

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEARCA-2023-79 and should be submitted on or before December 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

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

[FR Doc. 2023-25771 Filed 11-21-23; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35050; File No. 812-15458]

### John Hancock GA Mortgage Trust, et al.

November 16, 2023.

**AGENCY:** Securities and Exchange Commission ("Commission" or "SEC").

**ACTION:** Notice.

Notice of application for an order ("Order") under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the "Act") and rule 17d-1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d-1 under the Act.

**Summary of Application:** Applicants request an order to amend a previous order granted by the Commission that permits certain business development companies ("BDCs") and closed-end management investment companies to co-invest in portfolio companies with each other and with certain affiliated investment entities.

**Applicants:** John Hancock GA Mortgage Trust, John Hancock GA Senior Loan Trust, Manulife Investment

Management Private Markets (US) LLC, John Hancock Life Insurance Company (U.S.A.), John Hancock Life & Health Insurance Company, John Hancock Life Insurance Company of New York, John Hancock Funding Company, LLC, Manulife SDF SPV—OH, LLC, MDLF Holdings Onshore LLC, Manulife Direct Lending Fund (Unlevered) L.P., and Manulife Direct Lending Fund, L.P.

**Filing Dates:** The application was filed on April 25, 2023, and amended on May 10, 2023, August 16, 2023, and October 4, 2023.

**Hearing or Notification of Hearing:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the SEC's Secretary at [Secretaries-Office@sec.gov](mailto:Secretaries-Office@sec.gov) and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on, December 11, 2023, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at [Secretaries-Office@sec.gov](mailto:Secretaries-Office@sec.gov).

**ADDRESSES:** The Commission: [Secretaries-Office@sec.gov](mailto:Secretaries-Office@sec.gov). Applicants: E. David Pemstein, John Hancock GA Mortgage Trust, John Hancock GA Senior Loan Trust, c/o John Hancock Life Insurance Company (U.S.A.), at [DPemstein@jhancock.com](mailto:DPemstein@jhancock.com); and George J. Zornada, Esq., K&L Gates LLP, at [George.Zornada@klgates.com](mailto:George.Zornada@klgates.com).

**FOR FURTHER INFORMATION CONTACT:** Kieran G. Brown, Senior Counsel, or Terri Jordan, Branch Chief, at (202) 551-6825 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** For Applicants' representations, legal analysis, and conditions, please refer to Applicants' third amended and restated application, dated October 4, 2023, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at

<http://www.sec.gov/edgar/searchedgar/legacy/companysearch.html>. You may also call the SEC's Public Reference Room at (202) 551-8090.

For the Commission, by the Division of Investment Management, under delegated authority.

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

[FR Doc. 2023-25782 Filed 11-21-23; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98975; File No. SR-NYSEAMER-2023-57]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand the Application of the per User Access Fee for Use of Certain Market Data Products by Redistributors

November 16, 2023.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on November 1, 2023, NYSE American LLC ("NYSE American" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the fees for NYSE American BBO and NYSE American Trades by expanding the application of the Per User Access Fee. The Exchange proposes to implement the proposed fee change on November 1, 2023. The proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of,

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

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

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

<sup>37</sup> 17 CFR 200.30-3(a)(12).

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 to expand the application of the Per User Access Fee<sup>4</sup> for certain NYSE American market data products, as set forth on the NYSE American Proprietary Market Data Fee Schedule ("Fee Schedule"). Specifically, the Exchange proposes to expand the application of the Per User Access Fee, which is currently available for Redistributors<sup>5</sup> of NYSE American BBO and NYSE American Trades that subscribe to only such data feeds and do not subscribe to any other market data product listed on the Fee Schedule and use such market data product for external distribution only. The Exchange proposes to make the Per User Access Fee available to Redistributors of NYSE American OpenBook as well.

The proposed fee change, taken together with similar fee changes filed by the Exchange's affiliated exchanges, New York Stock Exchange LLC ("NYSE") and NYSE Arca, Inc. ("NYSE Arca"),<sup>6</sup> will reduce the fees associated with the NYSE BQT proprietary data product for Redistributors of NYSE American OpenBook. As described below, NYSE BQT competes directly with similar products offered by both

the Nasdaq and Cboe families of U.S. equity exchanges. Collectively, the proposed fee changes are intended to respond to the competition posed by similar products offered by the other exchange groups.

The Exchange proposes to implement the proposed fee change on November 1, 2023.

Background

The Securities and Exchange Commission ("Commission") has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>7</sup>

While Regulation NMS has enhanced competition, it has also fostered a "fragmented" market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that "such competition can lead to the fragmentation of order flow in that stock."<sup>8</sup> Indeed, equity trading is currently dispersed across 16 exchanges,<sup>9</sup> numerous alternative trading systems,<sup>10</sup> and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 17% market share (whether including or excluding auction volume).<sup>11</sup>

With the NYSE BQT market data product, NYSE American and its affiliates compete head to head with the

Nasdaq Basic<sup>12</sup> and Cboe One Feed<sup>13</sup> market data products. Similar to those market data products, NYSE BQT, which was established in 2014,<sup>14</sup> consists of certain elements from the NYSE American BBO and NYSE American Trades market data products as well as from market data products from the Exchange's affiliates, NYSE, NYSE Arca, NYSE Chicago, Inc. ("NYSE Chicago"),<sup>15</sup> and NYSE National, Inc. ("NYSE National").<sup>16</sup> Similar to both Nasdaq Basic and the Cboe One Feed, NYSE BQT provides investors with a unified view of comprehensive last sale and BBO data in all Tape A, B, and C securities that trade on the Exchange, NYSE, NYSE Arca, NYSE Chicago, and NYSE National. Also similar to Nasdaq Basic and the Cboe One Feed, NYSE BQT is not intended to be used for purposes of making order-routing or trading decisions, but rather provides indicative prices for Tape A, B, and C securities.<sup>17</sup>

Together with NYSE and NYSE Arca, the Exchange proposes to compete for subscribers to NYSE BQT by designing the proposed fee change to be attractive to Redistributors of NYSE American OpenBook that intend to subscribe to and externally redistribute NYSE BQT. Currently, Redistributors of NYSE American OpenBook that want to subscribe to and redistribute NYSE BQT must pay the General Access Fee. Redistributors of NYSE American OpenBook who have data recipient customers interested in NYSE BQT may

<sup>12</sup> As described on the Nasdaq website, available here: <http://www.nasdaqtrader.com/Trader.aspx?id=NASDAQBASIC>, Nasdaq Basic is a "low cost alternative" that provides "Best Bid and Offer and Last Sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center, as well as trades reported to the FINRA Trade Reporting Facility ("TRF")."

