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February 13, 2017

**VIA E-MAIL**

Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

Re: **File Nos. SR-NYSE-2016-45 (the "Proposal")**

Dear Mr. Fields:

The New York Stock Exchange LLC (the "NYSE" or "Exchange") appreciates the opportunity to respond to the comment letter from Melissa MacGregor, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association ("SIFMA"),<sup>1</sup> submitted in connection with the Proposal to amend the co-location services offered by the Exchange and the November 15, 2016, Order Instituting Proceedings to Determine Whether to Disapprove the Proposal, as amended by Amendments Nos. 1 and 2.<sup>2</sup>

The Exchange filed the Proposal with the Commission on July 29, 2016, and subsequently filed Amendments Nos. 1 and 2 to the Proposal (as so amended, the "Previous Proposal"). On November 15, 2016, the Commission issued the Order Instituting Proceedings,

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<sup>1</sup> See Letter from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, U.S. Securities and Exchange Commission ("Commission"), dated February 6, 2017 ("SIFMA Letter").

<sup>2</sup> See Securities Exchange Act Release No. 79316 (November 15, 2016), 81 FR 83303 (November 21, 2016) (SR-NYSE-2016-45) ("Order Instituting Proceedings"). The SIFMA Letter also addresses the proposed rule changes filed by the Exchange's affiliates, NYSE MKT LLC and NYSE Arca, Inc. (together, the "Affiliate SROs"), which proposals are substantially the same as the Current Proposal. See Securities Exchange Act Release Nos. 79672 (December 22, 2016), 81 FR 96080 (December 29, 2016) (SR-NYSEMKT-2016-63) and 79673 (December 22, 2016), 81 FR 96107 (December 29, 2016) (SR-NYSEArca-2016-89). The Exchange's present response to the comment letters is also applicable to the filings made by the Affiliate SROs.

which related to the Previous Proposal, and on December 12, 2016, SIFMA submitted a comment letter in response to the Order Instituting Proceedings (the “Prior SIFMA Letter”).<sup>3</sup>

On December 9, 2016, the Exchange filed Amendment 3 to the Proposal, which superseded the original filing and Amendments 1 and 2 in their entirety, and on February 7, 2017, the Exchange filed Amendment 4 to the Proposal (as so amended, the “Current Proposal”).<sup>4</sup> On January 17, 2017, the Exchange submitted a comment letter (the “Prior NYSE Letter”), which responded to the Order Instituting Proceedings and the Prior SIFMA Letter, as well as other comment letters.<sup>5</sup>

### **Response to the SIFMA Letter**

The SIFMA Letter makes three arguments in response to the Prior NYSE Letter, addressed in turn below. For the reasons set forth in this response, the Prior NYSE Letter, and the Previous and Current Proposal, the Exchange believes that the SIFMA Letter does not raise any new issues or present any credible basis to conclude that the Current Proposal is not consistent with Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Securities Exchange Act of 1934, as amended (the “Act”), and that the Commission should therefore approve the Current Proposal.<sup>6</sup>

#### *A. The SIFMA Letter Does Not Raise Valid New Arguments Regarding NetCoalition or SIFMA’s Denial of Access Petitions*

First, SIFMA reiterates its argument from the Prior SIFMA Letter that “[t]he 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” in *NetCoalition v. Securities and*

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<sup>3</sup> See Prior SIFMA Letter, dated December, 12, 2016, available at: <https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-1431912-129873.pdf>.

<sup>4</sup> See Securities Exchange Act Release No. 79674 (December 22, 2016), 81 FR 96060 (December 29, 2017) (SR-NYSE-2016-45), and Amendment No. 4 (February 7, 2017), available at: <https://www.nyse.com/publicdocs/nyse/markets/nyse/rule-filings/filings/2017/NYSE-2016-45,%20Pt.%20Am.%204.pdf>. Capitalized terms that are not defined herein are used as defined in the Current Proposal.

<sup>5</sup> See Prior NYSE Letter, dated January 17, 2017, available at: <https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645-1502013-130586.pdf>.

