

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-100235; File No. SR-NYSEARCA-2024-39)

May 28, 2024

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish Fees for the NYSE Arca Aggregated Lite Data Feed

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on May 13, 2024, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to establish fees for the NYSE Arca Aggregated Lite data feed. 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 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.

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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.

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

1. Purpose

The Exchange proposes to amend the NYSE Arca Equities Proprietary Market Data Fees Schedule (“Fee Schedule”) and establish fees for the NYSE Arca Aggregated Lite (“NYSE Arca Agg Lite”) data feed that would be effective May 13, 2024.<sup>4</sup>

In summary, the NYSE Arca Agg Lite is a NYSE Arca-only frequency-based depth of book market data feed of the NYSE Arca’s limit order book for up to ten (10) price levels on both the bid and offer sides of the order book for securities traded on the Exchange and for which the Exchange reports quotes and trades under the Consolidated Tape Association (“CTA”) Plan or the Nasdaq/UTP Plan. The NYSE Arca Agg Lite is a compilation of limit order data that the Exchange provides to vendors and subscribers. The NYSE Arca Agg Lite includes depth of book order data as well as security status messages. The security status message informs subscribers of changes in the status of a specific security, such as trading halts, short sale restriction, etc. In addition, the NYSE Arca Agg Lite includes order imbalance information prior to the opening and closing of trading.

**Background**

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also,

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<sup>4</sup> The proposed rule change establishing the NYSE Arca Agg Lite data feed was immediately effective on February 27, 2024. See Securities Exchange Act Release No. 99713 (March 12, 2024), 89 FR 19381 (March 18, 2024) (SR-NYSEARCA-2024-22) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE Arca Aggregated Lite Market Data Feed).

recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>5</sup>

While Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”<sup>6</sup> Indeed, cash equity trading is currently dispersed across 16 exchanges,<sup>7</sup> numerous alternative trading systems,<sup>8</sup> and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share (whether including or excluding auction volume).<sup>9</sup>

### **Proposed NYSE Arca Agg Lite Data Feed Fees**

To reflect the value of NYSE Arca’s market data, the Exchange proposes to establish the fees listed below for the NYSE Arca Agg Lite data feed, operative on May 13, 2024. The Exchange proposes to charge fees for the same categories of market data use as its affiliated exchanges (namely, NYSE, NYSE American and NYSE National) currently charge. The

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<sup>5</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7-10-04) (Final Rule) (“Regulation NMS”).

<sup>6</sup> See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

<sup>7</sup> See Cboe U.S Equities Market Volume Summary, available at [https://markets.cboe.com/us/equities/market\\_share](https://markets.cboe.com/us/equities/market_share). See generally <https://www.sec.gov/fastanswers/divisionsmarketregmrexchangesshtml.html>.

<sup>8</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

<sup>9</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

Exchange believes that adopting the same fee structure as its affiliated exchanges would reduce administrative burdens on market data subscribers that also currently subscribe to market data feeds from the Exchange's affiliates.

1. Access Fee. For the receipt of access to the NYSE Arca Agg Lite data feed, the Exchange proposes to charge \$1,500 per month. This proposed Access Fee would be charged to any data recipient that receives the NYSE Arca Agg Lite data feed. Data recipients that only use display devices to view NYSE Arca Agg Lite market data and do not separately receive a data feed would not be charged an Access Fee. The proposed Access Fee would be charged only once per firm.

2. User Fees. The Exchange proposes to charge a Professional User Fee (Per User) of \$30 per month and a Non-Professional User Fee (Per User) of \$4 per month. These user fees would apply to each display device that has access to the NYSE Arca Agg Lite data feed.

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

NYSE Arca Agg Lite data feed will have the Access Fee and Redistribution Fee waived if such Redistributor provides NYSE Arca Agg Lite externally to at least one data feed recipient and reports such data feed recipient to the Exchange.

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

Further, the Exchange proposes to adopt a credit that would be applicable to Redistributors that provide external distribution of NYSE Arca Agg Lite to Professional and Non-Professional Users. As proposed, such Redistributors would receive a credit equal to the amount of the monthly Professional User and Non-Professional User Fees for such external distribution, up to a maximum of the combination of the Access Fee and Redistribution Fee for NYSE Arca Agg Lite that the Redistributor would otherwise be required to pay to the Exchange. For example, a Redistributor that reports external Professional Users and Non-Professional Users in a month totaling \$1,750 or more would receive a maximum credit of \$1,750 for that month, which could effectively reduce its monthly fee for access and redistribution to zero. If that same Redistributor were to report external User quantities in a month totaling \$600 of monthly usage,

that Redistributor would receive a credit of \$600. The Exchange believes the proposed credit would provide Redistributors with an incentive to increase their redistribution of NYSE Arca Agg Lite because the credit they would be eligible to receive would increase if they report additional external User quantities.

4. Enterprise Fees.

The Exchange proposes to establish an enterprise license that will reduce Exchange fees and administrative costs for subscribers that disseminate NYSE Arca Agg Lite. Subscribers that are broker-dealers will be able to distribute the NYSE Arca Agg Lite data feed for display usage to an unlimited number of non-professional users for a monthly fee of \$35,000, with an opportunity to lower that fee to \$31,500 per month if they contract for twelve months of service in advance. Alternatively, subscribers that are broker-dealers will be able to distribute the NYSE Arca Agg Lite data feed for display usage to an unlimited number of recipients (professional users and non-professional users) for a monthly fee of \$110,000, with an opportunity to lower that fee to \$99,000 per month if they contract for twelve months of service in advance.

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

the number of users that receive the data feed from the Redistributor.