<sup>13</sup> As described on the Cboe website, available here: [https://markets.cboe.com/us/equities/market\\_data\\_services/cboe\\_one/](https://markets.cboe.com/us/equities/market_data_services/cboe_one/), the Cboe One Feed is a "market data product that provides cost-effective, high-quality reference quotes and trade data for market participants looking for comprehensive, real-time market data" and provides a "unified view of the market from all four Cboe equity exchanges: BZX Exchange, BYX Exchange, EDGX Exchange, and EDGA Exchange."

<sup>14</sup> See Securities Exchange Act Release Nos. 72750 (August 4, 2014), 79 FR 46494 (August 8, 2014) (notice—NYSE BQT); and 73553 (November 6, 2014), 79 FR 67491 (November 13, 2014) (approval order—NYSE BQT) (SR—NYSE—2014—40) ("NYSE BQT Filing").

<sup>15</sup> In 2019, NYSE BQT was amended to include NYSE Chicago BBO and NYSE Chicago Trades. See Securities Exchange Act Release No. 87511 (November 12, 2019), 84 FR 63689 (November 18, 2019) (SR—NYSE—2019—60).

<sup>16</sup> In 2018, NYSE BQT was amended to include NYSE National BBO and NYSE National Trades. See Securities Exchange Act Release No. 83359 (June 1, 2018), 83 FR 26507 (June 7, 2018) (SR—NYSE—2018—22).

<sup>17</sup> See NYSE BQT Filing, *supra* note 14.

<sup>4</sup> The Per User Access Fee is a lower access fee that currently applies for subscribers of NYSE American BBO and NYSE American Trades that receive a data feed and use those market data products in a display-only format. See Fee Schedule. See also Securities Exchange Act Release Nos. 87801 (December 19, 2019), 84 FR 71491 (December 27, 2019) (SR—NYSEAMER—2019—55) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Partial Amendment No. 1, To Amend the Fees for NYSE American BBO and NYSE American Trades) ("BQT Fee Reduction Filing"); and 90408 (November 12, 2020), 85 FR 73556 (November 18, 2020) (SR—NYSEAMER—2020—79) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Fees for NYSE American BBO and NYSE American Trades by Modifying the Application of the Access Fee and Amending the Fees for NYSE American Trades by Adopting a Waiver Applicable to the Redistribution Fee) ("Second BQT Fee Reduction Filing").

<sup>5</sup> A Redistributor is a vendor or any other person that provides a NYSE data product to a data recipient or to any system that a data recipient uses, irrespective of the means of transmission or access.

<sup>6</sup> See SR—NYSE—2023—42 and SR—NYSEArca—2023—78.

<sup>7</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7—10—04) (Final Rule) ("Regulation NMS Adopting Release").

<sup>8</sup> See Securities Exchange Act Release No. 61358, 75 3594, 3597 (January 21, 2010) (File No. S7—02—10) (Concept Release on Equity Market Structure).

<sup>9</sup> See Cboe U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

<sup>10</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atstlist.htm>.

<sup>11</sup> See Cboe U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

not be inclined to subscribe to NYSE BQT. When Redistributors do not subscribe to NYSE BQT, the prospective data recipients that are the customers of such Redistributors are unable to subscribe to NYSE BQT. The proposed fee change is designed to provide a financial incentive for such Redistributors to subscribe to NYSE BQT so that their customers, which have expressed an interest in subscribing to NYSE BQT, would be able to access the product via such Redistributors.

Currently, subscribers of each of the NYSE American BBO and NYSE American Trades products that receive a data feed pay a General Access Fee of \$750 per month. In February 2020, the Exchange added the Per User Access Fee, which is a reduced fee of \$100 per month available at that time only for subscribers of NYSE American BBO and NYSE American Trades that use those products in a display-only format, including for internal use for Professional Users and external distribution to both Professional and Non-Professional Users.<sup>18</sup>

In November 2020, the Exchange expanded the application of the reduced Per User Access Fee to Redistributors of NYSE American BBO and NYSE American Trades data feeds that do not subscribe to any other market data product listed on the Fee Schedule and use such market data products for external distribution only.<sup>19</sup>

As noted above, the Exchange now proposes to further expand the applicability of the reduced Per User Access Fee. Specifically, the Exchange proposes that Redistributors of NYSE American BBO and NYSE American Trades that do not subscribe to any other market data product listed on the Fee Schedule other than NYSE American OpenBook and use such market data products for external distribution only, would be eligible for the reduced Per User Access Fee. A Redistributor that receives such data feeds and uses the market data products for any other purpose (such as internal use) would continue to pay the \$1,500 per month General Access Fee. And, as currently set forth in footnote 3 to the Fee Schedule, a subscriber would be charged only one access fee for each of the NYSE American BBO and NYSE American Trades products, depending on the use of that product.

To effect this change, the Exchange proposes to modify footnote 3 to the Fee Schedule as follows (proposed text

italicized, proposed deletions bracketed):

The Per User Access Fee is charged to: (i) a subscriber that receives a data feed and uses the market data product only for Professional Users and Non-Professional Users in a display-only format, including for internal use and external redistribution in a display-only format, and (ii) a Redistributor that subscribes [only] to the NYSE American BBO and NYSE American Trades data feeds, and does not subscribe to any other Products listed on this Fee Schedule *other than the NYSE American OpenBook data feed*, and uses these market data products for external distribution only. A subscriber that receives a data feed and uses the market data product for any other purpose, including if combined with Per User use, will be charged the General Access Fee. A subscriber will be charged only one access fee for each of the NYSE American BBO and NYSE American Trades products, depending on the use of that product.

