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June 21, 2021

Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the Fee Schedules Related to Co-Location (Securities Exchange Act Release No. 91790)

Dear Ms. Countryman:

The New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the “Exchanges”) respectfully submit this comment letter in response to the above-referenced order¹ by the Securities and Exchange Commission (the “Commission”). The Order suspended proposed rule changes² that would provide co-located Users with access to the systems, and connectivity to the data feeds, of various additional third parties, and instituted proceedings to determine whether to approve or disapprove them.³

¹ See Securities Exchange Act Release No. 91790 (May 7, 2021), 86 FR 26242 (May 13, 2021) (SR–NYSE–2021–15, SR–NYSEAMER–2021–13, SR–NYSEArca–2021–15, SR–NYSECHX–2021–04, SR–NYSENAT–2021–05) (Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Amend the Fee Schedules Related to Co-Location) (“Order”).

² See Securities Exchange Act Release Nos. 91386 (March 23, 2021), 86 FR 16410 (March 29, 2021) (SR–NYSE–2021–15); 91387 (March 23, 2021), 86 FR 16417 (March 29, 2021) (SR–NYSEAMER–2021–13); 91388 (March 23, 2021), 86 FR 16433 (March 29, 2021) (SR–NYSEArca–2021–15); 91390 (March 23, 2021), 86 FR 16424 (March 29, 2021) (SR–NYSECHX–2021–04); and 91389 (March 23, 2021), 86 FR 16403 (March 29, 2021) (NYSENAT-2021-05) (collectively, the “Filings”). Capitalized terms not otherwise defined herein are used as defined in the Filings.

³ As an accommodation to Users of the suspended services, the Exchanges provided the Suspended Services to all Users at no charge until May 24, 2021, to enable Users to transition to substitute services without a gap in their service. See Securities Exchange Act Release No. 91859 (May 12, 2021), 86 FR 26995 (May 18, 2021) (SR–NYSE–2021–31); 91860 (May 12, 2021), 86 FR 26992 (May 18, 2021) (SR–NYSEAMER–2021–26); 91861 (May 12, 2021), 86 FR 26990 (May 18, 2021) (SR–NYSEArca–

In the Order, the Commission noted that the Filings stated that the proposed fees “are constrained by competition, and allow the Exchanges to defray or cover the costs of offering the services” but questioned “whether the Exchanges have provided sufficient information to demonstrate that the proposals, including in particular the fees for connectivity to the Proposed Third Party Systems and Proposed Third Party Data Feeds, are consistent with the Act.”⁴

As discussed in more detail below, the Exchanges believe that the Order did not satisfy its obligation to provide notice of the grounds for disapproval under consideration and may be applying a misplaced assumption about the types of information necessary to satisfy the Exchange Act’s requirements. Ultimately, the Exchanges believe that the Filings provided sufficient information demonstrating that the proposed rule changes are consistent with the Act. The Exchanges are supplementing the Filings with additional information nonetheless.

The Order Fails to Provide Notice of the Grounds for Disapproval Under Consideration

When instituting proceedings, the Exchange Act obligates the Commission to provide “notice of the grounds for disapproval under consideration.”⁵ The Commission’s own regulations reinforce this statutory notice command.⁶ This notice requirement serves important purposes: neither the Exchanges, nor the public, should be forced to guess what the Commission believes may be lacking in a rule filing. Congress designed the notice requirement to ensure that interested parties know what issues are under consideration so that those issues can be fully addressed in the subsequent proceeding.

But the Order here leaves everyone guessing as to the Commission’s concerns. The Commission’s rote recitation in the Order of the content of the Filings and the requirements of the Act⁷ □ accompanied by

2021-38); 91862 (May 12, 2021), 86 FR 28427 (May 26, 2021) (SR-NYSECHX-2021-10); and 91863 (May 12, 2021), 86 FR 26982 (May 18, 2021) (SR-NYSENAT-2021-13).

⁴ Order, supra note 1, at 26244. See 15 U.S.C. 78s(b)(1).

⁵ 15 U.S.C. 78s(b)(2)(B).

⁶ See 17 C.F.R. 201.700(b)(2) (“The grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission instituted the proceedings, including the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change or NMS plan filing.”).