Subscribers that intend to purchase a market data enterprise license for at least twelve months may elect to purchase this product in advance for a monthly fee of \$31,500 for distribution of NYSE Arca Agg Lite to an unlimited number of non-professional users, or \$99,000 per month for distribution to an unlimited number of professional users and non-professional users. This feature is intended to simplify cost projections and budgeting for both subscribers and the Exchange. Subscribers that elect not to purchase this particular feature will nevertheless be able to obtain all of the market data information offered by NYSE Arca Agg Lite by paying the standard fee of \$35,000 per month for distribution of NYSE Arca Agg Lite to an unlimited number of non-professional users, or \$110,000 per month for distribution to an unlimited number of professional users and non-professional users. Subscribers that elect to pay the monthly fee will be able to switch to the annual fee at any time, and those that elect to purchase the annual contract would be able to change to the monthly contract, with notice, at the end of the twelve-month period.

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

#### 5. Non-Display Use Fees.

The Exchange proposes to establish non-display fees for the NYSE Arca Agg Lite data feed that are based on the non-display use categories charged by NYSE, NYSE American, NYSE National, the CTA, and the UTP Plan for non-display use.<sup>10</sup> Non-display use would mean

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<sup>10</sup> See Endnote 1 to the NYSE Proprietary Market Data Fees, available here: [https://www.nyse.com/publicdocs/nyse/data/NYSE\\_Market\\_Data\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Fee_Schedule.pdf); Endnote 1 to the NYSE American LLC Equities Proprietary Market Data Fees, available here: [https://www.nyse.com/publicdocs/nyse/data/NYSE\\_American\\_Equities\\_Market\\_Data\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Equities_Market_Data_Fee_Schedule.pdf);

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

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

- As proposed, the Category 1 Fee would be \$4,500 per month and would apply when a data recipient's Non-Display Use of the NYSE Arca Agg Lite data feed is on its own behalf, not on behalf of its clients.
- As proposed, Category 2 Fees would be \$4,500 per month and would apply to a data recipient's Non-Display Use of the NYSE Arca Agg Lite data feed on behalf of its clients.
- As proposed, Category 3 Fees would be \$4,500 per month and would apply to a

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Endnote 1 to the NYSE National Equities Proprietary Market Data Fees, available here: [https://www.nyse.com/publicdocs/nyse/data/NYSE\\_National\\_Market\\_Data\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/data/NYSE_National_Market_Data_Fee_Schedule.pdf); Endnote 8 to the Schedule of Market Data Charges for the CTA, available here: <https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Schedule%20Of%20Market%20Data%20Charges%20-%20January%201.%202015.pdf>; and Non-Display Usage Fees as set forth in the UTP Plan Fee Schedule and Non-Display Policy, available here: <http://utpplan.com/DOC/Datapolicies.pdf>. See, e.g., Securities Exchange Act Release Nos. 69315 (April 5, 2013), 78 FR 21668 (April 11, 2013) (SR-NYSEArca-2013-37) and 73011 (September 5, 2014), 79 FR 54315 (September 11, 2014) (SR-NYSEARCA-2014-93).



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

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

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

6. Non-Display Use Declaration Late Fee. Data recipients that receive the NYSE Arca Agg Lite data feed for Non-Display Use would be required to complete and submit a Non-

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

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

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

7. Multiple Data Feed Fee. The Exchange proposes to establish a monthly fee, the “Multiple Data Feed Fee,” that would apply to data recipients that take a data feed for a market data product in more than two locations. Data recipients taking the NYSE Arca Agg Lite data feed in more than two locations would be charged \$200 per additional location per month. No new reporting would be required.<sup>11</sup>

8. Three-Month Fee Waiver. The Exchange currently provides a one-month free trial to any firm that subscribes to a particular NYSE Arca market data product for the first time. Under the current one-month trial, a first-time subscriber is not charged the Access Fee, Non-Display Fee, any applicable Professional and Non-Professional User Fee and Redistribution Fee for one calendar month.<sup>12</sup> The Exchange now proposes an additional three-month fee waiver for any Redistributor that subscribes to a particular NYSE Arca market data product for the first time for external redistribution. As proposed, a first-time Redistributor would be any firm that has not previously subscribed to and externally redistributed a particular NYSE Arca market data product listed on the Fee Schedule. As proposed, a first-time Redistributor that subscribes to a particular NYSE Arca market data product would not be charged the Access Fee and the Redistribution Fee for that product for three calendar months. Any other fees, including but not limited to, Non-Display Fee, any applicable Professional and Non-Professional User Fee, and Enterprise Fee would be billable after the first calendar month after a first-time Redistributor subscribes to a particular NYSE Arca market data product. For example, a first-time Redistributor that chooses to subscribe to NYSE Arca Agg Lite on June 24, 2024 would not be

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<sup>11</sup> Data vendors currently report a unique Vendor Account Number for each location at which they provide a data feed to a data recipient. The Exchange considers each Vendor Account Number a location. For example, if a data recipient has five Vendor Account Numbers, representing five locations, for the receipt of the NYSE Arca Agg Lite data feed, that data recipient will pay the Multiple Data Feed fee with respect to three of the five locations.

<sup>12</sup> See Fee Schedule.

charged the Access Fee and the Redistribution Fee for the months of July, August, and September 2024. The proposed fee waiver would be for the three calendar months following the date a Redistributor is approved to receive access to the particular NYSE Arca market data product. The Exchange would provide the three-month fee waiver for each particular product to each Redistributor once.

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

#### **Application of Proposed Fees**

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

The Exchange believes that subscribers would use the price level detail information available in the NYSE Arca Agg Lite data feed to make trading decisions that directly benefit the transaction services that the Exchange offers. The Exchange determined the level of the fees to charge for the NYSE Arca Agg Lite data feed based on the value of the Exchange's transaction services.