<sup>6</sup> 15 U.S.C. 78f(b)(4), 78f(b)(5) and 78f(b)(8).

*Exchange Commission*.<sup>7</sup> As the Exchange explained in the Prior NYSE Letter, *NetCoalition* addressed the standards governing proprietary market data fees, and the Previous and Current Proposal do not include market data fees.<sup>8</sup> In addition, as explained in the Prior NYSE Letter and not disputed by SIFMA, there is significant competition for the connectivity relevant to the Current Proposal. Thus, even if the *NetCoalition* standard did apply, the Current Proposal satisfies it.<sup>9</sup>

SIFMA also repeats its complaint that in the Order Instituting Proceedings the Commission did not mention the denial of access petitions that SIFMA has filed with the Commission pursuant to Section 19(d) of the Act.<sup>10</sup> In the Prior NYSE Letter, the Exchange explained that, because SIFMA requested that its denial of access petitions be held in abeyance pending a decision in the *NetCoalition* follow-on proceedings, “the Commission should not consider its petitions in the Order Instituting Proceedings, and SIFMA has no basis to demand otherwise.”<sup>11</sup>

SIFMA does not contest that it asked the Commission to hold its other petitions in abeyance. Nevertheless, it contends that the Exchange “inappropriately seeks to use SIFMA’s proper use of the 19(d) process to have SIFMA’s comment letters disregarded.”<sup>12</sup> This is patently false. A denial of access petition is not a comment letter, especially when the petitioner requests that no action be taken on the petition while other proceedings are pending. Even if such a petition somehow could be construed as a comment letter, it was not the Exchange that sought to have SIFMA’s petitions held in abeyance – it was SIFMA itself.

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<sup>7</sup> SIFMA Letter, at 2. See Prior SIFMA Letter, at 2-4; and NetCoalition v. Securities and Exchange Commission, 615 F.3d 525 (D.C. Cir. 2010).

<sup>8</sup> See Prior NYSE Letter, at 3-6. See also text accompanying notes 13 to 19, infra.

<sup>9</sup> See id., at 6-9 and 12-14.

<sup>10</sup> See Prior SIFMA Letter, at 4, and SIFMA Letter, at 2-3.

<sup>11</sup> Prior NYSE Letter, at 13-14.

<sup>12</sup> See SIFMA Letter, at 3. The Exchange notes that it has not conceded that SIFMA’s petitions are proper under Section 19(d). The Commission need not resolve that issue here because SIFMA has asked those petitions to be held in abeyance in their entirety, which necessarily precludes any determination of whether any of them are “proper use[s] of the 19(d) process.”

*B. Not All Costs of Doing Business for Market Participants are Market Data Fees*

Second, SIFMA argues that Exchange fees such as port, power, cross connect, connectivity and cage fees, “however labeled, are market data fees.”<sup>13</sup> This is incorrect. A market data fee is just that: a fee charged for market data. As stated in the Prior NYSE Letter, the mere fact that a User needs to have a port, power, and connectivity in place in order to be able to receive a market data feed *within co-location* does not convert the costs of such equipment and connections into market data fees.<sup>14</sup> Rather, they are costs associated with the User’s business activities. If a User opts to put a cage around its servers in the colocation hall, the cage fee it pays is a cost it chooses to incur in connection with the way it has chosen to do business, not a market data fee.

SIFMA continues its argument by asserting that:

NYSE should not be permitted to use creative nomenclature to avoid the purpose and intent of the statute. Accordingly, these fees, [sic] must be fair and reasonable, represent an equitable allocation of fees, and be nondiscriminatory.<sup>15</sup>

In so arguing, SIFMA appears to misunderstand not just the Exchange’s position but also the Act itself. It does not matter what an exchange calls a proposed fee. The Commission’s determination will be based on whether the fee is consistent with Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Act, not the fee’s name.<sup>16</sup> By observing that the proposed connectivity fees are not market data fees, the Exchange is not trying to avoid the purpose and intent of the Act – it is correcting SIFMA’s mistake.

