

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79378; File No. SR-NYSEMKT-2016-63)

November 22, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Change, as Modified by Amendment No. 1, Amending the Co-location Services Offered by the Exchange to Add Certain Access and Connectivity Fees

I. Introduction

On August 16, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change (1) to provide additional information regarding access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to Third Party Systems; and connectivity to DTCC provided to Users using data center local area networks; and (2) to establish fees relating to a User’s access to various trading and execution services; connectivity to market data feeds and testing and certification feeds; connectivity to DTCC; and other services. The proposed rule change was published for comment in the Federal Register on August 26, 2016.³ The Commission received no comments in response to the proposed rule change.⁴ On October 4, 2016, the Commission extended the time period within which to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 34-78629 (August 22, 2016), 81 FR 58992 (“Notice”).

⁴ The Commission notes that it did receive one comment letter on a related filing, NYSE-2016-45, which is equally relevant to this filing. See letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated September 9, 2016 (“IEX Letter”).

On September 23, 2016, the NYSE submitted a response (“Response Letter”).

approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to November 24, 2016.⁵

On November 2, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.⁶ The Commission is publishing this order to solicit comments on Amendment No. 1 from interested persons and to institute proceedings pursuant to Exchange Act Section 19(b)(2)(B) to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁷ Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to the proposed rule change, nor does it mean that the Commission will ultimately disapprove the proposed rule change. Rather, as discussed below, the Commission seeks additional input on the proposed rule change, as modified by Amendment No. 1, and on the issues presented by the proposal.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 1

The proposed rule change seeks to amend the co-location services offered by the Exchange to (1) provide additional information regarding the access to trading and execution services and connectivity to data provided to Users with local area networks available in the data center; and (2) establish fees relating to a User's⁸ access to trading and execution services;

⁵ See Securities Exchange Act Release No. 34-78968 (September 28, 2016), 81 FR 68493.

⁶ Amendment No. 1 is discussed further *infra*. Amendment No. 1 is available on the Commission's website at <https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663-1.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE MKT LLC ("NYSE MKT") and NYSE Arca, Inc. ("NYSE Arca" and,

connectivity to data feeds and to testing and certification feeds; connectivity to clearing; and other services.⁹

Background and Access to Exchange Systems

As discussed more fully in the Notice, a User can purchase access to the Liquidity Center Network (“LCN”) and/or internet protocol (“IP”) network in the data center through the purchase of a 1, 10, or 40 Gb LCN circuit, a 10 Gb LX Circuit, bundled network access, Partial Cabinet Solution bundle, or 1, 10 or 40 Gb IP network access.¹⁰ The purchase of any of the LCN or IP network circuit options gives a User access¹¹ to the Exchange’s trading and execution systems, connectivity to the Exchange’s certification and testing feeds,¹² and the ability to connect to any NYSE Data Product.¹³ More specifically, access to the Exchange’s trading and execution system provides a User with access to the Exchange’s “customer gateways that provide for order entry, order receipt (i.e. confirmation that an order has been received), receipt of drop copies and trade reporting (i.e. whether a trade is executed or cancelled), as well as for sending information to

together with NYSE MKT, the “Affiliate SROs”). See Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR-NYSE-2013-59).

⁹ See Notice, supra note 3, 81 FR at 58993.

¹⁰ See id.

¹¹ The purchase of access is subject to receiving authorization from the NYSE, NYSE MKT or NYSE Arca for the Included Data Products, as applicable. See id. at 58993 n.10.

¹² Certification feeds are used to certify that a User conforms to any relevant technical requirements for receipt of data or access to Exchange systems. Testing feeds, which do not carry live production data, provide Users with an environment to conduct tests with the non-live data, including testing for upcoming Exchange releases and product enhancements or the User’s own software development. See id. at 58993. These feeds are only available over the IP network, however a User without an IP network connection may obtain an IP network circuit for purposes of testing and certification for free for three months. See id. at 58993 n.12.