The proposed rule change would result in lower fees for Redistributors that receive NYSE American BBO, NYSE American Trades, and NYSE American OpenBook data feeds, and use such market data products for external distribution only.<sup>20</sup> The Exchange believes that the proposed expansion of the reduced Per User Access Fee would provide an incentive for Redistributors that currently subscribe to NYSE American OpenBook to also subscribe to the NYSE BQT data feeds so that such product would be available to their customers, which have expressed an interest in subscribing to NYSE BQT.

The proposed rule change is intended to encourage greater use of NYSE BQT by making it more affordable for Redistributors that subscribe to NYSE American OpenBook and also have customers interested in subscribing to NYSE BQT. The proposed fee change would allow the Exchange to compete more effectively with Nasdaq Basic and Cboe One Feed by expanding the number of Redistributors that would subscribe to NYSE BQT, and therefore make the product more widely available to data subscribers interested in NYSE BQT.

#### Applicability of Proposed Rule Change

As noted above, the proposed rule change is designed to reduce the overall cost for Redistributors of NYSE BQT that also redistribute NYSE American OpenBook by expanding the

applicability of the reduced Per User Access Fee. Today, the Exchange has thirty-one data feed subscribers, two of whom became Redistributors as a direct result of the Second BQT Fee Reduction Filing and currently pay the reduced Per User Access Fee. The Exchange believes that the proposed rule change would provide a further incentive for Redistributors that already subscribe to NYSE American OpenBook to subscribe to NYSE BQT for purposes of providing external distribution of NYSE BQT to potential data recipients interested in the product.

Because the proposed rule change is targeted to potential Redistributors of NYSE BQT that also subscribe to NYSE American OpenBook, the proposed change to the availability of the NYSE American BBO and NYSE American Trades Per User Access Fees, together with the proposed changes on NYSE and NYSE Arca, are narrowly tailored with that purpose in mind. Accordingly, this proposed fee change is not designed for Redistributors that are existing customers of NYSE American market data products (other than NYSE American OpenBook) or that engage in internal use of NYSE BQT. This proposed rule change would not result in any changes to the market data fees for NYSE American BBO and NYSE American Trades for such data subscribers.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>21</sup> in general, and Sections 6(b)(4) and 6(b)(5) of the Act,<sup>22</sup> in particular, in that it provides an equitable allocation of reasonable fees among users and recipients of the data and is not designed to permit unfair discrimination among customers, issuers, and brokers.

#### The Proposed Rule Change Is Reasonable

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that

<sup>18</sup> See BQT Fee Reduction Filing, *supra*, note 4.

<sup>19</sup> See Second BQT Fee Reduction Filing, *supra*, note 4.

<sup>20</sup> The Per User Access Fee is 93% lower than the General Access Fee. Together with the corresponding proposed rule changes by NYSE and NYSE Arca to similarly reduce the access fees to their BBO and Trades products for Redistributors, such Redistributors would be eligible for significantly lower access fees for NYSE BQT, from \$6,250 per month to \$850 per month (\$250 + \$200 + \$200 + \$200), a reduction of more than 86%.

<sup>21</sup> 15 U.S.C. 78f(b).

<sup>22</sup> 15 U.S.C. 78f(b)(4), (5).

current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>23</sup>

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

In fact, the legislative history indicates that the Congress intended that the market system “evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed” and that the SEC wield its regulatory power “in those situations where competition may not be sufficient,” such as in the creation of a “consolidated transactional reporting system.”<sup>24</sup>

The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”<sup>25</sup>

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

the Commission considers whether the exchange was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees. If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless there is a substantial countervailing basis to find that the terms of the rule violate the Act or the rules thereunder.<sup>26</sup>

### 1. The Proposed Fees Are Constrained by Significant Competitive Forces

An exchange may demonstrate that its fees are constrained by competitive forces by showing that platform competition applies.

As the United States Supreme Court recognized in *Ohio v. American Express*, platforms are firms that act as intermediaries between two or more sets of agents, and typically the choices

made on one side of the platform affect the results on the other side of the platform via externalities, or “indirect network effects.”<sup>27</sup> Externalities are linkages between the different “sides” of a platform such that one cannot understand pricing and competition for goods or services on one side of the platform in isolation; one must also account for the influence of the other side. As the Supreme Court explained:

To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. . . . Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If the participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. . . . Two-sided platforms therefore must take these indirect network effects into account before making a change in price on either side.<sup>28</sup>

The Exchange and its affiliated exchanges have long maintained that they function as platforms between consumers of market data and consumers of trading services. Proving the existence of linkages between the two sides of this platform requires an in-depth economic analysis of both public data and confidential Exchange data about particular customers’ trading activities and market data purchases. Exchanges, however, are prohibited from sharing details about these specific customer activities and purchases. For example, pursuant to Exchange Rule 7.41E, transactions executed on the Exchange are processed anonymously.

Exchanges function as platforms for market data and transaction services mean that exchanges do not set fees for market data products without considering, and being constrained by, the effect the fees will have on the order-flow side of the platform. And as the D.C. Circuit recognized in *NetCoalition I*, “[n]o one disputes that competition for order flow is fierce.”<sup>29</sup> The court further noted that “no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers,” and that an exchange “must compete vigorously for order flow to maintain its share of trading volume.”<sup>30</sup>

As noted above, while Regulation NMS has enhanced competition, it has

also fostered a “fragmented” market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”<sup>31</sup> The Commission’s Division of Trading and Markets has also recognized that with so many “operating equities exchanges and dozens of ATSEs, there is vigorous price competition among the U.S. equity markets and, as a result, [transaction] fees are tailored and frequently modified to attract particular types of order flow, some of which is highly fluid and price sensitive.”<sup>32</sup> Indeed, today, equity trading is currently dispersed across 16 exchanges,<sup>33</sup> numerous alternative trading systems,<sup>34</sup> broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 17% market share.<sup>35</sup>

Further, low barriers to entry mean that new exchanges may, and do, rapidly and inexpensively enter the market and offer additional substitute platforms to compete with the Exchange. For example, since 2020, three new exchanges have entered the market: Long Term Stock Exchange (LTSE), which began operations as an exchange on August 28, 2020;<sup>36</sup> Members Exchange (MEMX), which began operations as an exchange on

<sup>31</sup> See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

<sup>32</sup> Commission Division of Trading and Markets, Memorandum to EMSAC, dated October 20, 2015, available here: <https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf>.