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<sup>13</sup> SIFMA Letter, at 3.

<sup>14</sup> See Prior NYSE Letter, at 10. The Exchange notes that a market participant is not required to co-locate in order to receive market data, and in fact the vast majority of the customers for the Exchange’s market data products are not co-located. Accordingly, the vast majority of the Exchange’s market data customers would not be subject to any of the fees that SIFMA insists are “market data fees.”

<sup>15</sup> SIFMA Letter, at 3.

<sup>16</sup> 15 U.S.C. 78f(b)(4), 78f(b)(5) and 78f(b)(8).

A review of the fees that are actually proposed in the Current Proposal makes clear that they are not market data fees.<sup>17</sup> Rather, they are *connectivity fees* or *access fees* applicable when a User chooses to utilize connectivity or access services within co-location.

Two of the four proposed fees are for services that facilitate Users' trading activities, and have nothing to do with market data: a proposed fee for access within co-location to the execution systems of third party markets and other content service providers ("Third Party Systems"), and a proposed fee for connectivity within co-location to Depository Trust & Clearing Corporation ("DTCC") services, such as clearing, fund transfer, insurance, and settlement services.

The third proposed fee is for connectivity within co-location to third party testing and certification feeds. Certification feeds are used to certify that a User conforms to any of the relevant content service provider's requirements for accessing Third Party Systems or receiving market data feeds from third party markets and other content service providers ("Third Party Data Feeds"). Testing feeds provide Users an environment in which to conduct tests with non-live data, including testing for upcoming releases and product enhancements or the User's own software development. This third fee is also not a market data fee: providing connectivity to a third party feed that allows a User to certify its conformance to a content service provider's requirements or to conduct tests is in no way equivalent to providing a customer with market data.

The proposed fee for connectivity within co-location to Third Party Data Feeds has more often been mistaken for a market data fee.<sup>18</sup> However, it also is not a market data fee, as the Exchange providing a User with connectivity to Third Party Data Feeds is a different service than the third party providing the market data sent over the connection. Looking at how the proposed fee works makes this clear: in order to connect to a Third Party Data Feed, a User enters into a contract with the relevant third party market or other content service provider, pursuant to which the content service provider charges the User for the Third Party Data Feed – in other words, the *third party content service provider* charges the User the market data fee. In turn, the Exchange receives the Third Party Data Feed over its fiber optic network and, after the data provider and User enter into the contract and the Exchange receives authorization from the data provider, the Exchange transports the data to the User over the User's port. The

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<sup>17</sup> See Securities Exchange Act Release No. 79674, supra note 4, at 96054. The Current Proposal includes proposed fees for virtual control circuits between two Users within co-location. Id. Because the SIFMA Letter does not address or object to fees for virtual control circuits, they are not discussed herein.

<sup>18</sup> See Prior NYSE Letter, at 4.

third party content service provider charges the market data fee, and the Exchange charges the connectivity fee. In this context the Exchange is simply a conduit for market data being provided by a third party pursuant to a contract between the User and that third party, it is not selling or providing that market data to the User.

The Exchange notes that, while each proposed fee is for connectivity or access, in each case the service provided, and proposed fee, is not the same. Access to Third Party Systems and connectivity to DTCC is unicast.<sup>19</sup> The proposed monthly recurring fee varies by the bandwidth of the connection, and so is generally proportional to the bandwidth required. The Exchange notes that the monthly recurring fee for the 50 Mb access or connectivity to Third Party Systems and DTCC differ, as do some of the monthly fees for those Third Party Data Feeds that vary by bandwidth. The Exchange believes that such difference in pricing is reasonable, equitably allocated and not unfairly discriminatory because, although the bandwidth may be the same, the competitive considerations and the costs the Exchange incurs in providing such connections may differ.

