



November 13, 2018

Via Electronic Mail (rule-comments@sec.gov)

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

Re: Release No. 34-84444; File No. SR-NYSE-2018-49

Dear Mr. Fields:

The Healthy Markets Association appreciates the opportunity to comment on the above-referenced immediately effective exchange filing¹ which seeks to revise NYSE's fees.

The NYSE Tier Filing does not provide sufficient information to support a finding by the Commission that the proposed changes:

- provide for an equitable allocation of reasonable dues, fees, and other charges;
- do not unfairly discriminate between different exchange participants;
- do not impose burdens on competition that are not necessary or appropriate; and
- do not impose impediments to the free and open market system.

As a result, the filing is insufficient to establish that the exchange has met its obligations under the Exchange Act and Commission rules. Accordingly, we request that the Commission suspend the NYSE Tier Filing and institute proceedings to disapprove it.

¹ *New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Price List*, SEC, Oct. 17, 2018, available at <https://www.sec.gov/rules/sro/nyse/2018/34-84444.pdf> (NYSE Tier Filing). We do not know why NYSE originally filed on September 28, 2018 to implement what appears to be similar pricing tiers as are implemented here, but subsequently withdrew the filing. See, *Id.*, at 1, n.4. NYSE offers no discussion why it withdrew and subsequently refiled. Was there pushback from member organizations on this filing? Because SRO filings do not require this information, we will likely never know why the original filing was withdrawn and replaced with a remarkably similar filing eight days later.

About Healthy Markets and Our Interest in Exchange Pricing Fairness

The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets.²

The conflicts of interest and costs associated with exchange pricing have been a longstanding concern for Healthy Markets.

Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,³ including that an exchange's rules:

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”⁴
- not be “designed to permit unfair discrimination”;⁵
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;⁶ and
- be designed “to protect investors and the public interest.”⁷

² To learn more about Healthy Markets, please see our website at <http://www.healthymarkets.org>.

³ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) (“The SEC “shall approve” a self regulatory organization’s proposed rule change only “if it finds that such proposed rule change is consistent with” provisions of the Exchange Act.”). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, *available at* <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (declaring that in order for the Commission to “meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.”).

⁴ 15 U.S.C. § 78f(b)(4).

⁵ 15 U.S.C. § 78f(b)(5).

⁶ 15 U.S.C. § 78f(b)(8).

⁷ 15 U.S.C. § 78f(b)(5).

Making these findings is not an easy task. In 2017, the securities exchanges and FINRA made over 1500 filings with the Commission. Of those, about 200 were directly related to listings, another 350 related to fees, and about 100 related to order types. No less than 500 were “other” filings. Many of these filings were extremely complex. The vast majority received no public comments. Many were immediately effective upon filing, and many were approved without any public findings by the Commission. A significant portion of these filings do not contain sufficient information to make the determinations. Many include boilerplate language that has been recycled from filing to filing.

Nevertheless, the difficulty in wading through the massive volume of filings does not relieve the Commission of its legal obligation.⁸ The Commission must review all exchange filings, including those related to market data,⁹ connectivity costs,¹⁰ and trading fees (such as the NYSE Tier Filing).¹¹

⁸ *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017)(“We do not reach them because, as Petitioners also argue, the SEC’s Order approving the Plan fails in a more basic respect: the Commission did not itself “find[]” or “determin[e],” that the Plan met any of those requirements. Instead, the SEC effectively abdicated that responsibility...”)(citations omitted).

⁹ See, e.g., *Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan*, SEC, Rel. No. 34-83148, May 1, 2018, available at <https://www.sec.gov/rules/sro/nms/2018/34-83148.pdf>; see also *Order of Summary Abrogation of the Forty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis*, SEC, Rel. No. 34-83149, May 1, 2018, available at <https://www.sec.gov/rules/sro/nms/2018/34-83149.pdf>.

¹⁰ See, e.g., *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, SEC, Rel. No. 34-84168, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-84168.pdf>; see also *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, SEC, Rel. No. 34-84175, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf>.

