

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-91790; File Nos. SR-NYSE-2021-15, SR-NYSEAMER-2021-13, SR-NYSEArca-2021-15, SR-NYSECHX-2021-04, SR-NYSEENAT-2021-05)

May 7, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.; 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

I. Introduction

On March 10, 2021, New York Stock Exchange LLC (“NYSE”), NYSE American LLC (“NYSE American”), NYSE Arca, Inc. (“NYSE Arca”), NYSE Chicago, Inc. (“NYSE Chicago”), and NYSE National, Inc. (“NYSE National”) (collectively, the “Exchanges”) each filed with the Securities and Exchange Commission (the “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to provide Users with access to the systems and connectivity to the data feeds of several third parties and establish associated fees.³ Each proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ The proposed rule changes were published for comment in the Federal Register on March

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See also infra note 11.

⁴ 15 U.S.C. 78s(b)(3)(A).

29, 2021.⁵ The Commission received no comment letters on the proposals. Pursuant to Section 19(b)(3)(C) of the Act,⁶ the Commission is hereby: (1) temporarily suspending File Nos. SR-NYSE-2021-15, SR-NYSEAMER-2021-13, SR-NYSEArca-2021-15, SR-NYSECHX-2021-04, and SR-NYSENAT-2021-05; and (2) instituting proceedings to determine whether to approve or disapprove File Nos. SR-NYSE-2021-15, SR-NYSEAMER-2021-13, SR-NYSEArca-2021-15, SR-NYSECHX-2021-04, and SR-NYSENAT-2021-05.

II. Description of the Proposed Rule Change

The Exchanges, as part of their co-location services, offer Users connectivity to the execution systems of third party markets and other content service providers (“Third Party Systems”), and data feeds from third party markets and other content service providers (“Third Party Data Feeds”).⁷ The Exchanges charge fees for connectivity to Third Party Systems and

⁵ 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) (each, a “Notice”). For ease of reference, page citations are to the Notice for NYSE-2021-15.

⁶ 15 U.S.C. 78s(b)(3)(C).

⁷ See Notice, supra note 5, at 16410. For purposes of the Exchanges’ co-location services, a “User” means any market participant that requests to receive co-location services directly from one or more of the Exchanges, and a User that incurs colocation fees for a particular co-location service charged by one Exchange would not be subject to co-location fees for the same co-location service charged by the Exchange’s affiliates. See id. at 16410 n. 5.

Third Party Data Feeds. The list of Third Party Systems and Third Party Data Feeds and associated fees for connectivity thereto are set forth in the Exchanges' fee schedules.

In the instant filings, the Exchanges propose to offer and charge fees for connectivity to several additional Third Party Systems and Third Party Data Feeds. Specifically, the Exchanges propose to expand their offerings to include connectivity to the systems of Long Term Stock Exchange, Members Exchange (“MEMX”), MIAX Emerald, MIAX PEARL Equities, Morgan Stanley, and TD Ameritrade, and (“Proposed Third Party Systems”).⁸ The fees associated with these connections would be determined by the bandwidth a User chooses.⁹ The Exchanges also propose to expand their offerings to include connectivity to the data feeds of MEMX, MIAX Emerald, MIAX PEARL Equities, and ICE Data Services – ICE TMC (“Proposed Third Party Data Feeds”).¹⁰ The Exchanges propose to charge the following monthly connectivity fees for each of the Proposed Third Party Data Feeds: \$3,000 for Members Exchange, \$3,500 for MIAX Emerald, and \$2,500 for MIAX PEARL Equities, and \$200 for ICE Data Services – ICE TMC.¹¹

⁸ See Notice, supra note 5, at 16410-11.

⁹ The Exchanges' fee schedules set forth the current monthly recurring fees per connection to Third Party Systems based on the bandwidth of the connection: \$200 for 1 Mb, \$400 for 3 Mb, \$500 for 5 Mb, \$800 for 10 Mb, \$1,200 for 25 Mb, \$1,800 for 50 Mb, \$2,500 for 100 Mb, \$3,000 for 200 Mb, \$3,500 for 1 Gb.

¹⁰ Notice, supra note 5, at 16411. The Exchange represents that the Proposed ICE TMC Third Party Data Feed is generated by ICE Bonds, an indirect subsidiary of ICE, and includes market data for the ICE TMC alternative trading system and that it does not include market data of the Exchange or Affiliate SROs. Id. at 16411 n.7.

¹¹ Id. at 16411. The Exchanges also propose to amend the fee schedules to change the name of the “Miami International Securities Exchange” Third Party System to “MIAX Options,” to change the name of the “MIAX PEARL” Third Party System to “MIAX

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹² at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,¹³ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) 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. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

The Exchanges provide various arguments in support of the proposed fees for connections to the Proposed Third Party Data Systems and Proposed Third Party Data Feeds. With respect to whether the proposed fees are reasonable, the Exchanges argue that the market for access to Third Party Data Systems and Third Party Data Feeds is competitive, and that the

PEARL Options,’’ and to combine MIAX Options, MIAX PEARL Options, MIAX PEARL Equities, and MIAX Emerald as a single Third Party System on the fee schedules. The Exchanges further propose to remove obsolete rule text from their co-location fee schedules: (i) the reference to the ICE Data Global Index from the list of Third Party Data Feeds available for connectivity in the fee schedules and to remove the text noting that the Exchanges would inform customers that it would cease offering connectivity to the ICE Data Global Index once it was unavailable; and (ii) the reference in fee schedule indicating waiver of the Hot Hands fees from the date of the closing of the data center in Mahwah, New Jersey, through the date of the reopening of the data center (which occurred on October 1, 2020). See Notice, supra note 5, at 16411-16413.

