

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-100603; File No. SR-NYSE-2024-39)

July 25, 2024

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Proprietary Market Data Fee Schedule to Establish an Access Fee for the NYSE Pillar Depth Data Feed

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on July 11, 2024, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the NYSE Proprietary Market Data Fee Schedule to establish an Access Fee for the NYSE Pillar Depth data feed. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the

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

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

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

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to amend the NYSE Proprietary Market Data Fee Schedule (“Fee Schedule”). Specifically, the Exchange proposes to establish an Access Fee for the NYSE Pillar Depth (“Pillar Depth”) data feed, effective July 11, 2024.<sup>4</sup>

The proposed fee for Pillar Depth would be \$250 per month, provided that the market data recipient separately pays the applicable fees for the five existing market data products underlying the Pillar Depth data feed, consistent with the existing fee structures for those market data products.

The Pillar Depth data feed is a frequency-based depth of book market data feed that provides a consolidated view of the ten (10) best price levels on both the bid and offer sides across the NYSE Group’s combined limit order books for securities traded on the NYSE Group equities markets, i.e., NYSE, NYSE American LLC (“NYSE American”), NYSE Arca, Inc. (“NYSE Arca”), NYSE Chicago, Inc. (“NYSE Chicago”) and NYSE National, Inc. (“NYSE National”), for which the NYSE Group equities markets report quotes and trades under the Consolidated Tape Association (“CTA”) Plan or the Nasdaq/UTP Plan.<sup>5</sup> In other words, Pillar Depth would be a compilation of limit order data that the Exchange provides to vendors and

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<sup>4</sup> The Exchange originally filed to amend the Fee Schedule on May 13, 2024 (SR-NYSE-2024-30). SR-NYSE-2024-30 was subsequently withdrawn and replaced by this filing.

<sup>5</sup> See Securities Exchange Act Release No. 100030 (April 25, 2024), 89 FR 35260 (May 1, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE Pillar Depth Data Feed) (SR-NYSE-2024-24) (“Pillar Depth Product Filing”).

subscribers, updated no less frequently than once per second. Specifically, the Pillar Depth data feed consists of certain data elements from five market data feeds<sup>6</sup> – NYSE Aggregated Lite,<sup>7</sup> NYSE American Aggregated Lite,<sup>8</sup> NYSE Arca Aggregated Lite,<sup>9</sup> NYSE Chicago Aggregated Lite<sup>10</sup> and NYSE National Aggregated Lite.<sup>11</sup>

The Exchange, NYSE American, NYSE Arca, NYSE Chicago and NYSE National are the exclusive distributors of the five Aggregated Lite feeds from which certain data elements are taken to create the Pillar Depth data feed. By contrast, the Exchange would not be the exclusive distributor of the aggregated and consolidated information that comprises the Pillar Depth data feed. Any entity that receives, or elects to receive, the five underlying Aggregated Lite data feeds would be able, if it so chooses, to create a data feed with the same information included in Pillar Depth and sell and distribute it to its clients so that it could be received by those clients as quickly as the Pillar Depth data feed would be received by those same clients.<sup>12</sup>

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<sup>6</sup> Each of these data feeds are offered pursuant to preexisting and effective rules and fees filed with the Commission. This filing does not affect those rules, or the fees associated with these underlying data feeds or the ability for the Exchange, NYSE American, NYSE Arca, NYSE Chicago or NYSE National to amend the data feeds or fees associated with those data feeds pursuant to a separate rule filing.

<sup>7</sup> See Securities Exchange Act Release No. 99689 (March 7, 2024) 89 FR 18466 (March 13, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE Aggregated Lite Market Data Feed) (SR-NYSE-2024-12).

<sup>8</sup> See Securities Exchange Act Release No. 99690 (March 7, 2024) 89 FR 18445 (March 13, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE American Aggregated Lite Market Data Feed) (SR-NYSEAMER-2024-14).