¹¹ We previously objected to a similarly unsupported pricing tier filing. Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Oct. 12, 2018, available at <https://www.sec.gov/comments/sr-nyse-2018-40/srnyse201840-4510950-175996.pdf>. In response to that comment, NYSE offered a response. Letter from Elizabeth King, NYSE, to Brent J. Fields, SEC, Oct. 22, 2018, available at <https://www.sec.gov/comments/sr-nyse-2018-40/srnyse201840-4549661-176172.pdf> (“NYSE Tier Response Letter”). Despite that response, we still do not understand how the Commission could make any determinations regarding that filing’s compliance with the Exchange Act.

Background on Pricing Tiers

Transaction pricing tiers are common across exchanges, where they serve as powerful incentives for brokers and market makers to route orders to particular venues. Pricing tiers have also become a powerful tool for exchanges to compete for order flow.¹²

But there is also an important side effect of this competition for order flow: the competition between customers of the exchanges. To the extent that different competitors fall into different pricing tiers, it will directly impact the competitive balance between those firms.¹³ As a result, pricing tiers not only impact the competition between venues for execution, but also the competition between brokers and other market participants. Despite the Exchange Act's mandate that exchange fees be reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition, each firm is subject to whatever rate it can convince an exchange (presumably for business reasons) to grant. This is left to the whims of the exchange and the market participants.

Those without market power (e.g., smaller firms or those with less order volume) are likely to obtain the worst deals. Further, over time, as order flow has aggregated to the largest firms, this has increased their ability to negotiate even better rates; further expanding the gap between themselves and the smaller firms.

¹² We do not believe that the Commission is generally well-equipped to act as a "price controller." However, in adopting the 30 cents per 100 shares cap on fees to access a protected quote, the Commission appropriately recognized that it would be detrimental to the markets to, on the one hand, compel market participants to interact with the protected quote, and then not restrict the fees at the venue where that quote is offered. The government mandate to access that quote necessitates the further protections to ensure the reasonability of the fee to access it. Notably, there is no cap on the rebates that venues may pay--even though those rebates facially create conflicts of interest for routing brokers. Further, we do not urge the Commission to simply mandate one pricing tier for each exchange. Rather, to the extent that the Commission permits different pricing tiers, we urge the Commission to ensure that the distinctions between customers be transparent, justified, and consistent with the exchanges' Exchange Act obligations.

¹³ Remarks of Joe Wald, Clearpool Group, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 198, *available at* <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>. *Accord*, Remarks of Tyler Gellasch, Healthy Markets Association, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, Transcript at 280-281, *available at* <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf>.

In practice, pricing tiers serve as a one-two punch against fair competition between firms who route orders to the exchange--and a powerful force for order flow and industry consolidation. First, pricing tiers -- by design -- offer cheaper trading for larger firms with greater order volumes. This puts smaller firms at a competitive disadvantage on order and execution prices. A smaller firm's trading costs for any given trade on an exchange may be 30% or more of the costs of a larger competitor--for the exact same trade.

As one smaller broker-dealer recently told the Commission, the interactions between market data costs and pricing tiers combine to create significant barriers to entry and disadvantages for smaller firms

First, is there a disproportionate impact of the current market data and market access regime on smaller broker-dealers and does this act as a barrier of entry to innovation? From what we have experienced, through the high costs for market data and the complex and opaque tiering structure established by the exchanges for transactional fees, smaller broker-dealers end up subsidizing many of the costs for larger firms.

In fact, this disproportionate impact of pricing tiers on different market participants was expressly highlighted to the Commission by the President and COO of Cboe Global Markets, who explained that:

This is just our top 10 firms across our four exchanges by market share. So presumably, they're making a lot of money, given the size of their market share. There are four investment banks and six HFTs. Five out of the top 10 get a check from us after the costs of their connectivity and market data. So we are cutting them a check monthly after their costs.

...

[At the same time, the] top 10 firms on our exchange eat up 50 percent of the capacity on our exchanges.¹⁴

¹⁴ Remarks of Chris Concannon, Cboe Global Markets, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 74-75, *available at*

If the top 10 firms are comprising more than half the volume, and half of them are getting checks at the end of the month, who’s actually paying for the exchange operations (and the checks to the largest volume traders)?