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

The proposed fee structure is not novel as it is based on the fee structure currently in place for the NYSE ArcaBook feed. The Exchange is proposing fees for the NYSE Arca Agg Lite data feed that are based on the existing fee structure and rates that data recipients already pay for the NYSE ArcaBook feed. Specifically, the fees for the NYSE ArcaBook feed—which like the NYSE Arca Agg Lite data feed, includes depth of book, auction imbalances, and security status messages—consist of an Access Fee of \$2,000 per month, a Professional User Fee (Per User) of \$60 per month, a Non-Professional User Fee (Per User) that ranges between \$3 per month to \$10 per month, Non-Display Fees of \$6,000 per month for each of Categories 1, 2 and 3, and a Redistribution Fee of \$2,000 per month. The Exchange also charges a Non-Display Use Declaration Late Fee of \$1,000 per month and a Multiple Data Feed Fee of \$200 per month for NYSE ArcaBook.<sup>13</sup>

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<sup>13</sup> See NYSE Arca Equities Proprietary Market Data Fees at [https://www.nyse.com/publicdocs/nyse/data/NYSE\\_Arca\\_Equities\\_Proprietary\\_Data\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Equities_Proprietary_Data_Fee_Schedule.pdf).

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>14</sup> in general, and Sections 6(b)(4) and 6(b)(5) of the Act,<sup>15</sup> in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

### **The Proposed Rule Change Is Reasonable**

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>16</sup>

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

In fact, the legislative history indicates that the Congress intended that the market system “evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed” and that the SEC wield

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<sup>14</sup> 15 U.S.C. 78f(b).

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

<sup>16</sup> See Regulation NMS Adopting Release, 70 FR 37495, at 37499.

its regulatory power “in those situations where competition may not be sufficient,” such as in the creation of a “consolidated transactional reporting system.”<sup>17</sup>

The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”<sup>18</sup>

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

the Commission considers whether the exchange was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees. If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless there is a substantial countervailing basis to find that the terms of the rule violate the Act or the rules thereunder.<sup>19</sup>

An exchange may demonstrate that its fees are constrained by competitive forces by showing that platform competition applies.

As the United States Supreme Court recognized in Ohio v. American Express, platforms are firms that act as intermediaries between two or more sets of agents, and typically the choices made on one side of the platform affect the results on the other side of the platform via externalities, or “indirect network effects.”<sup>20</sup> Externalities are linkages between the different sides

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<sup>17</sup> NetCoalition v. SEC, 615 F.3d 525, 535 (D.C. Cir. 2010) (“NetCoalition I”) (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

<sup>18</sup> Id. at 535.

<sup>19</sup> See Securities Exchange Act Release No. 34-90217 (October 16, 2020), 85 FR 67392 (October 22, 2020) (SR-NYSENAT-2020-05) (“National IF Approval Order”) (internal quotation marks omitted), quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008).

<sup>20</sup> Ohio v. American Express, 138 S. Ct. 2274, 2280-81 (2018).

of a platform such that one cannot understand pricing and competition for goods or services on one side of the platform in isolation; one must also account for the influence of the other sides.

As the Supreme Court explained:

To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. . . . Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If the participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. . . . Two-sided platforms therefore must take these indirect network effects into account before making a change in price on either side.<sup>21</sup>

The Exchange and its affiliated exchanges have long maintained that they function as platforms between consumers of market data and consumers of trading services. Proving the existence of linkages between the two sides of this platform requires an in-depth economic analysis of both public data and confidential exchange data about particular customers’ trading activities and market data purchases. Exchanges, however, are prohibited from publicly sharing details about these specific customer activities and purchases. For example, pursuant to Exchange Rule 7.41-E, transactions executed on the Exchange are processed anonymously.

Exchanges function as platforms for market data and transaction services mean that exchanges do not set fees for market data products without considering, and being constrained by, the effect the fees will have on the order-flow side of the platform. As the D.C. Circuit recognized in NetCoalition I, “[n]o one disputes that competition for order flow is fierce.”<sup>22</sup> The

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<sup>21</sup> Id. at 2281.

<sup>22</sup> NetCoalition I, 615 F.3d at 544 (internal quotation omitted).



court further noted that “no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers,” and that an exchange “must compete vigorously for order flow to maintain its share of trading volume.”<sup>23</sup>

As noted above, while Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”<sup>24</sup> The Commission’s Division of Trading and Markets has also recognized that with so many “operating equities exchanges and dozens of ATSS, there is vigorous price competition among the U.S. equity markets and, as a result, [transaction] fees are tailored and frequently modified to attract particular types of order flow, some of which is highly fluid and price sensitive.”<sup>25</sup> Indeed, today, equity trading is currently dispersed across 16 exchanges,<sup>26</sup> numerous alternative trading systems,<sup>27</sup> broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share.<sup>28</sup>

Further, low barriers to entry mean that new exchanges may rapidly and inexpensively

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<sup>23</sup> Id.

<sup>24</sup> See Securities Exchange Act Release No. 61358, 75 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

<sup>25</sup> Commission Division of Trading and Markets, Memorandum to EMSAC, dated October 20, 2015, available here: <https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf>.