⁷ Order, supra note 1, at 26244 (“Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ‘provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities’;
- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national

the vaguely circular question “whether the Exchanges have provided sufficient information to demonstrate that the proposals ... are consistent with the Act”⁸ – does not satisfy the statutory and regulatory notice requirement because it offers no meaningful guidance on what, if anything, the Commission believes is lacking in the Filing. This defect renders the Order deficient.⁹

The Commission May Be Applying Improper Standards to the Rule Filing

Although the Commission has failed in the Order to put the Exchanges on sufficient notice of what information is lacking relating to the Filings or what the Commission’s genuine concerns are, the Commission may be applying a misplaced assumption about the types of information necessary to satisfy the Exchange Act’s requirements. In particular, the Commission may be improperly demanding that the Exchanges provide cost data in connection with all rule filings, even where an Exchange has demonstrated that sufficient competition exists. If so, such a demand would be unlawful.

securities exchange not be ‘designed to permit unfair discrimination between customers, issuers, brokers, or dealers’; and

- Whether the Exchanges have demonstrated how the proposed fees are consistent with 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].’”)

(Internal footnote references omitted.)

⁸ Id.

⁹ The Commission’s general and vague description of the issues under consideration leaves the Exchanges and other stakeholders in the dark as to what “grounds for disapproval” are actually “under consideration” by the Commission. This undermines the purpose of the review process and violates the statute and the Commission’s implementing regulations. Cf. Gerber v. Norton, 294 F.3d 173, 180 (D.C. Cir. 2002) (interpreting notice requirement in Endangered Species Act to mean that “opportunity for comment must be a meaningful opportunity”). In addition, although it would not cure the Commission’s failure to provide sufficient notice when it issued the Order, the Commission must also provide non-conclusory and detailed reasoning in approving or disapproving the Filings. In particular, were the Commission to disapprove the Filings, it must provide a reasoned explanation for how and why the Filings fail to satisfy particular statutory or regulatory standards. Indeed, this is “[o]ne of the most fundamental principles of administrative law.” Sw. Airlines Co. v. Fed. Energy Regul. Comm’n, 926 F.3d 851, 855 (D.C. Cir. 2019). To satisfy this requirement, moreover, “conclusory statements” – of the type set forth in the Order – “will not do; an ‘agency’s statement must be one of reasoning.’” Amerijet Int’l, Inc. v. Pistole, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). As the D.C. Circuit has made clear in the rule filing context, it is incumbent on the Commission to explain how a “proposed rule change is [or is not] consistent with the requirements of [the Act] and the rules and regulations issued under [the Act] that are applicable to [the Exchange].” 15 U.S.C. 78s(b)(2)(C)(i)-(ii).

Neither the Exchange Act nor the Commission's regulations require presentation of cost data in connection with every rule filing.¹⁰ And any demand for cost data in cases where evidence of a competitive market exists would be substantively unjustified.

Of particular relevance is NetCoalition v. SEC.¹¹ In that case, the D.C. Circuit held that an exchange can establish that its fees for market data products are fair and reasonable through *either* a cost-based analysis *or* a "market-based approach" that examines whether the exchange is subject to significant competitive forces in setting its fees.¹² In other words, a cost-based analysis is separate and distinct from a market competition-based analysis. An exchange does not and should not have to demonstrate both – and here, the Exchanges have provided ample evidence that the proposed services and their associated fees are constrained by competition.¹³ It would be inconsistent with NetCoalition I and the

¹⁰ In May 2019, the Division of Trading and Markets issued "Staff Guidance on SRO Rule Filings Relating to Fees" (the "Guidance"), and that Guidance does refer to the potential use of cost data. See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>. However, the Exchanges do not have to meet the specific demands of the Guidance in their Filings in order for the Commission to approve those Filings. As then-Chairman Jay Clayton stated, the Guidance "is not a rule, regulation, or statement of the Commission." Chairman Jay Clayton, Statement on Division of Trading and Markets Staff Fee Guidance (June 12, 2019), available at <https://www.sec.gov/news/public-statement/statement-division-trading-and-markets-staff-fee-guidance> ("Statement on Guidance"). Rather,

[t]he SRO rule filings related to fees addressed by the TM Staff Guidance are governed by Exchange Act Section 19(b), Exchange Act Rule 19b-4, and court decisions interpreting those provisions. Like all staff guidance, the TM Staff Guidance has no legal force or effect: as it states, it does not alter or amend applicable law, and it creates no new or additional obligations for SROs or the Commission.