¹³ See id. at 58993.

shared data services for clearing and settlement.”¹⁴ The Exchange seeks to add clarifying language in its proposed rule to reflect the services included with purchase of Exchange system access.¹⁵

Connectivity to Included Data Products

As discussed more fully below, the Exchange offers connectivity to three types of data products: Included Data Products, Premium NYSE Data Products, and Third Party Data Feeds.¹⁶ As discussed more fully in the Notice, the Included Data Products include Consolidated Tape Association (“CTA”) disseminated data feeds and NMS data feeds.¹⁷ The CTA disseminates consolidated real-time trade and quote information in NYSE listed securities (Network A) and NYSE MKT, NYSE Arca and other regional exchanges’ listed securities (Network B) pursuant to a national market system plan.¹⁸ The NMS data feeds include Consolidated Tape System and Consolidated Quote System data streams, as well as Options Price Reporting Authority feeds.¹⁹ To obtain connectivity to the Included Data Products, a User must enter into a contract with the data provider and pay any applicable fees.²⁰ Once the Exchange receives an authorization from

¹⁴ See id. The Exchange represents that connectivity to the Exchange systems can be obtained without the purchase of access to the LCN or IP network. See id.

¹⁵ See id.

¹⁶ See id. at 58993-58994. Neither the NYSE Data Products or Third Party Data Feeds provide access or order entry to the Exchange’s execution system. See id. at 58994 n. 15. Connectivity to the NYSE Data Products is available in three forms: a resilient feed, “Feed A”, or “Feed B.” A resilient feed includes two copies of the same feed for redundancy purposes and Feed A and Feed B are identical feeds. A User that wants redundancy would connect to both Feed A and Feed B or two resilient feeds, using two different ports. See id. at 58993; see also id. at 58993 n. 13.

¹⁷ See Notice, supra note 3, 81 FR at 58994.

¹⁸ See id.

¹⁹ See id.

²⁰ See id.

the data feed provider, the Exchange will provide connectivity to the Included Data Product(s) through a User’s LCN or IP network port.²¹ The Exchange does not charge any additional fees for this connectivity “because such access and connectivity is directly related to the purpose of co-location.”²² The Exchange proposes to add language to the NYSE MKT Equities Price List and the NYSE Amex Options Fee Schedule (collectively “Fee Schedules”) to specify that there are no additional fees for connectivity to Included Data Products.²³

Connectivity to Premium NYSE Data Products

As part of its data product offerings, the Exchange now proposes to provide connectivity to Premium NYSE Data Products from the Exchange and its Affiliate SROs to Users over either the LCN and/or IP network “because such access and connectivity is directly related to the purpose of co-location.”²⁴ The proposed rule change seeks to amend the Fee Schedules to specify the connectivity fees for Premium NYSE Data Products.²⁵

As discussed more fully in the Notice, the Premium NYSE Data Products are “equity market data products that are variants of the equity Included Data Products. Each Premium NYSE Data Product integrates, or includes data elements from, several Included Data Products.”²⁶ These Integrated Feeds include “depth of book order data (with add, modify and

²¹ See id.

²² See id.; see also Amendment No. 1, supra note 6.

²³ See Notice, supra note 3, 81 FR at 58994.

²⁴ See id.; see also Amendment No. 1, supra note 6.

²⁵ See Notice, supra note 3, 81 FR at 58995.

²⁶ See id. at 58994. Examples include: (1) the NYSE Integrated Feed that includes, among other items, data from three of the equity Included Data Products: NYSE OpenBook, NYSE Trades, and NYSE Order Imbalances; and (2) the NYSE BQT data feed that includes, among other items, specific data elements from six of the equity Included Data Products: NYSE Trades, NYSE BBO, NYSE Arca Trades, NYSE Arca BBO, NYSE MKT Trades, and NYSE MKT BBO. See id. Additionally, with respect to the NYSE

delete orders), trades (with corrections and cancel/errors), opening and closing imbalance data, security status updates (e.g., trade corrections and trading halts) and stock summary messages. The stock summary messages display a market's opening price, high price, low price, closing price, and cumulative volume for a security. Only the Integrated Feeds offer all these components in sequence in one feed."²⁷ Additionally, the NYSE BQT data feed includes, among other things, certain data elements from six of the equity Included Data Products of the Exchange and Affiliated SROs in one data feed: NYSE Trades, NYSE BBO, NYSE Arca Trades, NYSE Arca BBO, NYSE MKT Trades, and NYSE MKT BBO.²⁸