<sup>26</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

<sup>27</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

<sup>28</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

enter the market and offer additional substitute platforms to compete with the Exchange. For example, since 2020, three new ones have entered the market: Long Term Stock Exchange (LTSE), which began operations as an exchange on August 28, 2020;<sup>29</sup> Members Exchange (MEMX), which began operations as an exchange on September 29, 2020;<sup>30</sup> and Miami International Holdings (MIAX), which began operations of its first equities exchange on September 29, 2020.<sup>31</sup>

These low barriers enable existing exchange customers to disintermediate and start their own exchanges if they think the prices charged for exchange proprietary market data products are too high. This is precisely the rationale behind the creation of MEMX, which was formed by some of the largest and most well capitalized financial firms that are also Exchange customers (including Bank of America, BlackRock, Charles Schwab, Citadel, Citi, E\*Trade, Fidelity, Goldman Sachs, J.P. Morgan, Jane Street, Morgan Stanley, TD Ameritrade, and others).<sup>32</sup>

For example, one of MEMX's founding principles is that exchange proprietary market data prices are too high, and that MEMX will benefit its members by offering "[l]ower pricing on market data."<sup>33</sup> Nor is this a new phenomenon: exchange customers formed BATS to compete with incumbent exchanges and once registered as an exchange in 2008, BATS did not initially

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<sup>29</sup> See LTSE Market Announcement: MA-2020-020, dated August 14, 2020, announcing LTSE production securities phase-in planned for August 28, available here: [https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa0698e7\\_MA-2020-020\\_Production\\_Securities\\_Launching\\_August\\_28\\_-\\_Google\\_Docs.pdf](https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa0698e7_MA-2020-020_Production_Securities_Launching_August_28_-_Google_Docs.pdf) and LTSE Market Announcement: MA-2020-025, available here: [https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa069873\\_MA-2020-025.pdf](https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa069873_MA-2020-025.pdf).

<sup>30</sup> As of October 29, 2020, MEMX is trading all NMS symbols. See <https://info.memxtrading.com/trader-alert-20-10-memx-trading-symbols-update/>.

<sup>31</sup> See MIAX Pearl Press release, dated September 29, 2020, available here: [https://www.miaxoptions.com/sites/default/files/alert-files/MIAX\\_Press\\_Release\\_09292020.pdf](https://www.miaxoptions.com/sites/default/files/alert-files/MIAX_Press_Release_09292020.pdf).

<sup>32</sup> MEMX Home Page ("Founded by members and investors, MEMX aims to drive simplicity, efficiency, and competition in equity markets."), available at <https://memx.com/>.

<sup>33</sup> MEMX home page, available at <https://memx.com/>.

charge for market data. The BATS venture was a financial success for its founders, first through recouping their investment in its initial public offering and then in the subsequent sale of BATS to Cboe, which now charges for market data from those exchanges. Notably, MEMX has some of the same founding broker-dealer customers, leading some to dub MEMX “BATS 2.0.”<sup>34</sup>

The fact that this cycle is viable and repeatable by entities that both trade on and compete with existing exchanges confirms that barriers to entry are low and that these markets are competitive and contestable.<sup>35</sup> And low barriers to entry act as a market check on high prices.<sup>36</sup>

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

The proposed fees are therefore reasonable because in setting them, the Exchange is constrained by the availability of numerous substitute platforms offering market data products and trading. Such substitutes need not be identical, but only substantially similar to the product at hand.

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<sup>34</sup> See “MEMX turns up the heat on US stock exchanges,” *Financial Times*, January 9, 2019, available at <https://www.ft.com/content/4908c8b0-1418-11e9-a581-4ff78404524e>; see also “US equities exchanges: If you can’t beat them, join them,” *Euromoney*, February 13, 2019, available at <https://www.euromoney.com/article/b1d3tby4p3y4v/us-equities-exchanges-if-you-cant-beat-them-join-them>.

<sup>35</sup> *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001) (recognizing that “[a]s a matter of law, courts have generally recognized that when a customer can replace the services of an external product with an internally-created system, this captive output (i.e. the self-production of all or part of the relevant product) should be included in the same market.”). In *SunGard*, the court rejected the Antitrust Division’s attempt to block SunGuard’s acquisition of the disaster recovery assets of Comdisco on the basis that the acquisition would “substantially lessen competition in the market for shared hot-site disaster recovery services,” when the evidence showed that “internal hot-sites” created by customers competed with the “external shared hot-site business” engaged in by the merging parties. *Id.* at 173-74, 187.

<sup>36</sup> *United States v. Baker Hughes*, 908 F.2d 981, 987 (1990) (“In the absence of significant barriers [to entry], a company probably cannot maintain supracompetitive pricing for any length of time.”); see also David S. Evans and Richard Schmalensee, *Markets with Two-Sided Platforms*, in 1 *ISSUES IN COMPETITION LAW AND POLICY* 667, 685 (ABA Section of Antitrust Law 2008) (noting that exchange mergers in 2005 and 2006 were approved by competition authorities in part in reliance on planned and likely entry of other firms).

More specifically, in setting fees for the NYSE Arca Agg Lite data feed, the Exchange is constrained by the fact that, if its pricing across the platform is unattractive to customers, customers have their pick of an increasing number of alternative platforms to use instead of the Exchange. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish reasonable fees. The existence of numerous alternative platforms to the Exchange's platform ensures that the Exchange cannot set unreasonable market data fees without suffering the negative effects of that decision in the fiercely competitive market for trading order flow.

