

Electronic Comments

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Paper Comments

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All submissions should refer to File Number SR-CBOE-2020-099. 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 (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the 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 available publicly. All submissions should refer to File Number SR-CBOE-2020-099, and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90217; File No. SR-NYSENAT-2020-05]

Self-Regulatory Organizations; NYSE National, Inc.; Order Approving a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed

October 16, 2020.

I. Introduction

On February 3, 2020, NYSE National, Inc. ("NYSE National" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 establish fees for the NYSE National Integrated Feed. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the **Federal Register** on February 20, 2020.⁴ On April 1, 2020, the Division of Trading and Markets ("Division"), for the Commission pursuant to delegated authority, temporarily suspended the proposed rule change and instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁵ On June 12, 2020, the Commission issued a request for information and additional comment on the proposed rule change.⁶ On August

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 ("Notice"). Comments received on the Notice are available on the Commission's website at <https://www.sec.gov/comments/sr-nysenat-2020-05/srnyssenat202005.htm>. The Commission notes that, on December 4, 2019, NYSE National filed a proposed rule change to establish fees for the NYSE National Integrated Feed that are identical to the fees proposed in this filing. See Securities Exchange Act Release No. 87797 (December 18, 2019), 84 FR 71025 (December 26, 2019) (SR-NYSENAT-2019-31). Comments received on SR-NYSENAT-2019-31 are available on the Commission's website at <https://www.sec.gov/comments/sr-nysenat-2019-31/srnyssenat201931.htm>. On January 31, 2020, the Division of Trading and Markets, for the Commission pursuant to delegated authority, temporarily suspended SR-NYSENAT-2019-31 and instituted proceedings to determine whether to approve or disapprove that proposed rule change. See Securities Exchange Act Release No. 88109, 85 FR 6982 (February 6, 2020) ("SR-NYSENAT-2019-31 OIP"). On February 3, 2020, NYSE National withdrew SR-NYSENAT-2019-31. See Securities Exchange Act Release No. 88118 (February 4, 2020), 85 FR 7611 (February 10, 2020).

⁵ See Securities Exchange Act Release No. 88538, 85 FR 19541 (April 7, 2020).

⁶ See Securities Exchange Act Release No. 89065, 85 FR 37123 (June 19, 2020) ("Request for

18, 2020, pursuant to Section 19(b)(2) of the Act,⁷ the Division, for the Commission pursuant to delegated authority, designated a longer period within which to issue an order approving or disapproving the proposed rule change.⁸ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

NYSE National proposes to establish fees for the NYSE National Integrated Feed.⁹ According to NYSE National, the NYSE National Integrated Feed is a NYSE National-only market data feed that provides vendors and subscribers on a real-time basis with a unified view of events, in sequence, as they appear on the NYSE National matching engine.¹⁰ The NYSE National Integrated Feed includes depth-of-book order data, last sale data, security status updates (e.g., trade corrections and trading halts), and stock summary messages.¹¹ It also includes information about NYSE National's best bid or offer at any given time.¹² NYSE National proposes the following fees for the NYSE National Integrated Feed:

- \$2,500 per month access fee, which would be charged (once per firm) to any data recipient that receives a data feed of the NYSE National Integrated Feed;¹³
- \$1,500 per month redistribution fee, which would be charged (once per redistributor account) to any redistributor¹⁴ of the NYSE National Integrated Feed;
- \$10 per month professional per user fee and \$1 per month non-professional per user fee, which would apply to each display device that has access to the NYSE National Integrated Feed;¹⁵
- Non-display use¹⁶ fees:

Comment"). Comments received on the Request for Comment are available on the Commission's website at <https://www.sec.gov/comments/sr-nysenat-2020-05/srnyssenat202005.htm>.

⁷ 15 U.S.C. 78s(b)(2).

⁸ See Securities Exchange Act Release No. 89592, 85 FR 52174 (August 24, 2020).

⁹ The fees became effective on February 3, 2020. Prior to February 3, 2020, NYSE National did not charge any fees for the NYSE National Integrated Feed. See Notice, *supra* note 4, at 9847.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *id.*

¹³ Data recipients that only use display devices to view NYSE National Integrated Feed data and do not separately receive a data feed would not be charged an access fee. See *id.* at 9848.

¹⁴ A redistributor would be a vendor or person that provides a real-time NYSE National market data product externally to a data recipient that is not its affiliate or wholly-owned subsidiary, or to any system that an external data recipient uses, irrespective of the means of transmission or access. See *id.*

¹⁵ See *id.*

¹⁶ Non-display use would mean accessing, processing, or consuming the NYSE National

²⁶ 17 CFR 200.30-3(a)(12).

- \$5,000 per month category 1 non-display fee, which would apply when a data recipient's non-display use of real-time market data is on its own behalf;

- \$5,000 per month category 2 non-display fee, which would apply when a data recipient's non-display use of real-time market data is on behalf of its clients;

- \$5,000 per platform per month category 3 non-display fee (capped at \$15,000), which would apply when a data recipient's non-display use of real-time market data is for the purpose of internally matching buy and sell orders within an organization, including matching customer orders on a data recipient's own behalf and on behalf of its clients;¹⁷

- \$1,000 per month non-display use declaration late fee, which would apply to any data recipient that is paying an access fee for the NYSE National Integrated Feed and that fails to complete and submit the annual non-display use declaration by December 31 of the year, and would apply beginning January 1 and for each month thereafter until the data recipient has completed and submitted the annual non-display use declaration;¹⁸ and

- \$200 per month multiple data feed fee, which would apply to any data recipient that takes a data feed for a market data product in more than two locations, and would apply to each location, beyond the first two locations, where the data recipient receives a data feed.¹⁹

Integrated Feed, delivered directly or through a redistributor, for a purpose other than in support of a data recipient's display or further internal or external redistribution. *See id.* As proposed, non-display use would include trading uses such as high frequency or algorithmic trading, as well as any trading in any asset class, automated order or quote generation and order pegging, price referencing for algorithmic trading or smart order routing, operations controls programs, investment analysis, order verification, surveillance programs, risk management, compliance, and portfolio management. *See id.* One, two, or three categories of non-display use may apply to a data recipient. *See id.* at 9848–49. Moreover, data recipients that receive the NYSE National Integrated Feed for non-display use would be required to complete and submit a non-display use declaration before they would be authorized to receive the feed. *See id.* at 9849. In addition, if a data recipient's use of the NYSE National Integrated Feed data changes at any time after the data recipient submits a non-display use declaration, the data recipient must inform NYSE National of the change by completing and submitting an updated declaration reflecting the change of use at the time of the change. *See id.*

¹⁷ According to NYSE National, category 3 non-display fees would apply to non-display use in trading platforms, such as, but not limited to, alternative trading systems ("ATSS"), broker crossing networks, broker crossing systems not filed as ATSS, dark pools, multilateral trading facilities, exchanges, and systematic internalization systems. *See id.* at 9848–49.

¹⁸ *See id.* at 9849.

¹⁹ *See id.*

The access fees, professional user fees, and non-display fees would not apply to Federal agencies²⁰ that subscribe to the products listed on the proposed fee schedule that includes such fees.²¹

Finally, first-time subscribers²² would be eligible for a free trial by contacting NYSE National and would not be charged the access fee, the non-display fee, any applicable professional and non-professional user fee, and the redistribution fee for one calendar month for each of the products listed on the proposed fee schedule.²³ The free trial would be for the first full calendar month following the date a subscriber is approved to receive trial access to NYSE National market data.²⁴ As proposed, NYSE National would provide the one-month free trial for a particular product to each subscriber only once.²⁵

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁶ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(4) of the Act,²⁷ 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; Section 6(b)(5) of the Act,²⁸ which requires, among other things, that

²⁰ NYSE National states that the term "Federal agencies" as used in the proposed fee schedule would include all Federal agencies subject to the Federal Acquisition Regulation ("FAR"), as well as any Federal agency not subject to FAR that has promulgated its own procurement rules. *See id.* NYSE National further states that all Federal agencies that subscribe to the NYSE National real-time proprietary market data products would continue to be required to execute the appropriate subscriber agreement, which includes, among other things, provisions against the redistribution of data. *See id.*

²¹ The proposed fee schedule lists NYSE National BBO, NYSE National Trades, and NYSE National Integrated Feed, and specifies that there would be no fees for NYSE National BBO and NYSE National Trades.