As is the case with Included Data Products, a User of Premium NYSE Data Products must enter into a contract with the data provider for each feed and the provider would then authorize the Exchange to provide connectivity of the particular feed to that User's LCN or IP Network port.²⁹ The Exchange proposes to charge a User a monthly recurring fee per each Premium NYSE Data Product feed for the connectivity provided by the Exchange.³⁰

Amex and NYSE Arca options data, neither NYSE Amex nor NYSE Arca offer Premium Data Products because there are "no options data products that integrate, or include data elements from, other option data products in the same manner that the NYSE, NYSE MKT and NYSE Arca Integrated Feeds integrate, or include data elements from, equity Included Data Products." See id.

²⁷ See Amendment No. 1, supra note 6.

²⁸ See id. None of the Included Data Products provide Users with data from the Exchange and Affiliate SROs in one feed. See id. Also, according to the Exchange, the Premium Data Products contain more data overall in comparison to the Included Data Products and potentially can be subject to greater technical specifications in order to receive the feed(s). See Notice, supra note 3, 81 FR at 58995. "For example, a User connecting to the NYSE Arca Integrated Feed, NYSE Integrated Feed or NYSE MKT Integrated Feed would need at least a 1 Gb IP network connection in order to connect to either Feed A or Feed B. To connect to a resilient feed, the User would require an LCN or IP network connection of at least 10 Gb." See id. at 58993 n. 13.

²⁹ See Notice, supra note 3, 81 FR at 58994.

³⁰ See id. at 58995.

Connectivity to Third Party Data Feeds

The Exchange's proposal further seeks to offer Third Party Data Feeds to Users and to charge a connectivity fee per feed as reflected on its Fee Schedules.³¹ In the data center, the Exchange receives Third Party Data Feeds from multiple national securities exchanges and other content service providers which it then provides to requesting Users for a fee.³² With the exceptions of Global OTC and NYSE Global Index, Users connect to Third Party Data Feeds over the IP network.³³ In charging for this service, the Exchange notes that its practice is consistent with the monthly fee Nasdaq charges its co-location customers for connectivity to third party data.³⁴

In order to connect to a Third Party Data Feed, a User must enter into a contract with the relevant third party market or content service provider, under which the third party market or content service provider charges the User for the data feed.³⁵ The Exchange receives these Third Party Data Feeds over its fiber optic network and, after the data provider and User enter into a contract and the Exchange receives authorization from the data provider, the Exchange re-transmits the data to the User over a User's port.³⁶ Users only receive, and are only charged for, the feed(s) which they have entered into contracts for.³⁷ Additionally, the Exchange notes that Third Party Data Feeds do not provide access or order entry to its execution system or access to

³¹ See id. at 58996.

³² See id.

³³ See id.

³⁴ See id. The Exchange notes that Nasdaq charges monthly fees of \$1,500 and \$4,000 for connectivity to BATS Y and BATS, respectively, and of \$2,500 for connectivity to EDGA or EDGX. See id.

³⁵ See id.

³⁶ See id.