Subscribing to the NYSE Arca Agg Lite is entirely optional. The Exchange is not required to make the NYSE Arca Agg Lite available to any customers, nor is any customer required to purchase the NYSE Arca Agg Lite market data feed. Unlike some other data products (*e.g.*, the consolidated quotation and last-sale information feeds) that firms are required to purchase in order to fulfil regulatory obligations,<sup>37</sup> a customer's decision whether to purchase the NYSE Arca Agg Lite is entirely discretionary. Most firms that choose to subscribe to the NYSE Arca Agg Lite would do so for the primary goals of using it to increase their revenues, reduce their expenses, and in some instances to compete directly with the Exchange for order flow. Such firms are able to determine for themselves whether the NYSE Arca Agg Lite data feed is necessary for their business needs, and if so, whether or not it is attractively priced. If the NYSE Arca Agg Lite data feed does not provide sufficient value to firms based on the uses those firms may have for it, such firms may simply choose to conduct their business operations in ways that

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<sup>37</sup> The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. See In the Matter of the Application of Securities Industry and Financial Markets Association for Review of Actions Taken by Self-Regulatory Organizations, Release Nos. 34-72182; AP-3-15350; AP-3-15351 (May 16, 2014). Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATNs have chosen not to do so.

do not use the NYSE Arca Agg Lite data feed.

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

In setting the proposed fees for the NYSE Arca Agg Lite data feed, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition.

Even putting aside the facts that exchanges are platforms and that pricing decisions on the two sides of the platform are intertwined, the Exchange is constrained in setting the proposed market data fees by the availability of numerous substitute market data products. The Commission has been clear that substitute products need not be identical, but only substantially similar to the product at hand.<sup>38</sup>

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<sup>38</sup> For example, in the National IF Approval Order, the Commission recognized that for some customers, the best bid and offer information from consolidated data feeds may function as a substitute for the NYSE National Integrated Feed product, which contains order by order information. See National IF Approval Order, supra note 19, at 67397 [release p. 21] (“[I]nformation provided by NYSE National demonstrates that a number of executing broker-dealers do not subscribe to the NYSE National Integrated Feed and executing broker-dealers can otherwise obtain NYSE National best bid and offer information from the consolidated data feeds.” (internal quotations omitted)).

The NYSE Arca Aggregated Lite market data feed is subject to significant competitive forces that constrain its pricing. Specifically, the NYSE Arca Agg Lite data feed competes head-to-head with similar market data products currently offered by the four U.S. equities exchanges operated by Cboe Exchange, Inc. - Cboe BZX Exchange, Inc. (“BZX”), Cboe BYX Exchange, Inc. (“BYX”), Cboe EDGA Exchange, Inc. (“EDGA”), and Cboe EDGX Exchange, Inc. (“EDGX”), each of which offers a market data product called BZX Summary Depth, BYX Summary Depth, EDGA Summary Depth and EDGX Summary Depth, respectively (collectively, the “Cboe Summary Depth”).<sup>39</sup> Similar to Cboe Summary Depth, NYSE Arca Agg Lite can be utilized by vendors and subscribers to quickly access and distribute aggregated order book data. As noted above, NYSE Arca Agg Lite, similar to Cboe Summary Depth, would provide aggregated depth per security, including the bid, ask and share quantity for orders received by NYSE Arca, except unlike Cboe Summary Depth, which provides aggregated depth per security for up to five price levels, NYSE Arca Agg Lite would provide aggregated depth per security for up to ten price levels on both the bid and offer sides of the NYSE Arca limit order book as well as auction imbalance data.

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

Overall. The Exchange believes that the proposed fees for the NYSE Arca Agg Lite data feed are reasonable because they represent the value of the data available but also the value of receiving the data on an aggregated basis. The Exchange believes that providing vendors and

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<sup>39</sup> See BZX Rule 11.22(m) BZX Summary Depth; BYX Rule 11.22(k) BYX Summary Depth; EDGA Rule 13.8(f) EDGA Summary Depth; and EDGX Rule 13.8(f) EDGX Summary Depth. The Cboe Summary Depth offered by BZX, BYX, EDGA and EDGX are each a data feed that offers aggregated two-sided quotations for all displayed orders for up to five (5) price levels and contains the individual last sale information, market status, trading status and trade break messages.

subscribers with the option to subscribe to a market data product that integrates a subset of data from existing products and where such aggregated data is published at a pre-defined interval, thus lowering bandwidth, infrastructure and operational requirements, would allow vendors and subscribers to choose the best solution for their specific business needs.

The Exchange believes the proposed fees for the NYSE Arca Agg Lite data feed are also reasonable when compared to fees for comparable products, such as the Cboe Summary Depth.<sup>40</sup> Additionally, the Exchange is proposing fees for the NYSE Arca Agg Lite data feed that are based on the existing fee structure that data recipients already pay for the NYSE Arca's other market data products. The Exchange believes that adopting the same fee structure would reduce administrative burdens on NYSE Arca data subscribers that also currently subscribe to market data feeds from NYSE Arca.

Access Fee. The Exchange believes that is reasonable to charge access fees because of the value of the data to data recipients in their profit-generating activities. The Exchange believes that the proposed monthly Access Fee of \$1,500 for the NYSE Arca Aggregated Lite data feed is reasonable because it is lower than the fees charged by BZX, BYX, EDGA, and EDGX, each of which charges between \$2,500 per month to \$5,000 per month for both Internal Distribution and External Distribution of the Cboe Summary Depth market data product.<sup>41</sup>

User Fees. The Exchange believes that having separate Professional and Non-Professional User fees for the NYSE Arca Agg Lite data feed is reasonable because it will make the product more affordable and result in greater availability to Professional and Non-Professional Users. Setting a modest Non-Professional User fee is reasonable because it provides an additional

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<sup>40</sup> See [https://cdn.cboe.com/resources/membership/US Market Data Product Price List.pdf](https://cdn.cboe.com/resources/membership/US_Market_Data_Product_Price_List.pdf).

