectivity to Selected Market Data just like the other vendors that offer wireless connections in the Carteret and Secaucus Third Party Data Centers and fiber connections to all the Third Party Data Centers. The fact that in this case it is ICE Affiliates that offer the Wireless Market Data Connections does not make the Wireless Market Data Connections facilities of the Exchange any more than are the connections offered by other parties.

Further, the Exchange believes that requiring it to file this proposed rule change is not necessary in order for the Commission to ensure that the Exchange is satisfying its requirements under the Act. Because, as described above, the Wireless Market Data Connections are not necessary for, nor connected to, the operations of the Exchange, and customers are not required to use the Wireless Market Data Connections, holding the Wireless Market Data Connections to the statutory standards in Section 6(b) serves no purpose.

Instead, the sole impact of the requirement that the Exchange file the Wireless Market Data Connections is to place an undue burden on competition on the ICE Affiliates that offer the market data connections, compared to their market competitors. This filing requirement, thus, itself is inconsistent with the requirement under Section 6(b)(8) of the Act that the rules of the exchange not “impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”<sup>27</sup> This burden on competition arises because IDS would be unable, for example, to offer a client or potential client a connection to a new data feed it requests, without the delay and uncertainty of a filing, but its competitors will. Similarly, if a competitor

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<sup>27</sup> 15 U.S.C. 78f(b)(8).

decides to undercut IDS’ fees because IDS, unlike the competitor, has to make its fees public, IDS will not be able to respond quickly, if at all. Indeed, because its competitors are not required to make their services or fees public, and are not subject to a Commission determination of whether such services or fees are “not unfairly discriminatory” or equitably allocated, IDS is at a competitive disadvantage from the very start.

The Proposed Service and Fees

As noted above, the Exchange proposes to add to its rules the Wireless Market Data Connections to Selected Market Data, for an initial and monthly fee.

A market participant would be charged a \$5,000 non-recurring initial charge for each Wireless Market Data Connection and a monthly recurring charge (“MRC”) per connection that would vary depending upon the feed and the location of the connection. The proposal would waive the first month's MRC, to allow customers to test a new Wireless Market Data Connection for a month before incurring any MRCs, and the Exchange proposes to add text to the Wireless Fee Schedule accordingly.

The Exchange proposes to add a section to the Wireless Fee Schedule under the heading “B. Wireless Connectivity to Market Data” to set forth the fees charged by IDS related to the Wireless Market Data Connections, as follows:

<b>Type of Service</b>	<b>Amount of Charge</b>
NYSE Integrated Feed: Wireless Connection in Carteret access center	\$5,000 per connection initial charge plus monthly charge per connection of \$10,500
NYSE Arca Integrated Feed: Wireless Connection in Carteret access center	\$5,000 per connection initial charge plus monthly charge per connection of \$10,500
NYSE National Integrated Feed: Wireless Connection in Carteret access center	\$5,000 per connection initial charge plus monthly charge per connection of \$5,250
NYSE Integrated Feed and NYSE Arca Integrated Feed: Wireless Connection in Carteret access center	\$5,000 per connection initial charge plus monthly charge per connection of \$18,500

NYSE Integrated Feed, NYSE Arca Integrated Feed, and NYSE National Integrated Feed: Wireless Connection in Carteret access center	\$5,000 per connection initial charge plus monthly charge per connection of \$21,000
NYSE Integrated Feed: Wireless Connection in Secaucus access center	\$5,000 per connection initial charge plus monthly charge per connection of \$10,500
NYSE Arca Integrated Feed: Wireless Connection in Secaucus access center	\$5,000 per connection initial charge plus monthly charge per connection of \$10,500
NYSE National Integrated Feed: Wireless Connection in Secaucus access center	\$5,000 per connection initial charge plus monthly charge per connection of \$5,250
NYSE Integrated Feed and NYSE Arca Integrated Feed: Wireless Connection in Secaucus access center	\$5,000 per connection initial charge plus monthly charge per connection of \$18,500
NYSE Integrated Feed, NYSE Arca Integrated Feed, and NYSE National Integrated Feed: Wireless Connection in Secaucus access center	\$5,000 per connection initial charge plus monthly charge per connection of \$21,000
NYSE BBO and Trades: Wireless Connection in Markham, Canada access center	\$5,000 per connection initial charge plus monthly charge per connection of \$6,500
NYSE Arca BBO and Trades: Wireless Connection in Markham, Canada access center	\$5,000 per connection initial charge plus monthly charge per connection of \$6,500

There is limited bandwidth available on the wireless network to the Markham, Canada Third Party Data Center. Accordingly, such Wireless Market Data Connections do not transport information for all of the symbols included in the NYSE BBO and Trades and NYSE Arca BBO and Trades data feeds. Rather, IDS provides connectivity to a selection of such data feeds, including the data for which IDS believes there is demand. When a market participant requests a Wireless Market Data Connection to Markham, it receives connectivity to the portions of the NYSE BBO and Trades and NYSE Arca BBO and Trades data that IDS transmits wirelessly. The customer then determines the symbols for which it will receive data. The Exchange does not have visibility into which portion of the data feed a given customer receives.