²² A first-time subscriber would be any firm that has not previously subscribed to a particular product listed on the proposed fee schedule. *See Notice, supra* note 4, at 9849.

²³ *See id.*

²⁴ *See id.* at 9849–50.

²⁵ *See id.* at 9850.

²⁶ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). *See infra* Sections III.A–C.

²⁷ 15 U.S.C. 78f(b)(4).

²⁸ 15 U.S.C. 78f(b)(5).

the rules of a national securities exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and Section 6(b)(8) of the Act,²⁹ which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Commission also finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,³⁰ which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are fair and reasonable and that are not unreasonably discriminatory.³¹

The Commission has historically applied a "market-based" test in its assessment of market data fees, such as the fees proposed herein. 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."³² 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

²⁹ 15 U.S.C. 78f(b)(8).

³⁰ 17 CFR 242.603(a).

³¹ NYSE National is an exclusive processor of securities information under the Act because it distributes on its own behalf information regarding its quotations and transactions. *See* 15 U.S.C. 78c(a)(22)(B) (emphasis added) (defining "exclusive processor" to mean "any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association").

³² Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) ("2008 ArcaBook Approval Order") (approving proposed rule change to establish fees for a depth-of-book market data product). In 2010, the D.C. Circuit vacated the Commission's 2008 ArcaBook Approval Order. The court held that focusing on whether competitive market forces constrained the exchange's pricing decisions was an acceptable basis for assessing the fairness and reasonableness of the fees, but determined that the record did not factually support the conclusion that significant competitive forces limited the ability of NYSE Arca, Inc. ("NYSE Arca") to set unfair or unreasonable prices. The D.C. Circuit vacated and remanded for further proceedings. *See* NetCoalition v. SEC, 615 F.3d 525, 535 (D.C. Cir. 2010) ("NetCoalition I") ("We conclude the SEC's interpretation—that a market-based approach to evaluating whether NYSE Arca's non-core data fees are 'fair and reasonable'—is a permissible one.").

Act or the rules thereunder.³³ If an exchange cannot demonstrate that it was subject to significant competitive forces, it must “provide a substantial basis, other than competitive forces . . . demonstrating that the terms of the [fee] proposal are equitable, fair, reasonable, and not unreasonably discriminatory.”³⁴

A. Substitution-Based Arguments

In support of the proposed fees, NYSE National argues that the NYSE National Integrated Feed is sold in a competitive market.³⁵ NYSE National asserts that exchanges compete with each other in selling proprietary market data products, as well as with consolidated data feeds (*i.e.*, SIP feeds) and with data provided by ATSS.³⁶ In addition, NYSE National states that NYSE National BBO (which includes best bid and offer information for NYSE National on a real-time basis) and NYSE National Trades (which includes NYSE National last sale information on a real-time basis) are substitutes for the NYSE National Integrated Feed and constrain NYSE National’s ability to charge supracompetitive prices for the feed.³⁷ In support of its claim, NYSE National states that, since the date of filing of SR-NYSENAT-2019-31 and before the proposed fees went into effect on February 3, 2020, five subscribers to the NYSE National Integrated Feed (*i.e.*, nearly 9% of the prior subscriber base) have cancelled their subscriptions due to the imminent imposition of the fees.³⁸ Moreover, NYSE National states that a sixth customer informed NYSE National that if NYSE National is permitted to impose the fees, the customer would cancel its subscription to the NYSE National Integrated Feed and instead subscribe to the NYSE National BBO feed, which NYSE National states will remain available for free.³⁹

In response to the proposal, one commenter argues that the NYSE National Integrated Feed is not subject to competitive forces because there are no available substitutes to NYSE National’s depth-of-book product,⁴⁰ as the NYSE National Integrated Feed is the only source of depth-of-book information on NYSE National.⁴¹ This commenter also argues that NYSE National makes an unpersuasive attempt to show elasticity of demand for the NYSE National Integrated Feed (*i.e.*, in response to the fee increase, five of the 57 subscribers notified NYSE National of their intent to cancel their subscriptions before the fees went into effect, which the commenter considers to be a low proportion of subscribers).⁴²

This commenter also argues that market data products are complementary because the ability of participants to evaluate the market, and therefore the utility and value of market data, increases with the addition of market data products from other exchanges.⁴³ Therefore, according to the commenter, exchanges have little incentive to reduce the prices for their own data because any theoretical increase in demand would be shared with other exchanges.⁴⁴ In addition, this commenter argues that other data feeds offered by NYSE National or other exchanges are not alternatives to the NYSE National Integrated Feed because only this feed provides depth-of-book information on NYSE National.⁴⁵

According to this commenter, broker-dealers feel obligated to obtain direct feeds across multiple exchanges to have the most robust view of the market, regardless of a given exchange’s market share and, while not mandated by regulation to use direct feeds, a large number of broker-dealers feel that direct feeds are necessary for competitive and best execution reasons.⁴⁶ In this regard, the commenter states that a number of broker-dealers feel that they cannot ignore the NYSE National Integrated Feed and solely rely on consolidated data to meet their best execution obligations, and specifically that NYSE National has quotations at one side of the National Best Bid and Offer (“NBBO”) 37.7% of the time and at both sides of the NBBO 7.76% of the time.⁴⁷ This commenter also states that odd lot trades represented 36.6% of total trades at NYSE National, and the only way to see these odd lot quotes is to subscribe to the NYSE National Integrated Feed.⁴⁸ Finally, this commenter states that, despite a relatively small overall market share, NYSE National has a significant market share for certain stocks and exchange-traded products (“ETPs”).⁴⁹

⁴⁶ See SIFMA Letter III, *supra* note 40, at 1–3 (citing Credit Suisse Securities, BofA Securities, Morgan Stanley, and Barclays as examples). See also SIFMA Letter II, *supra* note 40, at 4.

⁴⁷ See SIFMA Letter III, *supra* note 40, at 2 (citing data from June 2020).

⁴⁸ See *id.*

⁴⁹ See *id.* at 3. Specifically, the commenter states that once trading volume associated with the opening and closing auctions is excluded, the data indicate that NYSE National holds a larger market share for certain types of securities during regular trading hours. See *id.* According to the commenter, of the stocks that trade on NYSE National, in the 30-day period ending July 17, 2020, over 22% were small-cap stocks; with regard to 35% of those small-cap stocks, NYSE National had a continuous market share of between 2% and 5%, and with regard to 6% of those small-cap stocks, NYSE National had a continuous market share of between 5% and 10%. See *id.* The commenter also states that over 26% of the stocks traded on NYSE National in the same time period were mid-cap stocks; with regard to 27% of those mid cap stocks, NYSE National had a continuous market share of between 2% and 5%, and with regard to 8% of those mid-cap stocks, NYSE National had a continuous market share of between 5% and 10%. See *id.* In addition, the commenter states that, during the same period, NYSE National had “significant market share” in certain smaller, less liquid ETPs and, for at least some individual common stocks and ETPs, NYSE National had a market share of greater than 10%. See *id.* Further, according to the commenter, there were “significant changes” in the stocks and ETPs that had the highest market shares on NYSE National in the 30-day periods ending July 17, 2020 and May 17, 2020. See *id.* Finally, this commenter ranks common stocks and ETPs traded on NYSE National based on their percentage of continuous market volume (excluding primary exchange opening and closing auction volume) on NYSE National, and states that NYSE National had 14% market share for the top common stock and 7–8% market share for the next six common stocks in July 2020, and 12% market share for the top common

³³ 2008 ArcaBook Approval Order, *supra* note 32, at 74781. See also NetCoalition I, 615 F.3d at 532.

³⁴ 2008 ArcaBook Approval Order, *supra* note 32, at 74781. See also NetCoalition I, 615 F.3d at 532.

³⁵ See Notice, *supra* note 4, at 9851. NYSE National’s initial proposal and subsequent comment letters focused on a platform-based argument and a substitution-based argument to demonstrate that the fees are constrained by significant competitive forces. The Commission discusses NYSE National’s platform-based argument in Section III.B below.

³⁶ See *id.* NYSE National provides a report by Charles M. Jones to support these arguments. See Charles M. Jones, *Understanding the Market for U.S. Equity Market Data* (August 31, 2018) (“Jones Paper”), available at <https://www.sec.gov/rules/sro/nyssenat/2020/34-88211-ex3a.pdf>.

³⁷ See Notice, *supra* note 4, at 9854.

³⁸ See *id.* at 9848.

