



February 6, 2017

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”), and its affiliated exchanges, NYSE Arca Inc. (“NYSE Arca”) and NYSE MKT LLC (“NYSE MKT”), 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”).

NYSE 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 the 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. Prior to and following the publication of the Commission’s Orders, NYSE filed a series of amendments to the Proposed Rules.

SIFMA respectfully requests that the Commission reject the Proposed Rules for all the reasons noted in SIFMA’s prior comment letter dated December 12, 2016 (“SIFMA’s Prior Letter”).² As set forth in SIFMA’s Prior Letter, the Proposed Rules are not consistent with Sections 6(b)(4), 6(b)(5) or 6(b)(8) of the Securities Exchange Act. Since SIFMA’s Prior Letter was filed, the

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 See SIFMA letter dated December 12, 2016, available at: <https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-1431912-129873.pdf>.

Investors Exchange LLC (“IEX”) also filed a second letter on December 21, 2016 raising concerns regarding the alternatives cited by NYSE not being viable substitutes, broker-dealers not being able to choose to avoid NYSE, NYSE not showing how its costs are relevant, and the fact that exchanges are statutorily held to a different standard than unregulated entities – SIFMA expresses strong support of the points made therein by IEX.³

SIFMA is now filing this letter to respond to the NYSE comment letter (the “NYSE Letter”) dated January 17, 2017 and to correct the record regarding several omissions and inaccuracies therein, specifically:⁴

I. Contrary to NYSE’s Assertions, the Arguments in SIFMA’s Prior Letter Stand.

NYSE’s amendments to the proposals do not speak to the fundamental objections SIFMA voiced in SIFMA’s Prior Letter. The proposed connectivity fees should be reviewed in a manner consistent with the decisions of the United States Court of Appeals for the District of Columbia Circuit (the “Court”) in *Net Coalition v. SEC*.⁵ The connectivity fees must “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.”⁶ Therefore, the questions raised by the Orders are *not* moot as NYSE contends, despite NYSE’s numerous attempts to amend the Proposed Rules.

The NYSE Letter argues that the Commission should ignore SIFMA’s request to reject these fees on the grounds that *NetCoalition* is inapplicable. The NYSE Letter attempts to make the semantic distinction that connectivity fees are distinct from market data fees.⁷ Why should NYSE and the other exchanges be permitted to slice and dice market data into the lowest common denominator so that each component may be called something different for purposes of evading the law? As discussed further below, it is the exchanges that require, and make enormous profits from, data connectivity fees, data port fees, data hardware fees, and a host of other market data fees. This is the exchanges self-proclaimed method of “harvesting” – utilizing new ways to slice and dice the market data services to assign new fees and capture additional profits – without providing the necessary *and statutory* justification for such new fees.

Additionally, SIFMA pointed out in SIFMA’s Prior Letter that the Commission noted in the Orders that, “The Commission received one comment in response to the proposed rule change, as

³ See IEX Letter dated December 21, 2016, available at: <https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-1436916-129934.pdf>.

⁴ See NYSE Letter dated January 17, 2017, available at: <https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-1502013-130586.pdf>.

⁵ See *NetCoalition I*: 615 F.3d 525 (D.C. Cir. 2010). *NetCoalition II*: 715 F.3d 342 (D.C. Cir. 2013).

⁶ 15 U.S.C. 78f(b)(4).

⁷ Interestingly, when it suits the exchanges, in Commission rule filings the exchanges often invoke the *NetCoalition* case when trying to make arguments in support of fees that are much less related to market data, including maker-taker, rebate, and transaction fees.

modified...” SIFMA merely pointed out that, in accordance with the decision of the Court in NetCoalition II, SIFMA has been objecting to the fees in these Proposed Rules via appropriately-filed 19(d) petitions for denial of access since November 3, 2016. SIFMA’s 19(d)s will be held in abeyance pending the decision in the NetCoalition follow-on proceedings – however, to say that there was only one commenter simply did not paint the whole picture of the universe of concerns on these Proposed Rules – when in fact SIFMA, which broadly represents the industry, had previously raised its concerns through the formal 19(d) process.⁸ NYSE now inappropriately seeks to use SIFMA’s proper use of the 19(d) process to have SIFMA’s comment letters disregarded. To be clear, SIFMA’s concerns as detailed by its comment letters continue to stand and must be considered in connection with this proceeding. For the reasons set forth in SIFMA’s Prior Letter and herein, SIFMA objects to the Proposed Rules.

II. The Proposed Connectivity Fees Are Subject To The Fair and Reasonable Standard.

NYSE claimed in the NYSE Letter that commenters frequently “mistake” the proposed connectivity fees for market data fees. NYSE argues that the connectivity fees would not be market data fees any more than the proposed fee for connectivity to DTCC would be a DTCC fee. Using faulty logic, NYSE reasons that the “distinction between the connectivity service and the data service is underscored by the fact that a User would not be able to connect to a data product merely by requesting connectivity.”⁹ This is undoubtedly true; however, it addresses the wrong question. A user would not be able to obtain the market data product from the exchange unless and until the user, or a third party, subscribed to the connectivity service. NYSE has gone to great lengths to permission access to market data through layers of fees, including port, power, cross connect, connectivity, and cage fees, which are necessary in order to obtain the market data from NYSE. These fees, however labeled, are market data fees. NYSE should not be permitted to use creative nomenclature to avoid the purpose and intent of the statute. Accordingly, these fees, must be fair and reasonable, represent an equitable allocation of fees, and be nondiscriminatory.

