

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-80309; File No. SR-NYSEMKT-2016-63)

March 24, 2017

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Partial Amendment No. 4 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 through 4, to Amend 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the co-location services offered by the Exchange to add certain access and connectivity fees, applicable to Users<sup>3</sup> in the Exchange’s data center in Mahwah, NJ (“Data Center”). The Exchange proposed to: (1) provide additional information regarding access to the trading and execution systems of the Exchange and its affiliated SROs, and establish fees for connectivity to certain NYSE, NYSE Arca, and NYSE MKT market data feeds; and (2) provide and establish fees for connectivity to data feeds from third party markets and other content service providers (“Third Party Data Feeds”); access to the trading and execution services of Third Party markets and other content service providers (“Third Party Systems”); connectivity to Depository Trust &

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

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

<sup>3</sup> 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. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR-NYSEMKT-2015-67). As specified in the Price List and Fee Schedule, 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 New York Stock Exchange LLC (“NYSE”) and NYSE Arca, Inc. (“NYSE Arca”). See Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR-NYSEMKT-2013-67).

Clearing Corporation (“DTCC”) services; connectivity to third party testing and certification feeds; and the use of virtual control circuits (“VCCs”).

The Commission published the proposed rule change for comment in the Federal Register on August 26, 2016.<sup>4</sup> The Commission received no comments in response to the proposed rule change.<sup>5</sup> On October 4, 2016, the Commission extended the time period within which to 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.<sup>6</sup>

On November 2, 2016, the Exchange filed partial Amendment No. 1 to the proposed rule change.<sup>7</sup> On November 29, 2016, the Commission instituted proceedings (“Order Instituting Proceedings” or “OIP”) to determine whether to approve or disapprove the proposed rule change,

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<sup>4</sup> See Securities Exchange Act Release No. 34-78629 (August 22, 2016), 81 FR 58992 (“Notice”).

<sup>5</sup> The Commission notes that it received one comment letter on a related filing by NYSE (NYSE-2016-45, the “NYSE Companion Filing”), 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 I Letter”).

Responding to the IEX I Letter, see letter to Brent J. Fields, Commission, from Martha Redding, Associate General Counsel and Assistant Secretary, NYSE, dated September 23, 2016 (“Response Letter I”), available at <https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-3.pdf>. In note 3 of Response Letter I, the NYSE states that its response is also applicable to the Exchange’s filing, Securities Exchange Act Release No. 78629 (August 22, 2016), 81 FR 58992 (August 26, 2016) (SR-NYSEMKT-2016-63). Accordingly, Response Letter I is referred to as the Exchange’s response.

<sup>6</sup> See Securities Exchange Act Release No. 34-78968 (September 28, 2016), 81 FR 68493.

<sup>7</sup> In partial 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. Amendment No. 1 is available on the Commission’s website at <https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663-1.pdf>.

as modified by Amendment No. 1.<sup>8</sup> The proposed rule change, as modified by Amendment No. 1, is referred to as the “Prior Proposal.”

On December 9, 2016, the Exchange filed Amendment No. 2 to the proposed rule change and on December 13, 2016 also filed Amendment No. 3 to the proposed rule change.<sup>9</sup> Amendment Nos. 2 and 3, which, together superseded and replaced the Prior Proposal in its entirety, were published for comment in the Federal Register on December 29, 2016.<sup>10</sup>

The Commission received additional comment letters following publication of the Order Instituting Proceedings.<sup>11</sup> Some of these comment letters addressed only the Prior Proposal, and some addressed the Prior Proposal, as modified by Amendment Nos. 2 and 3. NYSE, on behalf

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<sup>8</sup> See Securities Exchange Act Release 34-79378 (November 22, 2016), 81 FR 86050.

<sup>9</sup> The Commission notes that the Exhibit 5 filed with Amendment No. 2 contained erroneous rule text and therefore was corrected in Amendment No. 3. Amendment Nos. 2 and 3 are available at <https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663.shtml>.

<sup>10</sup> See Securities Exchange Act Release No. 34-79672 (December 22, 2016), 81 FR 96080 (“Notice of Amendment Nos. 2 and 3”).

<sup>11</sup> See letter to Brent J. Fields, Commission, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated December 12, 2016 (“SIFMA I Letter”); letter to Brent J. Fields, Commission, from Joe Wald, Chief Executive Officer, Clearpool Group, dated December 16, 2016 (“Clearpool Letter”); letter to Brent J. Fields, Secretary, Commission, from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (IEX), dated December 21, 2016 (“IEX II Letter”); letter to Brent J. Fields, Commission, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated February 6, 2017 (“SIFMA II Letter”). All comments received by the Commission on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663.shtml>.

The Commission received additional comment letters on the NYSE Companion Filing which are equally relevant to this filing. See letter to Brent J. Fields, Commission, from Adam C. Cooper, Senior Managing Director and Chief Legal Officer, Citadel Securities, dated December 12, 2016 (“Citadel Letter”); letter to Brent J. Fields, Commission, from David L. Cavicke, Chief Legal Officer, Wolverine LLC (“Wolverine Letter”); letter to Brent J. Fields, Secretary, Commission, from Stefano Durdic, Managing Director, R2G Services, LLC, dated January 21, 2017 (“R2G Letter”). All comments received by the Commission on the NYSE Companion Filing are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645.shtml>.

of the Exchange, responded to the comment letters submitted after the OIP in letters dated January 17, 2017 and February 13, 2017.<sup>12</sup> On February 7, 2017, the Exchange filed partial Amendment No. 4 to the proposed rule change.<sup>13</sup> On February 27, 2017, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> the Commission designated a longer period for Commission action on proceedings to determine whether to disapprove the proposed rule change, as modified by Amendment Nos. 1 through 4.<sup>15</sup> The Commission is publishing this notice to solicit comment on partial Amendment No. 4 and, and is approving the proposed rule change, as modified by Amendment Nos. 1 through 4, on an accelerated basis.