Connectivity to Third Party Data Feeds is multicast. The proposed monthly connectivity fees for the different Third Party Data Feeds vary. The Exchange believes that the proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the different Third Party Data Feeds vary in bandwidth; proximity to the Exchange, requiring different circuit lengths; fees charged by the third party provider, such as port fees; and levels of User demand. The fees facilitate offering Users connectivity to Third Party Data Feeds while providing Users the convenience of receiving such Third Party Data Feeds within co-location, helping them tailor their data center operations to the requirements of their business operations by allowing them to select the form and latency of connectivity that best suits their needs.

Connectivity to third party testing and certification feeds may be multicast or unicast, depending on the relevant third party content service provider's feed. The Exchange charges a monthly fee of \$100 for connectivity to all third party testing and certification feeds irrespective of whether they are multicast or unicast, because the feeds' bandwidth requirements are generally not large, and the Exchange believes that the relatively low connectivity fee may encourage Users to conduct tests and certify conformance, which the Exchange believes generally benefits the markets.

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<sup>19</sup> Information flows over existing network connections in two formats: "unicast" format, which is a format that allows one-to-one communication, similar to a phone line, in which information is sent to and from the Exchange; and "multicast" format, which is a format in which information is sent one-way from the Exchange to multiple recipients at once, like a radio broadcast.

*C. The SIFMA Letter Misses the Exchange's Point Regarding Market Data Revenue*

Noting that some of the comment letters erroneously contended that market participants effectively are required to co-locate with, or to subscribe to proprietary market data products directly from, an exchange, in the Prior NYSE Letter the Exchange demonstrated that some of the firms making such comments include some of the most successful firms in the market:

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.<sup>20</sup>

In its third argument, SIFMA accuses the Exchange of trying to use the cited figures to "obscure . . . skyrocketing fees charged for market data in violation of the statute" and of misrepresenting industry market data revenue.<sup>21</sup> Both claims are false. The fees in the Proposal, which range from \$100 to \$3,500, are neither skyrocketing nor, as discussed above, market data fees, and clearly are subject to the requirements of the Act, as witnessed by the Proposal and the comment letter process.

As for industry revenues relating to the sale of market data by non-exchange entities, the Exchange disagrees with SIFMA's characterization of the information cited. In trying to pick apart the source used for the revenue estimates, SIFMA misses the Exchange's points: First, the hypocrisy of firms choosing to build business models based on speed, and then objecting to the exchange fees (which are subject to Commission review and the requirements of the Act) that are the cost of operating the models *they chose* while simultaneously choosing not to disclose how much profit they make from operating those models is patent.

Second, the Exchange was demonstrating that, as SIFMA does not contest and the cited report itself notes, *exchange* market data fees were not included in the revenues discussed in the report.<sup>22</sup> As SIFMA well knows from the denial of access petitions it has pursued, fees paid

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<sup>20</sup> Prior NYSE Letter, at 11-12. Footnotes omitted. See Burton-Taylor International Consulting LLC, "Financial Market Data/Analysis Global Share & Segment Sizing 2015," at 12 ("Burton-Taylor Report").

<sup>21</sup> SIFMA Letter, at 4.

<sup>22</sup> See Burton-Taylor Report, supra note 14, at 7.

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to vendors such as Bloomberg have been reported to be 65-80% of a market data consumer's spending, as compared to just 8-15% for fees paid to exchanges.<sup>23</sup> In reality, by focusing on the fact that the information the Exchange cites does not include exchange market data costs, SIFMA succeeds only in highlighting how opaque firms can be regarding their market data product-related profits.

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For the reasons set forth in this response, the Prior NYSE Letter, and the Previous and Current Proposal, the Exchange believes that the SIFMA Letter does not raise any new issues or provide any credible basis to conclude that the Current Proposal is not consistent with Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Securities Exchange Act of 1934, as amended (the "Act").<sup>24</sup>

The Exchange appreciates the opportunity to respond to the SIFMA Letter, and respectfully requests the Commission approve the Current Proposal.

Very truly yours,



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<sup>23</sup> See Atradia, "A Research Study: The cost of access to real time pre & post trade order book data in Europe," at 21 and 23 (August 2010).

<sup>24</sup> 15 U.S.C. 78f(b)(4), 78f(b)(5) and 78f(b)(8).