<sup>41</sup> Id.

method for Non-Professional Users to access the NYSE Arca Agg Lite data feed by providing the same data that is available to Professional Users. The proposed monthly Professional User Fee (Per User) of \$30 and monthly Non-Professional User Fee (Per User) of \$4 are reasonable because they are comparable to user fees generally charged by exchanges. For example, NYSE Arca charges a monthly Professional User Fee (Per User) of \$60 and a monthly Non-Professional User Fee (Per User) of up to \$10 for the NYSE ArcaBook feed.<sup>42</sup> Although the proposed User Fees for Professional and Non-Professional Users are higher than those charged by BZX, BYX, EDGA and EDGX, the Exchange notes that User fees are only a subset of the total fees that vendors and subscribers pay and the lower fees proposed to access and redistribute NYSE Arca Agg Lite would provide such market data recipients with a more affordable alternative to existing substitutes offered by the Exchange and its competitors.

*Redistribution Fees.* The Exchange believes that it is reasonable to charge redistribution fees because vendors receive value from redistributing the data in their business products for their customers. The Exchange believes that charging a Redistribution Fee is reasonable because the vendors that would be charged such a fee profit by re-transmitting the Exchange's market data to their customers. This fee would be charged only once per month to each vendor account that redistributes the NYSE Arca Agg Lite data feed, regardless of the number of customers to which that vendor redistributes the data. The Exchange believes the proposed monthly Redistribution Fee of \$250 for the NYSE Arca Agg Lite data feed is reasonable because it is nominal and lower than the fees charged by BZX, BYX, EDGA and EDGX, each of which charges considerably more for both Internal Distribution and External Distribution of the Cboe Summary Depth market

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<sup>42</sup> See Fee Schedule.



data feed.<sup>43</sup>

Enterprise Fees. The Exchange believes the proposed enterprise license is reasonable because it would reduce exchange fees, lower administrative costs for subscribers that are broker-dealers and help expand the availability of market information to investors, and thereby increase participation in financial markets. Subscribers that are broker-dealers would be able to disseminate the NYSE Arca Agg Lite data feed for display usage to an unlimited number of non-professional users for a monthly fee of \$35,000, or \$31,500 if they contract for twelve months of service in advance. Alternatively, subscribers that are broker-dealers would be able to disseminate the NYSE Arca Agg Lite data feed for display usage to an unlimited number of professional users and non-professional users for a monthly fee of \$110,000, or \$99,000 if they contract for twelve months of service in advance. The proposed enterprise license would result in lower fees for subscribers able to reach the largest audience of investors, including retail investors. Discounts for broader dissemination of market data information have routinely been adopted by exchanges and permitted by the Commission as equitable allocations of reasonable dues, fees and charges.<sup>44</sup>

Non-Display Use Fees. The Exchange believes the proposed Non-Display Use fees are reasonable, because they reflect the value of the data to the data recipients in their profit-generating activities and do not impose the burden of counting non-display devices.

The Exchange believes that the proposed Non-Display Use fees reflect the significant value of the non-display data use to data recipients, which purchase such data on an entirely

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<sup>43</sup> See *supra*, note 40.

<sup>44</sup> For example, the Commission has permitted pricing discounts for market data under Nasdaq Rules 7023(c) and 7047(b). See also Securities Exchange Act Release No. 82182 (November 30, 2017), 82 FR 57627 (December 6, 2017) (SR-NYSE-2017-60) (changing an enterprise fee for NYSE BBO and NYSE Trades).

voluntary basis. Non-display data can be used by data recipients for a wide variety of profit-generating purposes, including proprietary and agency trading and smart order routing, as well as by data recipients that operate order matching and execution platforms that compete directly with the Exchange for order flow. The data also can be used for a variety of non-trading purposes that indirectly support trading, such as risk management and compliance. Although some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce a recipient's costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs, thereby benefiting recipients. The Exchange believes that charging for non-trading uses is reasonable because data recipients can derive substantial value from such uses, for example, by automating tasks so that can be performed more quickly and accurately and less expensively than if they were performed manually.

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

The Exchange believes that it is reasonable to segment the fee for non-display use into

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

The Exchange believes that the proposed fees of \$4,500 per month for each of Categories 1, 2, and 3 is reasonable. These fees are comparable to non-display use fees generally charged by exchanges. For example, the fees for Non-Display Use of NYSE ArcaBook for Categories 1, 2 and 3 is \$6,000 per month.<sup>45</sup> The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using non-display data in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.

The Exchange also believes that, regarding Category 3 fees, it is reasonable to charge \$4,500 per month for each trading platform on which the data recipient uses the Non-Display data, because such use of the data is directly in competition with the Exchange and the Exchange should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible. The Exchange believes that it is reasonable to cap such fees for Category 3 use at \$13,500 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE Arca Agg Lite data feed for use by their trading platforms.

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<sup>45</sup> See Fee Schedule.

The proposed Non-Display Use fees for the NYSE Arca Agg Lite data feed are also reasonable because they take into account the extra value of receiving the data for Non-Display Use on an integrated basis. The Exchange believes that the proposed fees directly and appropriately reflect the significant value of using the NYSE Arca Agg Lite data feed on a non-display basis in a wide range of computer-automated functions relating to both trading and non-trading activities and that the number and range of these functions continue to grow through innovation and technology developments.<sup>46</sup>

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

The Exchange believes that it is reasonable to impose a late fee in connection with the submission of the Non-Display Use Declaration. In order to correctly assess fees for the non-display use of the NYSE Arca Agg Lite data feed, the Exchange needs to have current and accurate information about the use of the NYSE Arca Agg Lite data feed. The failure of data recipients to submit the Non-Display Use Declaration on time leads to potentially incorrect billing and administrative burdens, including tracking and obtaining late Non-Display Use Declarations and correcting and following up on payments owed in connection with late Non-Display Use

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<sup>46</sup> See also Exchange Act Release No. 69157, March 18, 2013, 78 FR 17946, 17949 (March 25, 2013) (SR-CTA/CQ-2013-01) (“[D]ata feeds have become more valuable, as recipients now use them to perform a far larger array of non-display functions. Some firms even base their business models on the incorporation of data feeds into black boxes and application programming interfaces that apply trading algorithms to the data, but that do not require widespread data access by the firm’s employees. As a result, these firms pay little for data usage beyond access fees, yet their data access and usage is critical to their businesses.”).