In many instances, we know of exchange pricing tiers, including those offered by NYSE, where the rebates paid may exceed the fees taken in on the other side of the trade. To whom are those rebates being paid? None of those details are known. Who is subsidizing their trading (and paying the exchanges’ operating costs)? Again, those details are unknown. In fact, even the number of pricing tiers is unknown, much less who qualifies for them. However, given the public statements of exchange executives, we suspect that it is not smaller volume traders.¹⁵ Put simply, some of the largest volume traders may be trading at dramatically reduced costs--or even for a profit--while smaller customers may paying significant sums for the exact same trade execution. This seems to be the opposite of an equitable allocation of reasonable fees, dues and charges.

Second, several larger trading firms will then use their lower rates to attract greater order flow--consolidating. For example, below as Figure 1 is an excerpt from a pricing sheet from one large bank broker-dealer that is a few years old.

FIGURE 1: Broker A Exchange Pricing

	Tape A (NYSE)		Tape B (AMEX & Other)		Tape C (NASDAQ)	
	Taking	Providing	Taking	Providing	Taking	Providing
ARCA	0.00300	(0.00300)	0.00280	(0.00230)	0.00300	(0.00300)
BATS	0.00300	(0.00310)	0.00300	(0.00310)	0.00300	(0.00310)
NYSE	0.00250	(0.00180)	0.00250	(0.00180)	0.00250	(0.00180)
NASDAQ	0.00300	(0.00295)	0.00300	(0.00295)	0.00300	(0.00295)

Similarly, Figure 2 is another “price sheet” from another broker-dealer from around the same time period. Interestingly, the email enclosing Figure 2 noted the “tier improvement” to reflect Broker B had negotiated better rates.

Figure 2: Broker B Exchange Pricing

<https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>.

¹⁵ Concannon, at 74-75.

Description	Current Rate	New Rate
NASDAQ Make non-NBBO	-0.00295	-0.00305
NASDAQ Make NBBO	-0.0031	-0.00315
NASDAQ MidPoint	-0.0014	-0.0017
EDGA Make	0.0005	0.0003
Arca Make Tape A	-0.0029	-0.0032
Arca Make Tape B	-0.0022	-0.0025
Arca Make Tape C	-0.0029	-0.0032

These private advertising sheets, and many others like them, are often used by those who negotiate customized beneficial tiers to solicit greater order flow from other, likely smaller, brokers who are unable to negotiate the better rates.

The ability to negotiate a better pricing tier with an exchange or set of exchanges has become a point of competition between brokers--leading to unfair and anti-competitive practices. As we have previously articulated to the Commission:

In recent years, the number of brokers has declined. These economics may have nothing to do with the quality of service the smaller brokers provide, but rather their abilities to qualify for what are essentially volume discounts--notwithstanding the facts that the discount providers (the exchanges) are obligated by the Exchange Act to not discriminate between customers.¹⁶

As part of its Transaction Fee Pilot Proposal, the Commission included an Exchange Transaction Fee Summary, which is intended to facilitate comparison of exchanges' basic fee structures and identify changes.¹⁷

But rather than a comprehensive listing of fees and rebates, the proposed new summary would provide "Base" levels (which would be the "standard amount assessed or rebate offered before any applicable discounts, tiers, caps, or other incentives are applied") and "Top Tier" levels (which would be the fee assessed or rebate offered after

¹⁶ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, at 22, May 24, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3704495-162465.pdf> ("HMA Initial Fee Pilot Letter").

¹⁷ Transaction Fee Pilot Proposal, at 13029.

all applicable discounts, tiers, caps, or other incentives are applied”).¹⁸ Exchanges would also have to calculate and disclose on a monthly basis the “average” and “median” per share realized fees and rebates, overall, and by test group.¹⁹ Of course, this is incredibly important and valuable information.

Similarly, it is important for regulators, market participants, researchers, and others to know which firms are subject to which fees. For example, it may be that one or more market makers or large brokers may enjoy remarkably different cost structures than other market participants.

The Transaction Fee Pilot Proposal recognizes that these disclosures -- while necessary to understanding order routing incentives -- nevertheless “ignore[] significant variation in exchange fee schedules.”²⁰ And while the Commission stopped short of proposing more comprehensive disclosures,²¹ it clearly recognized the relative impacts of these pricing tiers on order routing behavior.

Various pricing tiers create facially discriminatory pricing practices for exchanges, and may create significant market distortions. For example, larger brokers who may hit tier levels could have dramatically different costs and revenues than smaller brokers on the same exchange for what would otherwise be the same order.

