December 12, 2016

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549

Re: Release No. 34-79316, File No. SR-NYSE-2016-45 (November 15, 2016); Release No. 34-79378, File No. SR-NYSEMKT-2016-63 (November 22, 2016); Release No. 34-79379, File No. SR-NYSEArca-2016-89 (November 22, 2016)

Dear Secretary Fields:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the above-referenced Orders Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change ("Orders"). On August 11, 2016 and August 22, 2016, the New York Stock Exchange LLC ("NYSE"), NYSE Arca Inc. ("NYSE Arca"), and NYSE MKT LLC ("NYSE MKT") (together, "the Exchanges"), filed with the Securities and Exchange Commission ("Commission") proposed rule changes which, among other things, provided information and established fees relating to various trading and execution services and connectivity to market data feeds ("Proposed Rules").

The Exchanges filed the Proposed Rules pursuant to section 19(b)(1) of the Securities Exchange Act ("Act") and Rule 19b-4 thereunder. On November 15, 2016 and November 22, 2016, the Commission published Orders to solicit comments from interested persons and to institute proceedings pursuant to the Act Section 19(b)(2)(B) to determine whether to approve or disapprove the Proposed Rules. The Commission noted that it received one comment on the Proposed Rules from Investors Exchange LLC ("IEX").[2] The Commission makes no mention of the fact that SIFMA has contested these fees with its properly filed 19(d) denial of access petitions pertaining to the Proposed Rules. Such petitions are directly relevant to the Commission's evaluation of the Proposed Rules and should not be ignored.

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[1] SIFMA represents these broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

[2] IEX is a national securities association registered with the Securities and Exchange Commission. Letter from John Ramsey, Chief Market Policy Officer, IEX dated September 9, 2016 ("IEX Letter").

SIFMA respectfully requests that the Commission reject the Proposed Rules on the following grounds for disapproval:

- Section 6(b)(4) of the Act is not met, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,"[3]
- Section 6(b)(5) of the Act is not met, which requires, among other things, that the rules of a national securities exchange be "designed to perfect the operation of a free and open market and a national market system" and "protect investors and the public interest," and not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers,"[4] and
- Section 6(b)(8) of the Act is not met, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[5]

I. The Proposed Rules exhibit a lack of competitive forces and no restraint on Exchanges pricing.

The Proposed Rules should be denied because the fees are inconsistent with the decisions of the United States Court of Appeals for the District of Columbia Circuit (the "Court") in *Net Coalition v. SEC*.[6] According to the Securities Act Amendments of 1975 and the *Net Coalition* decisions, market data fees must be fair and reasonable, represent an equitable allocation of fees, and be nondiscriminatory. Consistent with the *NetCoalition* decisions, the fees must be constrained by competitive forces and the exchanges bear the burden of demonstrating that the fees are constrained by competitive forces. However, the Exchanges have failed to demonstrate that these new connectivity fees are subject to any competitive forces. These fees are yet another example of the Exchanges so-called "naked," unjustified fee increases imposed by these conflicted for-profit self-regulatory organizations.

There is no competition for the Exchanges co-location and data services – thus there are no true alternatives available for market participants. The Exchanges' ability to set fees is not constrained by market forces because there is no comparable connectivity or product. This perspective is shared by others. For example, the IEX Letter highlighted the lack of alternative means of access.[7] Even the Commission questioned whether obtaining the information contained in the Exchanges' products set forth in the Proposed Rules from another source is a viable alternative given the importance of receiving such information in a timely manner because the only alternative actually proposed by the Exchanges has serious latency concerns.

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3 15 U.S.C. 78f(b)(4).

4 15 U.S.C. 78f(b)(5).

5 15 U.S.C. 78f(b)(8).

6 NetCoalition I: 615 F.3d 525 (D.C. Cir. 2010). NetCoalition II: 715 F.3d 342 (D.C. Cir. 2013).

7 "We question whether there are any true alternatives that are practically available to various types of participants…" See IEX Letter.