<sup>9</sup> See Securities Exchange Act Release No. 99713 (March 12, 2024) 89 FR 19381 (March 18, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE Arca Aggregated Lite Market Data Feed) (SR-NYSEARCA-2024-22).

<sup>10</sup> See Securities Exchange Act Release No. 99691 (March 7, 2024) 89 FR 18468 (March 13, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE Chicago Aggregated Lite Market Data Feed) (SR-NYSECHX-2024-08).

<sup>11</sup> See Securities Exchange Act Release No. 99715 (March 12, 2024) 89 FR 19383 (March 18, 2024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the NYSE National Aggregated Lite Market Data Feed) (SR-NYSENAT-2024-06).

<sup>12</sup> See Pillar Depth Product Filing, supra note 5.

As proposed, the Exchange would charge a \$250 per month Access Fee for Pillar Depth, which reflects the value of the aggregation and consolidation function that the Exchange performs in creating Pillar Depth. To obtain Pillar Depth, a market data recipient would need to pay any applicable fees for the five data feeds underlying Pillar Depth, consistent with the existing fee schedules for those market data products as previously filed with the Commission and which may be amended from time to time, including any applicable Access, Redistribution, Professional User, Non-Professional User, Non-Display or Enterprise fees. The Exchange proposes to denote the requirement for market data recipients to pay the applicable fees for the five data feeds underlying Pillar Depth in proposed footnote 3 on the Fee Schedule.

When subscribing to Pillar Depth, the underlying data feeds would be delivered in the Pillar Depth consolidated format, as described above, but charged for as if the recipient were receiving the underlying feeds directly. The Exchange notes that if a subscriber chooses to receive the five underlying feeds both separately and in the Pillar Depth format, such subscriber may be subject to additional Professional User or Non-Professional User fees to reflect the distribution of both Pillar Depth (which incorporates the five underlying data feeds) and any separate dissemination of the underlying data feeds. The Exchange believes that the proposed fees for Pillar Depth would not be lower than the cost to a vendor of creating a comparable product, including the cost of receiving the underlying data feeds.

The Exchange notes that another market participant seeking to distribute a competing product to Pillar Depth might engage in a different analysis of assessing the cost of a competing product, which may incorporate passing through fees associated with co-location at the Mahwah, New Jersey data center. However, the incremental co-location cost to a particular vendor might be inconsequential if such vendor is already co-located and is able to allocate its co-location

costs over numerous product and customer relationships. The Exchange therefore believes that a vendor could create and offer a product similar to Pillar Depth on a cost-competitive basis.

The proposed rule change is intended to encourage market participants to subscribe to Pillar Depth by making it more affordable for prospective customers. The proposed fee change would allow the Exchange to compete more effectively with the Cboe One Premium Feed, which as described below, is a comparable market data offering to Pillar Depth.

The Exchange notes that the proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that member organizations or others would have in complying with the proposed rule change.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>13</sup> in general, and Sections 6(b)(4) and 6(b)(5) of the Act,<sup>14</sup> in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers. The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act<sup>15</sup> in that it is consistent with (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets; and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,<sup>16</sup> which provides that any national securities exchange that distributes

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<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4), (5).

<sup>15</sup> 15 U.S.C. 78k-1.

<sup>16</sup> 17 CFR 242.603.

information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory.

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

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>17</sup>

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

In fact, the legislative history indicates that the Congress intended that the market system “evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed” and that the SEC wield its regulatory power “in those situations where competition may not be sufficient,” such as in the creation of a “consolidated transactional reporting system.”<sup>18</sup>

The court agreed with the Commission’s conclusion that “Congress intended that

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<sup>17</sup> See Regulation NMS Adopting Release, 70 FR 37495, at 37499.

<sup>18</sup> NetCoalition v. SEC, 615 F.3d 525, 535 (D.C. Cir. 2010) (“NetCoalition I”) (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”<sup>19</sup>

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

the Commission considers whether the exchange was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees. If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless there is a substantial countervailing basis to find that the terms of the rule violate the Act or the rules thereunder.<sup>20</sup>

As discussed below, the Exchange believes that its proposed fees are constrained by competitive forces.