#### Application and Impact of the Proposed Change

The proposed change would apply to all customers equally. The proposed change would



not apply differently to distinct types or sizes of market participants. Customers that require other types or sizes of network connections between the Mahwah data center and the access centers could still request them. As is currently the case, the purchase of any connectivity service is completely voluntary and the Wireless Fee Schedule is applied uniformly to all customers.

### Competitive Environment

Other providers offer connectivity to Selected Market Data in the Third Party Data Centers.<sup>28</sup> Based on the information available to it, the Exchange believes that a market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. The Exchange believes that the wireless connections offered by non-ICE entities provide connectivity at the same or similar speed as the Wireless Market Data Connections, and at the same or similar cost. The Exchange believes the Wireless Market Data Connections between the Mahwah data center and the Markham Third Party Data Center are the first public, commercially available wireless connections for Selected Market Data between the two points, creating a new connectivity option for customers in Markham. A market participant in any of the Third Party Data Centers or the Mahwah data center also may create a proprietary wireless market data connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

Wireless connections involve beaming signals through the air between antennas that are within sight of one another. Because the signals travel a straight, unimpeded line, and because

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<sup>28</sup> Third party providers obtain Selected Market Data from IDS at the Mahwah data center and send it over their own networks, fiber or wireless, to the Third Party Data Centers.

light waves travel faster through air than through glass (fiber optics), wireless messages have lower latency than messages travelling through fiber optics.<sup>29</sup> At the same time, as a general rule wireless networks have less uptime than fiber networks. Wireless networks are directly and immediately affected by adverse weather conditions, which can cause message loss and outage periods. Wireless networks cannot be configured with redundancy in the same way that fiber networks can. As a result, an equipment or weather issue at any one location on the network will cause the entire network to have an outage. In addition, maintenance can take longer than it would with a fiber based network, as the relevant tower may be in a hard to reach location, or weather conditions may present safety issues, delaying technicians servicing equipment. Even under normal conditions, a wireless network will have a higher error rate than a fiber network of the same length.

The proposed Wireless Market Data Connections traverse through a series of towers equipped with wireless equipment, including, in the case of the Carteret and Secaucus connections, a pole on the grounds of the Mahwah data center. With the exception of the non-ICE entity that owns the wireless network used for the Wireless Connections to Secaucus and Carteret,<sup>30</sup> third parties do not have access to such pole. However, access to such pole is not required for third parties to establish wireless networks that can compete with the Wireless Market Data Connections to the Carteret and Secaucus Third Party Data Centers, as witnessed by the existing wireless connections offered by non-ICE entities competitors.

In addition, proximity to a data center is not the only determinant of a wireless network's

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<sup>29</sup> See Securities Exchange Act Release No. 76750 (December 23, 2015), 80 FR 81648 (December 30, 2015) (SR-NYSEMKT-2015-85) (order approving offering of a wireless connection to allow Users to receive market data feeds from third party markets and to reflect changes to the Exchange's price list and fee schedule related to these services).

<sup>30</sup> See note 24, *supra*.

latency. Rather, the latency of a wireless network depends on several factors. Variables include the wireless equipment utilized; the route of, and number of towers or buildings in, the network; and the fiber equipment used at either end of the connection. Moreover, latency is not the only consideration that a customer may have in selecting a wireless network to connect to Selected Market Data. Other considerations may include the amount of network uptime; the equipment that the network uses; the cost of the connection; and the applicable contractual provisions. Indeed, fiber network connections may be more attractive to some market participants as they are more reliable and less susceptible to weather conditions.

## 2. Statutory Basis

Although the Exchange does not believe that the present proposed change is a change to the “rules of an exchange”<sup>31</sup> required to be filed with the Commission under the Act, the Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>32</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>33</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and does not unfairly discriminate between customers, issuers, brokers, or dealers. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>34</sup> because it

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<sup>31</sup> See 15 USC §78c(a)(27) (defining the term “rules of an exchange”).