³⁷ See id.

the execution system of the third party generating the feed.³⁸ The Exchange proposes to charge a monthly recurring fee for connectivity to each Third Party Data Feed, however for SuperFeed and MSCI it proposes to charge different fees which vary based on the bandwidth requirements for the connection.³⁹ A User is free to receive all or some of the feeds included in the Fee Schedules.⁴⁰ Moreover, the Exchange notes that Third Party Data Feed providers may charge redistribution fees, such as Nasdaq's Extranet Access Fees and OTC Markets Group's Access Fees,⁴¹ which the Exchange will pass through to the User in addition to charging the applicable connectivity fee.⁴² Finally, the Exchange permits third party markets or content providers that are also Users to connect to their own Third Party Data Feeds without a charge.⁴³ The Exchange represents that it does not charge Users that are third party markets or content providers for connectivity to their own feeds because such parties generally receive their own feeds for purposes of diagnostics and testing.⁴⁴

Connectivity to Other Services

As part of its data center offerings, the Exchange also seeks to provide access and connectivity to Third Party Systems/content service providers, the DTCC⁴⁵ (collectively "Service

³⁸ See id. There is one exception to this for the ICE feeds which include both market data and trading and clearing services. In order to receive the ICE feeds, a User must receive authorization from ICE to receive both market data and trading and clearing services. See id.

³⁹ See id.

⁴⁰ See id.

⁴¹ See id.

⁴² See id.

⁴³ See id. at 58996

⁴⁴ See id. at 58997.

⁴⁵ "Such connectivity to DTCC is distinct from the access to shared data services for clearing and settlement services that a User receives when it purchases access to the LCN

Providers”), third party certification and testing feeds,⁴⁶ and Virtual Control Circuits⁴⁷ (“VCCs”).⁴⁸ The proposed rule change seeks to amend the Fee Schedules to add new fees for connectivity to these Service Providers and third party certification and testing feeds and to specify that connectivity is dependent on a User meeting the necessary technical requirements, paying the applicable fees, and the Exchange receiving authorization to establish a connection for a User.⁴⁹ Similarly, the proposed rule change seeks to amend the Fee Schedules to add a new fee for connectivity for VCCs which will similarly require permission from the other User before the Exchange will establish the connection.⁵⁰ Accordingly, the Exchange proposes to amend its Fee Schedules to add recurring monthly connectivity fees for Service Providers and VCCs based upon the bandwidth requirements per system and/or VCC connection between two Users.⁵¹ For third party certification and testing feeds, the Exchange proposes to revise its Fee Schedules to include a monthly recurring \$100 fee per feed.⁵²

For each service, a User must execute a contract with the respective Service Provider and/or third party certification and testing feed provider(s) pursuant to which a User pays each

or IP network. The shared data services allow Users and other entities with access to the Trading Systems to post files for settlement and clearing services to access.” See id. at 58998 n. 33.

⁴⁶ Certification feeds certify that a User conforms to any of the relevant content service providers’ requirements for accessing Third Party Systems or receiving Third Party Data, whereas testing feeds provide Users an environment in which to conduct system tests with non-live data. See id. at 58997.

⁴⁷ A VCC (previously called a “peer to peer” connection) is a two-way connection through which two participants can establish a connection between two points over dedicated bandwidth using the IP network to be used for any purpose. See id.

⁴⁸ See id. at 58995, 58997.

⁴⁹ See id.

⁵⁰ See id. at 58997.

⁵¹ See id. at 58995, 58997.

⁵² See id. at 58997.

the associated fee(s) for their services.⁵³ Once the Exchange receives authorization from the Service Provider and/or third party certification and testing feed provider(s), the Exchange will enable a User to connect to the Service Provider and/or third party certification and testing feed(s) over the IP Network.⁵⁴ Similarly, with respect to VCCs, the Exchange will not establish a VCC connection over its IP Network until the other User confirms the VCC request.⁵⁵ Finally, the Exchange notes, that its execution system does not provide access to Service Provider systems, nor do the Service Provider systems provide access to the Exchange's execution system.⁵⁶

As noted above, the Commission received one comment letter on a related filing which is equally applicable to this filing.⁵⁷ This commenter (1) requested clarification about the history of the fees and “the increasing costs of maintaining the data center and providing co-location compared to any related fee revenue” and (2) expressed a concern about whether “there are any true alternatives that are practically available to various types of participants who are seeking to compete with those who are paying exchanges for co-location and data services.”⁵⁸ Specifically, the commenter noted that the NYSE states that the connectivity fees are used to defray the costs associated with providing co-location to Users, but, the commenter questions whether the fees to

⁵³ See id. at 58995, 58997.