As the D.C. Circuit recognized in NetCoalition I, “[n]o one disputes that competition for order flow is fierce.”<sup>21</sup> The court further noted that “no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers,” and that an exchange “must compete vigorously for order flow to maintain its share of trading volume.”<sup>22</sup>

As noted above, while Regulation NMS has enhanced competition, it has also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the

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<sup>19</sup> Id. at 535.

<sup>20</sup> See Securities Exchange Act Release No. 34-90217 (October 16, 2020), 85 FR 67392 (October 22, 2020) (SR-NYSENAT-2020-05) (“National IF Approval Order”) (internal quotation marks omitted), quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (“2008 ArcaBook Approval Order”).

<sup>21</sup> NetCoalition I, 615 F.3d at 544 (internal quotation omitted).

<sup>22</sup> Id.

Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”<sup>23</sup> Indeed, today, equity trading is currently dispersed across 16 exchanges,<sup>24</sup> numerous alternative trading systems,<sup>25</sup> broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share.<sup>26</sup>

Further, low barriers to entry mean that new exchanges may rapidly and inexpensively enter the market to compete with the Exchange. For example, since 2020, three new ones have entered the market: Long Term Stock Exchange (LTSE), which began operations as an exchange on August 28, 2020;<sup>27</sup> Members Exchange (MEMX), which began operations as an exchange on September 29, 2020;<sup>28</sup> and Miami International Holdings (MIAX), which began operations of its first equities exchange on September 29, 2020.<sup>29</sup>

These low barriers enable existing exchange customers to disintermediate and start their own exchanges if they think the prices charged for exchange proprietary market data products

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<sup>23</sup> See Securities Exchange Act Release No. 61358, 75 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

<sup>24</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

<sup>25</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

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

<sup>27</sup> See LTSE Market Announcement: MA-2020-020, dated August 14, 2020, announcing LTSE production securities phase-in planned for August 28, available here: [https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa0698e7\\_MA-2020-020\\_Production\\_Securities\\_Launching\\_August\\_28\\_-\\_Google\\_Docs.pdf](https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa0698e7_MA-2020-020_Production_Securities_Launching_August_28_-_Google_Docs.pdf) and LTSE Market Announcement: MA-2020-025, available here: [https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa069873\\_MA-2020-025.pdf](https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa069873_MA-2020-025.pdf).

<sup>28</sup> As of October 29, 2020, MEMX is trading all NMS symbols. See <https://info.memxtrading.com/trader-alert-20-10-memx-trading-symbols-update/>.

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



are too high. This is precisely the rationale behind the creation of MEMX, which was formed by some of the largest and most well capitalized financial firms that are also Exchange customers (including Bank of America, BlackRock, Charles Schwab, Citadel, Citi, E\*Trade, Fidelity, Goldman Sachs, J.P. Morgan, Jane Street, Morgan Stanley, TD Ameritrade, and others).<sup>30</sup>

For example, one of MEMX’s founding principles is that exchange proprietary market data prices are too high, and that MEMX will benefit its members by offering “[l]ower pricing on market data.”<sup>31</sup> Nor is this a new phenomenon: exchange customers formed BATS to compete with incumbent exchanges and once registered as an exchange in 2008, BATS did not initially charge for market data. The BATS venture was a financial success for its founders, first through recouping their investment in its initial public offering and then in the subsequent sale of BATS to Cboe, which now charges for market data from those exchanges. Notably, MEMX has some of the same founding broker-dealer customers, leading some to dub MEMX “BATS 2.0.”<sup>32</sup>

The fact that this cycle is viable and repeatable by entities that both trade on and compete with existing exchanges confirms that barriers to entry are low and that these markets are competitive and contestable.<sup>33</sup> And low barriers to entry act as a market check on high prices.<sup>34</sup>

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<sup>30</sup> MEMX Home Page (“Founded by members and investors, MEMX aims to drive simplicity, efficiency, and competition in equity markets.”), available at <https://memx.com/>.