Even more disturbingly, the conflict of interest created by different pricing tiers may also impact how brokers treat their own customers. For example, a broker with a less-sophisticated customer may send orders to a venue so that the firm would reach a certain tier threshold, despite the broker’s awareness that executions on that venue may result in inferior execution outcomes to investors. However, the same broker, if faced with the same order from a more-sophisticated customer, may not. Put simply, the broker may be tempted to engage in more conflicted routing practices based on the perceived likelihood of discovery by its customer.

NYSE Tier Filing

The NYSE Tier Filing proposes to amend the exchange’s price list to:

¹⁸ Id.

¹⁹ Id., at 13030.

²⁰ Transaction Fee Pilot Proposal.

²¹ Id.

(1) adopt an alternative way to qualify for the Tier 3 adding credit; (2) add a new charge for transactions that remove liquidity from the Exchange; (3) make certain non-substantive, clarifying changes.²²

Changing the Tier 3 Adding Credit Requirements

According to the filing,

The Exchange currently provides an equity per share credit of \$0.0018 per transaction for all orders, other than MPL and Non-Display Reserve orders, for transactions in stocks with a share price of \$1.00 or more when adding liquidity to the Exchange if the member organization (1) has an average daily trading volume (“ADV”) that adds liquidity to the Exchange during the billing month (“Adding ADV”) that is at least 0.40% of NYSE consolidated average daily volume (“CADV”), and (2) executes MOC and LOC orders of at least 0.05% of NYSE CADV. The Exchange proposes to provide an alternate way for member organizations to qualify for the Tier 3 Adding Credit. As proposed, the Exchange would provide an equity per share credit of \$0.0018 per transaction for all orders, other than MPL and Non-display Reserve orders, for transactions in stocks with a share price of \$1.00 or more when adding liquidity to the Exchange if the member organization (1) has an Adding ADV that is at least 0.35% of NYSE CADV, (2) executes MOC and LOC orders of at least 0.05% of NYSE CADV, and (3) has an Adding ADV in MPL orders of at least 400,000 shares.²³

Charges for Removing Liquidity

According to the filing,

The Exchange currently charges a fee of \$0.00275 for non-Floor broker transactions that remove liquidity from the Exchange including those of DMMs. The Exchange also

²² NYSE Tier Filing, at 2.

²³ NYSE Tier Filing, at 2-3.

currently charges \$0.0030 for non-Floor broker transactions removing liquidity from the Exchange by a member organization with an Adding ADV, excluding any liquidity added by a DMM, of less than 250,000 ADV on the Exchange during the billing month.²⁴

The Exchange proposes to add a slightly higher intermediate fee of \$0.00280 for non-Floor broker transactions that remove liquidity from the Exchange by member organizations with an Adding ADV, excluding any liquidity added by a DMM, that is at least 250,000 ADV on the NYSE in Tape A Securities and less than 500,000 ADV on the NYSE in Tape B and Tape C securities combined during the billing month.²⁵

Clarifying, Non-Substantive Changes

Lastly, according to the filing,

The Exchange proposes to add a sentence to Footnote * to clarify that, unless otherwise specified, reference to volumes, quoting, ADV and CADV in the Price List refer to Tape A securities. The Exchange also proposes to make a non-substantive, clarifying change to the annual trading license fee by adding the phrase “including Floor brokers” after “All member organizations” and the parenthetical “excluding Regulated Only Members” at the end of the entry.²⁶

Because the exchanges filed the changes under Section 19(b)(3)(A) of the Exchange Act and Rule 19b-4(f)(2) thereunder, the proposed rule changes became effective upon filing with the Commission.²⁷ The fee changes were filed with the Commission on

²⁴ Id., at 3.

²⁵ NYSE Tier Filing, at 3.

²⁶ NYSE Tier Filing, at 4-5.

²⁷ As we have stated before:

This truncated process, wherein rules are immediately effective, was enacted by the Dodd-Frank Wall Street Reform and Consumer Protection Act. As one of a very small number of organizations that reads every filing of every exchange each month, we believe that this process has enabled the proliferation of fees and complexity with little SEC

October 4, 2018, and became effective that day.²⁸ The Commission sent out the notice for comment on October 17th.