³⁹ NYSE National states that these six lost subscribers constitute 10.5% of the prior number of subscribers to the NYSE National Integrated Feed. See *id.*

⁴⁰ See letters from Ellen Greene, Managing Director, Equities & Options Market Structure, SIFMA, to Vanessa Countryman, Secretary, Commission, dated March 11, 2020, at 2 (“SIFMA Letter I”); July 10, 2020, at 3–4 (“SIFMA Letter II”); and August 14, 2020, at 1–3 (“SIFMA Letter III”). This commenter also more generally argues that NYSE National fails to provide the necessary information for the Commission to determine whether the proposed fees meet the requirements of the Act. See SIFMA Letter I, *supra*. See also SIFMA Letter II, *supra*, at 1–2 (reiterating arguments made in SIFMA Letter I). In addition, this commenter refers to the comment letter it submitted on SR-NYSENAT-2019-31 in stating that the proposal does not meet the requirements of the Act. See SIFMA Letter I, *supra*, at 2. See also SR-NYSENAT-2019-31 OIP, *supra* note 4, at 6984–85 (describing the commenter’s letter on SR-NYSENAT-2019-31); letter from Robert Toomey, Managing Director and Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, Commission, dated January 21, 2020, available at <https://www.sec.gov/comments/sr-nyssenat-2019-31/srnyssenat201931-6678406-204968.pdf>.

⁴¹ See SIFMA Letter II, *supra* note 40, at 4.

⁴² See SIFMA Letter I, *supra* note 40, at 2.

⁴³ See SIFMA Letter II, *supra* note 40, at 3 (citing Lawrence R. Glosten, *Economics of the Stock Exchange Business: Proprietary Market Data* (January 2020) (“Glosten Paper”)).

⁴⁴ See *id.*

⁴⁵ See *id.* at 4. This commenter also states that NYSE National’s monopoly over this integrated data precludes the development of competing products to constrain its pricing. See *id.*

Similarly, another commenter questions whether third parties can compete with NYSE National in offering data related to activity on NYSE National.⁵⁰ This commenter also questions NYSE National's assertion that market participants have a meaningful ability to choose whether or not to connect to the NYSE National Integrated Feed and believes instead that many market participants must buy the feed.⁵¹ This commenter acknowledges that NYSE National provides the number of customers that discontinued using the NYSE National Integrated Feed in response to the proposed fees, but expresses concern that NYSE National has not provided any relevant information about these customers (e.g., why they subscribed to the NYSE National Integrated Feed in the first place; whether they were proprietary trading firms, agency brokers, or data vendors; and whether and how often they sent orders to NYSE National).⁵² This commenter also states that NYSE National should update and further elaborate on information about the remaining subscribers.⁵³

Finally, another commenter argues that other NYSE market data offerings and consolidated data cannot be considered to be competitors or substitutes that would constrain the pricing of the NYSE National Integrated

Feed.⁵⁴ This commenter similarly states that data from one exchange is not a substitute for data from other exchanges, and that an exchange's depth-of-book data are unique to that exchange and cannot be obtained from any other source.⁵⁵

In response to the Commission's Request for Comment and the comment letters received, NYSE National argues that the observation that some firms buy proprietary data from all exchanges is not sufficient to show that these products are complements,⁵⁶ and that the concept of "monopolistic competition" does not apply to exchanges' pricing of proprietary market data products because the Glosten Paper fails to address a key component of "monopolistic competition."⁵⁷ In addition, NYSE National disagrees with commenters' assertions that customers

are "required" to purchase the NYSE National Integrated Feed.⁵⁸ NYSE National asserts that there is no regulatory mandate (e.g., best execution obligations) requiring any specific customers to purchase proprietary market data products from exchanges; rather, subscription to proprietary market data products is a business decision where individual market participants weigh the value of individual proprietary market data products to their individual business models and choose to invest in those products whose cost is justified by the expected benefits.⁵⁹ According to NYSE National, the fact that some number of broker-dealers choose to buy certain data products in order to compete with each other does not mean that the purchase of such products is "required."⁶⁰

In support of its arguments, NYSE National provides information regarding

⁵⁴ See letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, Commission, dated July 10, 2020, at 4, 6 ("Bloomberg Letter"). According to the commenter, if depth-of-book data products from different exchanges were close substitutes, it would be expected that customers purchase only from the lowest-priced provider. See *id.* at 6. Yet this commenter argues that such "prices have not converged." See *id.*

⁵⁵ See *id.* at 6.

⁵⁶ See letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission, dated August 14, 2020, at 15 ("NYSE National Letter I"). NYSE National also provides a report by Marc Rysman, which states that a standard definition of "complements" is "two goods for which an increase in the price of one leads to a decrease in demand for the other" and that a closely related definition of "complementarity" is that two goods are considered complements if the incremental value of consuming one good is greater when the other good is being consumed than when it is not. See Marc Rysman, *Complements, Competition, and Exchange Proprietary Data Products*, at 6–7 (August 13, 2020) ("Rysman Paper II"). Rysman Paper II states that the Glosten Paper does not test or directly argue that this definition of complements actually applies to any specific exchange data products, and that an observation that some buyers purchase all available products (even if true) does not imply that those products are complements. See *id.* at 6–8. Rather, Rysman Paper II provides an example designed to show that purchasing proprietary data products from several exchanges has decreasing marginal returns for the firms that purchase the data. See *id.* at 14–18. Rysman Paper II also states that goods for which an increase in the price of one leads to an increase in the demand for the other are "substitutes." See *id.* at 6.

⁵⁷ See NYSE National Letter I, *supra* note 56, at 15–16 (stating that Glosten's concept of "monopolistic competition" is inconsistent with platform economics, and that while the Glosten Paper refers to "monopolistic competitors," it does not engage in any meaningful analysis of new exchange competitors). See also Rysman Paper II, *supra* note 56, at 5, 20–21 (stating that the evocation of the monopolistic competition framework in the Glosten Paper is "puzzling" because the author does not engage with one of its characteristics, that there is free entry into the market for trading venues and that producers of market data make zero profits).

⁵⁸ See NYSE National Letter I, *supra* note 56, at 3, 17–21; letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission, dated September 22, 2020, at 1–2 ("NYSE National Letter II").

⁵⁹ See NYSE National Letter I, *supra* note 56, at 17–18. See also Rysman Paper II, *supra* note 56, at 9 (stating that competition among brokers can drive them to offer higher quality execution services and, to this end, to purchase proprietary data from more exchanges than they might otherwise have chosen to subscribe to, even though those data products deliver decreasing marginal returns in creating trading opportunities; and that proprietary traders compete to identify and take advantage of profitable trading opportunities, and may be driven to possibly purchase more of the data products offered by exchanges).

⁶⁰ See NYSE National Letter I, *supra* note 56, at 18. See also Rysman Paper II, *supra* note 56, at 19 (stating that even if exchanges' proprietary data products are complements to a limited set of traders, that does not imply that such data products are complements in terms of the overall demand for these products or that these products will be priced at supracompetitive levels). In addition, NYSE National cites a recent Commission order approving a new "D-Limit discretionary limit order type" offered by Investors Exchange LLC ("IEX"), in which the Commission stated that "most broker-dealers have not purchased the fastest connectivity and market data from multiple individual exchanges that are necessary to be able to trade at the precise moments in time identified by the [crumbling quote indicator]" used in conjunction with IEX's new order type. See NYSE National Letter II, *supra* note 58, at 2 (citing Securities Exchange Act Release No. 89686 (August 26, 2020), 85 FR 54438 (September 1, 2020) (SR-IEX-2019-15) (order approving a proposed rule change to add a new discretionary limit order type called D-Limit)). NYSE National argues that this finding means that "the Commission is not free to accept SIFMA's unsupported contention that broker-dealers are 'required' to purchase the NYSE National Integrated Feed." See *id.* at 3. The Commission notes, however, that the statement made in the context of the IEX proposed rule change does not constitute a specific finding regarding the extent to which market participants purchase depth-of-book data from a particular exchange.

stock and 6–7% market share for the next six common stocks in May 2020. See *id.* at 5. This commenter also states that NYSE National had 17% market share for the top ETP and 7–10% market share for the next six ETPs in July 2020, and 9% market share for the top ETP and 6–8% market share for the next six ETPs in May 2020. See *id.*

⁵⁰ See letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Vanessa Countryman, Office of the Secretary, Commission, dated March 12, 2020, at 6–8 ("Healthy Markets Letter"). This commenter states that NYSE National controls who, under what terms, and when anyone other than NYSE National can obtain order-related information about NYSE National. See *id.* at 7. This commenter also more generally argues that the information provided by NYSE National is not adequate to establish that the proposed fees are consistent with the Act and Commission rules. See *id.* at 3–4. See also SR-NYSENAT-2019-31 OIP, *supra* note 4, at 6984 (describing the commenter's letter on SR-NYSENAT-2019-31); letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Vanessa Countryman, Office of the Secretary, Commission, dated January 16, 2020, available at <https://www.sec.gov/comments/sr-nyssenat-2019-31/srnyssenat201931-6663540-203934.pdf>.

