

Dated: August 3, 2020.

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89462; File No. SR-NYSENAT-2020-08]

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing of Partial Amendment No. 1 to Proposed Rule Change To Amend the Schedule of Wireless Connectivity Fees and Charges To Add Wireless Connectivity Services

August 3, 2020.

I. Introduction

On February 11, 2020, NYSE National, Inc. (“NYSE National” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change (SR-NYSENAT-2020-08) to amend the schedule of Wireless Connectivity Fees and Charges (“Wireless Fee Schedule”) to add wireless connectivity services that transport the market data of the Exchange and certain affiliates.

The Commission published the proposed rule change for public comment in the **Federal Register** on February 25, 2020.³ The Commission received several comments on the proposed rule change, and a response from the Exchange.⁴ On April 1, 2020, pursuant to Section 19(b)(2) of the Act,⁵ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to

disapprove the proposed rule change.⁶ On May 18, 2020, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁷ The Commission received additional comments in response to the Order Instituting Proceedings.⁸

On July 27, 2020, the Exchange filed Partial Amendment No. 1 to the proposed rule change in response to certain comments on the proposed rule change. Partial Amendment No. 1 is described in Item II below, which has been substantially prepared by the Exchange.⁹ The Commission is publishing this notice to solicit comments on Partial Amendment No. 1 from interested persons.¹⁰

II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Amendment

NYSE National, Inc. (“NYSE National” or the “Exchange”) hereby submits this Partial Amendment No. 1 to the above-referenced filing (“Filing”) in connection with the proposed rule change to add wireless connectivity that transport the market data of the Exchange and certain affiliates to the schedule of Wireless Connectivity Fees and Charges (the “Wireless Fee Schedule”). With this Partial Amendment No. 1, the Exchange proposes a new rule to place restrictions on the use of a pole on the grounds of the Mahwah, New Jersey data center that is used for wireless connectivity services that transport the market data

of the Exchange and certain of its affiliates.

The Exchange proposes the following amendments to the Filing:

1. *The Exchange proposes to amend the first paragraph in Item 1(a) on page 3 of the Filing:*

The Exchange proposes to amend the first paragraph of Item 1(a) on page 3 of the Filing to add “(a)” before “wireless connectivity services” and add new text at the end of the paragraph to describe the proposed rule change, as follows (new text italicized):

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² NYSE National, Inc. (“NYSE National” or the “Exchange”) proposes to add (a) wireless connectivity services that transport the market data of the Exchange and certain affiliates to the schedule of Wireless Connectivity Fees and Charges (the “Wireless Fee Schedule”); and (b) a new rule to place restrictions on the use of a pole on the grounds of the Mahwah, New Jersey data center that is used for such wireless connectivity services.

2. *The Exchange proposes to amend the carryover paragraph on pages 3 and 4 of the Filing (second full paragraph on page 24 of the Exhibit 1):*

The Exchange proposes to add amend the carryover paragraph on pages 3 and 4 of the Filing (second full paragraph on page 24 of the Exhibit 1) to add “(a)” before “wireless connectivity services” and add new text to describe the proposed rule change, as follows (new text italicized, deletion in [brackets]):

The Exchange proposes to add (a) wireless connectivity services that transport market data of the Exchange and its affiliates New York Stock Exchange LLC (“NYSE”) and NYSE Arca, Inc. (“NYSE Arca”) to the Wireless Fee Schedule[.],^{3/4} and (b) a new rule to place restrictions on the use of a pole on the grounds of the Mahwah, New Jersey data center that is used for such wireless connectivity services.

3. *The Exchange proposes to add a new section titled “Proposed New Rule” and accompanying footnotes after the first full paragraph on page 14 of the Filing (first full paragraph on page 39 of the Exhibit 1):*

The Exchange proposes a new rule to place restrictions on the use of a pole on the grounds of the Mahwah, New Jersey data center that is used for wireless connectivity services. Accordingly, the Exchange proposes to add a new section titled “Proposed New Rule” and accompanying footnotes (subsequent footnotes would be renumbered in a conforming change) after the first full paragraph on page 14 of the Filing (first full paragraph on page 39 of the Exhibit 1), after the end of the section titled