To further confuse the nature of these fees, NYSE likened its market data fee structure to viewing Game of Thrones on HBO. NYSE explained: “To view Game of Thrones one must buy a television and pay for a subscription to HBO, but that does not convert the cost of the television, or of any other necessary equipment or connection, into a fee for the HBO content.” Lord Petyr “Littlefinger” Baelish would blush at the deception this analogy presents. Unlike HBO, NYSE controls the cost and terms of use for not only the market data, but also the connectivity fees, port fees, cross connect fees, and cage fees. The HBO content analogy would be akin to NYSE’s market data fees if HBO were also in a position to require the viewer to purchase from HBO the cable connection, the television, the television stand, the power cord, and the electricity, all in addition to the HBO subscription itself, and on the terms set solely by HBO.

⁸ Furthermore, co-location fees for exchange market data are subject to the NetCoalition standards, but regardless of the NetCoalition standards, a 19(d) petition for denial of access is an appropriate method of contesting the denial of access to a facility of the exchange.

⁹ See NYSE Letter at 4.

Further, and unlike subscribing to a television program, brokers are *legally obligated* to seek best execution for their customers. They are *required* to consider the likelihood that a trade will be executed and whether there is an opportunity to obtain a price better than what is currently quoted. There is no analogous legal requirement that television viewers subscribe to Game of Thrones. Likewise, in contrast to the privileged position of the exchanges, there is no legal obligation imposed on media stakeholders to provide content immediately and without compensation to HBO.

III. The NYSE Letter Grossly Mischaracterizes Market Data Revenues and the Fundamental Nature and Role of Competition in the Market.

NYSE seems annoyed that broker-dealers and financial media companies are sometimes profitable. To create the illusion that the industry at large is making billions of dollars in market data revenue, NYSE states the following: “For its part, SIFMA represents market participants that manage more than \$67 trillion in assets for individual and institutional clients. Considering just one of SIFMA’s members, in 2014, Bloomberg had worldwide revenue from its sale of market data of approximately \$8.5 billion, with roughly \$3.5 billion of that revenue coming from the Americas.”¹⁰ If this is the best example NYSE can conjure, NYSE has an extremely weak case indeed.

NYSE uses these figures in an attempt to obscure the real issue – its skyrocketing fees charged for market data in violation of the statute – and imply that SIFMA members make billions of dollars of undisclosed profits from being co-located to receive exchange market data products. The NYSE Letter grossly misrepresents industry market data revenue by including as exchange market data revenue sources with no nexus to exchange market data. NYSE cites the Burton-Taylor International Consulting LLC report “Financial Market Data/Analysis Global Share & Segment Sizing 2015” (the “Report”) in support of this assertion. NYSE’s arguments fail for several reasons.

First, the revenue estimates, which SIFMA neither contests nor confirms, as they purport to reflect the revenue from the sale of market data, are totally invalid. What NYSE fails to mention in quoting these irrelevant figures is that the Report overview very clearly notes that the estimates in the Report do not include revenue from exchange data feeds.¹¹

Indeed, Burton-Taylor also provides the following disclaimer:

“Although this is not a change from prior-year reports, we feel it is important to remind our readers that this report aspires to measure financial market data/analysis or news revenue, generated by companies with a primary core competency in the delivery of financial market data/analysis or news. This report does NOT include revenue generated by index products, ratings actions or exchange market data.” (emphasis in original)

¹⁰ See NYSE Letter at 11.

¹¹ See Report at 11.

Thus, the Report *explicitly excludes market data revenue*.

Further, the NYSE Letter cites as an example for purported billions in market data revenues, numbers it alleges to be SIFMA member Bloomberg's market data revenue numbers. However, what NYSE also fails to mention is that the Report states very clearly in no uncertain terms that the figures cited, including the \$8.5 billion dollar figure, are for *financial market revenue* for Bloomberg. Financial market revenue is not market data revenue in the least – financial market revenue includes the entire Bloomberg Professional service, analytics, research, support, third party news, radio, television, and stories and coverage generated by Bloomberg's thousands of reporters. (For Bloomberg, the profits go to Bloomberg Philanthropies, an entity devoted to philanthropies for positive improvements in the areas of the arts, education, the environment, public health and government innovation.¹²) Grouping most every business line together and attributing the sum total to exchange market data revenues is grossly misleading, particularly when using a report that explicitly excludes from its purview market data revenues.

One reason – among many others – why Congress has not charged the Commission with comprehensively regulating the fees of those who report on and analyze financial markets is because these are extremely competitive markets. Among the reasons why Congress has charged the Commission with regulating exchange fees is because market data fees represent a government-sponsored monopoly.

Despite NYSE's assertions otherwise, SIFMA members' purported revenues or assets under management are irrelevant to the Commission's analysis of NYSE's Proposed Rules. It is NYSE that has a statutory obligation to establish, and burden to prove, that its fees are fair and reasonable and nondiscriminatory. This analysis does not involve the purported revenues or assets of vendors or market participants. NYSE cannot deflect its statutory obligations.

* * * *

¹² For further information, please see the following link to Bloomberg Philanthropies' Annual Report: <https://annualreport.bloomberg.org/>.

As set forth above, NYSE's 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 202-962-7385 or mmacgregor@sifma.org.

Sincerely,

/Melissa MacGregor/

Melissa MacGregor
Managing Director and Associate General Counsel