<sup>32</sup> 15 U.S.C. 78f(b).

<sup>33</sup> 15 U.S.C. 78f(b)(5).

<sup>34</sup> 15 U.S.C. 78f(b)(4).

provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Change is Reasonable

The Exchange believes its proposal is reasonable.

Based on the information available to it, the Exchange believes that a market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. The Exchange believes that the wireless connections offered by non-ICE entities provide connectivity at the same or similar speed as the Wireless Market Data Connections, and at the same or similar cost. The Exchange believes the Wireless Market Data Connections between the Mahwah data center and the Markham Third Party Data Center are the first public, commercially available wireless connections for Selected Market Data between the two points, creating a new connectivity option for customers in Markham. A market participant in any of the Third Party Data Centers or the Mahwah data center also may create a proprietary wireless market data connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

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. Indeed, fiber network connections may be more attractive to some market participants as they are more reliable and less susceptible to weather conditions.

The Exchange believes that the proposed pricing for the Wireless Market Data Connections is reasonable because it allows customers to select the connectivity option that best suits their needs. A market participant that opts for Wireless Market Data Connections would be able to select the specific Selected Market Data feed that it wants to receive in accordance with its needs, thereby helping it tailor its operations to the requirements of its business operations. The fees also reflect the benefit received by market participants in terms of lower latency over the fiber optics options.

There is limited bandwidth available on the wireless network to the Markham, Canada Third Party Data Center. Accordingly, the Exchange believes that it is reasonable not to transport information for all of the symbols included in the NYSE BBO and Trades and NYSE Arca BBO and Trades data feeds to Markham, but rather to transport a subset of that data. Limiting the feeds to the data regarding securities for which IDS believes there is demand allows customers in Canada to receive the relevant Selected Market Data over a wireless network. The customer then determines those symbols for which it will receive data.

Only market participants that voluntarily select to receive Wireless Market Data Connections are charged for them, and those services are available to all market participants with a presence in the relevant Third Party Data Center. Furthermore, the Exchange believes that the services and fees proposed herein are reasonable because, in addition to the services being completely voluntary, they are available to all market participants on an equal basis (i.e., the same products and services are available to all market participants). All market participants that voluntarily select a Wireless Market Data Connection would be charged the same amount for the same service and would have their first month's MRC for the Wireless Market Data Connection waived.

Overall, the Exchange believes that the proposed change is reasonable because the Wireless Market Data Connections described herein are offered as a convenience to market participants, but offering them requires the provision, maintenance and operation of the Mahwah data center, wireless networks and access centers in the Third Party Data Centers, including the installation and monitoring, support and maintenance of the services.

The Exchange believes that the proposed waiver of the first month's MRC is reasonable as it would allow market participants to test a Wireless Market Data Connection for a month before incurring any monthly recurring fees and may act as an incentive to market participants to connect to a Wireless Market Data Connection.

The Proposed Change is an Equitable Allocation of Fees and Credits

The Exchange believes its proposal equitably allocates its fees among its market participants.

The proposed change would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all market participants equally. As is currently the case, the purchase of any connectivity service, including Wireless Market Data Connections, would be completely voluntary.

The Exchange believes that it is equitable to not to transport information for all of the symbols included in the NYSE BBO and Trades and NYSE Arca BBO and Trades data feeds to Markham, but rather to transport a subset of that data. There is limited bandwidth available on the wireless network to the Markham, Canada Third Party Data Center. Limiting the feeds to the data regarding securities for which IDS believes there is demand allows customers in Canada to receive the relevant Selected Market Data over a wireless network. The customer then determines those symbols for which it will receive data.

Without this proposed rule change, market participants with a presence in the Third Party Data Centers would have fewer options for connectivity to Selected Market Data. With it, market participants have more choices with respect to the form and price of connectivity to Selected Market Data they use, allowing a market participant that opts for a Wireless Market Data Connection to select the specific Selected Market Data feed that it wants to receive in accordance with what best suits its needs, thereby helping it tailor its operations to the requirements of its business operations.

The Proposed Change is Not Unfairly Discriminatory

The Exchange believes its proposal is not unfairly discriminatory.

The proposed change would not apply differently to distinct types or sizes of market participants. Rather, it would apply to all market participants equally. As is currently the case, the purchase of any connectivity service, including Wireless Market Data Connections, would be completely voluntary.