<sup>33</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

<sup>34</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

<sup>35</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

<sup>36</sup> See LTSE Market Announcement: MA-2020-020, dated August 14, 2020, announcing LTSE production securities phase-in planned for August 28, available here: [https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa0698e7\\_MA-2020-020\\_Production\\_Securities\\_Launching\\_August\\_28\\_-\\_Google\\_Docs.pdf](https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa0698e7_MA-2020-020_Production_Securities_Launching_August_28_-_Google_Docs.pdf) and LTSE Market Announcement: MA-2020-025, available here: [https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa069873\\_MA-2020-025.pdf](https://assets-global.website-files.com/6462417e8db99f8baa06952c/6462417e8db99f8baa069873_MA-2020-025.pdf).

<sup>23</sup> See Regulation NMS Adopting Release, 70 FR 37495, at 37499.

<sup>24</sup> *NetCoalition v. SEC*, 615 F.3d 525, 535 (D.C. Cir. 2010) (“*NetCoalition I*”) (quoting H.R. Rep. No. 94-229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

<sup>25</sup> *Id.* at 535.

<sup>26</sup> See Securities Exchange Act Release No. 34-90217 (October 16, 2020), 85 FR 67392 (October 22, 2020) (SR-NYSE-NAT-2020-05) (“National IF Approval Order”) (internal quotation marks omitted), quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (“2008 ArcaBook Approval Order”).

<sup>27</sup> *Ohio v. American Express*, 138 S. Ct. 2274, 2280-81 (2018).

<sup>28</sup> *Id.* at 2281.

<sup>29</sup> *NetCoalition I*, 615 F.3d at 544 (internal quotation omitted).

<sup>30</sup> *Id.*

September 29, 2020;<sup>37</sup> and Miami International Holdings (MIAX), which began operations of its first equities exchange on September 29, 2020.<sup>38</sup>

These low barriers enable existing exchange customers to disintermediate and start their own exchanges if they think the prices charged for exchange proprietary market data products are too high. This is precisely the rationale behind the creation of MEMX, which was formed by some of the largest and most well capitalized financial firms that are also Exchange customers (including Bank of America, BlackRock, Charles Schwab, Citadel, Citi, E\*Trade, Fidelity, Goldman Sachs, J.P. Morgan, Jane Street, Morgan Stanley, TD Ameritrade, and others).<sup>39</sup>

For example, one of MEMX's founding principles is that exchange proprietary market data prices are too high, and that MEMX will benefit its members by offering "[l]ower pricing on market data."<sup>40</sup> Nor is this a new phenomenon: exchange customers formed BATS to compete with incumbent exchanges and once registered as an exchange in 2008, BATS did not initially charge for market data. The BATS venture was a financial success for its founders, first through recouping their investment in its initial public offering and then in the subsequent sale of BATS to Cboe, which now charges for market data from those exchanges. Notably, MEMX has some of the same founding broker-dealer customers, leading some to dub MEMX "BATS 2.0."<sup>41</sup>

The fact that this cycle is viable and repeatable by entities that both trade on and compete with existing exchanges confirms that barriers to entry are low and that these markets are competitive and contestable.<sup>42</sup> And low barriers to

entry act as a market check on high prices.<sup>43</sup>

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

The proposed expansion of the Per User Access Fee is therefore reasonable because in setting it, the Exchange is constrained by the availability of numerous substitute platforms offering market data products and trading. Such substitutes need not be identical, but only substantially similar to the product at hand.

More specifically, in expanding the applicability of the Per user Access Fee to Redistributors of NYSE American OpenBook, the Exchange is constrained by the fact that, if its pricing across the platform is unattractive to customers, customers have their pick of an increasing number of alternative platforms to use instead of the Exchange. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish reasonable fees. The existence of numerous alternative platforms to the Exchange's platform ensures that the Exchange cannot set unreasonable market data fees without suffering the negative effects of that decision in the fiercely competitive market for trading order flow.

Even putting aside the facts that exchanges are platforms and that pricing decisions on the two sides of the platform are intertwined, the Exchange is constrained in setting the proposed market data fees by the availability of numerous substitute market data products. The Commission has been clear that substitute products need not

be identical, but only substantially similar to the product at hand.<sup>44</sup>

The NYSE BQT market data product is subject to significant competitive forces that constrain its pricing. Specifically, as described above, NYSE BQT competes head-to-head with the Nasdaq Basic product and the Cboe One Feed. These products each serve as reasonable substitutes for one another as they are each designed to provide investors with a unified view of real-time quotes and last-sale prices in all Tape A, B, and C securities. Each product provides subscribers with consolidated top-of-book quotes and trades from multiple U.S. equities markets. In the case of NYSE BQT, this product provides top-of-book quotes and trades data from five NYSE-affiliated U.S. equities exchanges, which together account for approximately 20% of consolidated U.S. equities trading volume as of October 2023.<sup>45</sup> Cboe One Feed similarly provides top-of-book quotes and trades data from Cboe's four U.S. equities exchanges. NYSE BQT, Nasdaq Basic, and Cboe One Feed are all intended to provide indicative pricing and are not intended to be used for order routing or trading decisions.