⁵⁴ See id. For Third Party Systems, once the Exchange receives the authorization from the respective third party it establishes a unicast connection between the User and the relevant third party over the IP network. See id. at 58995. For the DTCC, “[t]he Exchange receives the DTCC feed over its fiber optic network and, after DTCC and the User enter into the services contract and the Exchange receives authorization from DTCC, the Exchange provides connectivity to DTCC to the User over the User’s IP network port.” See id. at 58997.

⁵⁵ See id. at 58997.

⁵⁶ See id. at 58995, 58997.

⁵⁷ See IEX Letter, supra note 4.

⁵⁸ See id. at 1-2.

cover the increasing costs of providing co-location are applied in an equitable manner.⁵⁹ Moreover, with respect to alternatives, the commenter noted that broker-dealers face best execution obligations that are “critically impacted by sub-millisecond differences in access to exchange systems and market data.”⁶⁰ As a result, market participants face the quandary of whether to trade from outside the data center if other members are trading from inside.⁶¹ Additionally, some broker-dealers trading for clients “may be practically required to buy and consume proprietary market data feeds directly from exchanges in order to provide competitive products for those clients.”⁶² The commenter believes that this environment “imposes a form of trading tax on all members by offering different methods of access to different members.”⁶³ The commenter questions whether true alternatives are available for participants seeking to compete with firms paying for exchange co-location and data services and whether the Exchange’s ability to set fees is truly constrained by market forces for a “comparable product”.⁶⁴

As discussed above, the Exchange submitted a response to the commenter on the related filing.⁶⁵ The Exchange in its Response Letter stated that historical information about the development of these product offerings is “not required by the Act and is not relevant to [] the substance of the Proposal—which is, by definition, forward looking....”⁶⁶ Additionally, the Response Letter noted that costs are not the only consideration in setting its prices, but rather the

⁵⁹ See id.

⁶⁰ See id. at 2.

⁶¹ See id.

⁶² See id.

⁶³ See id.

⁶⁴ See id.

⁶⁵ See Response Letter, supra note 4.

⁶⁶ See id. at 2.

prices “include the competitive landscape; whether Users would be required to utilize a given service; the alternatives available to Users; and, significantly, the benefits Users obtain from the services.”⁶⁷ With respect to the commenter’s concern about members needing additional information to assess the fixed costs of exchange membership, the Exchange responded that these are not fixed costs of “Exchange members” but instead costs to any User who voluntarily chooses to purchase such services based upon “[t]he form and latency of access and connectivity that best suits a User’s needs...”⁶⁸ Users do not require the Exchange’s access or connectivity to trade on the Exchange and can instead use alternative access and connectivity options for trading if they choose.⁶⁹

In response to the commenter’s argument regarding different methods of access to trading, the Exchange stated that “it is a vendor of fair and non-discriminatory access, and like any vendor with multiple product offerings, different purchasers may make different choices regarding which products they wish to purchase.”⁷⁰ The Exchange further stated in response to the commenter’s concern of a lack of true alternatives for a “comparable product”, that the filing lists several alternative options for Users and a User can evaluate the “relative benefits of those alternatives and choose whichever it deems most beneficial to it...”⁷¹

⁶⁷ See id.

⁶⁸ See id. at 4.

⁶⁹ See id.

⁷⁰ See id. at 5. The Exchange makes a further argument about the Exchange being a regulated co-location space whereas other unregulated co-location options are available. See id.

⁷¹ See id. at 6. The Exchange noted that it is not addressing the commenter’s statements about broker-dealers needing to purchase market data from the Exchange as that is outside the scope of this proposal. See id. at 5 n.13.