¹² 15 U.S.C. 78s(b)(3)(C).

¹³ 15 U.S.C. 78s(b)(1).

availability of substitutes is a check on their ability to charge unreasonable fees for these services.¹⁴ The Exchanges also maintain that fees charged for co-location are constrained by active competition for order flow of, and other business from, such market participants.¹⁵ The Exchanges state that they compete with other providers, including other colocation providers and market data vendors, which may include Hosting Users.¹⁶ They state that they understand that at least one other vendor currently offers the Proposed MIAX Third Party Data Feeds, and that they are aware of no impediment to third parties offering substitute services.¹⁷ The Exchanges also state that if one or more third parties presently offer, or in the future opt to offer, access and connectivity to Third Party Systems and Third Party Data Feeds to Users, a User may utilize the IDS network, a third party telecommunication network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be an IDS access center, a third-party access center, or both), another User, or a third party vendor.¹⁸ The Exchanges also state that the fees are reasonable because they allow the Exchanges to defray or cover the costs of the data center facility hardware and technology infrastructure necessary to provide connectivity to Users.¹⁹ Regarding differences in

¹⁴ See Notice, supra note 5, at 16414.

¹⁵ See id. at 16414 and 16416.

¹⁶ See id.

¹⁷ See id. at 16414.

¹⁸ See id. at 16415.

¹⁹ See id. at 16414.

fees for the Proposed Third Party Data Feeds, the Exchanges state that they can charge the ICE TMC Third Party Data Feed a lower price because they can offer the feed over their established connection with less effort, since they already offer several Third Party Data Feeds supplied by ICE Data Service.²⁰ They state that they must establish and maintain connections to the exchanges for the other proposed Third Party Data Feeds,²¹ and that MIAX charges separate fees to the Exchange to become a distributor of each of its data feed products, and that the distribution fees that the Exchange must pay to MIAX are higher for the proposed MIAX Emerald Third Party Data Feed than for the proposed MIAX PEARL Equities Third Party Data Feed.²²

In addition, the Exchanges state that the proposed fees are equitably allocated and not unfairly discriminatory because they would apply to all Users equally, the proposed services are voluntary, and Users would only be charged if they opted to use them.²³ Further, the Exchanges state that the proposals do not impose a burden on competition that is not necessary or appropriate because they offer choice and reflects the competitive environment.²⁴

When exchanges file their proposed rule changes with the Commission, including fee filings, they are required to provide a statement supporting the proposal's basis under the Act and

²⁰ See id.

²¹ See id.

²² See id.

²³ See id. at 16415.

²⁴ See id. at 16416.

the rules and regulations thereunder applicable to the exchange.²⁵ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements”²⁶

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;²⁷ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;²⁸ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁹

In temporarily suspending the Exchanges’ proposed rule changes, the Commission intends to further consider whether the proposed fees for connections to the Proposed Third Party Data Systems and the Proposed Third Party Data Feeds are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act

²⁵ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

²⁶ See id.

²⁷ 15 U.S.C. 78f(b)(4).

²⁸ 15 U.S.C. 78f(b)(5).

²⁹ 15 U.S.C. 78f(b)(8).

and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.³⁰

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.³¹

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Changes

In addition to temporarily suspending the proposals, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)³² and 19(b)(2)(B) of the Act³³ to determine whether the Exchanges proposed rule changes should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions

³⁰ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

³¹ For purposes of temporarily suspending the 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).

³² 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

³³ 15 U.S.C. 78s(b)(2)(B).

with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,³⁴ 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”;³⁵
- 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 securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;³⁶ 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

³⁴ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

³⁵ 15 U.S.C. 78f(b)(4).

³⁶ 15 U.S.C. 78f(b)(5).

exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”³⁷

As discussed in Section III above, the Exchanges argue that the fees proposed for connectivity to the Proposed Third Party Data Systems and Proposed Third Party Data Feeds are constrained by competition, and allow the Exchanges to defray or cover the costs of offering the services. The Commission believes that there are questions as to 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.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder...is on the [SRO] that proposed the rule change.”³⁸ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,³⁹ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁴⁰

³⁷ 15 U.S.C. 78f(b)(8).

³⁸ 17 CFR 201.700(b)(3).

³⁹ See id.

⁴⁰ See id.

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act; as well as any other provision of the Act, or the rules and regulations thereunder.

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁴¹

⁴¹ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking,

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Nos. SR-NYSE-2021-15, SR-NYSEAMER-2021-13, SR-NYSEArca-2021-15, SR-NYSECHX-2021-04, and SR-NYSENAT-2021-05 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 Nos. SR-NYSE-2021-15, SR-NYSEAMER-2021-13, SR-NYSEArca-2021-15, SR-NYSECHX-2021-04, and SR-NYSENAT-2021-05. The 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>).

Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Nos. SR-NYSE-2021-15, SR-NYSEAMER-2021-13, SR-NYSEArca-2021-15, SR-NYSECHX-2021-04, and SR-NYSENAT-2021-05 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁴² that File Nos. SR-NYSE-2021-15, SR-NYSEAMER-2021-13, SR-NYSEArca-2021-15, SR-NYSECHX-2021-04, and SR-NYSENAT-2021-05, be and hereby are, temporarily suspended. In addition,

⁴² 15 U.S.C. 78s(b)(3)(C).

the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴³

Jill M. Peterson
Assistant Secretary

⁴³ 17 CFR 200.30-3(a)(57) and (58).