In addition to competing with proprietary data products from Nasdaq and Cboe, NYSE BQT also competes with the consolidated data feed. However, the Exchange does not claim that NYSE BQT is a substitute for consolidated data with respect to requirements under the Vendor Display Rule, which is Regulation NMS Rule 603(c).

The fact that this filing is proposing to further expand the application of the reduced Per User Access Fee is itself confirmation of the inherently competitive nature of the market for the sale of proprietary market data. For example, in August 2019, Cboe filed proposed rule changes to reduce certain of its Cboe One Feed fees and noted that it attracted two additional customers because of the reduced fees.<sup>46</sup> More

<sup>37</sup> As of October 29, 2020, MEMX is trading all NMS symbols. See <https://info.memxtrading.com/trader-alert-20-10-memx-trading-symbols-update/>.

<sup>38</sup> See MIAX Pearl Press release, dated September 29, 2020, available here: [https://www.miaxoptions.com/sites/default/files/alert-files/MIAX\\_Press\\_Release\\_09292020.pdf](https://www.miaxoptions.com/sites/default/files/alert-files/MIAX_Press_Release_09292020.pdf).

<sup>39</sup> MEMX Home Page ("Founded by members and investors, MEMX aims to drive simplicity, efficiency, and competition in equity markets."), available at <https://memx.com/>.

<sup>40</sup> MEMX home page, available at <https://memx.com/>.

<sup>41</sup> See "MEMX turns up the heat on US stock exchanges," Financial Times, January 9, 2019, available at <https://www.ft.com/content/4908c8b0-1418-11e9-a581-4ff78404524e>; see also "US equities exchanges: If you can't beat them, join them," Euromoney, February 13, 2019, available at <https://www.euromoney.com/article/b1d3tfby4p3y4v/us-equities-exchanges-if-you-cant-beat-them-join-them>.

<sup>42</sup> *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001) (recognizing that "[a]s a matter of law, courts have generally recognized that when a customer can replace the

services of an external product with an internally-created system, this captive output (*i.e.* the self-production of all or part of the relevant product) should be included in the same market."). In *SunGard*, the court rejected the Antitrust Division's attempt to block SunGuard's acquisition of the disaster recovery assets of Comdisco on the basis that the acquisition would "substantially lessen competition in the market for shared hot-site disaster recovery services," when the evidence showed that "internal hot-sites" created by customers competed with the "external shared hot-site business" engaged in by the merging parties. *Id.* at 173–74, 187.

<sup>43</sup> *United States v. Baker Hughes*, 908 F.2d 981, 987 (1990) ("In the absence of significant barriers [to entry], a company probably cannot maintain supracompetitive pricing for any length of time."); see also David S. Evans and Richard Schmalensee, Markets with Two-Sided Platforms, in 1 Issues In Competition Law And Policy 667, 685 (ABA Section of Antitrust Law 2008) (noting that exchange mergers in 2005 and 2006 were approved by competition authorities in part in reliance on planned and likely entry of other firms).

<sup>44</sup> For example, in the National IF Approval Order, the Commission recognized that for some customers, the best bid and offer information from consolidated data feeds may function as a substitute for the NYSE National Integrated Feed product, which contains order by order information. See National IF Approval Order, *supra* note 26, at 67397 [release p. 21] ("[I]nformation provided by NYSE National demonstrates that a number of executing broker-dealers do not subscribe to the NYSE National Integrated Feed and executing broker-dealers can otherwise obtain NYSE National best bid and offer information from the consolidated data feeds." (internal quotations omitted)).

<sup>45</sup> See Cboe Global Markets U.S. Equities Market Volume Summary, available at [https://www.cboe.com/us/equities/market\\_share/](https://www.cboe.com/us/equities/market_share/).

<sup>46</sup> See Securities Exchange Act Release Nos. 86667 (August 14, 2019) (SR-CboeBZX-2019-069);

recently, Nasdaq filed a proposed rule change to lower the enterprise license fee for broker-dealers distributing Nasdaq Basic to internal Professional subscribers and the enterprise license fee for broker-dealers distributing

86670 (August 14, 2019) (SR-CboeBYX-2019-012); 86676 (August 14, 2019) (SR-CboeEDGA-2019-013); and 86678 (August 14, 2019) (SR-CboeEDGX-2019-048) (Notices of filing and Immediate effectiveness of proposed rule change to reduce fees for the Cboe One Fee) (collectively "Cboe One Fee Filings"). The Cboe One Fee Filings were in effect from August 1, 2019 until September 30, 2019, when the Commission suspended them and instituted proceedings to determine whether to approve or disapprove those proposals. *See, e.g.*, Securities Exchange Act Release No. 87164 (September 30, 2019), 84 FR 53208 (October 4, 2019) (SR-CboeBZX-2019-069). On October 1, 2019, the Cboe equities exchanges refiled the Cboe One Fee Filings on the basis that they had new customers subscribe as a result of the Cboe One Fee Filings, and therefore its fee proposal had increased competition for top-of-book market data. *See* Securities Exchange Act Release Nos. 87312 (October 15, 2019), 84 FR 56235 (October 21, 2019) (SR-CboeBZX-2019-086); 87305 (October 14, 2019), 84 FR 56210 (October 21, 2019) (SR-CboeBYX-2019-015); 87295 (October 11, 2019), 84 FR 55624 (October 17, 2019) (SR-CboeEDGX-2019-059); and 87294 (October 11, 2019), 84 FR 55638 (October 17, 2019) (SR-CboeEDGA-2019-015) (Notices of filing and immediate effectiveness of proposed rule changes to re-file the Small Retail Broker Distribution Program) ("Cboe One Fee Re-Filings"). On November 26, 2019, the Commission suspended the Cboe One Fee Re-Filings and instituted proceedings to determine whether to approve or disapprove those proposals. *See, e.g.*, Securities Exchange Act Release No. 87629 (November 26, 2019), 84 FR 66245 (December 3, 2019) (SR-CboeBZX-2019-086). On November 27, 2019, the Cboe equities exchanges refiled the Cboe One Fee Filings with one revision to the requirements for participating in the Small Retail Broker Distribution Program and additional information about the basis for the proposed fee changes. *See* Securities Exchange Act Release Nos. 87712 (December 10, 2019), 84 FR 68508 (December 16, 2019) (SR-CboeBZX-2019-101); 87713 (December 10, 2019), 84 FR 68530 (December 16, 2019) (SR-CboeBYX-2019-023); 87709 (December 10, 2019), 84 FR 68523 (December 16, 2019) (SR-CboeEDGA-2019-021); and 87711 (December 10, 2019), 84 FR 68501 (December 16, 2019) (SR-CboeEDGX-2019-071) (Notices of filing and immediate effectiveness of proposed rule changes to introduce a Small Retail Broker Distribution Program) ("Cboe One Third Fee Re-Filings"). On February 4, 2020, the Cboe equities exchanges withdrew the Cboe One Third Fee Re-Filings and, on the same date, refiled the Cboe One Fee Filings. *See* Securities Exchange Act Release Nos. 88221 (February 14, 2020), 85 FR 9904 (February 20, 2020) (SR-CboeBYX-2020-007); 88218 (February 14, 2020), 85 FR 9827 (February 20, 2020) (SR-CboeBZX-2020-014); 88220 (February 14, 2020), 85 FR 9912 (February 20, 2020) (SR-CboeEDGA-2020-004); and 88219 (February 14, 2020), 85 FR 9872 (February 20, 2020) (SR-CboeEDGX-2020-008) (Notices of filing and immediate effectiveness of proposed rule changes to introduce a Small Retail Broker Distribution Program) ("Cboe One Fourth Fee Re-Filings"). On April 15, 2020, the Cboe equities exchanges withdrew the Cboe One Fee Filings and the Cboe One Fee Re-Filings. Pursuant to the Cboe One Fourth Fee Re-Filings, the Small Retail Broker Distribution Program is currently in effect at the Cboe equities exchanges.