## II. Description of the Proposed Rule Change, as Modified by Amendment Nos. 1 through 4

### A. Background: Prior Proposal and the Order Instituting Proceedings

In the proposed rule change, as modified by Amendment Nos. 1 through 4 (also referred to as the “Current Proposal”), the Exchange proposes to amend the co-location services offered

<sup>12</sup> See letter to Brent J. Fields, Commission, from Martha Redding, Associate General Counsel and Assistant Secretary, NYSE, dated January 17, 2017; letter to Brent J. Fields, Commission, from Martha Redding, Associate General Counsel and Assistant Secretary, NYSE, dated February 13, 2017 (“Response Letter II” and “Response Letter III,” respectively), available at <https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663.shtml>. In Response Letter II, note 4, and Response Letter III, note 2, respectively, the NYSE states that its response to comments on the NYSE Companion Filing are equally applicable to this filing. Accordingly, Response Letters II and III are referred to as the Exchange’s response.

<sup>13</sup> In partial Amendment No. 4 the Exchange proposes to (1) remove reference to the National Stock Exchange from its list of Third Party Systems, and (2) provide and establish fees for connectivity to three additional Third Party Data Feeds - ICE Data Services Consolidated Feed, ICE Data Services PRD, and ICE Data Services PRD CEP, which are feeds owned by the Exchange’s ultimate parent, but not by the Exchange or its affiliated self-regulatory organizations, NYSE MKT or NYSE. Partial Amendment No. 4, as filed by the Exchange, is available at <https://www.sec.gov/comments/sr-nysemkt-2016-63/nysemkt201663-1570727-131699.pdf>.

<sup>14</sup> 15 U.S.C. 78s(b)(2).

<sup>15</sup> See Securities Exchange Act Release No. 34-80077 (February 22, 2017), 82 FR 11959. The Commission designated April 23, 2017 as the date by which it should determine whether to disapprove the proposed rule change.

by the Exchange to add certain access and connectivity services and establish fees applicable to Users in the Data Center. Specifically, the Exchange proposes to provide and establish fees for connectivity to: (i) Third Party Data Feeds, (ii) Third Party Systems, (iii) DTCC services, (iv) third party testing and certification feeds; and for the use of VCCs.<sup>16</sup>

In the Prior Proposal (i.e., prior to filing Amendment Nos. 2 and 3), the Exchange also had proposed to provide additional information about access to NYSE, NYSE Arca, and NYSE MKT trading and execution services, and to establish fees for connectivity to certain proprietary market data feeds.<sup>17</sup> Specifically, the Exchange had proposed that connectivity to most of the Exchange's and its affiliated SROs' proprietary market data products would be included in the purchase price of an LCN/IP network connection in the Data Center, but that an additional connectivity fee ("Premium NYSE Product Connectivity Fee") would apply to the NYSE Integrated Feed, NYSE Arca Integrated Feed, NYSE MKT Integrated Feed, and the NYSE Best Quote and Trades (BQT) feed ("Premium NYSE Data Products").<sup>18</sup> As a result, the purchase of access to NYSE, NYSE Arca, and NYSE MKT trading and execution services, would not include connectivity to every purchased proprietary data product; and whereas the Exchange would charge no additional fees for connectivity to most of the Exchange's and its affiliated SROs' data products, it would charge additional fees for connectivity to Premium NYSE Data Products.

The Commission specifically requested comment on this aspect of the Prior Proposal in

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<sup>16</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96081, and partial Amendment No. 4 supra note 13. A VCC is a unicast connection between two Users over dedicated bandwidth using the IP network. See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96081.

<sup>17</sup> For a detailed description of the Prior Proposal, see the Notice, supra note 4, and the OIP, discussing Amendment No. 2, supra note 8.

<sup>18</sup> See the Notice, supra note 4, and the OIP, discussing Amendment No. 1, supra note 8.

the OIP. In particular, in the OIP, the Commission expressed concern that the Exchange had not identified a distinction between the provision of connectivity to Premium NYSE Data Products and the Exchange's and its affiliated SROs' other data products, and noted that the Premium NYSE Data Products are similar to such other data products.<sup>19</sup> In addition, the Commission requested comment on whether charging fees for connectivity to Premium NYSE Data Products in a different manner from other Exchange and affiliated SRO proprietary market data products was consistent with Section 6(b)(4) of the Act.<sup>20</sup> The Commission also sought comment on whether Users would have viable alternatives to paying the Exchange a connectivity fee for the Premium NYSE Data Products.<sup>21</sup> As discussed below, several commenters stated that it was inequitable for the Exchange to charge a separate and additional connectivity fee for some Exchange and affiliated SRO proprietary market data products and not others, and that receiving the Premium NYSE Data Products from an alternative source was not a viable option.<sup>22</sup>

In Amendment Nos. 2 and 3, the Exchange eliminated the Premium NYSE Product Connectivity Fee from the Current Proposal, and that fee is therefore no longer presented to the Commission for consideration.

#### B. Description of the Current Proposal

As stated above and more fully described in the Notice of Amendment Nos. 2 and 3, as partially modified by Amendment No. 4, the Exchange proposes to provide and establish fees for connectivity to: (i) Third Party Data Feeds, (ii) Third Party Systems, (iii) DTCC services, (iv)

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<sup>19</sup> See OIP, supra note 8, 81 FR at 86054.

<sup>20</sup> See id.

<sup>21</sup> See id.

<sup>22</sup> See infra notes 69-71 and accompanying text.

third party testing and certification feeds; and for the use of VCCs.<sup>23</sup>

Regarding Third Party Data Feeds, the Exchange proposes to offer Users the option to connect to Third Party Data Feeds in the Data Center for a monthly connectivity fee per feed.<sup>24</sup> The Exchange states that it receives Third Party Data Feeds in the Data Center from multiple national securities exchanges and other content service providers which it then provides to requesting Users for a fee.<sup>25</sup> The Exchange states that its proposal to charge Users a monthly fee for connectivity to Third Party Data Feeds is consistent with the monthly connectivity fee Nasdaq charges its co-location customers for connectivity to third party data.<sup>26</sup> According to the Exchange, the proposed fees “allow the Exchange to defray or cover the costs associated with offering Users connectivity to Third Party Data Feeds while providing Users the convenience of receiving such Third Party Data Feeds within co-location.”<sup>27</sup> Additionally, the Exchange noted that some of the proposed fees vary depending on the bandwidth considerations and, in cases where the bandwidth requirements are the same as other proposed services such as Third Party Systems or VCCs, the prices reflect “the competitive considerations and the costs the Exchange incurs in providing such connections.”<sup>28</sup>

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<sup>23</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96081 and partial Amendment No. 4 supra note 13.