Declarations. The purpose of the late fee is to incent data recipients to submit the Non-Display Use Declaration promptly to avoid the administrative burdens associated with the late submission of Non-Display Use Declarations.

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

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

a three-month credit for external distribution, which is akin to the three-month fee waiver proposed by the Exchange.<sup>47</sup>

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

### **The Proposed Fees Are Equitably Allocated**

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

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

*Access Fee.* The Exchange believes the proposed monthly Access Fee of \$1,500 for the NYSE Arca Agg Lite data feed is equitably allocated because it would be charged on an equal basis to all data recipients that receive a data feed of the NYSE Arca Agg Lite data feed, regardless of what type of business they operate or the use they plan to make of the data feed.

*User Fees.* The Exchange believes that the fee structure differentiating Professional User fees (\$30 per month per user) from Non-Professional User fees (\$4 per month per user) for

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<sup>47</sup> See e.g., Securities Exchange Act Release No. 94432 (March 16, 2022), 87 FR 16277 (March 22, 2022) (SR-CboeBZX-2022-015) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Applicable to Various Market Data Products).

display device access to the NYSE Arca Agg Lite data feed is equitable. This structure has long been used by the Exchange to reduce the price of data to Non-Professional Users and make it more broadly available.<sup>48</sup> Offering the NYSE Arca Agg Lite data feed to Non-Professional Users with the same data as is available to Professional Users results in greater equity among data recipients. These user fees would be charged uniformly to all display devices that have access to the NYSE Arca Agg Lite data feed.

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

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

Non-Display Use Fees. The Exchange believes the proposed Non-Display Use fees are equitably allocated because they would require subscribers to pay fees only for the uses they actually make of the data. As noted above, non-display data can be used by data recipients for a

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<sup>48</sup> See, e.g., Securities Exchange Act Release No. 72560 (July 8, 2014), 79 FR 40801 (July 14, 2014) (SR-NYSEARCA-2014-72) (establishing tiered Non-Professional User Fees (Per User) for NYSE ArcaBook); Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983), 48 FR 34552 (July 29, 1983) (establishing Non-Professional fees for CTA data); NASDAQ BX Equity 7 Pricing Schedule, Section 123.

wide variety of profit-generating purposes (including trading, risk management, and compliance) as well as purposes that do not directly generate revenues but nonetheless substantially reduce the recipient's costs by automating certain functions. The Exchange believes that it is equitable to charge non-display data subscribers a \$4,500 fee for each category of use they make of such data—namely, using the data on their own behalf (Category 1), on behalf of their clients (Category 2), and to internally match buy and sell orders within an organization (Category 3)—because this fee structure results in subscribers with greater uses of the data paying higher fees, and subscribers with fewer uses of the data paying lower fees. This segmented fee structure is also equitable because no subscriber of non-display data would be charged a fee for a category of use in which it did not actually engage.

The Exchange also believes that, regarding Category 3 fees, it is equitable to charge \$4,500 per month for each trading platform on which the data recipient uses the Non-Display data, because such use of the data is directly in competition with the Exchange and the Exchange should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible. The Exchange believes that it is equitable to cap such fees for Category 3 use at \$13,500 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE Arca Agg Lite data feed for use by their trading platforms.

*Non-Display Use Declaration Late Fee.* The Exchange believes that the proposed fee of \$1,000 per month for a late Non-Display Use Declaration is equitably allocated because it applies to any data recipient that pays an Access Fee for the NYSE Arca Agg Lite data feed but has failed to complete and submit a Non-Display Use Declaration. In addition, the Exchange believes that it is equitable to charge a late fee to subscribers who fail to timely submit their Non-Display Use



Declarations because their failure to do so leads to potentially incorrect billing and administrative burdens on the part of the Exchange. The Exchange believes it is equitable to defray these administrative costs by imposing a late fee only on subscribers' whose declarations were late, as opposed to all subscribers.

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

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

For all of the foregoing reasons, the Exchange believes that the proposed fees for the

NYSE Arca Agg Lite data feed are equitably allocated.

**The Proposed Fees Are Not Unfairly Discriminatory**

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

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

*Access Fee.* The Exchange believes the proposed monthly Access Fee of \$1,500 for the NYSE Arca Agg Lite data feed is not unfairly discriminatory because it would be charged on an equal basis to all data recipients that receive a data feed of the NYSE Arca Agg Lite, regardless of what type of business they operate or the use they plan to make of the data feed.

*User Fees.* The Exchange believes that the fee structure differentiating Professional User fees (\$30 per month per user) from Non-Professional User fees (\$4 per month per user) for display device access to the NYSE Arca Agg Lite data feed is not unfairly discriminatory. This structure has long been used by the Exchange to reduce the price of data to Non-Professional Users and make it more broadly available.<sup>49</sup> Offering the NYSE Arca Agg Lite data feed to Non-

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<sup>49</sup> Id.

Professional Users with the same data as is available to Professional Users results in greater equity among data recipients. These user fees would be charged uniformly to all display devices that have access to the NYSE Arca Agg Lite data feed.