NYSE Tier Filing Is Inconsistent with the Exchange Act

As described above, the Exchange Act requires, among other items, that an exchange's rules:

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”²⁹
- not be “designed to permit unfair discrimination”;³⁰
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;³¹ and
- be designed “to protect investors and the public interest.”³²

Further, as the Commission has recently explained:

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.” The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may

oversight. With upwards of 200 SRO filings each month, and remarkably limited SEC staff resources, we have significant questions regarding the staff’s ability to review the filings, identify concerns, and take appropriate action to protect investors and promote fair and efficient markets on a consistent basis. Letter from Tyler Gellasch, Healthy Markets Association, to Brett J. Fields, SEC, at 4 n.15, Sept. 4, 2018, *available at* <https://www.sec.gov/comments/sr-miax-2018-19/srmiac201819-4300775-173209.pdf>.

²⁸ NYSE Tier Filing, at 1.

²⁹ 15 U.S.C. § 78f(b)(4).

³⁰ 15 U.S.C. § 78f(b)(5).

³¹ 15 U.S.C. § 78f(b)(8).

³² 15 U.S.C. § 78f(b)(5).

result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.³³

The NYSE Tier Filing fails to meet this burden.

Interestingly, under the section titled “*Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*”, the NYSE Tier Filing offers no actual “statement of purpose.”³⁴ Instead, it simply states the substance of the changes. Presumably, the changes are intended to increase revenues for the exchange, but that is not clear. In fact, there is no statement regarding the intention for any of the changes articulated in the filing.

The filing never articulates any issues sought to be addressed by any of the proposed changes other than to offer abstract statements that

- the Tier 3 Adding Credit changes would “encourage member organizations to send orders, thereby contributing to robust levels of liquidity, which benefits all market participants.”³⁵ and
- The technical changes would “provide greater specificity and clarity to the Price List.”³⁶

The filing offers no justification at all for the removing liquidity changes.

Somewhat confusingly, after explaining the changes to the technical requirements for each of the fees, the NYSE Tier Filing concludes “No written comments were solicited or received with respect to the proposed rule change.”³⁷ If the change was intended to benefit market participants in some way, for example, we might think that the exchange would have consulted them in advance of the filing. If there were communications with those firms, why are they not provided? Shouldn’t the Commission and market

³³ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, SEC, Rel. No. 34-84175, at 6, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf> (citations omitted).

³⁴ NYSE Tier Filing, at 2-5.

³⁵ *Id.*, at 5.

³⁶ *Id.*, at 7.

³⁷ *Id.*, at 9.

participants have some understanding of those communications, particularly as they may shed light on the intent and likely impacts of the proposed changes?

NYSE Tier Filing Fails to Offer Sufficient Evidence to Support a Commission Finding That it Provides for an Equitable Allocation of Reasonable Fees, Costs, and Charges or That it is Not Unfairly Discriminatory

By law, the proposed fees must be both (1) reasonable and (2) equitably allocated.³⁸ The NYSE Tier Filing makes little attempt to demonstrate compliance with either mandate. Further, despite the fact that the NYSE Tier Filing expressly discriminates between exchange customers, it makes no significant effort to explain why that discrimination is not unfair (much less in the public interest).

The NYSE Tier Filing Does Not Establish the Fees Are Reasonable

We do not know if the changes are reasonable or not, because the NYSE Tier Filing does not contain any information necessary for us to engage in that analysis. The NYSE Tier Filing offers almost no discussion regarding the “reasonability” of the pricing changes. Specifically, for the Tier 3 Adding Credit and technical changes, the NYSE Tier Filing offers no discussion at all regarding reasonability.³⁹ Instead, it simply declares that the changes are

Reasonable ... because it would encourage additional liquidity on the Exchange and because members and member organizations benefit from the substantial amounts of liquidity that are present on the Exchange.⁴⁰

And for the Charges for Removing Liquidity, the NYSE Tier Filing declares the fees to be “reasonable”, but does not say what analysis it has undertaken or offer any facts to support its conclusion.⁴¹

³⁸ 5 U.S.C. § 78f.

³⁹ NYSE Tier Filing at 5-6 and 7-8.