<sup>24</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96082.

<sup>25</sup> See id.

<sup>26</sup> See id. The Exchange notes that Nasdaq charges monthly fees of \$1,500 and \$4,000 for connectivity to BATS Y and BATS data feeds, respectively, and of \$2,500 for connectivity to EDGA or EDGX. See id.

<sup>27</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96085; partial Amendment No. 4, supra note 13.

<sup>28</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96085; partial Amendment No. 4, supra note 13.

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.<sup>29</sup> 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's port.<sup>30</sup> Users only receive, and are only charged for, the feed(s) for which they have entered into contracts.<sup>31</sup> Additionally, the Exchange notes that Third Party Data Feeds do not provide access or order entry to its execution system or access to the execution system of the third party generating the feed.<sup>32</sup> The Exchange proposes to charge a set monthly recurring connectivity fee per Third Party Data Feed, as set forth in its proposed Price List and Fee Schedule ("Fee Schedules").<sup>33</sup> A User is free to receive all or some of the feeds included in its Fee Schedules.<sup>34</sup> 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, which the Exchange will pass through to the User in addition to charging the applicable connectivity fee.<sup>35</sup>

The Exchange represents that "as alternatives to using the [proposed connectivity to

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<sup>29</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96082.

<sup>30</sup> See id.

<sup>31</sup> See id.

<sup>32</sup> See id. The Exchange notes that 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.

<sup>33</sup> See id., as modified by partial Amendment No. 4, supra note 13 (adding additional Third Party Data Feeds).

<sup>34</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96082.

<sup>35</sup> See id.

Third Party Data Feeds] provided by the Exchange, a User may access or connect to such... 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.”<sup>36</sup>

As more fully described in the Notice of Amendment Nos. 2 and 3, as modified by partial Amendment No. 4, the Exchange also proposes to provide and establish fees for connectivity (also referred to as “Access”) to Third Party Systems,<sup>37</sup> to DTCC services,<sup>38</sup> and to third party certification and testing feeds, and charge a monthly recurring fee.<sup>39</sup> The Exchange proposes to amend its Fee Schedules to provide and establish fees for connectivity to these service providers and certification/testing feeds.<sup>40</sup> The Exchange states that connectivity is dependent on a User

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<sup>36</sup> See id. at 96085.

<sup>37</sup> The Exchange states that it selects what connectivity to Third Party Systems to offer in the Data Center based on User demand. See id. at 96081. In partial Amendment No. 4, the Exchange removed the National Stock Exchange from the list of Third Party Systems, noting that it is now owned by the Exchange’s parent. See partial Amendment No. 4, supra note 13. Establishing a User’s access to a Third Party System does not give the Exchange any right to use the Third Party Systems; connectivity to a Third Party System does not provide access or order entry to the Exchange’s execution system, and a User’s connection to a Third Party System is not through the Exchange’s execution system. See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96081.

<sup>38</sup> The Exchange states that 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 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 Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96083 n. 25.

<sup>39</sup> 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 Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96083.

<sup>40</sup> See Notice of Amendment Nos. 2 and 3, supra note 10, 81 FR at 96081-96083.

meeting the necessary technical requirements, paying the applicable fees, and the Exchange receiving authorization from the relevant third party service provider to make the connection.<sup>41</sup>

For each service, a User must execute a contract with the respective third party service provider pursuant to which a User pays each the associated fee(s) for their services.<sup>42</sup> Once the Exchange receives authorization from the third party service provider, 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.<sup>43</sup> The proposed recurring monthly fees for connectivity to Third Party Systems and DTCC are based upon the bandwidth requirements per system.<sup>44</sup>

The Exchange represents that as alternatives to using the proposed connectivity to Third Party Systems, to DTCC services, and to third party certification and testing feeds offered 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.”<sup>45</sup>

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<sup>41</sup> See id.

<sup>42</sup> See id.

<sup>43</sup> 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 96081. 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 96083.

<sup>44</sup> See id. at 96081, 96083.

<sup>45</sup> See id. at 96084-96085.

Finally, as more fully described in the Notice of Amendment Nos. 2 and 3, as partially modified by partial Amendment No. 4, the Exchange also proposes to provide and establish fees for VCCs.<sup>46</sup> A VCC (previously called a “peer to peer” connection) is a unicast 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.<sup>47</sup> The proposed recurring monthly fees for VCCs are based upon the bandwidth requirements per VCC connection between two Users.<sup>48</sup> Connectivity to VCCs will similarly require permission from the other User before the Exchange will establish the connection.<sup>49</sup> As an alternative to using a VCC, Users can connect to other Users through a cross-connect.<sup>50</sup>

The Exchange states in reference to all of the proposed services that in adding the fees it seeks to defray or cover its costs in providing these voluntary services to Users, and that in order to provide these services it must, among other things, provide, maintain and operate the data center facility hardware and technology infrastructure; and handle the installation, administration, monitoring, support and maintenance of such services, including by responding to any production issues.<sup>51</sup> The Exchange also states that the fees charged for co-location services are constrained by the active competition for the order flow and other business from such market participants,<sup>52</sup> and that charging excessive fees would make it stand to lose not only

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<sup>46</sup> See id. at 96083.

<sup>47</sup> See id.

<sup>48</sup> See id.

<sup>49</sup> See id.

<sup>50</sup> See id. at 96084.

<sup>51</sup> See id. at 96085.

<sup>52</sup> See id. at 96084.

co-location revenues but also the liquidity of the formerly co-located trading firms.<sup>53</sup>

Additionally, the Exchange states that Users have alternatives if they believe the fees are excessive.<sup>54</sup> Specifically, the Exchange notes 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 [D]ata [C]enter (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with colocation.”<sup>55</sup>

### III. Summary of Comments Received and Exchange Responses

The Commission received four comment letters on the proposed rule change, as modified by Amendment Nos. 1 through 4, and an additional four comment letters on the NYSE Companion Filing.<sup>56</sup> The Exchange submitted three letters in response to the comments.<sup>57</sup>

#### A. Comment Submitted Prior to the OIP

The Commission received one comment letter prior to publication of the OIP.<sup>58</sup> The initial commenter requested that the Exchange provide additional information on the history of all of the proposed fees (which the commenter believed were already in effect), and the relationship between the fees and the Exchange’s costs to maintain the Data Center and provide

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<sup>53</sup> See id.