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

Enterprise Fees. The Exchange believes the proposed enterprise license will not unfairly discriminate between customers, issuers, brokers or dealers. The Act does not prohibit all distinctions among customers, but only discrimination that is unfair, and it is not unfair discrimination to charge those subscribers that are able to reach the largest audiences of investors, including retail investors, a lower fee for incremental investors in order to encourage the widespread distribution of market data. This principle has been repeatedly endorsed by the Commission, as evidenced by the approval of enterprise licenses for other market data products.<sup>50</sup> Moreover, the proposed enterprise license will be subject to significant competition, and that competition will ensure that there is no unfair discrimination. Each subscriber will be able to accept or reject the license depending on whether it will or will not lower costs for that particular subscriber, and, if the license is not sufficiently competitive, the Exchange may lose market share. The proposed enterprise license will compete with other enterprise licenses of the Exchange, underlying fee schedules promulgated by the Exchange, and enterprise licenses and fee structures implemented by other exchanges. As such, it is a voluntary product for which market participants can readily find substitutes. Accordingly, the Exchange is constrained from introducing a fee that

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<sup>50</sup> See e.g., Securities Exchange Act Release No. 83751 (July 31, 2018), 83 FR 38428 (August 6, 2018) (SR-NASDAQ-2018-058) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower Fees and Administrative Costs for Distributors of Nasdaq Basic, Nasdaq Last Sale, NLS Plus and the Nasdaq Depth-of-Book Products Through a Consolidated Enterprise License).

would be inequitable or unfairly discriminatory.

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

The Exchange also believes that, regarding Category 3 fees, it is not unreasonably discriminatory to charge \$4,500 per month for each trading platform on which the data recipient uses the Non-Display data, because such use of the data is directly in competition with the Exchange and the Exchange should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible. The Exchange believes that it is not unreasonably discriminatory to cap such fees for Category 3 use at \$13,500 per month per data recipient, because a higher monthly fee may potentially dissuade competitors from buying the NYSE Arca Agg Lite data feed for use by their trading platforms.

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

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

Three-Month Fee Waiver. The Exchange believes the proposal to waive the Access Fee and the Redistribution Fee for the NYSE Arca Agg Lite data feed to new Redistributors for three months is not unfairly discriminatory because it would apply to any first-time Redistributor, regardless of the use they plan to make of the feed. As proposed, any first-time Redistributor of

the NYSE Arca Agg Lite data feed would not be charged the Access Fee and the Redistribution Fee for three calendar months. The Exchange believes it is not unfairly discriminatory to restrict the availability of this three-month fee waiver to Redistributors that have not previously subscribed to the NYSE Arca Agg Lite data feed, since Redistributors who are current or previous subscribers of the feed are already familiar with it and are able to determine whether it suits their needs.

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

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

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

*Intramarket Competition.* The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants. As noted above, the proposed fee schedule would apply to all subscribers, including Redistributors, of the NYSE Arca Agg Lite data feed, and customers may not only choose whether to subscribe to the feed at all, but may tailor their subscriptions by choosing particular uses of the feed but not others (*e.g.*, Category 1 only versus all three categories; display device access only versus non-display use).

The Exchange also believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue market on competition. As shown above, to the extent that particular proposed fees apply to only a subset of subscribers (*e.g.*, Category 2 fees apply only to those making non-display use on behalf of clients; late fees apply only to customers who fail to timely submit their declarations), those

distinctions are not unfairly discriminatory and do not unfairly burden one set of customers over another. To the contrary, by tailoring the proposed fees in this manner, the Exchange believes that it has eliminated the potential burden on competition that might result from unfairly asking subscribers to pay fees for services they did not use, or late fees they did not actually incur.

*Intermarket Competition.* The Exchange believes that the proposed fees do not impose a burden on competition or on other SROs that is not necessary or appropriate. As noted above, exchanges are platforms for market data and trading. In setting the proposed fees, the Exchange was constrained by the availability of numerous substitute platforms also offering market data products and trading, and low barriers to entry mean new exchange platforms are frequently introduced. The fact that exchanges are platforms ensures that no exchange can make pricing decisions for one side of its platform without considering, and being constrained by, the effects that price will have on the other side of the platform. In setting fees for the NYSE Arca Agg Lite data feed, the Exchange is constrained by the fact that, if its pricing across the platform is unattractive to customers, customers will have its pick of an increasing number of alternative platforms to use instead of the Exchange. Given this intense competition between platforms, no one exchange's market data fees can impose an unnecessary burden on competition, and the Exchange's proposed fees do not do so here.

In addition, the Exchange believes that the proposed fees do not impose a burden on competition or on other exchanges that is not necessary or appropriate because of the availability of numerous substitute market data products. Many other exchanges offer proprietary data feeds like the NYSE Arca Agg Lite data feed, supplying depth of book order data, security status updates, stock summary messages, and the exchange's best bid and offer at any given time, on a real-time basis. Because market data users can find suitable substitute feeds, an exchange that

overprices its market data products stands a high risk that users may substitute another platform, in which case the platform would stand to lose both market data and trading fees. These competitive pressures ensure that no one exchange's market data fees can impose an unnecessary burden on competition, and the Exchange's proposed fees do not do so here.

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

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

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>51</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>52</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>53</sup> of the Act to determine whether the proposed rule change should be approved or 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:

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<sup>51</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>52</sup> 17 CFR 240.19b-4(f)(2).

<sup>53</sup> 15 U.S.C. 78s(b)(2)(B).



Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NYSEARCA-2024-39 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-NYSEARCA-2024-39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NYSEARCA-2024-39 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>54</sup>

**Sherry R. Haywood,**  
*Assistant Secretary.*

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<sup>54</sup> 17 CFR 200.30-3(a)(12).