⁵¹ See Healthy Markets Letter, *supra* note 50, at 4–5. According to this commenter, if one set of market participants has access to a faster, richer data set, then those without that information will not be as competitive and may not be able to quote or otherwise route orders in a manner that could effectively achieve best execution. See *id.* at 8.

⁵² See *id.* at 5–6.

⁵³ See *id.* at 6.

New York Stock Exchange LLC (“NYSE”), NYSE American LLC (“NYSE American”), NYSE Arca, and NYSE National (collectively, “NYSE Group”) market data subscriptions by firms that trade on NYSE, which according to NYSE National indicates that many firms that trade on NYSE do not subscribe to the proprietary market data products of each of the NYSE Group exchanges and a significant percentage of such firms subscribe to no proprietary market data products at all.⁶¹ NYSE National also states that 28 out of 49 total NYSE National member firms subscribed to the NYSE National Integrated Feed in February 2020 (when fees were charged for the feed) and 30 out of 48 total NYSE National member firms subscribed to the NYSE National Integrated Feed in June 2020 (when the feed was offered free of charge).⁶² According to NYSE National, members that did not subscribe to the feed included several broker-dealers affiliated with global banks and other trading firms.⁶³ In addition, NYSE National states that five subscribers cancelled their subscriptions before the new fees went into effect due to the imminent imposition of the fees,⁶⁴ and that the sixth customer who warned it would cancel its subscription did in fact do so.⁶⁵ According to NYSE National, these former subscribers include at least one well-known hedge fund, a brokerage firm and investment adviser affiliated with a global bank, and several broker-dealers and investment management firms.⁶⁶ In addition, the Exchange states that two more subscribers requested cancellation of their subscriptions after

paying the fees in February and March 2020, citing the fees as their reason for cancelling, but ultimately did not pursue cancellation once the feed became free again in April 2020.⁶⁷ NYSE National further states that an additional prospective customer “walked away” upon learning of the fees it would have to pay.⁶⁸

As discussed below in this Section III.A., in light of NYSE National’s consistently low percentage of market share, the relatively small number of subscribers to the NYSE National Integrated Feed, and the sizeable portion of subscribers that terminated their subscriptions following the proposal of the fees, the Commission finds that the proposed rule change is consistent with the Act. In particular, the Commission believes that NYSE National has provided sufficient information to demonstrate that it was subject to significant substitution-based competitive forces in setting the terms of its proposal for NYSE National Integrated Feed fees.⁶⁹

In *NetCoalition I*, while vacating the Commission’s 2008 ArcaBook Approval Order, the D.C. Circuit stated that “the existence of a substitute does not necessarily preclude market power,” that “whether a market is competitive notwithstanding potential alternatives depends on factors such as the number of buyers who consider other products interchangeable and at what prices,” and that “[t]he inquiry into whether a market for a product is competitive . . . focuses on . . . the product’s elasticity of demand.”⁷⁰ The court found that the Commission’s analysis of alternatives in the 2008 ArcaBook Approval Order did not reveal the number of potential users of the data or how they might react to

a change in price.⁷¹ The court stated that there was no information regarding how many traders accessed NYSE Arca’s depth-of-book data during the period it was offered without charge (and thus how many traders might have been interested in paying for NYSE Arca’s depth-of-book data), or whether the traders who wanted depth-of-book data would have declined to purchase it if met with a supracompetitive price.⁷²

With respect to the current proposal, NYSE National provides the information identified by the court in *NetCoalition I* as information it considers useful to demonstrate whether an exchange is subject to significant competitive forces in pricing its market data. Specifically, NYSE National provides information regarding the number of potential users of the NYSE National Integrated Feed—in November 2019, prior to NYSE National’s first filing to adopt fees for the feed, when the feed was offered without charge, there were 57 subscribers to the feed.⁷³ NYSE National also provides information regarding how potential users of the feed reacted to the introduction of the fees—six out of the 57 subscribers cancelled their subscriptions due to the proposed fees after they were first filed in December 2019, and two more subscribers requested cancellation of their subscriptions after paying the fees in February and March 2020, citing the fees as their reason for cancelling, but ultimately did not pursue cancellation once the feed became free again in April 2020.⁷⁴ NYSE National also states that an additional prospective customer “walked away” upon learning of the fees it would have to pay.⁷⁵

⁷¹ See *id.* at 542.

⁷² See *id.* at 542–43. Moreover, the court in *NetCoalition I* noted that, as of July 2008, about 15% of International Securities Exchange (“ISE”) members—20 out of 140—subscribed to ISE’s depth-of-book product even though it was free, and stated that, given that ISE’s share volume in U.S.-listed stocks was significantly smaller than that of NYSE Arca (0.9% compared to 16.5% in June 2008), it was no surprise that its market data was less in demand. See *id.* at 543. Similar to ISE in 2008, NYSE National has had less than 2% of total share volume on all but 16 days since it re-launched trading in May 2018 (and never above 2.2%) and, as demonstrated by the number of NYSE National Integrated Feed subscribers, faces a lower demand for the NYSE National Integrated Feed as compared to demand for the data feeds of other exchanges. See Choe Global Markets, U.S. Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_statistics/venue/nysenational/all_market/ (showing that NYSE National has had 2% or more of total market share on only 16 days since it re-launched trading in May 2018). See also *infra* note 83 (discussing the Commission’s analysis of NYSE National’s market share).

⁷³ See *supra* note 64 and accompanying text.

⁷⁴ See *supra* notes 64–67 and accompanying text.

⁷⁵ See *supra* note 68 and accompanying text.

⁶¹ According to NYSE National, this data show that in December 2018 and June 2020: (1) Less than one-third of the firms subscribed to proprietary market data from all of the four NYSE Group exchanges; (2) approximately one-third of the firms subscribed to proprietary market data from only one of these four exchanges; and (3) 14.6% (in December 2018) and 12.8% (in June 2020) of the firms did not subscribe to any proprietary market data products from any of these four exchanges. See NYSE National Letter I, *supra* note 56, at 18; Rysman Paper II, *supra* note 56, at 10–11. This data also show that in December 2018 and June 2020: (1) Less than 20% of the firms subscribed to the Integrated Feeds from all of NYSE, NYSE American, NYSE Arca, and NYSE National; and (2) 66.0% (in December 2018) and 59.6% (in June 2020) of the firms did not subscribe to any Integrated Feed from any of these four exchanges. See NYSE National Letter I, *supra* note 56, at 18; Rysman Paper II, *supra* note 56, at 11–12.

⁶² See NYSE National Letter I, *supra* note 56, at 19.

⁶³ See *id.*

⁶⁴ See *id.* See also *supra* note 38 and accompanying text.

⁶⁵ See NYSE National Letter I, *supra* note 56, at 19–20. See also *supra* note 39 and accompanying text.

⁶⁶ See NYSE National Letter I, *supra* note 56, at 20.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ Under Commission Rule of Practice 700(b)(3), NYSE National has the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder.” 17 CFR 201.700(b)(3). Based on the discussion below, the Commission does not agree with commenter arguments that the information provided by NYSE National is not adequate to establish that the proposed fees are consistent with the Act and Commission rules. See *supra* notes 40, 50.

⁷⁰ See *NetCoalition I*, 615 F.3d at 542 (internal quotation marks omitted). See also *id.* at 539–41 (considering order flow competition); *id.* at 537 (stating that “[a]lthough we uphold the SEC’s market-based approach against the petitioners’ cost-based challenges, we do not mean to say that a cost analysis is irrelevant” and that because “in a competitive market, the price of a product is supposed to approach its marginal cost, *i.e.*, the seller’s cost of producing one additional unit,” “the costs of collecting and distributing market data can indicate whether an exchange is taking ‘excessive profits’ or subsidizing its service with another source of revenue”).