⁴⁰ NYSE Tier Filing, at 5

⁴¹ Id., at 6. Even the comparison to Nasdaq’s PSX (which is not offered to support the “reasonability,” but instead the “equitability”) does not explain why that comparison is apt. Id., at 7.

Further, while not articulated in the NYSE Tier Filing, we note that representatives from exchanges (including NYSE) have recently urged the Commission and market participants to focus on firms' "all-in" trading costs as a way to assess the appropriateness and reasonability of the various exchanges' fees.⁴² At the same time, the exchanges have declined to provide the information with which to engage in the analysis needed to determine if that "all-in" cost is reasonable, equitably allocated, not an undue burden on competition, or unfairly discriminatory. For example, to engage in that analysis, we would think the Commission and market participants would need to see from the exchanges sufficient information to perform an analysis of cost per shares traded (both inclusive and exclusive of market data and connectivity fees), based on volumes of orders sent, shares executed, firm size, and firm type. Currently, we are not aware of either the Commission or the public having any of that information.

Reasonability is a normative judgment that must be made in relation to something else. In the abstract, a \$20 movie ticket may seem reasonable. Of course, if we knew that the price charged by the five other movie theaters in the area was \$5, then the \$20 movie ticket could be found to be unreasonable.

Notably, the NYSE Tier Filing seems to assume that any incentive is, perhaps by definition, "reasonable." We disagree. We strain to see how the motivation to offer an incentive to attract order flow *de facto* makes any incentive -- regardless of size or form -- reasonable. If the exchange were to offer \$100 million cash payments each month to its top 5 customers, the "incentive" would be present, but the payments would clearly not be "reasonable."⁴³ Even more so if the \$100 million came at the expense of the

⁴² See, e.g., Remarks of Stacey Cunningham, New York Stock Exchange Group, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 34, *available at* <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf> ("The value and importance of market data and connectivity has evolved and it has increased, based on the competition that was introduced with regulations, namely Reg NMS. That competition has benefitted investors and brought costs down, as Chris just detailed, but it's introduced fragmentation, dramatic fragmentation. It is unsurprising that, in a fragmented world, that variable costs come down and fixed costs have gone up. But the overall, all-in cost to trade on the New York Stock Exchange has come down. When I say the all-in cost to trade, that includes transaction fees, market data fees, colocation fees, port fees and all of the connectivity fees. That all-in cost to trade, while it's a different mix of revenues than it was before, it has come down.").

⁴³ See generally, Remarks of Chris Concannon, Cboe Global Markets, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 74-75, *available at* <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>.

smallest firms. In such a case, it would be unreasonable, inequitable, unfairly discriminatory, and a burden on competition--any one of which would be disqualifying.

Lastly, we are unaware of how increasing charges to remove liquidity will incentivize more liquidity. Most demand curves typically work in the opposite direction. Yet, the NYSE Tier Filing offers no explanation for its evidently counterintuitive analysis.

The NYSE Tier Filing Does Not Establish That the Fees are Equitably Allocated Or That Discrimination Is Fair

The NYSE Tier Filing asserts that the Adding Tier 3 Credit changes are

equitable and not an unfairly discriminatory allocation of fees because it would encourage additional liquidity on the Exchange and because members and member organizations benefit from the substantial amounts of liquidity that are present on the Exchange.⁴⁴

We are puzzled as to how adding an incentive for one firm or a small subset of firms⁴⁵ is somehow “equitable” for all firms and not unfairly discriminatory.

Similarly, with respect to the proposed charges for removing liquidity, the NYSE Tier Filing explains

The Exchange also believes that the proposed fee is equitable because it would apply to all similarly situated member organizations that add liquidity in Tape B or Tape C securities. The proposed fee also is equitable and not unfairly discriminatory because it would be consistent with the applicable rate on other marketplaces.⁴⁶

⁴⁴ NYSE Tier Filing, at 5

⁴⁵ Again, we have to assume this, because the NYSE Tier Filing does not provide the Commission or public with sufficient information regarding to the nature or number of firms to which the pricing is likely to apply.

⁴⁶ NYSE Tier Filing, at 6-7. We fail to see how comparing a fee to another marketplace (with a very different business model) is evidence that the action is “equitable” or “not unfairly discriminatory.” Because another participant engages in an activity does not mean that such activity is somehow equitable and not unfairly discriminatory. Sadly, history is littered with inequitable and unfairly discriminatory practices that have, at times, been popularly practiced.