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 88241 (February 19, 2020), 85 FR 10738 (February 25, 2020) (SR-NYSENAT-2020-08) (“Wireless II Notice”). See also Securities Exchange Act Release Nos. 88237 (February 19, 2020), 85 FR 10752 (February 25, 2020) (SR-NYSE-2020-11); 88238 (February 19, 2020), 85 FR 10776 (February 25, 2020) (SR-NYSEAMER-2020-10); 88239 (February 19, 2020), 85 FR 10786 (February 25, 2020) (SR-NYSEArca-2020-15); and 88240 (February 19, 2020), 85 FR 10795 (February 25, 2020) (SR-NYSECHX-2020-05).

⁴ Comments received on the Wireless II Notice and the Exchange’s response are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysenat-2020-08/srnysenat202008.htm>.

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities Exchange Act Release No. 88540 (April 1, 2020), 85 FR 19562 (April 7, 2020). The Commission designated May 25, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

⁷ See Securities Exchange Act Release No. 88901 (May 18, 2020), 85 FR 31273 (May 22, 2020) in which the Commission instituted proceedings (“Order Instituting Proceedings” or “OIP”).

⁸ Comments received on the Wireless II Notice following the OIP also are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysenat-2020-08/srnysenat202008.htm>.

⁹ The Commission has reformatted the Exchange’s presentation of the footnotes.

¹⁰ Partial Amendment No. 1 is also available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysenat-2020-08/srnysenat202008.htm>. The Commission also refers interested persons to Securities Exchange Act Release No. 88171 (February 11, 2020), 85 FR 8930 (February 18, 2020) (SR-NYSENAT-2020-03) (wherein the Exchange filed a proposed rule change to establish the Wireless Fee Schedule listing available wireless bandwidth connections between the Mahwah, New Jersey data center and other data centers (“Wireless I”) and concurrently proposes to partially amend Wireless I). Partial Amendment No. 1 to Wireless I is available on the Commission’s website at: <https://www.sec.gov/comments/sr-nysenat-2020-03/srnysenat202003.htm>.

“*The Proposed Service and Fees*,” as follows (all text is new):

Proposed New Rule

Since 2016, IDS has had the use of a pole on the grounds of the Mahwah data center.^{27/28} The data center pole is part of the network utilized for the Wireless Market Data Connections to the Carteret and Secaucus Third Party Data Centers.^{28/29} At the data center pole, the wireless connection to the Third Party Data Centers converts to a fiber connection, and the fiber connection travels from the data center pole into the Mahwah data center.^{29/30} The equipment on the data center pole belongs to IDS and Anova Technologies, LLC (“Anova”), the non-ICE entity that owns the wireless network used for the Wireless Market Data Connections to Secaucus and Carteret.^{30/31}

Other third parties that offer wireless services utilize commercial poles located outside the grounds of the Mahwah, New Jersey data center for their wireless networks. A third party’s wireless connections to the Third Party Data Center convert to fiber connections at the commercial pole, and the fiber connects the commercial pole to the Mahwah data center.

Several such third parties have objected to the use of the data center pole for the Wireless Market Data Connections. They argue that IDS has an advantage over its competitors because third parties are not allowed access to the data center pole,^{31/32} and the data center pole is closer to the Mahwah data center than any commercial pole.^{32/33} At least one third party has raised the additional concern that the Wireless Market Data Connections may benefit from “less obvious and more discreet types of latency advantages” due to infrastructure inside the Mahwah data center, noting that “some connections may have a longer fiber route than others within a data center or may have to go through various equipment or meet me rooms that an affiliate or preferred provider of an exchange do not.”^{33/34}

The Exchange is proposing a new Rule 3.14 (Data Center Pole Latency Restrictions—Connectivity to Production of Exchange Market Data) that would require that the length of the connection from the data center pole to the point inside the Mahwah data center where Exchange market data is produced be no less than the length of the connection from the closest commercial pole to the same point. By requiring that the compared connections both extend to where Exchange market data is produced, the proposed rule would take distances within the Mahwah data center into account.