A market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. A market participant in any of the Third Party Data Centers or the Mahwah data center also may create a proprietary wireless market data connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

Without this proposed rule change, market participants with a presence in the Third Party Data Centers would have fewer options for connectivity to Selected Market Data. With it, market participants have more choices with respect to the form and price of connectivity to Selected

Market Data they use, allowing a market participant that opts for a Wireless Market Data Connection to select the specific Selected Market Data feed that it wants to receive in accordance with what best suits its needs, thereby helping it tailor its operations to the requirements of its business operations.

The Wireless Market Data Connections provide customers in the Secaucus and Carteret access centers with one means of connectivity to Selected Market Data, but based on the information available to it, the Exchange believes that a market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. The Exchange believes that the wireless connections offered by non-ICE entities provide connectivity at the same or similar speed as the Wireless Market Data Connections, and at the same or similar cost. The Exchange believes the Wireless Market Data Connections between the Mahwah data center and the Markham Third Party Data Center are the first public, commercially available wireless connections for Selected Market Data between the two points, creating a new connectivity option for customers in Markham.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

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

The Exchange believes that the only burden on competition of the proposed change is on IDS and other commercial connectivity providers. Solely because IDS is wholly owned by the same parent company as the Exchange, IDS will be at a competitive disadvantage to its commercial competitors, and its commercial competitors, without a filing requirement, will be at a relative competitive advantage to IDS.

By permitting IDS to continue to offer the Wireless Market Data Connectivity, approval



of the proposed changes would contribute to competition by allowing IDS to compete with other connectivity providers, and thus provides market participants another connectivity option. For this reason, the proposed rule changes will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.<sup>35</sup>

Based on the information available to it, the Exchange believes that a market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. The Exchange believes that the wireless connections offered by non-ICE entities provide connectivity at the same or similar speed as the Wireless Market Data Connections, and at the same or similar cost. The Exchange believes the Wireless Market Data Connections between the Mahwah data center and the Markham Third Party Data Center are the first public, commercially available wireless connections for Selected Market Data between the two points, creating a new connectivity option for customers in Markham. The Exchange does not control the Third Party Data Centers and could not preclude other parties from creating new wireless or fiber connections to Selected Market Data in any of the Third Party Data Centers.

The Wireless Market Data Connections provide customers in the Secaucus and Carteret Third Party Data Centers with one means of connectivity to Selected Market Data, but substitute products are available, as witnessed by the existing wireless connections offered by non-ICE entities. A market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. A market participant in any of the Third Party Data Centers or the Mahwah data center may also create a proprietary wireless market data

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<sup>35</sup> 15 U.S.C. 78f(b)(8).

connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

The Exchange notes that the proposed Wireless Market Data Connections compete not just with other wireless connections to Selected Market Data, but also with fiber network connections, which may be more attractive to some market participants as they are more reliable and less susceptible to weather conditions. 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. A market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. A market participant also may create a proprietary wireless market data connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

The proposed Wireless Market Data Connections traverse through a series of towers equipped with wireless equipment, including, in the case of the Carteret and Secaucus Wireless Market Data Connections, a pole on the grounds of the Mahwah data center. With the exception of the non-ICE entity that owns the wireless network used for the Wireless Connections to Secaucus and Carteret,<sup>36</sup> third parties do not have access to such pole, as the IDS wireless network has exclusive rights to operate wireless equipment on the Mahwah data center pole. IDS does not sell rights to third parties to operate wireless equipment on the pole, due to space

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<sup>36</sup> See note 24, supra.

limitations, security concerns, and the interference that would arise between equipment placed too closely together.

However, access to such pole is not required for other parties to establish wireless networks that can compete with the Wireless Market Data Connections, as witnessed by the existing wireless connections offered by non-ICE entities. Proximity to a data center is not the only determinant of a wireless network's latency. Rather, the latency of a wireless network depends on several factors. Variables include the wireless equipment utilized; the route of, and number of towers or buildings in, the network; and the fiber equipment used at either end of the connection. Moreover, latency is not the only consideration that a customer may have in selecting a wireless network to connect to Selected Market Data. Other considerations may include the amount of network uptime; the equipment that the network uses; the cost of the connection; and the applicable contractual provisions. Indeed, fiber network connections may be more attractive to some market participants as they are more reliable and less susceptible to weather conditions.

The proposed change does not affect competition among national securities exchanges or among members of the Exchange, but rather between IDS and its commercial competitors.

For the reasons described above, the Exchange believes that the proposed rule changes reflect this competitive environment.

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

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

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and

publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

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

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2020-10 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAMER-2020-10. This 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 change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2020-10, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>37</sup> 17 CFR 200.30-3(a)(12).