



HEALTHY MARKETS
TRANSPARENCY & TRUST

March 9, 2020

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

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Exch. Act Rel. No. 34-88168; File No. SR-NYSE-2020-05;¹
Exch. Act Rel. No. 34-88237; File No. SR-NYSE-2020-11;²
Exch. Act Rel. No. 34-88170; File No. SR-NYSEArca-2020-08;³
Exch. Act Rel. No. 34-88239; File No. SR-NYSEArca-2020-15;⁴
Exch. Act Rel. No. 34-88169; File No. SR-NYSEAMER-2020-05;⁵
Exch. Act Rel. No. 34-88238; File No. SR-NYSEAMER-2020-10;⁶
Exch. Act Rel. No. 34-88172; File No. SR-NYSECHX-2020-02;⁷
Exch. Act Rel. No. 34-88240; File No. SR-NYSECHX-2020-05;⁸

¹ *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88168, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/nyse/2020/34-88168.pdf> ("NYSE Filing I").

² *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88237, Feb. 19, 2020, available at <https://www.sec.gov/rules/sro/nyse/2020/34-88237.pdf> ("NYSE Filing II").

³ *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88170, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/nysearca/2020/34-88170.pdf> ("NYSE Arca Filing I").

⁴ *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88239, Feb. 19, 2020, available at <https://www.sec.gov/rules/sro/nysearca/2020/34-88239.pdf> ("NYSE Arca Filing II").

⁵ *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88169, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/nyseamer/2020/34-88169.pdf> ("NYSE American Filing I").

⁶ *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88238; File No. SR-NYSEAMER-2020-10, Feb. 19, 2020, available at <https://www.sec.gov/rules/sro/nyseamer/2020/34-88238.pdf> ("NYSE American Filing II").

⁷ *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88172, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/nysechx/2020/34-88172.pdf> ("NYSE Chicago Filing I").

⁸ *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-88240, Feb. 19, 2020, available at <https://www.sec.gov/rules/sro/nysechx/2020/34-88240.pdf> ("NYSE Chicago Filing II").



Exch. Act Rel. No. 34-88171; File No. SR-NYSENAT-2020-03;⁹ and
Exch. Act Rel. No. 34-88241; File No. SR-NYSENAT-2020-08.¹⁰

Dear Ms. Countryman:

The Healthy Markets Association¹¹ appreciates the opportunity to offer our comments to the above-referenced proposals by the NYSE-family of Exchanges to establish new wireless connectivity offerings (collectively, “Wireless Connectivity Filings”).

In making these filings, the Exchanges have offered a specious argument that “the Wireless Connections are not facilities of the Exchange within the meaning of the Act, and therefore do not need to be included in [their] rules.”¹² The plainly intended result of these assertions is to exempt the filings from having to comply with the Exchange Act.

Put simply, the Exchanges concocted a legal argument to erroneously assert that the law doesn’t apply to them, and then have made essentially no effort to comply with it. The potentially damaging precedential impact cannot be overstated. If permitted by the Commission to stand, the Exchanges’ legal interpretation could render the offerings generally free from the regulatory strictures imposed by the Exchange Act -- in contravention of the law, the protection of investors, and the public interest. Accordingly, we urge the Commission to disapprove the filings and clearly reject the erroneous interpretation of the law upon which the Wireless Connectivity Filings rely.

The Proposals

On January 30th, the Intercontinental Exchange family of NYSE-branded exchanges (NYSE, NYSE Arca, NYSE American, NYSE Chicago, and NYSE National, collectively, the “Exchanges”) each filed with the Commission a proposed new fee schedule for offering wireless connectivity “between the Mahwah, New Jersey data center and three data centers that are owned and operated by third parties unaffiliated with the

⁹ *Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88171, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/nysenat/2020/34-88171.pdf> (“NYSE National Filing I”).

¹⁰ *Notice of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88241, Feb. 19, 2020, available at <https://www.sec.gov/rules/sro/nysenat/2020/34-88241.pdf> (“NYSE National Filing II”).

¹¹ 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. To learn more about Healthy Markets or our members, please see our website at <http://healthymarkets.org>.

¹² NYSE Filing I, at 2.



Exchange: (1) Carteret, New Jersey, (2) Secaucus, New Jersey, and (3) Markham, Canada.”¹³

On February 11th, the Exchanges filed a second round of filings to detail the fees. According to the Exchanges:

A market participant would be charged a \$5,000 non-recurring initial charge for each Wireless Market Data Connection and a monthly recurring charge (“MRC”) per connection that would vary depending upon the feed and the location of the connection. The proposal would waive the first month's MRC, to allow customers to test a new Wireless Market Data Connection for a month before incurring any MRCs, and the Exchange proposes to add text to the Wireless Fee Schedule accordingly.¹⁴

These monthly recurring charges would range from \$5250/month per connection of NYSE National Integrated Feed to Carteret or Secaucus data centers up to \$21,000/month per connection of NYSE Integrated Feed, NYSE Arca Integrated Feed, and NYSE National Integrated Feed to those two data centers.¹⁵

Rather than having the new wireless connections provided by the Exchanges themselves, the offerings would be provided by an affiliate of the Exchanges (ICE Data Services). The Exchanges argue this interpositioning of an affiliate directly impacts the applicability of the Exchange Act. As the Wireless Connectivity Filings explain:

In all, the ICE Affiliates include hundreds of ICE subsidiaries, including more than thirty that are significant legal entity subsidiaries as defined by Commission rule. Through its ICE Data Services (“IDS”) business, ICE operates the ICE Global Network, a global connectivity network whose infrastructure provides access to over 150 global markets, including the Exchange and Affiliate SROs, and over 750 data sources. All the ICE Affiliates are ultimately controlled by ICE, as the indirect parent company, but generally they do not control each other. In the present case, it is IDS, not the Exchange, that provides the Wireless Market Data Connections to market participants. The Exchange does not control IDS.¹⁶

Would-be customers of the proposed wireless connectivity services would, prior to their receipt of data from ICE Data Services or another third-party provider, first need

¹³ See, e.g., NYSE Filing, at 2.