Accordingly, approximately 14% of the NYSE National Integrated Feed subscribers were willing to drop or did drop the feed in response to the proposed fees.

Other information also shows that many market participants (including executing broker-dealers and other trading venues) do not subscribe to (*i.e.*, have access to one or more substitutes for) the NYSE National Integrated Feed, even when the feed is offered without charge, which further demonstrates that NYSE National was subject to significant competitive forces in pricing the NYSE National Integrated Feed. In particular, many of the NYSE National member firms do not subscribe to the NYSE National Integrated Feed, even when it was available for free: NYSE National states that 28 out of 49 NYSE National member firms subscribed to the NYSE National Integrated Feed in February 2020 (when fees were charged for the feed) and 30 out of 48 NYSE National member firms subscribed to the NYSE National Integrated Feed in June 2020 (when the feed was again offered free of charge).⁷⁶ In addition, NYSE National states that at least ten firms would have been subject to the Category 3 Non-Display Use fees at the time NYSE National first filed these fees with the Commission in December 2019.⁷⁷ Given that, in December 2019, there were 12 equities exchanges (not including NYSE National)⁷⁸ and 31 NMS Stock ATSs that had an effective Form ATS-N on file with the Commission⁷⁹ that would be subject to the Category 3 Non-Display Use fees if they subscribed to the NYSE National Integrated Feed, it appears that more than three-quarters of trading platforms that would be subject to the Category 3 Non-Display Use fees have chosen not to subscribe to the NYSE National Integrated Feed. Moreover, a recent Commission decision on market data fees included an argument from The Nasdaq Stock Market LLC that approximately 100 trading firms pursue algorithmic trading strategies that may require all depth-of-book data from every exchange.⁸⁰ However, given that there were only 57 subscribers to the NYSE National Integrated Feed when it

was offered for free and six subscribers discontinued their subscriptions in response to the fees, it is likely that a significant number of firms that typically require exchange depth-of-book data products are using a substitute to the NYSE National Integrated Feed (and any substitute may include the option to forgo access to such proprietary data for certain firms).

Based on the foregoing, the Commission finds that NYSE National was subject to significant competitive forces in setting the terms of its proposed fees. The Commission believes that market participants have access to a substitute for the NYSE National Integrated Feed in light of NYSE National's consistently low percentage of market share, and as demonstrated by the relatively small number of subscribers to the NYSE National Integrated Feed and the sizeable portion of subscribers that terminated their subscriptions following the proposal of the fees. In addition, the Commission believes that, despite commenters' arguments to the contrary,⁸¹ and while it has not been substantiated that data from another exchange are a substitute for data from NYSE National, the information provided by NYSE National demonstrates that a number of executing broker-dealers⁸² 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.⁸³

⁸¹ See *supra* notes 40, 47–49, 51, 54, and accompanying text (describing commenters' arguments that NYSE National has quotations at the NBBO a notable percentage of the time, a notable percentage of odd lot trades, and a "significant" market share for certain securities, and that market participants do not have a meaningful ability to choose not to subscribe to the NYSE National Integrated Feed).

⁸² The Commission believes that different types of market participants have different needs for market data products. For example, executing broker-dealers, or those that are directly involved in the submission of orders to an exchange, may have a greater need for the exchange's market data products than other market participants that do not submit and execute orders on the exchange, and executing broker-dealers who purchase the exchange's market data products may execute a significant portion of volume on the exchange.

⁸³ Moreover, while a commenter provides data to support its argument that NYSE National has a "significant" market share for certain securities, the commenter's data only show NYSE National's market share over two 30-day periods and do not take into account primary exchange opening and closing auction volume. See *supra* note 49. The Commission has analyzed the securities that traded at least one day on NYSE National during the period from May 21, 2018 (*i.e.*, the re-launch of trading on NYSE National) through July 23, 2020, and finds that during this period, on a monthly basis, the percent of shares traded on NYSE National averaged less than 2% of total shares traded for over 94% of the securities. Of the 21

As discussed above,⁸⁴ the Commission's market-based test 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."⁸⁵ 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.⁸⁶ The Commission has stated that it "believes that the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."⁸⁷ With the current proposed rule change, because NYSE National has demonstrated that it was subject to significant competitive forces in setting the terms of its proposed fees, the Commission finds that the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act and Rule 603(a) of Regulation NMS.

The Commission notes that its finding is specific to the fees proposed by NYSE National and the information provided by NYSE National in connection with the current proposed rule change, and that any proposed rule change by any SRO will be considered based on the specific factual information before the Commission in the record at issue.

B. Platform Competition-Based Arguments

In support of its belief that the proposed fees are reasonable, NYSE National states that exchanges in general function as platforms between consumers of market data and consumers of trading services, and that overall competition between exchanges will limit their overall profitability.⁸⁸ In

securities in which the commenter claims NYSE National has a "significant market share," average market share (for all trading, including regular trading hours, extended hours, and auctions) during the 27-month period from May 21, 2018 through July 23, 2020 was, in all cases, lower than what the commenter shows for the two months that it has selected.

⁸⁴ See *supra* notes 32–34 and accompanying text.

⁸⁵ 2008 ArcaBook Approval Order, *supra* note 32, at 74781.

⁸⁶ *Id.*

⁸⁷ *Id.* at 74781–82. In this regard, the Commission has also indicated that the availability of substitutes can impose competitive restraints to ensure that an exchange acts equitably, fairly, and reasonably. See *id.* at 74785.

⁸⁸ See Notice, *supra* note 4, at 9852. According to NYSE National, exchanges are platforms for market data and transaction services and competition for order flow on the trading side of the platform acts to constrain the pricing of market data on the other side of the platform. See *id.* at 9853.

⁷⁶ See *supra* note 62 and accompanying text.

⁷⁷ See Notice, *supra* note 4, at 9850.

⁷⁸ A list of national securities exchanges is available on the Commission's website at <https://www.sec.gov/rules/sro.shtml>.

⁷⁹ A list of NMS Stock ATSs is available on the Commission's website at <https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm>.

⁸⁰ In the Matter of the Application of SIFMA, Securities Exchange Act Release No. 84432, 29 (October 16, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-84432.pdf> ("SIFMA Decision").

connection with these arguments, NYSE National asserts that the introduction of the NYSE Integrated Feed in 2015 attracted more trading to NYSE by both subscribers and non-subscribers to the NYSE Integrated Feed,⁸⁹ and concludes that overall competition between exchanges will limit exchanges' overall profitability (not margins on any particular side of the platform).⁹⁰

In addition, NYSE National argues that, due to the ready availability of substitutes and the low cost to move order flow to substitute trading venues, an exchange setting market data fees that are not at competitive levels would expect to quickly lose business to alternative platforms with more attractive pricing.⁹¹ NYSE National argues that subscribing to the NYSE National Integrated Feed is optional, that its customers may choose to discontinue using the feed once the proposed fees are effective, and that any customers who choose to discontinue using the feed may choose to shift order flow away from NYSE National.⁹² Similarly, NYSE National argues that its market data pricing is constrained by the availability of numerous substitute platforms offering competing proprietary market data products and trading services.⁹³

In response to the proposal, one commenter argues that competition for order flow under the "platform theory" does not constrain the cost of market data, but instead results in "supra-monopoly" prices for market data products.⁹⁴ This commenter also argues

that an exchange has yet to show an increase (or decrease) in trading volume after reducing (or increasing) its price of market data, and that NYSE National does not state the anticipated impact on order flow from losing subscribers to the NYSE National Integrated Feed.⁹⁵ In addition, this commenter argues that, because it believes competitive forces have not constrained the cost of market data, NYSE National should provide additional information on cost.⁹⁶

Another commenter argues that regulatory requirements and commercial realities regarding brokers' execution obligations preclude firms from diverting orders from an exchange to protest market data fees, and that "protests" and "threats" do not equate to competition.⁹⁷ According to this commenter, abandoning an exchange with substantial volume means forgoing valuable trading opportunities and hurting execution quality.⁹⁸ Moreover, this commenter maintains that NYSE National's characterization of platform competition, and characterization of market data and transaction services as two sides of an exchange platform, are incorrect.⁹⁹ This commenter argues that because an exchange's trading services and market data subscriptions are different services that are sold separately to different (albeit overlapping) customers at different times, they are not on opposite sides of the same transaction—the "key feature" of multisided platforms.¹⁰⁰ This

forces, while charging "high" prices for data because exchanges' data products are complements, resulting in "supra-monopoly" prices for such complementary products. See SIFMA Letter II, *supra* note 40, at 2–3 (citing Glosten Paper, *supra* note 43).