Nasdaq Last Sale to Professional subscribers.<sup>47</sup>

The Exchange notes that NYSE American proprietary market data products are entirely optional. The Exchange is not required to make the proprietary data products that are the subject of this proposed rule change available or to offer any specific pricing alternatives to any customers, nor is any firm or investor required to purchase the Exchange's data products. Unlike some other data products (e.g., the consolidated quotation and last-sale information feeds) that firms are required to purchase in order to fulfill regulatory obligations,<sup>48</sup> a customer's decision whether to purchase any of the Exchange's proprietary market data feeds is entirely discretionary. Most firms that choose to subscribe to proprietary market data feeds from the Exchange and its affiliates do so for the primary goals of using them to increase their revenues, reduce their expenses, and in some instances compete directly with the Exchange's trading services. Such firms are able to determine for themselves whether or not the products in question or any other similar products are attractively priced. If market data feeds from the Exchange and its affiliates do not provide sufficient value to firms based on the uses those firms may have for it, such firms may simply choose to conduct their business operations in ways that do not use the products.

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

<sup>47</sup> *See* Securities Exchange Act Release No. 90177 (October 14, 2020), 85 FR 66620 (October 20, 2020) (SR-NASDAQ-2020-065) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower the Enterprise License Fee for Broker-Dealers Distributing Nasdaq Basic to Internal Professional Subscribers as Set Forth in the Equity 7 Pricing Schedule, Section 147, and the Enterprise License Fee for Broker-Dealers Distributing Nasdaq Last Sale to Professional Subscribers at Equity 7, Section 139).

<sup>48</sup> The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. *See* *The Matter of the Application of Securities Industry and Financial Markets Association for Review of Actions Taken by Self-Regulatory Organizations*, Release Nos. 34-72182; AP-3-15350; AP-3-15351 (May 16, 2014). Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSS have chosen not to do so.

are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. This competitive constraint is precisely what is driving the proposed fee changes here, which are designed to attract new market data vendors, and through them new subscribers, to the NYSE BQT product. Currently, only seven data feed vendors subscribe to NYSE BQT, and each vendor has limited redistribution of NYSE BQT. No other vendors currently subscribe to NYSE BQT and likely will not unless their customers request it, and customers will not elect to pay the proposed fees unless such product can provide value by sufficiently increasing revenues or reducing costs in the customer's business in a manner that will offset the fees. All of these factors operate as constraints on pricing proprietary data products.

Because of the availability of substitutes, an exchange that overprices its market data products stands a high risk that users may substitute another source of market data information for its own. Those competitive pressures imposed by available alternatives are evident in the Exchange's proposed pricing.

In setting the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish reasonable fees. The existence of numerous alternatives to the Exchange's platform and, more specifically, alternatives to the market data products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

The proposed expansion of the Per User Access Fee is reasonable, for the following additional reasons.

*Overall.* This proposed fee change is a result of the competitive environment, as the Exchange seeks to decrease certain of its fees to attract Redistributors that do not currently subscribe to the NYSE BQT market data product. The Exchange is proposing the fee reduction at issue to make the Exchange's fees more competitive for a specific segment of market participants, thereby increasing the availability of the Exchange's data products, and

expanding the options available to firms making data purchasing decisions based on their business needs. The Exchange believes that this is consistent with the principles contained in Regulation NMS to “promote the wide availability of market data and to allocate revenues to SROs that produce the most useful data for investors.”<sup>49</sup>

*Access Fee.* By making the reduced Per User Access Fee available to Redistributors of NYSE American OpenBook for external distribution who do not subscribe to any other products listed on the Fee Schedule other than NYSE American BBO and NYSE American Trades, the Exchange believes that more Redistributors may choose to subscribe to these products, thereby expanding the distribution of this market data for the benefit of investors that participate in the national market system and increasing competition generally. The Exchange also believes that offering the Per User Access Fee to these Redistributors would expand the availability of NYSE BQT to potential data recipients that are interested in subscribing to NYSE BQT but do not have access to a Redistributor who subscribes to the data feeds.