<sup>54</sup> See id.

<sup>55</sup> See id.

<sup>56</sup> See supra notes 5 and 11. Because the additional letters on NYSE Companion Filing address the same issues, all eight letters are considered as submitted in response to the proposed rule change, as modified by Amendment Nos. 1 through 4, and are discussed herein. In addition, one commenter noted that it filed a denial of access petition on the proposal. See SIFMA I Letter at 1 and SIFMA II Letter at 3.

<sup>57</sup> See Response Letters I, II, and III, supra notes 5 and 12.

<sup>58</sup> See IEX I Letter, supra note 5.

co-location services.<sup>59</sup> The commenter urged “additive transparency” to enable members to evaluate the fixed costs of exchange membership and whether fees were applied equitably.<sup>60</sup> This commenter also stated that broker-dealers “may be practically required to buy and consume proprietary market data feeds directly from exchanges in order to provide competitive products for those clients, and that the trading environment “imposes a form of trading tax on all members by offering different methods of access to different members.”<sup>61</sup> The commenter questioned 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,” and urged that the Exchange provide information and analysis on how its ability to set co-location fees is constrained by market forces for a “comparable product.”<sup>62</sup>

In response, the Exchange replied that historical information about the development of its product offerings is “not required by the Act and is not relevant to [] the substance of the Proposal—which is, by definition, forward looking....”<sup>63</sup> The Exchange added that costs are not its only consideration in setting prices, but rather that 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.”<sup>64</sup> 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

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<sup>59</sup> See id. at 1-2.

<sup>60</sup> See id.

<sup>61</sup> See id. at 2.

<sup>62</sup> See id.

<sup>63</sup> See Response Letter I, supra note 5, at 3.

<sup>64</sup> See id.

to purchase.”<sup>65</sup> The Exchange further stated that co-location fees are not fixed costs to members, but 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.”<sup>66</sup> The Exchange added that Users do not require the Exchange’s access or connectivity offerings in co-location to trade on the Exchange and can instead use alternative access and connectivity options for trading if they choose.<sup>67</sup>

B. Comments Following Publication of the OIP

(i) Comments on the Premium NYSE Product Connectivity Fee and Cumulative Fees Generally

As noted above, the Commission specifically requested comment on the Premium NYSE Product Connectivity Fee in the OIP.<sup>68</sup> In response, some commenters objected to the establishment of a separate connectivity fee for Premium NYSE Data Products as duplicative of fees already charged for bandwidth and access to the market data product itself, and therefore that this fee would result in an inequitable allocation of fees, inconsistent with Section 6(b)(4) of the Act.<sup>69</sup> Another commenter similarly objected to an additional connectivity/bandwidth charge for each Premium NYSE Data Product as an example of “double dipping,” and a fee having “no merit” on its own.<sup>70</sup> Additionally, some commenters objected to the reasonableness of the proposed Premium NYSE Product Connectivity Fee on the basis that there was no viable

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<sup>65</sup> See id. at 5.

<sup>66</sup> See id. at 4.

<sup>67</sup> See id.

<sup>68</sup> See OIP, supra note 8, and Section II.A. supra.

<sup>69</sup> See Citadel Letter at 2; Clearpool Letter at 4.

<sup>70</sup> See Wolverine Letter at 3. See also Citadel Letter at 2; R2G Letter at 3 (each expressing concern about cumulative fees).

alternative to paying the fee to obtain connectivity to the Premium NYSE Data Products.<sup>71</sup>

In response to comments on the Premium NYSE Product Connectivity Fee, the Exchange noted that it was no longer proposing that fee and that the questions posed in the OIP about that fee were moot.<sup>72</sup>

Some commenters opposed to the Premium NYSE Product Connectivity Fee also expressed broader concern about “layered” and cumulative fees charged by the Exchange to access market data.<sup>73</sup> Some of these commenters believe that the rising costs related to the receipt of market data in co-location over time effectively impose a barrier to entry for smaller broker-dealers and new entrants, and are a burden on competition.<sup>74</sup> For example, Wolverine stated that it has an aggregate cost of “\$123,750 per month of fixed costs in co-location, port, and access fees today, solely for access to NYSE controlled markets,” which is “an amount which presents a steep barrier to entry for new participants.”<sup>75</sup> Wolverine also estimated that its NYSE market data costs have increased “over 700% over 8 years.”<sup>76</sup> Citadel similarly stated that

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<sup>71</sup> See Citadel Letter at 3 (“there is no readily available substitute or equivalent means of access to the Premium NYSE Data Products”); Wolverine Letter at 3 (objecting to the statement “the Exchange is not the exclusive method to connect to Premium NYSE Data Products” noting that it is “misleading at best.”). See also R2G Letter at 1-2 (stating, its view that the Prior Proposal “raises serious concerns” under the Exchange Act, but that “Amendment No. 3 adequately addresses the original concerns,” and adding that it would, however, object if the Exchange similarly sought to apply the logic of Amendment No. 3 regarding Third Party Systems to any “NYSE Proprietary Product”).

<sup>72</sup> See Response Letter II at 4, 7-8. The Exchange also stated, as discussed further below, that it did not agree with commenters suggesting that a connectivity fee is indistinguishable from a market data fee.

<sup>73</sup> See Wolverine Letter at 1-3; Clearpool Letter at 3; Citadel Letter at 3; R2G Letter 1, 3-6.

<sup>74</sup> See Wolverine Letter at 1-3; Clearpool Letter at 3; Citadel Letter at 3.

<sup>75</sup> See Wolverine Letter at 3.

<sup>76</sup> See *id.* at 1 (also objecting to port and other charges (outside the scope of the Current Proposal) as unreasonable); see also R2G Letter at 3 (expressing agreement with Wolverine).