Id. (footnote omitted). Any effort by the Commission to apply the Guidance so as to inflexibly demand cost data in connection with all rule filings would be unlawful because the Guidance was not promulgated pursuant to notice and comment, as the Administrative Procedure Act requires of binding regulations. See, e.g., Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 717 (D.C. Cir. 2015) ("agency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule" is subject to the notice-and-comment requirements of the APA).

¹¹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) ("NetCoalition I"). See also Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (approving proposed rule change to establish fees for a depth-of-book market data product).

¹² NetCoalition I, 615 F.3d at 535.

¹³ See "The Proposed Services are Consistent with the Act," below. See also Securities Exchange Act Release No. 90217 (October 16, 2020), 85 FR 67392, 67396 (October 22, 2020) (Order Approving a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed) (noting that "[t]he

Commission's embrace of market-based pricing for the Commission to require the Exchanges to also satisfy a rigorous cost-based analysis.¹⁴ Indeed, as basic rate regulation theory and economics explain, cost-based regulation is simply unnecessary in a competitive market because market forces – rather than rate regulators – will help to ensure competitive pricing.

Instead, the Exchanges looked to the Act, Rule 19b-4, and relevant court decisions, including NetCoalition I, in assessing the information it provided in the Filings. Based on their review, the Exchanges believe that the Filings provide sufficient information demonstrating that the proposed rule changes are consistent with the Act. Nevertheless, by this letter, the Exchanges are supplementing the Filings with additional information.

The Proposed Changes

Users may purchase access to the execution systems of third party markets and other content service providers ("Third Party Systems") and connectivity to data feeds from third party markets and other content service providers ("Third Party Data Feeds"). The Exchanges currently charge monthly recurring charges between \$200 and \$3,500 for access to Third Party Systems and between \$100 and \$3,000 for connectivity to Third Party Data Feeds.¹⁵ The Filings propose to add new options to the 23 Third Party Systems and 43 Third Party Data Feeds to which Users can already connect.

inquiry into whether a market for a product is competitive . . . focuses on . . . the product's elasticity of demand" (citing NetCoalition I, 615 F.3d at 542)).

¹⁴ NetCoalition I does state in passing that costs might be relevant to a determination of the reasonableness of fees, but that statement appears to have been based on the record in that case (which did not contain direct evidence of proprietary data product competition and platform competition) as well as the questionable assumption that "in a competitive market, the price of a product is supposed to approach its marginal cost." NetCoalition I, 615 F.3d at 537. But the economic theory that "price equals marginal cost" has limited real-world application outside of agricultural commodity products. As highlighted by Professor Kenneth Elzinga, "[f]ew firms fit the textbook definition of perfect competition," and in fact, marginal-cost pricing in "technology-driven industries . . . is neither feasible nor desirable." Kenneth G. Elzinga & David E. Mills, The Lerner Index of Monopoly Power: Origins and Uses, 101 Am. Econ. Rev. 558, 560 (2011). Moreover, the statement in NetCoalition I simply reflects the reality that, in a competitive marketplace, market forces should work to ensure that firms cannot engage in supra-competitive pricing, whereas the question at issue here is not whether or how prices should bear some relationship to costs, but whether market forces or a rate regulator should make that determination.

¹⁵ The Commission approved the rule changes to provide and establish fees for connectivity to Third Party Data Feeds and Third Party Systems in 2017. See Securities Exchange Act Release Nos. 80311 (March 24, 2017), 82 FR 15741 (March 30, 2017) (SR-NYSE-2016-45); 80309 (March 24, 2017), 82 FR 15725 (March 30, 2017) (SR-NYSEMKT-2016-63); and 80310 (March 24, 2017), 82 FR 15763 (March 30, 2017) (SR-NYSEArca-2016-89). In the order approving the fees, the Commission stated that "[t]he 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." 82 FR 15741, supra, at 15748. It also stated that "[t]he Commission does not believe that the Current Proposal would impose a burden on competition inconsistent with the Act because, as