⁹⁵ See SIFMA Letter I, *supra* note 40, at 2. See also SIFMA Letter II, *supra* note 40, at 3 (stating that, despite a meaningful decrease in market share by NYSE and NYSE Arca between May 2018 and December 2019, those exchanges did not respond by reducing the cost of their market data due to the loss of market share, and that the introduction of the NYSE National Integrated Feed fees would significantly increase the overall cost of market data for the NYSE exchanges when the overall market share for those exchanges collectively increased by only 0.34% between May 2018 and December 2019).

⁹⁶ See SIFMA Letter I, *supra* note 40, at 2; SIFMA Letter II, *supra* note 40, at 4.

⁹⁷ See Bloomberg Letter, *supra* note 54, at 5.

⁹⁸ See *id.* The commenter states that if any firm unilaterally abandons a major exchange to protest market data fees, it would put itself at a significant competitive disadvantage. See *id.*

⁹⁹ See *id.* at 7–8. Rather, this commenter believes that exchanges are two-sided platforms only insofar as they intermediate between liquidity providers and liquidity takers. See *id.* at 7.

¹⁰⁰ See *id.* at 8. In that vein, this commenter argues that NYSE National's interpretation of platform theory incorrectly assumes that traders can readily shift orders to another exchange in response to market data fees and thereby lower their overall costs of trading, and that regulatory and business

commenter further argues that NYSE National has not substantiated the assertion that "traders base their decisions regarding where to execute trades based on the combined cost of execution and data services."¹⁰¹ Lastly, this commenter argues that NYSE National's interpretation of platform theory would lead to inconsistencies with the Act, as it would allow NYSE National to set supracompetitive depth-of-book data prices so long as it charged less for other services, whereas the Act requires data prices themselves to be fair and reasonable to protect investors and ensure that market data are widely disseminated.¹⁰²

Finally, another commenter objects to NYSE National's platform-based arguments, stating that the supply and demand functions for order flow and market data are separate.¹⁰³ This commenter also states that NYSE National does not provide any information about the costs of production for the NYSE National Integrated Feed and the expected revenue NYSE National projects to generate from the proposed fees.¹⁰⁴

In response to the Commission's Request for Comment and the comment letters received, NYSE National reiterates that, under the market-based approach, it has already demonstrated that pricing for proprietary market data products such as the NYSE National Integrated Feed is constrained by competition among exchanges.¹⁰⁵ In support of this argument, NYSE National references statements by the Antitrust Division of the U.S. Department of Justice for the merger of NYSE Euronext with Deutsche Börse AG from 2011, which stated that real-time proprietary market data products constitute a separate "relevant market" for antitrust purposes and that at that time there were four "major

considerations constrain traders' ability to shift order flow based on market data fees. See *id.*

¹⁰¹ See *id.* Further, this commenter states that even if a trader were somehow to shift all of its orders to a different exchange, this would not obviate the trader's need to purchase market data from that exchange, as sophisticated traders purchase substantially all exchanges' market data to optimize trading decisions. See *id.*

¹⁰² See *id.* at 8–9.

¹⁰³ See Healthy Markets Letter, *supra* note 50, at 9–10. See also SIFMA Letter III, *supra* note 40, at 3 (stating that market data fees are charged on a monthly basis and such fees are not one of the best execution factors used by broker-dealers when routing client orders).

¹⁰⁴ See Healthy Markets Letter, *supra* note 50, at 9. In addition, this commenter states that NYSE National does not provide any information about the latency difference between the NYSE National Integrated Feed and the consolidated data feed or other methods of transmitting data. See *id.*

¹⁰⁵ See NYSE National Letter I, *supra* note 56, at 2.

⁸⁹ See *id.* at 9852. NYSE National provides a report by Marc Rysman to support these arguments. See Marc Rysman, *Stock Exchanges as Platforms for Data and Trading* (December 2, 2019) ("Rysman Paper I"), available at <https://www.sec.gov/rules/sro/nyse/2020/34-88211-ex3b.pdf>. NYSE National also states that, since May 2018, when NYSE National re-launched trading, it has observed a direct correlation between the steady increase of subscribers to the NYSE National Integrated Feed and the increase in NYSE National's transaction market share volume over the same period. See Notice, *supra* note 4, at 9850. NYSE National states that, between May 2018 and October 2019, it has grown from 0% to nearly 2% market share of consolidated trading volume and, between May 2018 and November 2019, the number of NYSE National Integrated Feed subscribers increased from 12 to 57. See *id.* at 9847–48, 9852.

⁹⁰ See Notice, *supra* note 4, at 9852 (citing Rysman Paper I, *supra* note 89).

⁹¹ See *id.* at 9853. See also Jones Paper, *supra* note 36 (stating that the market for order flow and the market for market data are closely linked, and that an exchange needs to consider the negative impact on its order flow if it raises the price of market data).

⁹² See Notice, *supra* note 4, at 9850, 9853.

⁹³ See *id.* at 9853.

⁹⁴ See SIFMA Letter I, *supra* note 40, at 2. In a subsequent letter, this commenter also cites a report concluding that exchanges charge "reasonable" prices for trading because trading services are substitutes and subject to "strong" competitive

competitors” in that market.¹⁰⁶ NYSE National also argues that there is a high degree of fragmentation among trading venues and low barriers to entry.¹⁰⁷ According to NYSE National, these factors demonstrate that the market for proprietary market data products is highly competitive, and that customers dissatisfied with exchanges’ pricing for market data products may respond by moving their order flow to a different venue, or even by establishing competing exchanges with different pricing models (e.g., BATS Exchange, Inc. (“BATS”), or MEMX LLC).¹⁰⁸

In addition, NYSE National reiterates that exchanges are platforms for market data and trading, that fierce competition for order flow on the trading side of the platform acts to discipline the pricing of market data on the other side of the platform, and that NYSE National is thereby constrained from pricing the NYSE National Integrated Feed at a supracompetitive price.¹⁰⁹ NYSE

National argues that the different timing of decisions for purchasing data and order routing is not inconsistent with trade executions and market data being joint products.¹¹⁰ NYSE National also argues that the Glosten Paper provides no empirical analysis or data to support its conclusions that exchanges are not platforms and that exchanges’ proprietary market data products are complements offered by monopolistic competitors charging supracompetitive prices.¹¹¹ NYSE National further states that conclusions about the existence of exchange-versus-exchange competition in the market for trading services and data are not dependent on any assessment of its costs to produce the NYSE National Integrated Feed, its return on that investment, or its profit margin.¹¹²

Moreover, in response to the Commission’s Request for Comment, NYSE National argues that under *NetCoalition I*, an exchange does not have to provide both a cost-based analysis and a market-based approach to demonstrate that the proposed fees are constrained by competition.¹¹³ According to NYSE National, it has provided ample evidence that pricing for the NYSE National Integrated Feed is constrained by competition.¹¹⁴ NYSE National also states that the cost data requested by the Commission to assess the presence of competition would not

accurately reveal the profitability of NYSE National’s market data products for the following reasons: (1) Such accounting data do not always accurately reflect economic profitability and therefore can be unreliable for evaluating the competitiveness of an industry, especially where such costs are disaggregated and allocated across various units within a firm;¹¹⁵ (2) transaction services and market data are two sides of the same coin, and artificially dividing costs between these two products would result in data that are inaccurate and unreliable;¹¹⁶ and (3) *NetCoalition I* incorrectly assumed that in a competitive market, the price of a product approaches its marginal cost, and this theory has limited real-world application.¹¹⁷

As discussed above, in light of NYSE National’s consistently low percentage of market share, the relatively small number of subscribers to the NYSE National Integrated Feed, and the sizeable portion of subscribers that terminated their subscriptions following the proposal of the fees, the Commission finds that the proposal is consistent with the Act. The Commission reaches that conclusion, however, without agreeing with or otherwise relying on the arguments made by NYSE National that exchanges function as platforms between consumers of market data and consumers of trading services, that overall competition between exchanges will limit their overall profitability, and that competition for order flow on the trading side of the platform acts to constrain the pricing of market data on the other side of the platform.