“additive and layered fees are a persistent problem with exchange fees more generally,” and urged scrutiny of the aggregate impact of fees, “in particular with respect to market data products where exchanges have a monopoly as the initial distributors.”<sup>77</sup>

Clearpool stated, among other things, that market participants are beholden to the exchanges for market data; that it is not feasible for broker-dealers with best execution obligations to rely on SIP data as an alternative to exchange proprietary data feeds; and that the role and cost of using SIP and proprietary feeds should be considered in connection with Commission proposals to improve Regulation NMS Rules 605 and 606 reporting.<sup>78</sup> Clearpool advocated for the Commission to “thoroughly review the issues around market data” and to ensure that it is priced more competitively and equitably for all market participants.<sup>79</sup> Clearpool also stated that high costs prevent new innovative technology services, including order routing, risk management, and transaction cost analysis services, from entering the market, and further, that increasing fees significantly reduce the margin that smaller broker-dealers can earn on a transaction, putting them at a disadvantage to larger firms that can absorb these costs.<sup>80</sup>

In response to these comments, the Exchange challenged Wolverine’s assessment that Exchange fees have increased by 700% over the past eight years, explaining that it was a mischaracterization and did not represent a true comparison of the fees paid for particular data feeds in 2008 as compared to fees paid for those specific feeds today.<sup>81</sup> The Exchange also rejected Wolverine’s argument that all of its costs—including the optional cage surrounding its

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<sup>77</sup> See Citadel Letter at 2.

<sup>78</sup> See Clearpool Letter at 2-4.

<sup>79</sup> See id. at 1, 4.

<sup>80</sup> See id. at 3.

<sup>81</sup> See Response Letter II at 10 and n.27.

cabinets, power, cross connects, network ports and connectivity—should be treated as costs related to market access.<sup>82</sup> The Exchange stated, that “however self-servingly [Wolverine] tries to characterize them, these listed costs, like rent and employee compensation and benefits, are simply costs associated with Wolverine’s business activities. These business activities and Wolverine’s business judgment—not the Exchange—determine the most effective way for Wolverine to select the products and services it uses.”<sup>83</sup>

Regarding comments about market data and co-location fees more generally, the Exchange responded that a User that chooses to receive market data within co-location will incur several costs in addition to the cost a market data provider will charge for its data, including the costs associated with the LCN or IP network port, power, cross connects, and connectivity, but the need for equipment and connections to enable receipt of a market data feed within co-location does not convert the costs of such equipment and connections into market data fees.<sup>84</sup> The Exchange also stated that some commenters were using the Prior Proposal as a “departure point to discuss broader issues related to market data.”<sup>85</sup> The Exchange catalogued comments about exchange fees for proprietary market data products, the effect of Commission proposals to improve disclosure of order execution and order routing information under Rules 605 and 606 of Regulation NMS, and the payment of rebates for posted liquidity as comments beyond the scope of the Current Proposal, as well as the fees any one exchange might propose.<sup>86</sup>

The Exchange also stated that market participants are not required to co-locate with or

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<sup>82</sup> See id. at 10.

<sup>83</sup> See id.

<sup>84</sup> See id. at 5.

<sup>85</sup> See id.

<sup>86</sup> See id. at 5-6. See also infra notes 114-127, discussing SIFMA’s comments characterizing a variety of fees as market data fees and the Exchange’s response.

subscribe to proprietary market data products from an exchange, emphasizing that firms using exchange market data products in co-location “have chosen to build business models based on speed.”<sup>87</sup>

(ii) Comments Regarding Competition and Alternatives to the Proposed Co-Location Services

Some commenters addressing both the Prior Proposal and Amendment Nos. 2 and 3 suggested that co-location services in general are not optional.<sup>88</sup> In the context of whether the Current Proposal’s connectivity fees are reasonable, some of these commenters argued that there is a lack of competition for the Exchange’s co-location and data services generally, and suggested a lack of viable alternatives to the Current Proposal’s proposed connectivity services and fees in particular.<sup>89</sup> For instance, SIFMA argued that the Exchange’s ability to set co-location fees is not constrained by market forces because there is “no comparable connectivity or product,” and low-latency alternatives to these services do not exist.<sup>90</sup> SIFMA stated that “[a]ny

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<sup>87</sup> See Response Letter II at 11-12.

<sup>88</sup> See IEX I Letter at 2 (best execution requires broker-dealer to have “effective access” to exchanges); SIFMA II Letter at 4 (“brokers are legally obligated to seek best execution for their customers. They are required to consider the likelihood that a trade will be executed and whether there is an opportunity to obtain a price better than what is currently quoted.”) See also Citadel Letter at 3 (stating that “competitive pressures oblige broker-dealers to seek the most efficient access to markets and market data to execute orders...,” creating a risk for those firms that elect to trade with “slower and less efficient access.”); R2G Letter at 3 (referring to an “ever increasing need for speed”); Wolverine Letter at 1 (stating that it is “required to subscribe to the lowest latency NYSE market data products and services”).

<sup>89</sup> See IEX I Letter at 2, IEX II Letter at 1-3, SIFMA I Letter at 2 and SIFMA II Letter at 2. Compare with comments alleging a lack of viable alternatives to connectivity to Premium NYSE Data Products, supra note 73.

<sup>90</sup> See SIFMA I Letter at 2. According to SIFMA, “the mere presence of the IEX Letter in the comment file” evidences of a lack of competitive market forces to constrain pricing, because IEX is a competitor to the Exchange. See id. at 3.

alternative with severely increased latencies would not be a viable alternative.”<sup>91</sup> Similarly, IEX argued that if co-location services are optional, and therefore need not be purchased if the fees are excessive, then the Exchange should demonstrate how firms are not placed at a competitive disadvantage if they elect to not receive such services from the Exchange.<sup>92</sup> In particular, IEX suggested that the Exchange provide data on the expected latency (or range of latencies) in receiving data or transmitting orders directly from the Exchange, compared to the equivalent latency (or range) for firms that rely on a third party access center.<sup>93</sup> IEX requested that the NYSE “explain whether it believes that this difference would not affect the ability of electronic market makers and other trading firms and active agency brokers to compete with firms in the same businesses that have faster access, and if so how it reached this conclusion.”<sup>94</sup> IEX also disputed that competition for order flow constrains pricing of co-location services, arguing that NYSE often displays protected quotes for certain stocks, a status it achieves by paying a high number of rebates for liquidity, and firms are forced to interact with it to avoid trade-throughs.<sup>95</sup> Both IEX and SIFMA argued that in the absence of competition for the proposed services and fees (which, in SIFMA’s view are indistinguishable from market data fees), the Exchange should be required to discuss the relationship between the proposed fees and increasing Data Center

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<sup>91</sup> See SIFMA I Letter at 3 (also stating “different fees are charged for the different types of connectivity, with no rational basis, [is] unfairly discriminatory between customers.”)