<sup>31</sup> MEMX home page, available at <https://memx.com/>.

<sup>32</sup> See “MEMX turns up the heat on US stock exchanges,” Financial Times, January 9, 2019, available at <https://www.ft.com/content/4908c8b0-1418-11e9-a581-4ff78404524e>; see also “US equities exchanges: If you can’t beat them, join them,” Euromoney, February 13, 2019, available at <https://www.euromoney.com/article/b1d3tfty4p3y4v/us-equities-exchanges-if-you-cant-beat-them-join-them>.

<sup>33</sup> United States v. SunGard Data Sys., 172 F. Supp. 2d 172, 186 (D.D.C. 2001) (recognizing that “[a]s a matter of law, courts have generally recognized that when a customer can replace the services of an external product with an internally-created system, this captive output (i.e. the self-production of all or part of the relevant product) should be included in the same market.”). In SunGard, the court rejected the Antitrust Division’s attempt to block SunGuard’s acquisition of the disaster recovery assets of Comdisco on the basis that the acquisition would “substantially lessen competition in the market for shared hot-site disaster recovery services,” when the evidence showed that “internal hot-sites” created by customers competed with the “external shared hot-site business” engaged in by the merging parties. Id. at 173-74, 187.

<sup>34</sup> United States v. Baker Hughes, 908 F.2d 981, 987 (1990) (“In the absence of significant barriers [to entry],

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

More specifically, in setting fees for the Pillar Depth data feed, the Exchange is constrained by the fact that, if its pricing is unattractive to customers, customers have their pick of an increasing number of alternatives to purchase similar data from instead of purchasing it from the Exchange. The existence of alternatives to the Exchange's data product ensures that the Exchange cannot set unreasonable market data fees without suffering the negative effects of that decision in the fiercely competitive market for proprietary market data.

More specifically, the Exchange believes that the proposed \$250 per month Access Fee for Pillar Depth is reasonable because it represents the value for the data aggregation and consolidation function that the Exchange performs. The Exchange further believes that requiring market data recipients to separately pay for the five underlying data feeds to Pillar Depth is reasonable because by design, Pillar Depth represents an aggregated and consolidated version of those existing five data feeds. The Exchange notes that it is not seeking with this filing to establish fees relating to the underlying five Aggregated Lite data feeds, as those fees have been established consistent with Section 19(b)(3)(A) of the Act<sup>35</sup> and Rule 19b-4(f)(2)<sup>36</sup> thereunder, and which may be amended from time to time. However, the Exchange believes it would be unfair if it did not require Pillar Depth data feed recipients to separately pay for those five feeds because otherwise, Pillar Depth data feed recipients would be receiving a data product that

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a company probably cannot maintain supracompetitive pricing for any length of time.”); see also David S. Evans and Richard Schmalensee, Markets with Two-Sided Platforms, in 1 ISSUES IN COMPETITION LAW AND POLICY 667, 685 (ABA Section of Antitrust Law 2008) (noting that exchange mergers in 2005 and 2006 were approved by competition authorities in part in reliance on planned and likely entry of other firms).

<sup>35</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>36</sup> 17 CFR 240.19b-4(f)(2).

includes such underlying data at a lower cost than separately subscribing to the underlying data feeds. Similarly, the Exchange believes that it would be reasonable to charge separate Professional User or Non-Professional User fees if a market data recipient chooses to receive both Pillar Depth and a separate dissemination of the five underlying data feeds in a non-consolidated form. The Exchange believes that such delivery would constitute two separate uses of the underlying data feeds and thus should be charged accordingly, consistent with the existing fee schedule for those market data products. The Exchange therefore believes that the proposed fee structure for Pillar Depth would not be lower than the cost to another party to create a comparable product, including the cost of receiving the underlying data feeds.