The proposed rule would include the following definitions:

- “Commercial Pole” would mean a pole (a) on which one or more third parties locate wireless equipment used to offer wireless connectivity to other third parties, and (b) from which a fiber connection extends from third party equipment on the pole to the Data Center.
- “Data Center” would mean the Mahwah, New Jersey data center where the Exchange’s matching engine is located, or its successor.
- “Data Center Pole” would mean a pole that (a) holds wireless equipment, (b) is

located within the grounds of the Data Center, and (c) cannot be used by third parties other than third parties with which the Exchange or an ICE Affiliate has an agreement to provide services in the name of the Exchange or an ICE Affiliate.

- “ICE Affiliate” would mean Intercontinental Exchange, Inc. (“ICE”) and any entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with ICE, where “control” means that one entity possesses, directly or indirectly, voting control of the other entity either through ownership of capital stock or other equity securities or through majority representation on the board of directors or other management body of such entity.

The proposed rule would require that:

The length of the connection between (a) the base of the Data Center Pole and (b) the point inside the Data Center where Exchange market data is produced shall be no less than the length of the connection between (x) the base of the closest Commercial Pole and (y) the point inside the Data Center where Exchange market data is produced.

^{27/28} See Securities Exchange Act Release No. 76748 (December 23, 2015), 80 FR 81609 (December 30, 2015) (SR–NYSE–2015–52) (order approving proposed rule change to the co-location services offered by the NYSE (the offering of a wireless connection to allow users to receive market data feeds from third party markets) and to reflect changes to the NYSE’s price list related to these services).

^{28/29} The Wireless Market Data Connections with Markham, Canada do not use equipment on the data center pole.

^{29/30} The wireless network similarly converts to a fiber connection for its connection into the Third Party Data Centers.

^{30/31} Equipment for services Anova offers under its own name is not allowed on the data center pole.

^{31/32} IDS does not sell rights to third parties to operate wireless equipment on the data center pole due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together.

^{32/33} See letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Ms. Vanessa Countryman, Secretary, Securities and Exchange Commission (“Commission”), dated June 12, 2020; letter from Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel Securities, to Ms. Vanessa Countryman, Secretary, Commission, dated June 12, 2020; letter from Jim Considine, Chief Financial Officer, McKay Brothers LLC (“McKay Brothers”), to Ms. Vanessa Countryman, Secretary, Commission, dated June 12, 2020 (“McKay Letter”); and letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. to Ms. Vanessa Countryman, Secretary, Commission, dated March 10, 2020.

^{33/34} McKay Letter, *supra* note 32/33, at 9.

4. *The Exchange proposes to add new text after the carryover paragraph on pages 15 and 16 of the Filing (first full paragraph on page 41 of the Exhibit 1):*

The Exchange proposes to amend the Filing to include additional analysis on the competitive environment for wireless connections. Accordingly, the Exchange proposes to add a paragraph and accompanying footnotes (subsequent footnotes would be renumbered in a conforming change) after the carryover paragraph on pages 15 and 16 of the Filing (first full paragraph on page 41 of the Exhibit 1), as follows (all text is new):

Such competitors can offer wireless connectivity to Selected Market Data or other Exchange market data in the Third Party Data Centers by obtaining the market data at the Mahwah data center and sending it over their wireless network to the Third Party Data Centers.^{37/38} The Exchange believes that its competitors’ wireless connections provide connectivity at the same or similar speed as the Wireless Market Data Connections, and at the same or similar cost. Indeed, the McKay Letter acknowledges that McKay Brothers has the fastest wireless network.^{38/39}

^{37/38} A market participant in any of the Third Party Data Centers or the Mahwah data center also may create a proprietary wireless market data connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

^{38/39} McKay Letter, *supra* note 32/33, at 4.