The Exchange determined to make the reduced Per User Access Fee available to these Redistributors because it constitutes a substantial reduction of the current fee, with the intended purpose of increasing use of NYSE BQT by Redistributors. NYSE BQT has been in place since 2014 but has a very small number of subscribers. The Exchange believes that in order to compete with other indicative pricing products such as Nasdaq Basic and Cboe One Feed, it needs to provide a meaningful financial incentive for more Redistributors to choose to subscribe to NYSE BQT so that they can make it available to their customers. Accordingly, the proposed expansion of the Per User Access Fee, together with the proposed expansion of the Per User Access Fee by the Exchange’s affiliates, is reasonable because the reductions will make NYSE BQT a more attractive offering for Redistributors that do not currently subscribe to any NYSE American market data products other than NYSE American OpenBook and make it more competitive with Nasdaq Basic and Cboe One Feed.

Evidence of the competition among exchange groups for these products has previously been demonstrated via fee changes. For example, following the introduction of the Cboe One Feed, Nasdaq responded by reducing its fees

for the Nasdaq Basic product.<sup>50</sup> With the proposed changes by the Exchange, NYSE, and NYSE Arca, the Exchange is similarly seeking to compete by decreasing the total access fees for NYSE BQT from \$6,250 to \$850 for Redistributors that do not currently subscribe to any NYSE American market data products other than NYSE American OpenBook and have customers that are interested in subscribing to NYSE BQT but cannot do so until their Redistributor also subscribes. This proposed rule change therefore demonstrates the existence of an effective, competitive market because this proposal resulted from a need to generate innovative approaches in response to competition from other exchanges that offer market data for a specific segment of market participants.

For all of the foregoing reasons, the Exchange believes that the proposed fees are reasonable.

#### The Proposed Fees Are Equitably Allocated

The Exchange believes the proposed expansion of the Per User Access Fee is allocated fairly and equitably among the various categories of users of the Exchange’s market data feed, and any differences among categories of users are justified.

*Overall.* As noted above, this proposed fee change is a result of the competitive environment for market data products that provide indicative pricing information across a family of exchanges. To respond to this competitive environment, the Exchange seeks to expand the application of the Per User Access Fee for Redistributors that would be subscribing to the NYSE American BBO, NYSE American Trades and NYSE American OpenBook data feeds and would use these market data products for external distribution only, which the Exchange hopes will attract new Redistributor subscribers for the NYSE BQT market data product so that the product can be made available to prospective market data recipients. The Exchange is proposing to expand the application of the reduced Per User Access Fee to make the Exchange’s fees more competitive for a specific segment

of market participants, thereby increasing the availability of the Exchange’s data products, expanding the options available to firms making data purchasing decisions based on their business needs, and generally increasing competition.

*Access Fee.* The Exchange believes that making the Per User Access Fee available to Redistributors that would be subscribing to the NYSE American BBO, NYSE American Trades and NYSE American OpenBook data feeds and would use these market data products for external distribution only is equitable as the reduced fee would apply equally to all data recipients that choose to subscribe to NYSE American BBO, NYSE American Trades and NYSE American OpenBook for external distribution only. Because NYSE American BBO, NYSE American Trades and NYSE American OpenBook are optional products, any data recipient could choose to subscribe to such data feeds to distribute externally and be eligible for the Per User Access Fee. The Exchange does not believe that it is inequitable that the Per User Access Fee would be available only to data recipients that subscribe to NYSE American BBO, NYSE American Trades and NYSE American OpenBook and only for external distribution. Internal use of data represents a different set of use cases than a Redistributor that is engaged only in external distribution of data. For example, non-display data can be used by data recipients for a wide variety of profit-generating purposes, including proprietary and agency trading and smart order routing, as well as by data recipients that operate order matching and execution platforms that compete directly with the Exchange for order flow. The data also can be used for a variety of non-trading purposes that indirectly support trading, such as risk management and compliance. Although some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce the recipient’s costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs, thereby benefiting end users. The Exchange believes that charging a different access fee for a Redistributor that is engaged solely in external distribution of only the NYSE American BBO, NYSE American Trades and NYSE American OpenBook products is equitable because it would make NYSE BQT available to more data recipients that are customers of such Redistributors and who would not otherwise be able to access NYSE BQT

<sup>50</sup> See e.g., Securities Exchange Act Release No. 33751 (July 31, 2018), 83 FR 38428 (August 6, 2018) (SR-NASDAQ-2018-058) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Lower Fees and Administrative Costs for Distributors of Nasdaq Basic, Nasdaq Last Sale, NLS Plus and the Nasdaq Depth-of-Book Products Through a Consolidated Enterprise License). Nasdaq filed the proposed fee change to lower the Enterprise Fee for Nasdaq Basic and other market data products in response to the Enterprise Fee for the Cboe One Feed adopted by Cboe family of exchanges.

<sup>49</sup> See Regulation NMS Adopting Release, 70 FR 37495, at 37503.

if their Redistributor did not subscribe to and redistribute NYSE BQT.

For all of the foregoing reasons, the Exchange believes that the proposed fees for the NYSE American market data products are equitably allocated.

#### The Proposed Fees Are Not Unfairly Discriminatory

The Exchange believes the proposed fees are not unfairly discriminatory because any differences in the application of the fees are based on meaningful distinctions between customers, and those meaningful distinctions are not unfairly discriminatory between customers.

*Overall.* As noted above, this proposed fee change is a result of the competitive environment for market data products that provide indicative pricing information across a family of exchanges. To respond to this competitive environment, the Exchange seeks to amend its fees to provide a financial incentive for Redistributors of NYSE American OpenBook that do not currently subscribe to any NYSE American market data products that decide to subscribe to NYSE BQT, which the Exchange hopes will attract more subscribers for the NYSE BQT market data product. The Exchange is proposing to expand the application of the Per User Access Fee to make the Exchange's fees more competitive for a specific segment of market participants, thereby increasing the availability of the Exchange's data products, expanding the options available to firms making data purchasing decisions based on their business needs, and generally increasing competition.