The Exchange notes that its proposed fee structure is similar to the fee structure for the NYSE BQT data feed.<sup>37</sup> The NYSE BQT data feed provides best bid and offer (“BBO”) and last sale information (“Trades”) for the Exchange and its affiliates, NYSE Arca, NYSE American, NYSE Chicago and NYSE National. NYSE BQT consists of certain data elements from ten market data feeds – NYSE Trades, NYSE BBO, NYSE Arca Trades, NYSE Arca BBO, NYSE American Trades, NYSE American BBO, NYSE Chicago Trades, NYSE Chicago BBO, NYSE National Trades and NYSE National BBO.<sup>38</sup> To receive NYSE BQT, a market data recipient must pay the applicable fee for the ten data feeds underlying NYSE BQT, and an Access Fee of

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<sup>37</sup> See Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish an Access Fee for the NYSE Best Quote & Trades Data Feed) (SR-NYSE-2014-64).

<sup>38</sup> See Securities Exchange Act Release Nos. 72750 (August 4, 2014), 79 FR 46494 (August 8, 2014) (notice - NYSE BQT); and 73553 (November 6, 2014), 79 FR 67491 (November 13, 2014) (approval order - NYSE BQT) (SR-NYSE-2014-40) (“NYSE BQT Filing”). In 2018, NYSE BQT was amended to include NYSE National BBO and NYSE National Trades. See Securities Exchange Act Release No. 83359 (June 1, 2018), 83 FR 26507 (June 7, 2018) (SR-NYSE-2018-22). In 2019, NYSE BQT was amended to include NYSE Chicago BBO and NYSE Chicago Trades. See Securities Exchange Act Release No. 87511 (November 12, 2019), 84 FR 63689 (November 18, 2019) (SR-NYSE-2019-60).

\$250 per month.<sup>39</sup>

The Exchange notes that Pillar Depth is entirely optional. The Exchange is not required to make Pillar Depth available to any customers, nor is any customer required to purchase the Pillar Depth data feed. Unlike some other data products (*e.g.*, the consolidated quotation and last-sale information feeds) that firms are required to purchase in order to fulfil regulatory obligations,<sup>40</sup> a customer's decision whether to purchase any of the Exchange's proprietary market data feed, including Pillar Depth, is entirely discretionary. Most firms that choose to subscribe to proprietary market data feeds from the Exchange, including Pillar Depth, would do so for the primary goals of using it to increase their revenues, reduce their expenses, and in some instances compete directly with the Exchange's order flow. Such firms are able to determine for themselves whether Pillar Depth is necessary for their business needs, and if so, whether or not it is attractively priced. If Pillar Depth does not provide sufficient value to firms based on the uses those firms may have for it, such firms may simply choose to conduct their business operations in ways that do not use Pillar Depth.

Further, in the case of products that are also redistributed through market data vendors such as Bloomberg and Refinitiv, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors

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<sup>39</sup> See Securities Exchange Act Release No. 82121 (November 30, 2017), 82 FR 57627 (December 6, 2017) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Fees for NYSE BBO and NYSE Trades To Lower the Enterprise Fee, and for NYSE BQT To Lower the Access Fee) (SR-NYSE-2017-60).

<sup>40</sup> The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. See In the Matter of the Application of Securities Industry and Financial Markets Association for Review of Actions Taken by Self-Regulatory Organizations, Release Nos. 34-72182; AP-3-15350; AP-3-15351 (May 16, 2014). Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSS have chosen not to do so.

that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Vendors may elect not to make Pillar Depth available to its customers unless their customers request it, and customers will not elect to pay the proposed fees unless Pillar Depth can provide value by sufficiently increasing revenues or reducing costs in the customer's business in a manner that will offset the fees. All of these factors operate as constraints on pricing proprietary data products.