First, Users would be able to acquire access to Long Term Stock Exchange (“LTSE”), Members Exchange (“MEMX”), MIAX Emerald, MIAX PEARL Equities, Morgan Stanley, and TD Ameritrade (the “Proposed Third Party Systems”).¹⁶ The Filings do not propose to change the monthly recurring fee Users are charged for unicast connectivity to each Third Party System, which differ based on the bandwidth of the connection. Accordingly, the fees for the Proposed Third Party Systems would be as follows:

Bandwidth of connection to Proposed Third Party System	Monthly recurring fee per connection to Proposed Third Party System
1Mb	\$200
3Mb	\$400
5Mb	\$500
10Mb	\$800
25Mb	\$1,200
50Mb	\$1,800
100Mb	\$2,500
200 Mb	\$3,000
1 Gb	\$3,500

Second, the Filings propose to provide Users connectivity to data feeds from MEMX, MIAX Emerald, MIAX PEARL Equities, and ICE Data Services - ICE TMC (collectively, the “Proposed Third Party Data

discussed above, viable alternatives to the Exchange’s proposed services exist, both inside and outside the Data Center.” *Id.*, at 15749. *See also* Securities Exchange Release Nos. 83706 (July 25, 2018), 83 FR 37033 (July 31, 2018) (SR-NYSE-2018-32); 83707 (July 25, 2018), 83 FR 36985 (July 31, 2018) (SR-NYSEAmer-2018-35); 83708 (July 25, 2018), 83 FR 36980 (July 31, 2018) (SR-NYSEArca-2018-52); 87408 (October 28, 2019), 84 FR 58778 (November 1, 2019) (SR-NYSECHX-2019-12); 83351 (May 31, 2018), 83 FR 26314 (June 6, 2018) (SR-NYSENat-2018-07); and 83709 (July 25, 2018), 83 FR 37028 (July 31, 2018) (SR-NYSENat-2018-15). The Exchanges believe that the amount of information provided in the 2017 filings adding access and connectivity to Third Party Systems and Third Party Data Feeds is consistent with the amount of information in the present Filings, and that it has provided the basis for the Commission to make the same findings of competition. The cited filings were made prior to the Guidance being issued, but, as noted above, the Guidance “does not alter or amend applicable law, and it creates no new or additional obligations for SROs or the Commission.” Statement on Guidance, *supra* note 10.

¹⁶ The Filings also propose to update the names of the “Miami International Securities Exchange” and “MIAX Pearl” to “MIAX Options” and “MIAX PEARL Options,” respectively, and to combine MIAX Options, MIAX PEARL Options, MIAX PEARL Equities, and MIAX Emerald as a single Third Party System. The Filings would also remove obsolete text from the Exchanges’ Price Lists and Fee Schedules.

Feeds”).¹⁷ As with the existing Third Party Data Feeds, the Filings propose a monthly recurring fee for connectivity to the Proposed Third Party Data Feeds: \$200 per month for ICE Data Services - ICE TMC; \$3,000 per month for Members Exchange; \$3,500 per month for MIAX Emerald; and \$2,500 per month for MIAX PEARL Equities.

In each case, the service to offer access to a Proposed Third Party Data System (“Proposed Access”) or connectivity to a Proposed Third Party Data Feed (“Proposed Connectivity”) was proposed in response to a User request for access or connectivity to the specific third party system or data feed. Five Users purchased the proposed services prior to their suspension. Based on experience, the Exchanges expect that ultimately each proposed service would have between one and five customers.

The Proposed Services Are Consistent with the Act

The Exchanges believe that the proposed rule change is reasonable and equitable not just because it would respond to User requests and result in Users having more options for access and connectivity, but also because of the extent of the competition for the proposed services.¹⁸

As described in the Filings,¹⁹ the Exchanges compete with other providers – including other colocation providers and market data vendors – that offer access to Third Party Systems and connectivity to Third Party Data Feeds. To obtain access to a Third Party System or connectivity to a Third Party Data Feed from within co-location, a User has alternatives to the Exchanges’ filed access and connectivity services. It instead could obtain access or connectivity by connecting to (a) a User that acts as a service provider to other Users (such as a Hosting User²⁰); (b) a third party vendor; or (c) the relevant market or data source itself. To make the connection, a User may utilize a cross connect, third party telecommunication network, the ICE Data Services (“IDS”) network, or a combination thereof.²¹

Moreover, in the Exchanges’ experience, few if any Users are only present in co-location: almost all Users maintain a presence in one or more other data centers (each, a “Third Party Data Center”).²² As a

¹⁷ The Filings also propose to update “Miami International Securities Exchange/MIAX PEARL” to “MIAX Options/MIAX PEARL Options,” update “SR Labs – SuperFeed” to “Vela – SuperFeed,” and delete the “NASDAQ OMDF” data feed.