<sup>92</sup> See IEX II Letter at 2.

<sup>93</sup> See id.

<sup>94</sup> See id.

<sup>95</sup> See id. at 3. See also SIFMA II Letter at 2 (expressing general agreement); see also SIFMA I Letter at 3 (stating that the presence of a comment letter from IEX cuts against the argument that competition for order flow constrains fees). See also Citadel Letter at 2 (urging greater transparency regarding the Exchange’s Data Center costs).

costs, or detail how the fee increases relate to the costs of providing the service, in order to justify the proposed fees as reasonable.<sup>96</sup>

In contrast, two commenters acknowledged the existence of alternatives to some Exchange co-location services.<sup>97</sup> One of these commenters noted that alternatives are present for Third Party System connectivity as evidenced by the fact that it “finds NYSE’s third part[y] system costs out of line and does not subscribe to this NYSE offering, instead implementing this connectivity internally using a proprietary network.”<sup>98</sup> Another commenter stated that it “directly competes with NYSE for these [Third Party Systems] services and does so at prices significantly lower than the fees NYSE has proposed.”<sup>99</sup>

In response to comments that competitive forces do not constrain co-location fees and that alternatives to co-location services are lacking, the Exchange defended its representations that the proposed services are offered as a convenience to Users, are voluntary, and that Users have viable alternatives to the proposed services.<sup>100</sup> The Exchange stated that additional latency in an alternative means of connectivity does not negate the viability of that alternative,<sup>101</sup> and that commenters arguing that only an “equivalent” latency alternative is a viable alternative are misguided.<sup>102</sup> The Exchange stated that, “the Act does not require that there be at least one third party option available that has exactly the same characteristics as a proposed service before a national securities exchange can impose or change a fee for a service,” adding that such a

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<sup>96</sup> See IEX II Letter at 3; SIFMA II Letter at 2.

<sup>97</sup> See Wolverine Letter at 3; R2G Letter at 1-2.

<sup>98</sup> See Wolverine Letter at 3.

<sup>99</sup> See R2G Letter at 1-2.

<sup>100</sup> See Response Letter II at 6.

<sup>101</sup> See id. at 7-8.

<sup>102</sup> See id. at 7.

requirement would be “untenable, as every exchange would have to have an exact duplicate before it could charge a fee.”<sup>103</sup> Rather, the relevant question is whether a proposed fee would be “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.”<sup>104</sup> The Exchange noted that it did not represent that the connectivity alternatives available to co-located Users (including alternatives for connectivity to Premium NYSE Data Products) are exactly the same as those proposed, but rather that the cited alternatives show that Users have the option “to receive the same market data, or make the same trades, in other manners.”<sup>105</sup> The Exchange added that its cited alternatives “offer distinct services and pricing structures that some Users may find more attractive than those proposed by the Exchange,” and that these alternatives are “real,” even if not all Users will find them equally attractive for their individual business model.<sup>106</sup> The Exchange stated that the viability of alternatives is “underscored by the Wolverine Letter, which explicitly states that it does not object to the proposed fees for access to Third Party Systems in the Current Proposal on the basis

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<sup>103</sup> See id. at 8.

<sup>104</sup> See id.

<sup>105</sup> See id. The Exchange also noted that Clearpool is not a co-location customer of the Exchange, which the Exchange believes illustrates that market participants can and do avail themselves of alternatives for connecting to NYSE market data products. See id.

<sup>106</sup> See id. In addition, in response to IEX’s suggestion that the Exchange provide data on the expected latency (or range of latencies) in receiving data or transmitting orders directly from the Data Center, compared to the expected latency (or range) for firms that rely on a third party access center, the Exchange stated it could not do so without having access to the latency data of third parties, or each User’s specific system configuration and latency needs and therefore could not satisfy IEX’s “deliberately impossible requirement.” See id. at 7.

that firms may contract with other parties or contract directly with network providers.”<sup>107</sup> The Exchange added that, “[I]t is the Exchange’s understanding that a User could access Third Party Systems and connect to Third Party Data Feeds, third party testing and certification feeds, and DTCC using one or more of the listed alternatives without increasing its latency levels – and, in many cases, the alternatives would offer lower latency.”<sup>108</sup>

Further, the Exchange emphasized that while some commenters focus exclusively on latency as the only relevant consideration, “Users with different investment strategies or business models may focus on other characteristics, including redundancy, resiliency, cost, and the services that third parties offer but the Exchange does not, such as managed services.”<sup>109</sup> The Exchange stated that alternatives exist as evidenced by the fact that “there are at least six Users within the co-location hall that offer other Users or hosted customers access to trading or connectivity to market data, including the two other exchanges that are co-located with the Exchange, as well as the fact that Users may contract with any of the 15 telecommunication providers—including five third party wireless networks—available to Users to connect to third party vendors.”<sup>110</sup> The Exchange also noted that the alternatives are possible in part because the Exchange voluntarily allows Users to provide services to other Users and third parties out of the Exchange’s co-location facility—that is, to compete with the Exchange using the Exchange’s own facilities.<sup>111</sup> For example, according to the Exchange, “a User that wished to receive

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<sup>107</sup> See id. at 9. The Exchange did not similarly address the R2G Letter.

<sup>108</sup> See id. at 9-10.

<sup>109</sup> See id. at 8 n.16.

<sup>110</sup> See id. at 9.

<sup>111</sup> See id.

Nasdaq market data could connect directly to the Nasdaq server within co-location.”<sup>112</sup>

Therefore, the Exchange believes that contrary to commenters’ beliefs, the Exchange’s cited alternatives offer comparable services that can be used in lieu of receiving Exchange offered services, and that there are competitive forces constraining pricing.<sup>113</sup>

SIFMA raised additional arguments. SIFMA urged that “[t]he proposed connectivity fees should be reviewed in a manner consistent with the decisions of the United States Court of Appeals for the District of Columbia Circuit” in NetCoalition v. SEC, because says SIFMA, they are market data fees.<sup>114</sup> SIFMA took the position that under NetCoalition I (615 F.3d 525 (D.C. Cir. 2010)) an exchange’s assertion that order flow competition constrains pricing of data is insufficient.<sup>115</sup> More specifically, in SIFMA’s view “port, power, cross connect, connectivity and cage fees, which are necessary in order to obtain the market data from NYSE,” “however labeled, are market data fees.”<sup>116</sup> SIFMA also noted that it had submitted a “properly filed 19(d) denial of access petition on the proposal,” but had requested that it be “held in abeyance pending the decision in the NetCoalition follow-on proceedings....”<sup>117</sup> SIFMA urged however, that such petition, despite its abeyance, not be ignored.<sup>118</sup>

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<sup>112</sup> See id. at 10 n.24.