While the fee schedule may apply to all members, the actual impact of those fees is extremely inequitable. Under the exchange's logic, it would be "equitable" and "non-discriminatory" for the exchanges to provide free trading for its largest three volume customers, if the volume thresholds applied for all members. Of course, smaller firms would be forced to continue paying to trade, while larger firms would not. And so the smaller firms would be effectively subsidizing the largest firms. Further, this would effectively exclude smaller firms from the opportunity to effectively compete on price, leading to greater market consolidation and weaker markets. Such a fee would be facially inequitable, discriminatory, an unnecessary barrier to competition, and contrary to fair and open markets. It would be -- put simply -- unquestionably contrary to the Exchange Act.

By definition, the pricing changes proposed (and implemented) by the NYSE Tier Filing discriminate between customers who meet the articulated criteria and those who do not. Unfortunately, the exchange does not offer any explanation for making the distinctions. We do not know whether this distinction between customers is appropriate or not. We do know, however, that favored firms will receive more beneficial pricing than disfavored firms. There is also no information or logic on how they arrived at the requirements for the various tiers. The filing does not explain which, how many, or the nature of the firms that meet the qualifications. The NYSE Tier Filing does not explain why those firms selected as "deserving" the preferential treatment. Other than saying the changes will serve as incentives for qualifying firms, the NYSE Tier Filing does not explain what impact, if any, the changes will have on quote behavior by market participants, trading activity on the exchange, execution quality, or overall market quality.

For example, what is the justification for changing the ADV requirement of at least 250,000 on NYSE Tape A and less than 500,000 on NYSE in Tape B and Tape C securities? Why were those numbers selected? What will be the impact on qualifying market participants? What is the impact on the firms that do not qualify? What will be the impact on the order and trading activity on the exchange?

Lastly, somewhat bizarrely, the exchange seems to argue that the fees are "equitable" because they "will encourage the submission of additional liquidity."⁴⁷ How offering an incentive to a small subset of customers is "equitable" for all customers is unexplained.

⁴⁷ Id., at 5-6. We can argue that it would be an overall good thing for a town to build a new school. However, if the town seeking to build that school were to seek to pass a school levy that was to be paid exclusively by only the poorest 25% of residents in the town, the result would be both inequitable and discriminatory. Yet, under the exchange's logic, it would be neither.

We struggle to understand how the Commission could reasonably find that the changes provide for “reasonable” fees that are “equitably” allocated when the Commission has not been provided with any information about the magnitude of the fees, the impacted parties, or the allocation of the fees across the different customers of the exchange. Further, while the fees are facially discriminatory, the NYSE Tier Filing offers no details as to who receives them and who doesn’t, what the impact is on each group, or why the favored firms are given the preferential pricing.

How can the Commission conclude a fee is not unfairly discriminatory when it has no understanding of who is impacted, what the impact is, or why the discrimination is being made?

Accordingly, because the NYSE Tier Filing fails to establish that the changes provide for an equitable allocation of reasonable fees, costs, and charges, and that the discrimination provided by is not unfair, the Commission should suspend the filing and initiate proceedings to disapprove it.

The NYSE Tier Filing Imposes a Burden on Competition That is Not Necessary or Appropriate, and Imposes Impediments to the Free and Open Market System

As stated before, the NYSE Tier Filing correctly notes that NYSE competes with other trading venues for order flow. However, the filing offers no clear explanation of how the changes it proposes would impact that competition.

But perhaps more importantly, the NYSE Tier Filing entirely ignores the impact of its pricing changes on the competition between its customers. The Exchange Act’s mandate is not just limited to protecting against undue burdens on competition for order flow. The Exchange Act also protects against exchanges’ rules acting as undue burdens on competition between brokers, data providers, investment advisers, proprietary trading firms, and other market participants. In the NYSE Tier Filing, the exchange offers a statement on the burden on competition.