¹⁸ See 15 U.S.C. 78f(b)(4) and (5).

¹⁹ See, e.g., 86 FR 16410, *supra* note 2, at 16414.

²⁰ A “Hosting User” is a User that hosts customers in the User’s co-location space. See Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding Definitions Applicable to Certain Co-Location Services to the Exchange’s Price List and Modifying the Fee for Users That Host Their Customers at the Exchange’s Data Center).

²¹ For example, a User may connect to a Third Party Data Feed from its equipment in co-location by cross-connecting to a third party telecommunications network that extends between the Mahwah data center and the source of the data feed, located in another data center.

²² For example, the Exchanges understand that the five Users that purchased the proposed services prior to their suspension all maintain a presence in at least one other data center, in addition to

result, services available in Third Party Data Centers directly compete with the access and connectivity offered in co-location. A User with a presence in a Third Party Data Center can obtain access or connectivity to a Third Party System or data feed at that presence, by using a connection to a vendor or to the relevant market or data source itself. As with co-location services, the User may utilize a third party telecommunication network, the IDS network, a cross connect, or a combination thereof to make the connection. Ultimately, a User will choose whether to get its access or connectivity service in co-location or in another location based on its business considerations, which could include latency, cost, and redundancy.²³

The Exchanges do not have complete visibility into whether third parties currently offer, or intend to offer, access to all of the Proposed Third Party Systems and connectivity to all of the Proposed Third Party Data Feeds, or what the terms would be for such access or connectivity. Unlike the Exchanges, most third parties are not required to make that information public and may negotiate different terms with different customers.

Nonetheless, although not wholly transparent, there is no question that the competition is robust. The Exchanges are aware of at least a few providers that already provide competing services. The Exchanges believe that at least three Hosting Users offer access or connectivity within colocation to at least some, if not all, of the Proposed Third Party Systems and Proposed Third Party Data Feeds. In such a case, the Hosting User would offer access or connectivity to a Proposed Third Party System or Proposed Third Party Data Feed to its customers, including both Users and Hosted Customers.

Further, as explained above, a provider does not have to be located in co-location to be a competitor. For its part, MIAX's website lists eight vendors (including IDS) that it has approved to be providers of connectivity to the MIAX trading system and market data.²⁴ A User could use any of those providers to connect to MIAX, whether from within co-location or at a Third Party Data Center. Indeed, the Exchanges believe that at least one other vendor currently offers connectivity to the MIAX Proposed Third Party Data Feeds. For access to Morgan Stanley and TD Ameritrade, Users may buy a connection directly to those firms through a vendor, including IDS. For connectivity to the ICE Data Services - ICE TMC data feed, a User could use whichever provider it presently uses to access IDS systems and data feeds, whether it is a third party service or IDS. Similarly, a User could use a vendor such as Options Technology, for example, to connect to LTSE or MEMX,²⁵ and may be able to use other third party vendors for the same purpose.

being co-located in the Mahwah data center. See also Securities Exchange Release No. 90610, 86 FR 18596 (April 9, 2021) (Market Data Infrastructure), at 18733 (observing that "the most competitive executing broker-dealers, market makers, and traders using highly latency sensitive strategies . . . typically purchase[] co-location services at all major data centers").

²³ Indeed, if a User is more latency sensitive, it is more likely to purchase access or connectivity directly from the relevant exchange in the third party access center that hosts that market's matching engines than from within co-location.

²⁴ See <https://www.miaxoptions.com/approved-vendors?gid=options>

²⁵ See <https://www.options-it.com/global-extranet/direct-market-data/>.