The Commission acknowledges that platform-based competition could potentially provide a basis for demonstrating significant competitive forces with regard to pricing market data. With respect to the current proposal, the Commission requested information in connection with NYSE National’s platform theory arguments in

¹⁰⁶ See *id.* at 2, 5–6. The question posed in a proceeding under Section 7 of the Clayton Act is distinct from that necessary for the Commission to determine whether there is sufficient market competition to constrain the prices charged for the NYSE National Integrated Feed, such that fees are fair and reasonable under the Act.

¹⁰⁷ See NYSE National Letter I, *supra* note 56, at 2, 6–9 (noting that today, equities trading is dispersed across 13 equities exchanges (with three additional exchanges expected to enter the market in 2020) and 31 ATSs and numerous broker-dealer internalizers and wholesalers, that no single exchange has more than 20% market share, and that NYSE National has less than 2% market share). See also Rysman Paper II, *supra* note 56, at 5 (stating that the NYSE exchanges’ share of U.S. equities trading is below thresholds considered indicative of substantial market power).

¹⁰⁸ See NYSE National Letter I, *supra* note 56, at 9.

¹⁰⁹ See *id.* at 2, 9–11 (reiterating conclusions from Rysman Paper I, *supra* note 89). NYSE National disagrees with a commenter’s view that exchanges are platforms insofar as they intermediate between liquidity providers and liquidity takers. See *id.* at 11 n.42. According to NYSE National, from an “economic perspective,” firms are platforms if they act as intermediaries between two or more sets of agents in a setting where the decisions of each set of agents affects the outcomes of the other set of agents, typically through an externality. See *id.* NYSE National also states that platform theory does not assume that traders can readily shift orders to another exchange in response to market data fees and thereby lower their overall cost of trading. See *id.* Rather, firms may respond to market data fees by choosing to purchase or not to purchase a particular data product, and such choices have implications for that firm’s order routing decisions. See *id.* In a subsequent comment letter, NYSE National provides a report that tests whether the introduction of certain market data fees by NYSE Arca, EDGX Exchange, Inc. (“EDGX”), and BATS affected the exchanges’ market share, and states that the introduction of these fees led to a decrease in the exchanges’ market share. See letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission, dated October 12, 2020 (introducing Jonathan Brogaard and James Brugler, *Competition and Exchange Data Fees* (October 2, 2020) (“Brogaard and Brugler

Paper”)). NYSE National submitted the Brogaard and Brugler Paper less than four days before the date by which the Commission must approve or disapprove the proposed rule change, which does not allow sufficient time to meaningfully engage with the complex analysis in the paper. Thus, the paper has not been fully considered. The Commission staff reminded NYSE National of the option to withdraw the proposed rule change and resubmit with the paper so it could be appropriately reviewed. In any event, the Commission need not consider an argument premised on this study because the Commission concludes there is an adequate basis for approval without the study.

¹¹⁰ See *id.* at 15. See also Rysman Paper II, *supra* note 56, at 22 (stating that this type of mismatch in timescales is common on platforms, and if data are useful for deciding what exchange to route orders to, the data subscription decisions made each month can impact the order routing decisions made at high frequencies; that having additional trading on an exchange makes its data more valuable so that a trader should be more willing to pay for it; and that therefore there are reasons to expect linkages running in both directions, from trading to data and from data to trading, despite the difference in timeframes).

¹¹¹ See NYSE National Letter I, *supra* note 56, at 2, 14–16. Rysman Paper II also states that the “central implication of platform theory for the assessment of exchange proprietary data fees, that they cannot be considered independently of competition for order flow, does not depend on the size of a platform.” Rysman Paper II, *supra* note 56, at 23.

¹¹² See NYSE National Letter I, *supra* note 56, at 11–12.

¹¹³ See *id.* at 2–4.

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 12. NYSE National states that data regarding its costs are not kept in the disaggregated manner requested by the Commission, meaning that cost data would have to be imperfectly allocated across business lines. See *id.*

¹¹⁶ See *id.* at 12–13 (referencing a 2014 report prepared by Oxera for the European Commission, which: (1) Observed that market data products and trading services are joint products because it is not possible to provide transaction services without generating market data, and it is not possible to generate trade transaction or market depth data without also supplying an execution service; and (2) stated that with joint products, the production costs of the outputs cannot be separated (*i.e.*, they are joint costs), and that the appropriate frame of reference for the economically efficient recovery of the costs of trading venues is at the level of combined transaction revenues and data revenues).

¹¹⁷ See *id.* at 13–14.

the Request for Comment.¹¹⁸ The Commission believes, however, that more information than has been provided (including some or all of the following information discussed below) would be necessary to demonstrate that NYSE National was constrained by the presence of competitive forces under the platform theory in setting the terms of its proposed fees.

NYSE National argues that customers who are dissatisfied with the proposed fees may discontinue using the NYSE National Integrated Feed, and customers who choose to discontinue using the feed may choose to shift order flow away from NYSE National (*i.e.*, there are substitute exchange platforms to NYSE National).¹¹⁹ However, while NYSE National provides information regarding the number of subscribers who discontinued using the NYSE National Integrated Feed due to the proposed fees,¹²⁰ NYSE National does not address whether and to what extent these customers also shifted order flow away from NYSE National.¹²¹ NYSE National also does not address whether the customers who continued using the NYSE National Integrated Feed shifted order flow away from NYSE National in response to the proposed fees and whether the shift in order flow would be sufficient to have a disciplining effect on market data prices.¹²²

Moreover, as discussed above, NYSE National states that it has observed a correlation between the increase in subscribers to the NYSE National Integrated Feed and the increase in NYSE National's transaction market share volume.¹²³ However, NYSE National has not established a causal relationship between the increase in NYSE National Integrated Feed subscribers and the increase in NYSE National's transaction market share volume.¹²⁴ Indeed, other factors could explain the increase in transaction market share volume. For example, during the relevant period, NYSE

National's transaction fees were priced such that NYSE National experienced negative net capture, meaning the revenue from transaction fees was exceeded by transaction-based expenses,¹²⁵ and NYSE National did not address whether these transaction fees may have been the driving cause behind its changes in market share.¹²⁶ Likewise, NYSE National does not explain why the correlation supports a conclusion that competition for order flow on NYSE National constrains the pricing of the NYSE National Integrated Feed.¹²⁷ Similarly, as discussed above, NYSE National states that the introduction of the NYSE Integrated Feed (which was offered for free at the time it was introduced¹²⁸) attracted more trading on NYSE.¹²⁹ However, NYSE National does not explain why this scenario is applicable to the current proposal (*i.e.*, adoption of fees for an existing market data product) and why it supports a conclusion that competition for order flow on NYSE National constrains the pricing of the NYSE National Integrated Feed.¹³⁰

In addition, as discussed above, NYSE National argues that the fragmentation of equities trading among trading venues and low barriers to entry demonstrate that the market for

proprietary market data products is highly competitive, and that customers dissatisfied with exchanges' pricing for market data products may respond by moving their order flow to a different venue.¹³¹ However, NYSE National does not provide data to show that customers moving order flow away from an exchange because of changes in that exchange's market data fees has a sufficiently disciplinary effect on market data pricing (or explain why such data would be unnecessary).¹³²

Further, as discussed above, NYSE National argues that overall competition between exchanges will limit their overall profitability (and not margins on any particular side of the platform).¹³³ However, NYSE National has not established that competition between exchanges has in fact limited its overall profitability (or explain why doing so would be unnecessary).¹³⁴ Even though NYSE National argues that accounting data do not always accurately reflect economic profitability and therefore can be unreliable for evaluating the competitiveness of an industry,¹³⁵ NYSE National does not explain what information, other than accounting data, would appropriately demonstrate that its overall profitability is limited by competition with other exchanges.¹³⁶

C. Other Arguments and Comments

NYSE National argues that the proposed fees are equitably allocated and not unfairly discriminatory,¹³⁷ and do not impose an unnecessary or

¹²⁵ In 2019, NYSE National collected \$53,810,000 in transaction fees but incurred transaction-based expenses, exclusive of Section 31 fees, of \$57,983,000. See Exhibit 1 Accompanying Amendment to Form 1 Registration Statement of NYSE National, Inc. (June 29, 2020), available at <https://www.sec.gov/Archives/edgar/vpr/2001/20012255.pdf> (providing audited financial statements for NYSE National for the year ended December 31, 2019).