In setting the proposed fees for Pillar Depth, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish reasonable fees. The proposed fees are therefore reasonable because in setting them, the Exchange is constrained by the availability of numerous substitute market data products. The Commission has been clear that such substitutes need not be identical, but only substantially similar to the product at hand.<sup>41</sup>

The four U.S. equities exchanges operated by Cboe Exchange, Inc. - Cboe BZX Exchange, Inc. ("BZX"), Cboe BYX Exchange, Inc. ("BYX"), Cboe EDGA Exchange, Inc. ("EDGA"), and Cboe EDGX Exchange, Inc. ("EDGX"), currently offer a market data product called the Cboe One Premium Feed,<sup>42</sup> which competes with the Pillar Depth data feed. Similar

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<sup>41</sup> For example, in the National IF Approval Order, the Commission recognized that for some customers, the best bid and offer information from consolidated data feeds may function as a substitute for the NYSE National Integrated Feed product, which contains order by order information. See National IF Approval Order, supra note 20, at 67397 [release p. 21] ("[I]nformation provided by NYSE National demonstrates that a number of executing broker-dealers do not subscribe to the NYSE National Integrated Feed and executing broker-dealers can otherwise obtain NYSE National best bid and offer information from the consolidated data feeds." (internal quotations omitted)).

<sup>42</sup> See BZX Rule 11.22(j); BYX Rule 11.22(i); EDGA Rule 13.8(b); and EDGX Rule 13.8(b). The Cboe One Feed offered by BZX, BYX, EDGA and EDGX is a data feed that contains the aggregate best bid and offer of all displayed orders for securities traded on the Cboe exchanges. The Cboe One Feed also contains the individual last sale information, consolidated volume, the primary listing market's official opening and closing price, and the current day consolidated high and low price for all listed equity securities. Cboe One Feed recipients may also elect to receive aggregated two-sided quotations from the Cboe exchanges for five

to the Cboe One Premium Feed, Pillar Depth can be utilized by vendors and subscribers to quickly access and distribute aggregated order book data. As noted above, Pillar Depth, similar to Cboe One Premium Feed, would provide aggregated depth per security, including the bid, ask and share quantity for orders received by the NYSE Group markets. The Exchange believes that Pillar Depth will offer a competitive alternative to the Cboe One Premium Feed.<sup>43</sup>

The fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange's Statement on Burden on Competition, the existence of alternatives to these data products further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. If another exchange (or its affiliate) were to charge less to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute Pillar Depth, prospective users likely would not subscribe to, or would cease subscribing to, Pillar Depth. In addition, the Exchange would compete with unaffiliated market data vendors who would be in a position to consolidate and distribute the same data that comprises the Pillar Depth data feed into the vendor's own comparable market data product. If the third-party vendor is able to provide the exact same data for a lower cost, prospective users would avail themselves of that lower cost and elect not to take Pillar Depth.

### **The Proposed Fees Are Equitably Allocated and Are Not Unfairly Discriminatory**

The Exchange believes that the proposed fee is equitable and non-discriminatory in that it would apply uniformly to all recipients of Exchange data. The Exchange also believes the

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(5) price levels ("Cboe One Premium Feed").

<sup>43</sup> Fees for the Cboe One Premium Feed are available at [https://www.cboe.com/market\\_data\\_services/us/equities/cboe\\_one/](https://www.cboe.com/market_data_services/us/equities/cboe_one/).

proposed fee is competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients. The Exchange also notes that the proposed fee is not designed to permit unfair discrimination because all market data recipients that subscribe to Pillar Depth would be charged the same fee. The Exchange further believes that the proposed Pillar Depth fee structure is equitable and not unfairly discriminatory because all vendors and subscribers that elect to purchase Pillar Depth would be charged the same fees. In addition, vendors and subscribers that do not wish to purchase Pillar Depth may separately purchase the five individual underlying products, and if they so choose, perform a similar aggregation and consolidation function that the Exchange performs in creating Pillar Depth. To enable such competition, the Exchange is offering Pillar Depth on terms that a subscriber of those five feeds could offer a competing product if it so chooses.