[T]he Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, the Exchange believes that the proposed

change would foster liquidity provision and stability in the marketplace, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations. In this regard, the Exchange believes that the transparency and competitiveness of attracting additional executions on an exchange market would encourage competition. The Exchange also believes that the proposed rule change is designed to provide the public and investors with a Price List that is clear and consistent, thereby reducing burdens on the marketplace and facilitating investor protection.⁴⁸

This blanket statement is little more than an unsupported assertion that it doesn't "believe" the filing will impose any burden on competition. Unfortunately, the NYSE Tier Filing offers no details relevant to assessing the burden on competition posed by the changes on market participants, such as:

- the number and types of firms impacted by each change;
- the dollars involved in each change;
- how each change is expected to impact order routing behavior in qualitative or quantitative terms;
- how each change is expected to impact trading (including execution quality) in qualitative or quantitative terms;
- How each change may impact the competition between exchange customers; and
- Overall market quality.

NYSE would have the Commission ignore its responsibility to ensure that the exchange's rules do not unfairly discriminate or burden competition between member firms.

The filing appears to offer no particular boundary regarding what is permitted, versus impermissible, fee discrimination or burden on competition. For example, what if one broker was able to negotiate an outrageous subsidy of 1 penny per share for all trades? Or perhaps more realistically, what if an exchange granted a proprietary trading firm with a senior executive that was personally close to an exchange executive a unique, highly-beneficial set of rates? This arrangement would plainly fail to meet the Exchange

⁴⁸ NYSE Tier Filing, at 8-9.

Act's requirements. It would clearly pose an undue burden on competition between the proprietary trading firm with the pricing advantage and all of its competitors. It would be facially unfair discrimination against all but the favored firm. And it would be facially inequitable. In another example, suppose NYSE were to propose a pricing tier schedule whereby it would offer free trading to each of its top 10 volume traders. Wouldn't this be "unfair discrimination" against smaller firms, who would still have to pay the fees? Wouldn't this be an "undue burden" on competition against the member firms?

Rather than simply stating its belief that the proposed fee changes won't impact competition, the exchange offers no analysis or data with which to assess the impact of any of the proposed changes on the competition between its customers--much less conclude that the changes are not an undue burden on competition. Yet, it must. That is what the Exchange Act requires.

In particular, in the charges for removing liquidity change, NYSE is raising intermediary fees to non-floor brokers, but excluding any liquidity added by a DMM. NYSE is further establishing a threshold of 250,000 shares ADV on the NYSE in Tape A Securities and less than 500,000 ADV on the NYSE in Tape B and Tape C securities combined during the billing month. This appears to target a specific firm or a limited number of firms. These criteria do not naturally have any policy-related connections. NYSE provides no evidence, statistics or any information to support why this firm (or group of firms) should be subjected to a higher fee than other groups.

Because the NYSE Tier Filing imposes fees and limits that impose a burden on competition that is not necessary or appropriate and unfairly discriminates between different exchange participants, and imposes impediments to the free and open market system, it should be disapproved.

Conclusion

In sum, the latest NYSE Tier Filing is yet another example of a conflicted process wherein an exchange has proposed non-transparent, discriminatory benefits to some selected customers. Presumably, the exchange is seeking to further its own profit-seeking motives (as is its right), but that must still be balanced by the exchange's obligations under the Exchange Act.

Unfortunately, the NYSE Tier Filing is facially inconsistent with the exchange's obligations under the Exchange Act, and should be disapproved.

Further, the NYSE Tier Filing is but one of many fee filing changes--almost none of which provide sufficient details to permit the Commission to find that the proposals are consistent with the Exchange Act. Accordingly, we urge the Commission to, for this and all similar filings, take any appropriate actions to pause and carefully review the filings for their compliance with the law.

Lastly, because of the importance of pricing tiers on order routing incentives more broadly, we strongly urge the Commission to strengthen disclosure of pricing tiers. Requiring basic disclosures of pricing tiers would greatly improve market participants' and regulators' understanding of how they work, and what the impacts of pricing tiers have on market participant behavior and execution quality.⁴⁹

Thank you for the opportunity to highlight our concerns contained within the NYSE Tier Filing. Should you have any questions or seek further information please contact me at

[REDACTED]

Sincerely,



Tyler Gellasch
Executive Director

⁴⁹ See, e.g., HMA Initial Fee Pilot Letter, 19-23; see also, Chester S. Spatt, *Is Equity Market Structure Anti-Competitive?*, May 24, 2018 (working draft available upon request to the author).