¹²⁶ See NYSE National Schedule of Fees and Rebates as of August 12, 2020, available at https://www.nyse.com/publicdocs/nyse/regulation/nyse/NYSE_National_Schedule_of_Fees.pdf. See also, *e.g.*, Securities Exchange Act Release Nos. 84380 (October 5, 2018), 83 FR 51750 (October 12, 2018) (SR-NYSE-2018-22) (notice of filing and immediate effectiveness of proposed rule change to amend NYSE National's schedule of fees); 86618 (August 9, 2019), 84 FR 41761 (August 15, 2019) (SR-NYSE-2019-18) (notice of filing and immediate effectiveness of proposed rule change to amend NYSE National's schedule of fees and rebates).

¹²⁷ See Request for Comment, *supra* note 6, at 37127 ("NYSE National may provide other data to substantiate its platform theory-based argument, including the claim[] that . . . competition for order flow on the trading side of the platform acts to constrain the pricing of market data on the other side of the platform.").

¹²⁸ See Securities Exchange Act Release Nos. 74128 (January 23, 2015), 80 FR 4951 (January 29, 2015) (SR-NYSE-2015-03) (notice of filing and immediate effectiveness of proposed rule change to establish the NYSE Integrated Feed); and 76485 (November 20, 2015), 80 FR 74158 (November 27, 2015) (SR-NYSE-2015-57) (notice of filing and immediate effectiveness of proposed rule change to establish fees for the NYSE Integrated Feed).

¹²⁹ See *supra* note 89 and accompanying text.

¹³⁰ See *supra* note 127 and accompanying text.

¹³¹ See *supra* note 107 and accompanying text.

¹³² See *supra* note 127.

¹³³ See *supra* notes 88, 90, and accompanying text.

¹³⁴ NYSE National also does not provide information regarding "overall profitability" of other exchanges (*e.g.*, changes (or lack of changes) in "overall profitability" for another exchange in connection with a market data fee change on that exchange). See Request for Comment, *supra* note 6, at 37127 (requesting "[a]ny other information to support the argument that competition between exchanges will limit the overall profitability of NYSE National and meaningfully constrain NYSE National's ability to price its proprietary market data products at supracompetitive prices"). See also *id.* ("NYSE National may provide other data to substantiate its platform theory-based argument, including the claim[] that competition among exchanges will limit the overall profitability of NYSE National's platform").

¹³⁵ See *supra* note 115 and accompanying text.

¹³⁶ See Request for Comment, *supra* note 6, at 37127 (requesting information regarding profit margins, returns on assets, or other metrics that would indicate the presence of competition).

¹³⁷ See Notice, *supra* note 4, at 9856–58. NYSE National argues that the professional and non-professional user fee structure has long been used by NYSE National to reduce the price of data for non-professional users and to make it more broadly available, and that the non-display fee structure results in subscribers with greater uses of the data paying higher fees and subscribers with fewer uses of the data paying lower fees. See *id.* at 9856–57.

¹¹⁸ See Request for Comment, *supra* note 6, at 37126–28. See also *infra* notes 121, 124, 127, 130, 132, 134, 136, and accompanying text.

¹¹⁹ See *supra* notes 91–93, 108, and accompanying text.

¹²⁰ See *supra* notes 64–67 and accompanying text.

¹²¹ See Request for Comment, *supra* note 6, at 37127 (requesting, for time periods that would provide meaningful comparisons, information regarding trading volume for customers and firms on NYSE National). See also *id.* at 37127–28 (requesting analogous additional information with respect to NYSE).

¹²² See *supra* note 121.

¹²³ See *supra* note 89.

¹²⁴ See Request for Comment, *supra* note 6, at 37127 (requesting "[a]n explanation of NYSE National's characterization that market data and transaction services are the two sides of the exchange platform").

inappropriate burden on competition.¹³⁸ In addition, NYSE National makes specific additional arguments with respect to the redistribution fee,¹³⁹ the category 3 non-display fee,¹⁴⁰ and the non-display use declaration late fee and the multiple data feed fee.¹⁴¹

Commenters state their belief that NYSE National has not demonstrated that the proposed fees represent an equitable allocation of reasonable fees, do not permit unfair discrimination, and do not impose an unnecessary or inappropriate burden on competition.¹⁴²

As discussed above, the Commission finds that NYSE National was subject to significant competitive forces in setting fees for the NYSE National Integrated Feed. An analysis of the proposal and of the views of commenters does not provide a substantial countervailing basis to suggest that the proposed fees are not consistent with the Act. Accordingly, the Commission finds that the proposed rule change is equitable, fair, reasonable, not unreasonably or unfairly discriminatory, and not an undue burden on competition, and is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act and Rule 603(a) of Regulation NMS.¹⁴³

IV. Conclusion

For the reasons set forth above, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act, and Rule 603(a) of Regulation NMS.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁴⁴ that the proposed rule change (SR-NYSENAT-2020-05) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴⁵

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020-23367 Filed 10-21-20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90216; File No. SR-NYSEArca-2020-59]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Amend NYSE Arca Rule 8.201-E (Commodity-Based Trust Shares) and To Permit the Listing and Trading of Shares of the Wilshire wShares Enhanced Gold Trust Under Amended NYSE Arca Rule 8.201-E

October 16, 2020.

I. Introduction

On June 30, 2020, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to: (1) Amend NYSE Arca Rule 8.201-E to (a) permit a trust to hold (i) a specified commodity or (ii) a specified commodity and cash; (b) permit a trust that holds a specified commodity deposited with the trust to issue and redeem shares for such commodity and/or cash; and (c) state that the term “commodity” is defined in Section 1a(9) of the Commodity Exchange Act; and (2) list and trade shares of the Wilshire wShares Enhanced Gold Trust under NYSE Arca Rule 8.201-E, as proposed to be amended. The proposed rule change was published for comment in the **Federal Register** on July 20, 2020.³

On August 17, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, and, on August 18, 2020, the Exchange withdrew Amendment No. 1 to the proposed rule change. On September 1, 2020, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or

institute proceedings to determine whether the proposed rule change should be disapproved.⁵ On September 21, 2020, the Exchange filed Amendment No. 2 to the proposed rule change.⁶ On October 13, 2020, the Exchange filed Amendment No. 3 to the proposed rule change.⁷ The Commission has received no comment letters on the proposal. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 3, from interested persons, and is approving the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change, as Modified by Amendment No. 3

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 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 (1) to amend NYSE Arca Rule 8.201-E (“Commodity-Based Trust Shares”) to permit a trust to hold (a) a specified commodity deposited with the Trust (defined below), or (b) a specified commodity and, in addition to such specified commodity, cash; (2) to list and trade shares (“Shares”) of the Wilshire wShares Enhanced Gold Trust (“Trust”) under NYSE Arca Rule 8.201-E as proposed to be amended; and (3) to amend Rule 8.201-E(c)(2) to state that

⁵ See Securities Exchange Act Release No. 89724, 85 FR 55535 (September 8, 2020). The Commission designated October 18, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

⁶ Amendment No. 2, which amended and replaced the proposed rule change in its entirety, is available at: <https://www.sec.gov/comments/sr-nysearca-2020-59/srnysearca202059-7801813-223658.pdf>.

⁷ Amendment No. 3 amended and replaced the proposed rule change, as modified by Amendment No. 2, in its entirety. When the Exchange filed Amendment No. 3 with the Commission, it also submitted Amendment No. 3 as a comment letter to the filing, which is publicly available on the Commission’s website.

¹³⁸ See *id.* at 9858–59.

¹³⁹ See *id.* at 9854, 9856–57 (arguing that vendors that would be charged the proposed fee would profit by re-transmitting NYSE National’s market data to their customers and that the proposed fee would be charged on an equal basis to those vendors that choose to redistribute the feed).

¹⁴⁰ See *id.* at 9855–58 (arguing that such use of data is directly in competition with NYSE National and NYSE National should be permitted to recoup some of its lost trading revenue by charging for the data that makes such competition possible).

¹⁴¹ See *id.* at 9856–58 (arguing that these fees would offset NYSE National’s administrative burdens and costs associated with incorrect billing, late payments, and tracking data usage locations).

¹⁴² See SIFMA Letter II, *supra* note 40, at 4; Bloomberg Letter, *supra* note 54, at 2; Healthy Markets Letter, *supra* note 50, at 8–9.

¹⁴³ See *supra* notes 84–87 and accompanying text.

¹⁴⁴ 15 U.S.C. 78s(b)(2).

¹⁴⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89310 (July 14, 2020), 85 FR 43932 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).