5. *The Exchange proposes to amend the Statutory Basis section of the Filing after the second full paragraph on page 18 of the Filing (second full paragraph on page 45 of the Exhibit 1):*

The Exchange proposes to include information in the Filing regarding why it believes the proposed new rule is reasonable. The Exchange proposes to amend the Statutory Basis section of the Filing to add new paragraphs and accompanying footnotes (subsequent footnotes would be renumbered in a conforming change) after the second full paragraph on page 18 of the Filing (second full paragraph on page 45 of the Exhibit 1), at the end of the section titled “*The Proposed Change is Reasonable*,” as follows (all text is new):

The Exchange believes that the proposed new Rule 3.14 would be reasonable as, pursuant to the rule, the networks for the Wireless Market Data Connections, and future wireless connections that use a Data Center Pole, would “operat[e] in the same manner as competitors do today without a latency subsidy or other advantage provided by the Exchanges. . . .”^{43/44} Accordingly, the proposed new rule would promote just and equitable principles of trade and, in general, protect investors and the public interest by ensuring that the subscribers to

services using the IDS wireless network do not benefit from any physical proximity “on the segment [of the network] closest to the Exchanges’ data center that no competitor can replicate.”^{44/45} By ending both of the compared connections at the point inside the Data Center where Exchange market data is produced, the proposed rule would take distances within the Mahwah data center into account.^{45/46} The proposed new rule would not apply differently to distinct types or sizes of market participants. The Exchange would be required to ensure that the length of the connection between (a) the base of the Data Center Pole and (b) the point inside the Data Center where Exchange market data is produced, would be no less than the length of the connection between (x) the base of the closest Commercial Pole and (y) the point inside the Data Center where Exchange market data is produced.

The Exchange believes that the proposed definition of “Commercial Pole” is reasonable and would promote just and equitable principles of trade because it would encompass any pole on which a third party locates its wireless equipment in order to offer wireless connectivity to customers. The Exchange believes that such third parties are the direct competitors for the Wireless Market Data Connections, as they also offer wireless connections to customers. If a third party used a pole for a proprietary wireless network and that pole does not have one or more third parties’ wireless equipment used to offer wireless connectivity to other third parties, that pole would not fall within the scope of the definition of Commercial Pole.

The Exchange believes that the proposed definition of “Data Center” is reasonable and would promote just and equitable principles of trade because it would capture any data center to which the Exchange locates its matching engine.

The Exchange believes that the proposed definition of “Data Center Pole” is reasonable and would promote just and equitable principles of trade because it would encompass not just the current pole, but also any additional or successor pole on the grounds of the Data Center, so long as such pole could not be used by third parties other than third parties with which the Exchange or an ICE Affiliate had an agreement to provide services in the name of the Exchange or an ICE Affiliate, such as Anova.

The Exchange believes that the definition of “ICE Affiliate” is reasonable and would promote just and equitable principles of trade because the same definition is used in Rule 3.1 (Additional Requirements for Listed Securities Issued by Intercontinental Exchange, Inc. or its Affiliates) and so using it would add transparency, clarity and internal consistency to Exchange rules.

^{43/44} McKay Letter, *supra* note 32/33, at 7.

^{44/45} *Id.*, at note 33.

^{45/46} Each of the Affiliate SROs is filing for a rule change that is substantially similar to the proposed Exchange rule. Assuming such filings are approved by the Commission, to the extent that the market data of an Affiliate SRO is produced separately from where the Exchange market data is produced, the wireless connection to that Affiliate

SRO’s market data would be captured by that Affiliate SRO’s rule.

6. The Exchange proposes to amend the Statutory Basis section of the Filing after the third full paragraph on page 19 of the Filing (second full paragraph on page 47 of the Exhibit 1):

The Exchange proposes to include information in the Filing regarding why it believes the proposed new rule is not unfairly discriminatory. The Exchange proposes to amend the Statutory Basis section of the Filing to add new paragraphs and accompanying footnotes (subsequent footnotes would be renumbered in a conforming change) after the third full paragraph on page 19 of the Filing (second full paragraph on page 47 of the Exhibit 1), immediately prior to the last paragraph of the section titled “*The Proposed Change is Not Unfairly Discriminatory*,” as follows (all text is new):

The Exchange believes that the proposed new Rule 3.14 would not be unfairly discriminatory, as pursuant to the rule, the networks for the Wireless Market Data Connections, and future wireless connections that use the Data Center Pole, would “operat[e] in the same manner as competitors do today without a latency subsidy or other advantage provided by the Exchanges. . . .”^{46/47} Accordingly, the proposed new rule would ensure that the IDS wireless network does not benefit from physical proximity “on the segment [of the network] closest to the Exchanges’ data center that no competitor can replicate.”^{47/48} By ending both of the compared connections at the point inside the Data Center where Exchange market data is produced, the proposed rule would take distances within the Mahwah data center into account.