For these reasons, the Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory.

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

In accordance with Section 6(b)(8)<sup>44</sup> of the Act, the Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the Pillar Depth data feed represents aggregated and consolidated information from five existing market data feeds. Although the Exchange, NYSE American, NYSE Arca, NYSE Chicago and NYSE National are the exclusive distributors of the five Aggregated Lite data feeds from which certain data elements are taken to create Pillar Depth, the Exchange may not be the exclusive distributor of the aggregated and consolidated information that comprises the Pillar Depth data feed. Any other market participant

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<sup>44</sup> 78 U.S.C. 78f(b)(8).

recipient of the five Aggregated Lite feeds would be able, if it chose, to create a data feed with the same information as Pillar Depth and distribute it to their clients on a level-playing field with respect to latency and cost as compared to the Exchange's product.<sup>45</sup>

*Intramarket Competition.* The Exchange believes that the proposed fees do not put any market participant at a relative disadvantage compared to other market participant. As noted above, the proposed fees would apply equally to all subscribers of Pillar Depth, and subscribers may not only choose whether to subscribe to Pillar Depth at all, but also may tailor their subscription to include only the products offered by the Exchange that they deem suitable for their business needs. The Exchange also believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue market on competition.

*Intermarket Competition.* The Exchange believes that the proposed monthly Access Fee the Exchange proposes to charge subscribers for Pillar Depth would be pro-competitive because another market data recipient could perform a similar aggregating and consolidating function and similarly charge for such service. The Exchange notes that a competing vendor might engage in a different analysis of assessing the cost of a competing product, which may incorporate passing through fees associated with co-location at the Mahwah, New Jersey data center. However, the incremental co-location costs to a particular vendor may be inconsequential if such vendor is already co-located and is able to allocate its co-location costs over numerous product and customer relationships. The Exchange therefore believes that a competing vendor could create and offer a product similar to the Pillar Depth data feed at a similar cost. For these reasons, the Exchange believes that vendors could readily offer a product similar to Pillar Depth on a

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<sup>45</sup> See Pillar Depth Product Filing, supra note 5.



competitive basis.

In addition, the Exchange believes that the proposed fees do not impose a burden on competition or on other exchanges that is not necessary or appropriate because of the availability of numerous substitute market data products. Specifically, as described above, Pillar Depth would compete with the Cboe One Premium Feed.<sup>46</sup> These products each serve as reasonable substitutes for one another as they are each designed to provide investors with a unified view of quotes in all Tape A, B, and C securities. Each product provides subscribers with aggregated and consolidated quotes from multiple U.S. equities markets. Pillar Depth provides depth of book data from five NYSE-affiliated U.S. equities exchanges, while Cboe One Premium Feed similarly provides depth of book data from Cboe's four U.S. equities exchanges. Pillar Depth and Cboe One Premium Feed are intended to provide indicative pricing and therefore, are reasonable substitutes for one another. Additionally, market data vendors are also able to offer close substitutes to Pillar Depth. Because market data users can find suitable substitute feeds, an exchange that overprices its market data products stands a high risk that users may substitute another source of market data information for its own. These competitive pressures ensure that no one exchange's market data fees can impose an unnecessary burden on competition, and the Exchange's proposed fees do not do so here.

As such, in establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The existence of alternatives to Pillar Depth, including the

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<sup>46</sup> See supra, note 42.

five underlying feeds, consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

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

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

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)<sup>47</sup> of the Act and paragraph (f) thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number

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<sup>47</sup> 15 U.S.C. 78s(b)(3)(A).

SR-NYSE-2024-39 on the subject line.

Paper Comments:

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

All submissions should refer to file number SR-NYSE-2024-39. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

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

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>48</sup>

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

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<sup>48</sup> 17 CFR 200.30-3(a)(12).