Moreover, as noted above, the Exchanges proposed to add the Proposed Access and Proposed Connectivity in response to requests from Users. Users and customers of third party providers are likely to also request these services from other potential third party providers, who could similarly respond to this demand by offering access to the Proposed Third Party Systems and connectivity to the Proposed Third Party Data Feeds. The Exchanges are not aware of any impediment to third parties offering substitutes for Proposed Access and Proposed Connectivity, within or without of co-location.²⁶

On the other hand, the Exchanges are at a competitive disadvantage to third parties who can and do offer substitutes because of the obligation to disclose fees through the rule filing process, the inability to charge different fees to different customers, to negotiate fees in response to competitive offerings and the uncertainty and delay created by needing to await Commission action. Indeed, the impact that the suspension in the Order has had on the Users of the suspended products could lead a potential User to be less likely to purchase access or connectivity services from the Exchanges in the future, since the Exchanges are subject to the uncertainty and delay of the rule filing process. That, in turn, would have a negative effect on competition.

If the Exchanges were to charge supra-competitive fees for access to any of the Proposed Third Party Systems or connectivity to any of the Proposed Third Party Data Feeds, the various actual and possible competitors would respond by offering access and connectivity at lower rates. In turn, Users would opt to use those competitors' services rather than the Exchanges'. Ultimately, competition and the availability of substitutes is a check on the Exchange's ability to charge unreasonable fees for the Proposed Access and Proposed Connectivity. For this reason, the Exchanges believe that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.²⁷ Rather, it would expand the array of access and connectivity services available to Users, responding to User demand for access and connectivity options. Providing additional services would help each User tailor its data center operations to the requirements of its business operations by allowing it to select the form and latency of access and connectivity that best suits its needs. A User that does not wish to use the Proposed Access or Proposed Connectivity offered by the Exchanges is not required to do so.

Even though competition would constrain the Exchanges' ability to price any of the services at a supra-competitive level, at the request of Commission staff, the Exchanges did explain in the Filings why it did not propose identical fees for Proposed Connectivity to the various Proposed Third Party Data Feeds. As noted in the Filings,²⁸ the distinction between the proposed monthly recurring fees for the ICE TMC Proposed Third Party Data Feed and for the MIAX and MEMX Proposed Third Party Data Feeds reflects the reality that the Exchanges already offer several Third Party Data Feeds supplied by ICE Data Services, such that the Exchanges could add the Proposed ICE TMC Third Party Data Feed over this established

²⁶ Apparently, no third parties objected to the Filings: as of June 21, 2021, no comment letters regarding the Filings had been posted on the Commission website.

²⁷ 15 U.S.C. 78f(b)(8).

²⁸ See, e.g., 86 FR 16410, supra note 2, at 16414.

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connection with less effort.²⁹ In contrast, in order to offer connectivity to the MEMX Proposed Third Party Data Feed, the MIAX Emerald Proposed Third Party Data Feed, and the MIAX PEARL Equities Proposed Data Feed, the Exchanges must establish and maintain connections to each of those exchanges, which requires significantly more effort.³⁰ As such, it is reasonable and equitable for the Exchanges to offer connectivity to the ICE TMC Proposed Third Party Data Feed at a lower fee than it proposes to charge for connectivity to the other Proposed Third Party Data Feeds. Further, the different fees that the Exchanges propose for the MIAX Emerald Proposed Third Party Data Feed and the MIAX PEARL Equities Proposed Third Party Data Feed are reflective of the fact that MIAX charges separate fees to the Exchanges to obtain access to each of its data feed products, and that these distribution fees that the Exchanges must pay to MIAX are higher for the MIAX Emerald Proposed Third Party Data Feed than for the MIAX PEARL Equities Proposed Third Party Data Feed.

For the reasons set forth in the Filings and herein, the Exchanges believe that they have provided the Commission sufficient information to demonstrate that the proposed rule changes, including the proposed fees for access to the Proposed Third Party Systems and connectivity to the Proposed Third Party Data Feeds, are consistent with the Act.

Respectfully submitted,



Elizabeth K. King

cc: Honorable Gary Gensler, Chair
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
David Saltiel, Acting Director, Division of Trading and Markets

²⁹ The ICE TMC Proposed Third Party Data Feed would require little bandwidth, and so the existing connection is not expected to be expanded.

³⁰ Unlike with the Exchanges, customers are required to establish separate connections to the MIAX PEARL Equities and MIAX Emerald exchanges.