The proposed new rule would not apply differently to distinct types or sizes of market participants. The Exchange would be required to ensure that the length of the connection between (a) the base of the Data Center Pole and (b) the point inside the Data Center where Exchange market data is produced, would be no less than the length of the connection between (x) the base of the closest Commercial Pole and (y) the point inside the Data Center where Exchange market data is produced.

The Exchange believes that the proposed definition of “Commercial Pole” would not be unfairly discriminatory because it would encompass any pole on which a third party locates its wireless equipment in order to offer wireless connectivity to customers. The Exchange believes that such third parties are the direct competitors for the Wireless Market Data Connections, as they also offer wireless connections to customers. If a third party used a pole for a proprietary wireless network and that pole does not have one or more third parties’ wireless equipment used to offer wireless connectivity to other third parties, that pole would not fall within the scope of the definition of Commercial Pole. The Exchange believes that the proposed definition of “Data Center” would not be

unfairly discriminatory because it would capture any data center to which the Exchange locates its matching engine.

The Exchange believes that the proposed definition of “Data Center Pole” would not be unfairly discriminatory because it would encompass not just the current pole, but also any additional or successor pole on the grounds of the Data Center, so long as such pole could not be used by third parties other than third parties with which the Exchange or an ICE Affiliate had an agreement to provide services in the name of the Exchange or an ICE Affiliate, such as Anova.

The Exchange believes that the definition of “ICE Affiliate” would not be unfairly discriminatory because the same definition is used in Rule 3.1 and so using it would add transparency, clarity and internal consistency to Exchange rules.

^{46/47} McKay Letter, *supra* note 32/33, at 7.

^{47/48} *Id.*, at note 33.

7. The Exchange proposes to amend the section of the Filing titled “Self-Regulatory Organization’s Statement on Burden on Competition” in the following two ways:

The Exchange proposes to include information in the Filing regarding why it believes the proposed new rule would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Securities Exchange Act of 1934 (the “Act”).¹¹ Accordingly, the Exchange proposes to amend the section of the Filing titled “*Self-Regulatory Organization’s Statement on Burden on Competition*” in the following two ways. First, to set the new text apart from the previous discussion regarding the burden on competition, the Exchange proposes to add the heading “*Wireless Market Data Connectivity*” immediately before the first full paragraph under the heading on page 19 of the Filing (page 48 of the Exhibit 1). The new heading would apply to the current text of the Filing.

Second, after the third full paragraph on page 21 of the Filing (first full paragraph on page 51 of the Exhibit 1), the Exchange proposes to add the heading “*Proposed New Rule*” and new paragraphs and accompanying footnotes (subsequent footnotes would be renumbered in a conforming change), as follows (all text is new):

Proposed New Rule

The Exchange does not believe that the proposed new rule would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of Section 6(b)(8) of the Act.^{50/51}

With the exception of Anova, third parties do not have access to the data center pole. Under the proposed rule, the Exchange would always be obligated to ensure that the length of the connection between (a) the base

¹¹ 15 U.S.C. 78f(b)(8).

of the Data Center Pole and (b) the point inside the Data Center where Exchange market data is produced, would be no less than the length of the connection between (x) the base of the closest Commercial Pole and (y) the point inside the Data Center where Exchange market data is produced.

IDS, not the Exchange, provides the Wireless Market Data Connections to market participants, and so it would be IDS that would have to slow its connection down as required by the rule. Accordingly, the Exchange believes that the only burden on competition of the proposed change would be on IDS.