Amendment No. 1

In Amendment No. 1, the Exchange offers additional justification for the proposed rule change.⁷² In Amendment No. 1, the Exchange addressed (1) the benefits offered by the Premium NYSE Data Products that are not present in the Included Data Products (2) how Premium NYSE Data Products are related to the purpose of co-location, (3) the similarity of charging for connectivity to Third Party Systems and DTCC and charging for connectivity to Premium NYSE Data Products and (4) the costs incurred by the Exchange in providing connectivity to Premium NYSE Data Products to Users in the data center.⁷³ In the Amendment, the Exchange provided further detail on the benefits provided to Users through the Premium NYSE Data Products including “depth of book order data (with add, modify and delete orders), trades (with corrections and cancel/errors), opening and closing imbalance data, security status updates (e.g., trade corrections and trading halts) and stock summary messages.”⁷⁴ The Exchange also clarified which costs are associated with providing Users with access and connectivity to the various services discussed in the filing, including the Premium NYSE Data Products.

III. Proceedings to Determine Whether to Disapprove SR-NYSEMKT-2016-63 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁷⁵ to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as modified by Amendment No.

1. Institution of proceedings does not indicate that the Commission has reached any conclusions

⁷² See Amendment No. 1, supra note 6.

⁷³ See id.

⁷⁴ See id.; see also supra note 27 and accompanying text.

⁷⁵ 15 U.S.C. 78s(b)(2)(B).

with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change, as modified by Amendment No. 1.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the following grounds for disapproval that are under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,”⁷⁶
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers,”⁷⁷ and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”⁷⁸

As discussed above, the Exchange’s proposal would, among other things, establish fees relating to a User’s access to trading and execution services, connectivity to data feeds and to testing and certification feeds, connectivity to clearing, and other services. The Exchange believes that the proposed fees are consistent with Sections 6(b)(4), (5), and (8) of the Act because the fees charged for co-location services are constrained by the active competition for the order flow and other business from such market participants.⁷⁹ The Exchange stated that charging excessive fees would make it stand to lose not only co-location revenues but also the

⁷⁶ 15 U.S.C. 78f(b)(4).

⁷⁷ 15 U.S.C. 78f(b)(5).

⁷⁸ 15 U.S.C. 78f(b)(8).

⁷⁹ See Notice, supra note 3, 81 FR at 58999.

liquidity of the formerly co-located trading firms.⁸⁰ Additionally, the Exchange believes that because there are alternatives for a User both in and outside of the data center if it believes the fees are too excessive, the fees are consistent with the Act.⁸¹ Specifically, the Exchange noted that a User could terminate its co-location arrangement with the exchange “and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange’s data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location.”⁸² Additionally, “[a]s alternatives to using the Access and Connectivity provided by the Exchange, a User may access or connect to such services and products through another User or through a connection to an Exchange access center outside the data center, third party access center, or third party vendor. The User may make such connection through a third party telecommunication provider, third party wireless network, the SFTI network, or a combination thereof.”⁸³ However, the Exchange also stated that the expectation of co-location was that normally Users would expect reduced latencies in sending orders to the Exchange and in receiving market data from the Exchange by being co-located.⁸⁴ Therefore, as the Exchange states in Amendment No. 1, both Included Data Products and Premium NYSE Data Products are “directly related to the purpose of co-location.”⁸⁵

80 See id.

81 See id.

82 See id.

83 See id.

84 See id.

85 See Amendment No. 1, supra note 6.

The commenter suggests that Users do not in fact have alternatives to paying the connectivity fee to obtain Premium NYSE Data Products.⁸⁶ If these products are integral to co-located Users for trading on the Exchange, the Commission questions whether obtaining the information contained in these products from another source is, in fact, a viable alternative given the importance of receiving such information in a timely manner. The Commission is concerned that the Exchange has not supported its argument that there are viable alternatives for Users inside the data center in lieu of obtaining such information from the Exchange. The Commission seeks comment on whether Users do have viable alternatives to paying the Exchange a connectivity fee for the Premium NYSE Data Products.