<sup>113</sup> See id. at 9.

<sup>114</sup> See SIFMA II Letter at 2-3 (citing NetCoalition I, 615 F.3d 525 (D.C. Cir. 2010); NetCoalition II, 715 F.3d 342 (D.C. Cir. 2013)).

<sup>115</sup> SIFMA I Letter at 3 (noting that “[t]he Court’s NetCoalition decisions, the controlling law on this subject, rejected this order flow argument because, like here, there was no support for the assertion that order flow competition constrained the ability of the exchange to charge supracompetitive prices for data.”).

<sup>116</sup> See SIFMA II Letter at 3. See also SIFMA I Letter at 4 (stating that market data fees, port fees, hardware fees and connectivity fees are all “within the ambit of the NetCoalition decisions.”)

<sup>117</sup> See SIFMA I Letter at 1; SIFMA II Letter at 3.

<sup>118</sup> See SIFMA II Letter at 3.

In response to SIFMA on these points, the Exchange stated that, “NetCoalition addressed the standards governing proprietary market data fees,” and that it is “incorrect” to characterize the Current Proposal as establishing market data fees.<sup>119</sup> The Exchange stated:

the fact that a User needs to have a port, power, and connectivity in place in order to be able to receive a market data feed within co-location does not convert the costs of such equipment and connections into market data fees. Rather, they are costs associated with the User’s business activities. If a User opts to put a cage around its servers in the colocation hall, the cage fee it pays is a cost it chooses to incur in connection with the way it has chosen to do business, not a market data fee.<sup>120</sup>

The Exchange distinguished the services and fees proposed in the Current Proposal from market data fees, emphasizing that they are connectivity fees or access fees applicable when a User chooses to utilize connectivity or access services within co-location.<sup>121</sup> The Exchange noted that two of the proposed fees are for services that facilitate Users’ trading activities, and have nothing to do with market data: a proposed fee for access within co-location to the execution systems of third party markets and other content service providers, and a proposed fee for connectivity within co-location to DTCC services, such as clearing, fund transfer, insurance, and settlement services.<sup>122</sup> The Exchange similarly distinguished the proposed connectivity fee for third party testing and certification feeds as not equivalent to providing a customer with market data.<sup>123</sup> Addressing the proposed connectivity fee for Third Party Data Feeds within co-location, the

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<sup>119</sup> See Response Letter III at 3-4.

<sup>120</sup> See id. at 4 (emphasis in original).

<sup>121</sup> See id. at 5-6. The Exchange noted that SIFMA did not address VCC fees. See id. at 5, n. 17.

<sup>122</sup> See id. at 5-6 (also noting that fees for Third Party System and DTCC connectivity vary by bandwidth and are generally proportional to the bandwidth required).

<sup>123</sup> See id. at 5 (also noting that fees for connectivity to third party testing and certification feeds reflect that bandwidth requirements are generally not large, and the relatively low fee may encourage Users to conduct tests and certify conformance, which the Exchange believes generally benefits the markets).

Exchange noted that this proposed fee “has more often been mistaken for a market data fee,” but distinguished the service of providing a User with connectivity to Third Party Data Feeds from the service that the third party providing the market data provides by sending the data over the connection, noting that the third party content service provider charges the User the market data fee.<sup>124</sup>

The Exchange did not agree with SIFMA’s contention that the Current Proposal would establish market data fees, nor agree that NetCoalition standard was applicable to the Current Proposal,<sup>125</sup> but instead stated, “[t]here is significant competition for the connectivity relevant to the Current Proposal;” and “even if the NetCoalition standard did apply, the Current Proposal satisfies it.”<sup>126</sup>

Regarding SIFMA’s denial of access petition, the Exchange responded that a denial of access petition is not a comment letter, and should not be treated as such given that SIFMA itself has requested that its denial of access petition on fee filings be held in abeyance pending a decision in the NetCoalition follow-on proceedings.<sup>127</sup>

#### IV. Discussion and Commission Findings

After careful consideration of the proposed rule change, as modified by Amendment Nos. 1 through 4, the comments received, and the Exchange’s responses to the comments, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 through 4,

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<sup>124</sup> See id. at 5-6 (also noting that the fees for Third Party Data Feeds vary because Third Party Data Feeds vary in bandwidth; proximity to the Exchange, requiring different circuit lengths; fees charged by the third party provider, such as port feeds; and levels of User demand).

<sup>125</sup> See id. at 3. See also Response Letter II at 13.

<sup>126</sup> See Response Letter III at 3. See also Response Letter II at 13.

<sup>127</sup> See Response Letter III at 3. See also Response Letter II at 13; SIFMA Letter II at 3 (noting that “SIFMA’s 19(d)s will be held in abeyance pending the decision in the NetCoalition follow-on proceedings...”).

is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>128</sup> which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members, issuers and other persons using its facilities; Section 6(b)(5) of the Act,<sup>129</sup> which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers; and Section 6(b)(8) of the Act,<sup>130</sup> which prohibits any exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the Act.<sup>131</sup>

As discussed more fully above, some commenters oppose the proposed co-location fees on the basis that viable alternatives to the Exchange's co-location services are lacking, and particularly that similar low-latency alternatives to the Exchange's co-location services do not exist.<sup>132</sup> According to these commenters, the lack of viable alternatives means that competitive forces do not constrain Exchange pricing of co-location services, and the Exchange's proposed fees should be subject to a cost-based assessment.<sup>133</sup>

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<sup>128</sup> 15 U.S.C. 78f(b)(4).

<sup>129</sup> 15 U.S.C. 78f(b)(5).

<sup>130</sup> 15 U.S.C. 78f(b)(8).

<sup>131</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>132</sup> See supra notes 62, 88-94, and accompanying text.