Nonetheless, the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate because the proposed change would ensure that the IDS wireless network did not benefit from physical proximity “on the segment [of the network] closest to the Exchanges’ data center that no competitor can replicate.”^{51/52} The networks for the Wireless Market Data Connections, and future wireless connections that use the Data Center Pole, would “operat[e] in the same manner as competitors do today without a latency subsidy or other advantage provided by the Exchanges. . . .”^{52/53}

The proposed rule would not otherwise put a burden on competition. As noted above, access to the data center pole is not required for third parties to establish wireless networks that can compete with the Wireless Market Data Connections to the Carteret and Secaucus Third Party Data Centers, as evidenced by the existing wireless connections offered by third party competitors.^{53/54} Such competitors can offer wireless connectivity to Selected Market Data or other Exchange market data in the Third Party Data Centers by obtaining the market data at the Mahwah data center and sending it over their wireless network to the Third Party Data Centers.^{54/55} Indeed, the Exchange believes that its competitors’ wireless connections provide connectivity at the same or similar speed as the Wireless Market Data Connections, and at the same or similar cost. The McKay Letter acknowledges that McKay Brothers has the fastest wireless network.^{55/56}

The Exchange notes that proximity to a data center is not the only determinant of a wireless network’s latency. Rather, the latency of a wireless network depends on several factors. Variables include the wireless equipment utilized; the route of, and number of towers or buildings in, the network; and the fiber equipment used at either end of the connection. Moreover, latency is not the only consideration that a customer may have in selecting a wireless network to connect to for market data. Other considerations may include the amount of network uptime; the equipment that the network uses; the cost of the connection; and the applicable contractual provisions.

The proposed change does not affect competition among national securities exchanges or among members of the Exchange, but rather between IDS and its commercial competitors.

^{50/51} 15 U.S.C. 78f(b)(8).

^{51/52} McKay Letter, *supra* note 32/33, at note

33.

^{52/53} *Id.*, at 7.

^{53/54} Based on the information available to it, the Exchange believes that a market participant in the Carteret or Secaucus Third Party Data Center may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity.

^{54/55} A market participant in any of the Third Party Data Centers or the Mahwah data center also may create a proprietary wireless market data connection, connect through another market participant, or utilize fiber connections offered by the Exchange, ICE Affiliates, and other service providers and third party telecommunications providers.

^{55/56} *Id.*, at 4.

8. *The Exchange proposes to add a list under “Exhibit 5—Text of the Proposed Rule Change” on page 22 of the Filing:*

The Exchange proposes to add a new Exhibit 5B. Accordingly, the Exchange proposes to add a list under “Exhibit 5—Text of Proposed Rule Change” on page 22 of the Filing, as follows (new text italicized):

Exhibit 5—Text of the Proposed Rule Change

A. *Text of the Proposed Schedule of Wireless Connectivity Fees and Charges*

B. *Text of the Proposed Rule*

9. *The Exchange proposes to add new text to the first full paragraph of Section I on page 23 of the Exhibit 1:*

The Exchange proposes to add new text to the first full paragraph of Section I on page 23 of the Exhibit 1, as follows (new text italicized):

The Exchange proposes to add wireless connectivity services that transport the market data of the Exchange and certain affiliates to the schedule of Wireless Connectivity Fees and Charge (the “Wireless Fee Schedule”) and add a new rule to place restrictions on the use of a pole on the grounds of the Mahwah, New Jersey data center that is used for such wireless connectivity services. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

10. *The Exchange proposes to amend “Exhibit 5” to “Exhibit 5A” on page 54 of the Exhibit 5:*

To reflect the addition of a new Exhibit 5B, the Exchange proposes to add “A” to “EXHIBIT 5” on page 54 of the Exhibit 5, to make it “EXHIBIT 5A”.

* * * * *

All other representations in the Filing remain as stated therein and no other changes are being made.

III. Date of Effectiveness of the Proposed Rule Change As Modified By Partial Amendment No. 1 and Timing for Commission Action

Within 180 days after the date of publication of the initial Notice of Filing in the **Federal Register** or within such longer period up to an additional 60 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will issue an order approving or disapproving such proposed rule change, as amended.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended by Partial Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–NYSENAT–2020–08 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–NYSENAT–2020–08. 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-NYSENAT-2020-08, and should be submitted on or before August 28, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89464; File No. SR-NASDAQ-2020-017]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of a Proposed Rule Change To Amend Nasdaq Rule 5704

August 4, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 23, 2020, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. 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 Nasdaq Rule 5704 to remove the listing requirement that following twelve months after listing a series of Exchange Traded Fund Shares (the “Fund”) on Nasdaq that the Fund has at least 50 beneficial holders and to amend the requirement that Nasdaq will establish a minimum number of shares of the Fund to be outstanding at the time of initial listing with a requirement that the Fund must have a minimum number of shares outstanding to facilitate the formation of

at least one creation unit on an initial and continued listing basis.