*Access Fee.* The Exchange believes that making the Per User Access Fee available to Redistributors that would be subscribing to the NYSE American BBO, NYSE American Trades and NYSE American OpenBook data feeds and would use these market data products for external distribution only is not unfairly discriminatory as the reduced fee would apply equally to all Redistributors that choose to subscribe to NYSE American BBO, NYSE American Trades and NYSE American OpenBook for external distribution only. Because NYSE American BBO, NYSE American Trades and NYSE American OpenBook are optional products, any data recipient could choose to subscribe to such data feeds to distribute externally and be eligible for the Per User Access Fee. The Exchange does not believe that it is unfairly discriminatory that the Per User Access Fee would be available only to data recipients that subscribe to NYSE American BBO, NYSE American Trades

and NYSE American OpenBook and only for external distribution. Internal use of data represents a different set of use cases than a Redistributor that is engaged only in external distribution of data. For example, non-display data can be used by data recipients for a wide variety of profit-generating purposes, including proprietary and agency trading and smart order routing, as well as by data recipients that operate order matching and execution platforms that compete directly with the Exchange for order flow. The data also can be used for a variety of non-trading purposes that indirectly support trading, such as risk management and compliance. While some of these non-trading uses do not directly generate revenues, they can nonetheless substantially reduce the recipient's costs by automating such functions so that they can be carried out in a more efficient and accurate manner and reduce errors and labor costs, thereby benefiting end users. The Exchange therefore believes that there is a meaningful distinction between internal use and redistribution of market data and that charging a different access fee to a Redistributor that is engaged solely in external distribution of only the NYSE American BBO, NYSE American Trades and NYSE American OpenBook products is not unfairly discriminatory because it would make NYSE BQT available to more data recipients that are customers of such Redistributors and who would not otherwise be able to access NYSE BQT if their Redistributor did not subscribe to and redistribute NYSE BQT.

Moreover, the Exchange does not believe that it is unfairly discriminatory to offer the Per User Access Fee only to those Redistributors that would subscribe to the NYSE American BBO, NYSE American Trades and NYSE American OpenBook data feeds, and only for external distribution. This proposed rule change is designed to provide an incentive for Redistributors that currently subscribe to NYSE American OpenBook, but do not subscribe to NYSE BQT, and may have customers that are interested in subscribing to NYSE BQT, to subscribe to the NYSE American BBO and NYSE American Trades data feeds so that they can make NYSE BQT available to their customers. This fee incentive is not necessary for Redistributors that currently subscribe to the NYSE American BBO and NYSE American Trades data feeds because such Redistributors could already subscribe to NYSE BQT, but have chosen not to, and a reduction in their existing access fees would likely not result in such

Redistributors choosing to subscribe to NYSE BQT.

For all of the foregoing reasons, the Exchange believes that the proposed fees are not unfairly discriminatory.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Indeed, as demonstrated above, the Exchange believes the proposed rule changes are pro-competitive.

*Intramarket Competition.* The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants. As noted above, the proposed fee schedule would apply to all subscribers of NYSE American market data products, and customers may not only choose whether to subscribe to the products at all, but also may tailor their subscriptions to include only the products and uses that they deem suitable for their business needs. The Exchange also believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue market on competition. As shown above, to the extent that particular proposed fees apply to only a subset of subscribers, those distinctions are not unfairly discriminatory and do not unfairly burden one set of customers over another.

*Intermarket Competition.* The Exchange believes that the proposed fees do not impose a burden on competition on other exchanges that is not necessary or appropriate; indeed, the Exchange believes the proposed fee changes would have the effect of increasing competition. As described above, exchanges are platforms for market data and trading. In setting the proposed fees, the Exchange is constrained by the availability of substitute platforms also offering market data products and trading, and low barriers to entry mean new exchange platforms are frequently introduced. The fact that exchanges are platforms ensures that no exchange can make pricing decisions for one side of its platform without considering, and being constrained by, the effects that price will have on the other side of the platform. In setting fees at issue here, the Exchange is constrained by the fact that, if its pricing across the platform is unattractive to customers, customers will have its pick of an increasing number of alternative platforms to use instead of the Exchange. Given this



intense competition between platforms, no one exchange's market data fees can impose an unnecessary burden on competition, and the Exchange's proposed fees do not do so here.

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

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

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

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

The foregoing rule change has become effective upon filing pursuant to Section 19(b)(3)(A)<sup>51</sup> of the Act and paragraph (f) of Rule 19b-4 thereunder.<sup>52</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the

Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NYSEAMER-2023-57 on the subject line.

#### *Paper Comments*

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

All submissions should refer to file number SR-NYSEAMER-2023-57. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEAMER-2023-57 and should

be submitted on or before December 13, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>53</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023-25787 Filed 11-21-23; 8:45 am]

BILLING CODE 8011-01-P

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-98967; File No. SR-NYSE-2023-34]

### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Designation of Longer Period for Commission Action on a Proposed Rule Change To Amend Section 312.03(b) of the NYSE Listed Company Manual To Modify the Circumstances Under Which a Listed Company Must Obtain Shareholder Approval of a Sale of Securities Below the Minimum Price to a Substantial Security Holder of the Company**

November 16, 2023.

On September 26, 2023, New York Stock Exchange LLC (the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Section 312.03(b) of the NYSE Listed Company Manual ("Manual") to modify the circumstances under which a listed company must obtain shareholder approval of a sale of securities below the Minimum Price<sup>3</sup> to a substantial security holder of the listed company. The proposed rule change was published for comment in the **Federal Register** on October 4, 2023.<sup>4</sup> The Commission received no comments on the proposed rule change.

Section 19(b)(2) of the Act<sup>5</sup> provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the

<sup>53</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> Minimum Price is defined in Section 312.04(h) of the Manual.

<sup>4</sup> See Securities Exchange Act Release No. No. 98662 (September 29, 2023), 88 FR 68675 (October 4, 2023).

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>51</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>52</sup> 17 CFR 240.19b-4(f).