<sup>133</sup> See supra notes 62, 96, 114-116 and accompanying text.

In response to these comments, the Exchange counters that co-location Users have several alternatives to the Exchange’s proposed services, both inside and outside the Data Center. The Exchange explains that as alternatives to using the access to Third Party Systems, and connectivity to Third Party Data Feeds, third party testing and certification feeds, and DTCC, provided by the Exchange, a User may access or connect to such services and products through an Exchange access center, third party access center, or a third party vendor outside the Data Center, and may do so using a third party telecommunication provider, a third party wireless network, the Secure Financial Transaction Infrastructure (SFTI) network, or a combination thereof.<sup>134</sup> Furthermore, the Exchange points out that alternatives to the Exchange’s access and connectivity services also exist inside the Data Center, as evidenced by the fact that “there are at least six Users within the co-location hall that offer other Users or hosted customers access to trading or connectivity to market data, including the two other exchanges that are co-located with the Exchange, as well as the fact that Users may contract with any of the 15 telecommunication providers—including five third party wireless networks—available to Users to connect to third party vendors.”<sup>135</sup> The Exchange notes that these alternatives are possible because the Exchange allows Users to provide services to other Users and third parties out of the Exchange’s co-location facility—that is, to compete with the Exchange using the Exchange’s own facilities.<sup>136</sup>

The Commission has carefully considered the comments and the Exchange’s response concerning the availability of alternatives to the Exchange’s proposed access and connectivity services. In addition, the Commission notes that two commenters expressed the view that viable

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<sup>134</sup> See Response Letter II at 6.

<sup>135</sup> See id. at 9.

<sup>136</sup> See id.

alternative means of accessing Third Party Systems are available.<sup>137</sup> The Commission believes that viable alternatives to the Exchange's proposed co-location services are available which bring competitive forces to bear on the fees set forth in the Current Proposal.<sup>138</sup>

Also, as discussed above, some commenters expressed concern that the proposed fees would impose a barrier to entry on smaller broker-dealers and new entrants, and a burden on competition.<sup>139</sup> The Commission does not believe that the Current Proposal would impose a burden on competition inconsistent with the Act because, as discussed above, viable alternatives to the Exchange's proposed services exist, both inside and outside the Data Center.

Finally, the Commission notes that several commenters believed the originally proposed NYSE Premium Connectivity Fee to be duplicative and an inequitable allocation of fees.<sup>140</sup> Because the Exchange eliminated that fee in Amendment Nos. 2 and 3, the Commission believes that these concerns have been addressed.<sup>141</sup>

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<sup>137</sup> See supra notes 97-99. One of these commenters also stated its view that Amendment No. 3 addressed the concerns raised in the OIP. See supra note 71. Furthermore, the Exchange's proposal with respect to connectivity to Third Party Data Feeds is not novel, given that Nasdaq similarly charges connectivity fees for third party data feeds, as reflected on its co-location fee schedule. See Nasdaq Rule 7034.

<sup>138</sup> See also Securities Exchange Act Release No. 34-62397 (June 28, 2010); Securities Exchange Act Release No. 34-66013 (December 20, 2011), 76 FR 80992 (December 27, 2011) (noting "that members may choose not to obtain low latency network connectivity through the Exchange and instead negotiate connectivity options separately through other vendors on site"); Securities Exchange Act Release No. 34-76748 (finding the establishment of an exclusive wireless connection consistent with the Act because, among other reasons, the alternatives suggested provided the same or similar speeds as compared to the NYSE's wireless connectivity); Securities Exchange Act Release No. 34-68735 (finding the establishment of an exclusive wireless connection consistent with the Act because, among other reasons, the alternatives suggested provided the same or similar speeds as compared to Nasdaq's wireless connectivity).

<sup>139</sup> See supra notes 74-80 and accompanying text.

<sup>140</sup> See supra notes 69-70 and accompanying text.

<sup>141</sup> The Commission believes that comments expressing concerns about proprietary market data fees more generally are outside the scope of the Current Proposal.

Accordingly, the Commission finds that the Current Proposal is consistent with the Act.

V. Solicitation of Comments on Partial Amendment No. 4

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether partial Amendment No. 4 is consistent with the Exchange Act.

Comments may be submitted by any of the following methods: Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEMKT-2016-63 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 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, DC 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the 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 on or before [insert date 21 days from publication in the Federal Register].

VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 -4

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos 1- 4, prior to the thirtieth day after the date of publication of notice of the amended proposal in the Federal Register. The revisions made to the proposal in partial Amendment No. 4<sup>142</sup> (1) removed reference to the National Stock Exchange (NSX) from its list of Third Party Systems, (2) added three additional Third Party Data Feeds - ICE Data Services Consolidated Feed, ICE Data Services PRD, and ICE Data Services PRD CEP, (3) added connectivity fees for each of the newly added Third Party Data feeds. With respect to NSX, the Exchange represents that NSX was acquired by the NYSE Group on January 31, 2017, making it no longer a Third Party System. The Commission believes this characterization is consistent with the NYSE Group's similarly situated affiliated exchanges, NYSEMKT and NYSE, which, like NSX are solely within the NYSE Group's control. Regarding the ICE Data Services feeds, the Exchange notes that it has an indirect interest in these feeds because ICE Data Services is owned by the Exchange's ultimate parent, Intercontinental Exchange, Inc. As represented in partial Amendment No. 4, the Exchange considers the ICE Data Services Consolidated Feed (like the NYSE Global Index feed), a Third Party Data Feed because it includes third party market data rather than exclusively the proprietary market data of the Exchange and its affiliated SROs, NYSE and NYSE Arca.<sup>143</sup> The Commission believes that partial Amendment No. 4 does not raise issues not previously raised in the proposed rule change, as modified Amendment Nos. 1 - 3, and addressed in Exchange Response Letters I, II, and III. Accordingly, the Commission

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<sup>142</sup> See partial Amendment No. 4, supra note 13.

<sup>143</sup> See id.

finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>144</sup> to approve the proposed rule change, as modified by Amendment Nos. 1 - 4, on an accelerated basis.

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>145</sup> that the proposed rule change (SR-NYSEMKT-2016-63) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>146</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>144</sup> 15 U.S.C. 78s(b)(2).

<sup>145</sup> See id.

<sup>146</sup> 17 CFR 200.30-3(a)(12).