Additionally, the Exchange states that both Included Data Products and Premium NYSE Data Products are “directly related to the purpose of co-location.” The Commission is concerned that the Exchange has not made clear why including the cost of connectivity to the Included Data Products in the purchase of a LCN or IP network connection and charging an additional fee to obtain the Premium NYSE Data Products is an equitable allocation of reasonable dues, fees, and other charges among Users in the data center; does not unfairly discriminate between customers, issuers, brokers, or dealers; and does not impose a burden on competition which is not necessary or appropriate in furtherance of the purposes of the Act. The Commission is concerned that the Exchange has not identified a distinction between the provision of connectivity to Included Data Products and the provision of connectivity to Premium NYSE Data Products, as opposed to a distinction between the utility of the Included Data Products and Premium NYSE Data Products to Users, which the Exchange has demonstrated, even though these are all NYSE proprietary data products. Therefore, the Commission is concerned that the Exchange has not identified a

⁸⁶ See IEX Letter, supra note 4.

reasonable basis for charging Users a separate connectivity fee for the Premium NYSE Data Products while including connectivity in the purchase price for a LCN/IP network connection. The Exchange stated in its filing that both are “directly related to the purpose of co-location” but it has not clearly justified why this permits including the connectivity fee for Included Data Products as part of the LCN or IP Network connection, even for those Users that do not use the Included Data Products, but not including the connectivity fee for the Premium NYSE Data Products as well. Similarly, the Exchange justifies the costs associated with providing these feeds by stating “[i]n order to offer connectivity to the Premium NYSE Data Products, the Exchange must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of the connectivity, including by ensuring that the network infrastructure has the necessary bandwidth for the Premium NYSE Data Products and responding to any production issues.”⁸⁷ The Commission does not believe the Exchange has clearly explained why the same rationale would not apply to the Included Data Products. The Exchange has sought to justify this on the basis that the Premium NYSE Data Products are similar to any other service offered by the Exchange such as connectivity to Third Party Systems and DTCC.⁸⁸ The Commission however is concerned that these Premium NYSE Data Products are similar to the Included Data Products and therefore should not include different fee structures as they are the same offering by the Exchange within the contemplated purpose of co-location. The Commission seeks comment on whether charging fees for connectivity to Included Data Products and Premium NYSE Data Products in a different manner is consistent with Section 6(b)(4) of the Act.

⁸⁷ See Amendment No. 1, supra note 6.

⁸⁸ See id.

Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposed rule change, as modified by Amendment No. 1. In particular, the Commission invites the written views of interested persons concerning whether the proposal, as modified by Amendment No. 1, is consistent with Sections 6(b)(4), (5), or (8)⁸⁹ or any other provision of the Act, or the rules and regulations thereunder. Although there does not appear to be any issue relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,⁹⁰ any request for an opportunity to make an oral presentation.⁹¹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal, as modified by Amendment No. 1, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. In light of the concerns raised by the proposed rule change, as discussed above, the Commission invites additional comment on the proposed rule change, as modified by Amendment No. 1, as the Commission continues its analysis of the proposed rule

⁸⁹ 15 U.S.C. 78f(b)(4), (b)(5) and (b)(8).

⁹⁰ 17 CFR 240.19b-4.

⁹¹ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

change's consistency with Sections 6(b)(4), (5) and (8),⁹² or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposed rule change, as modified by Amendment No. 1, in addition to any other comments they may wish to submit about the proposed rule change.

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. Please include File No. SR-NYSEMKT-2016-63 on the subject line.

Paper comments:

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

All submissions should refer to File No. SR-NYSEMKT-2016-63. 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, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the

⁹² 15 U.S.C. 78f(b)(4), (b)(5) and (b)(8).

principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-NYSEMKT-2016-63, and should be submitted by [insert date 21 days from the date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹³

Robert W. Errett
Deputy Secretary

⁹³ 17 CFR 200.30-3(a)(57).