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, 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 Exchange 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 these 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 aspects of such statements.

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

1. Purpose

The Exchange proposes to amend Nasdaq Rule 5704 to remove the listing requirement that following twelve months after listing a series of an Exchange Traded Fund Shares on Nasdaq that the Fund has at least 50 beneficial holders and to amend the requirement that Nasdaq will establish a minimum number of shares of the Fund to be outstanding at the time of initial listing with a requirement that the Fund must have a minimum number of shares outstanding to facilitate the formation of at least one creation unit on an initial and continued listing basis.³

Nasdaq believes that the requirement that a series of Exchange Traded Fund Shares listed pursuant to Nasdaq Rule 5704 must have at least 50 beneficial shareholders is no longer necessary. The Exchange believes that the conditions of Rule 6c-11⁴ (“Rule 6c-11”) under the Investment Company Act of 1940, as amended,⁵ coupled with the existing

³ The term creation unit would have the same meaning as defined in Rule 6c-11 (*i.e.*, a specified number of exchange-traded fund shares that the exchange-traded fund will issue to (or redeem from) an authorized participant in exchange for the deposit (or delivery) of a basket and a cash balancing amount, if any.).

⁴ A series of Exchange Traded Fund Shares listed pursuant to Nasdaq Rule 5704 is required to be eligible to operate pursuant to Rule 6c-11. See Nasdaq Rule 5704(b).

⁵ See Release No. 33-10695; IC-33646; File No. S7-15-18 (Exchange-Traded Funds) (September 25, 2019), 84 FR 57162 (October 24, 2019) (“ETF Adopting Release”).

creation and redemption process, mitigate the potential lack of liquidity that the shareholder requirement was intended to address.⁶ Nasdaq believes that requiring a sufficient number of shares to be outstanding at all times in order to facilitate the formation of at least one creation unit, coupled with the daily portfolio transparency and other enhanced disclosure requirements of Rule 6c-11, will facilitate an effective arbitrage mechanism and provide market participants and investors with sufficient transparency into the holdings of the underlying portfolio and ensure that the trading price in the secondary market remains in line with the value per share of the portfolio. The Exchange believes this is consistent with prior Commission statements.⁷

For example, Rule 6c-11 requires additional disclosure if the premium or discount is in excess of 2% for more than seven consecutive days, as well as related website disclosure and discussion requirements.⁸ This disclosure provides additional transparency to investors in the event that the trading value and the underlying portfolio deviate for an extended period of time, which could indicate an inefficient arbitrage mechanism.⁹ The arbitrage mechanism relies on the fact that shares of the Fund can be created and redeemed and that shares of the Fund are able to flow into or out of the market when the price of the Fund is not aligned with the net asset value per share of the portfolio. The resulting buying and selling of the shares of the Fund, as well as the underlying portfolio components, generally causes the market price and the net asset value per share to

⁶ As stated in previous rule proposals, Nasdaq believes that the shareholder requirement, as it relates to common stock, is a measure of liquidity designed to help assure that there will be sufficient investor interest and trading to support price discovery once a security is listed. See Securities Exchange Act Release No. 86314 (July 5, 2019), 84 FR 33102 (July 11, 2019) (Notice of Filing of Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 3, To Revise the Exchange’s Initial Listing Standards Related to Liquidity). However, as discussed herein, the pricing, liquidity, trading and valuation of Exchange Traded Fund Shares is fundamentally different from that of common stock.

⁷ In the Adopting Release, the Commission stated, “Further, we believe that the conditions we are adopting as part of rule 6c-11, along with other recent actions that are designed to promote an effective arbitrage mechanism, will continue to result in a sufficiently close alignment between an ETF’s market price and NAV per share in most circumstances . . .” See *supra* note 6, at pp. 41.

⁸ See 17 CFR 270.6c-11(c)(1)(vi).

⁹ The Exchange notes that the Commission discussed the importance of an effective and efficient arbitrage mechanism in the Rule 6c-11 Release. See *supra* note 6 at pp. 14-16.

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.