As evidence that the fees charged for co-location services are constrained, NYSE claimed that there is active competition for order flow and other business. NYSE also asserted that charging excessive fees would make it stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms. The Exchanges do not support their argument that order flow competition constrains these connectivity fees. The Exchanges do not provide any evidence that this connectivity fee is subject to competitive forces. Moreover, NYSE claims that connectivity fee competition must exist because market participants have numerous venues available to which they may route order flow and liquidity. The Court's *NetCoalition* decisions, the controlling law on this subject, rejected this order flow argument because, like here, there was no support for the assertion that order flow competition constrained the ability of the exchange to charge supracompetitive prices for data. In rejecting the argument, the Court discounted the statements made by various exchanges to the effect that the exchanges consider the impact on attracting order flow in setting data prices. "The self-serving views of the regulated entities ... provide little support to establish that significant competitive forces affect their pricing decisions."[8] Note also the mere presence of the IEX Letter in the comment file – IEX as a competitor to NYSE and a market participant that, according to NYSE, would supposedly be "constraining" the pricing weighed in and disagreed that the Exchanges pricing of these connectivity fees are subject to competitive market forces. IEX critically questioned whether there were any true alternatives practically available, and sought information on market forces for a *comparable* product.[9]

The Proposed Rules' connectivity fees are not fair and reasonable. There are no viable alternatives and SIFMA finds it noteworthy that the Exchanges have provided no evidence of competition, and therefore no evidence that there is in fact any constraint on the pricing of their data. Any alternative with severely increased latencies would not be a viable alternative. In addition, different fees are charged for the different types of connectivity, with no rational basis, unfairly discriminatory between customers. Presumably the reason for the differing fees is to maximize the Exchanges profits – with complete disregard for the Act's provisions set forth above. Herein lies another example of the Exchanges "harvesting" of fees – looking at new ways to slice the market data services to assign new fees and capture additional profits – without providing the necessary justification for such new fees.

II. The Exchanges' fees in the Proposed Rules constitute a denial of access.

The Commission has repeatedly taken the position that an aggrieved party who wishes to challenge an unreasonable fee as constituting a denial of access to services under section 19(d) of the Act may file an application with the Commission to review such fee. In *NetCoalition v. SEC*, the Court noted that, "The Commission contends that, together, section 19(d) and (f) permit a party that is aggrieved by the fees at issue [to] challenge them as not consistent with the Exchange Act, including for not being fair and reasonable."[10] The Court also noted section 19(f)

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8 See NetCoalition I.

9 See IEX Letter.

10 See NetCoalition II. See also Brief of Respondent at 46.

of the Act "requires the Commission to review an SRO rule challenged under section 19(d) to ensure that it is consistent with the purposes of this chapter and does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter." Most importantly, the Court relied upon the Commission's representations that the 19(d) process would be made available to aggrieved parties in a manner that provided meaningful consideration and the potential for judicial review, if necessary. "[W]e take the Commission at its word, to wit, that it will make the section 19(d) process available to parties seeking review of unreasonable fees charged for market data, thereby opening the gate to our review."[11]

Since this process set forth by the Court in NetCoalition II, SIFMA has appropriately filed scores of denial of access petitions with the Commission pursuant to section 19(d) for exchange fee increases on the grounds that they are not fair and reasonable, do not represent an equitable allocation of fees, and are discriminatory. These unjustified monopoly fee increases run the gamut from fees for the data itself, to port fees, to hardware fees, and connectivity fees such as the ones at issue herein – all falling within the ambit of the *Net Coalition* decisions. In fact, SIFMA has filed with the Commission denial of access petitions related to these very Proposed Rules, and should consider our comments as part of this proceeding. However, when referring to the IEX Letter, the Commission notes in the Order, "The Commission received one comment in response to the proposed rule change, as modified by Amendment No. 1 and the Exchange responded." The Commission makes no mention of the fact that SIFMA has contested these fees with its properly filed 19(d) denial of access petitions pertaining to the Proposed Rules. Such petitions are directly relevant to the Commission's evaluation of the Proposed Rules and should not be ignored.

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As set forth above, the Exchanges' proposed fees are not fair or reasonable, and provide for access only on a discriminatory basis. Such fees are not in furtherance of a free and open market and serve as a burden on competition. We respectfully petition the Commission to reject the Proposed Rules.

If you have any questions or need any additional information, please contact me at [redacted].

Sincerely,

/Melissa MacGregor/

Melissa MacGregor
Managing Director and Associate General Counsel

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11 See NetCoalition II.