¹⁴ NYSE Filing II, at 14-15.

¹⁵ NYSE Filing II, at 15.

¹⁶ See, e.g., NYSE Filing II, at 4-5.

authorization from the relevant NYSE-branded Exchange.¹⁷ The Exchanges accept that this authorization for receipt of data -- and associated fees -- are subject to Exchange Act and Commission Rules.¹⁸

However, the Exchanges argue that because the *proposed wireless connections themselves* would be offered by ICE Data Services, they are not part of the “facility of the exchange,” as applied to the Exchange Act. In particular, the Exchanges then argue that the wireless connections:

- are “not part of the Exchange, as they are services;”¹⁹
- “do not bring ‘together orders for securities of multiple buyers and sellers,’ and so are not an ‘exchange’ or part of the ‘Exchange’ for purposes of Rule 3b-16;”²⁰ and
- Are not “facilities” of an exchange, which the Exchange Act defines as

[the exchange’s] premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.²¹

In support of these assertions, the Exchanges note that customers

may purchase a wireless connection to the NYSE and NYSE Arca Integrated Feed data feeds from at least two other providers of wireless connectivity. 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.²²

¹⁷ NYSE Filing II, at 6.

¹⁸ NYSE Filing II, at

¹⁹ NYSE Filing II, at 8.

²⁰ NYSE Filing II, at 9.

²¹ NYSE Filing II, at 9 (citing 15 USC §78c(a)(2)).

²² NYSE Filing II, at 7.

The Wireless Connectivity Filings are Clearly Subject to the Exchange Act and Commission Rules

While the first Wireless Connectivity Filings were not made until January 30th, we have been expecting these filings for many months. In 2019, NYSE Group, Inc. sought and obtained approval from the Township of Mahwah, New Jersey to add the necessary equipment to its physical facility.

In fact, one year ago, NYSE Group appeared before the Board of Adjustment for the Township of Mahwah to support its application for a needed building variance.²³ In that meeting, NYSE Group witnesses clearly explained the details of the new connectivity, as well as NYSE Group's intentions.

A civil engineer explained that the equipment would include approximately one-foot diameter antennae that would be placed towards the middle of the roof of the data center.²⁴ He further noted that the equipment would require no employee staffing on-site and limited maintenance (about once a month).²⁵ The intention was to add the new equipment "*in the New York Stock Exchange's own facility.*"²⁶ Similarly, a NYSE Group wireless network engineer explained that wireless networks to connect the exchanges already exist, but that the purpose was to "*just extend [the wireless network] onto the New York Stock Exchange Inc. property.*"²⁷

NYSE Group was, at the time, very clear that it was not seeking to offer a new business or service.²⁸

²³ Town of Mahwah, Board of Adjustment Regular/Work Session Meeting Agenda, Mar. 20, 2019, available at <http://www.mahwahtwp.org/uppages/March%202020.%202019%20BOA%20Agenda.pdf>.

²⁴ Town of Mahwah, Board of Adjustment Meeting, Mar. 20, 2019, (Statement of Kyle McGinley) *webcast available at* <http://mahwahnj.swagit.com/play/03202019-1419>.

²⁵ Statement of Kyle McGinley.

²⁶ Statement of Kyle McGinley (emphasis added).

²⁷ Town of Mahwah, Board of Adjustment Meeting, Mar. 20, 2019, (Statement of Sanjam Kaur), *webcast available at* <http://mahwahnj.swagit.com/play/03202019-1419>.

²⁸ See, e.g., Town of Mahwah, Board of Adjustment Meeting Minutes, Mar. 20, 2019, at 4-5, available at <http://www.mahwahtwp.org/uppages/BOA%20MINUTES%20MARCH%202020.%202019.pdf> (“[A]dding the antennas ... would increase speed of data transmission, no service is being added, no business is being added, just faster speed which is the best alternative, and that the data being transmitted is strictly for NYSE data and its customers...”)(summarizing statements of Sanjam Kaur, witness called by Exchanges’ affiliate requesting variance); see also, Town of Mahwah, Board of Adjustment Meeting, Mar. 20, 2019, (Statement of Michael Levine, counsel for NYSE Group, Inc.) (stating that the equipment would be for a “very similar use, very similar nature” to previously approved telecommunications equipment). Notably, we question the accuracy of these representations, in light of the fact that the Exchanges are now filing to offer this “new” wireless connectivity “service.” We do not speculate as to whether the Township of Mahwah may seek recourse or reconsider its approval, based on the Board of Adjustment’s reliance, if any, on these representations.

On May 1st, NYSE Group's variance request was approved without further discussion.²⁹



Town of Mahwah, Board of Adjustment, May 1, 2019

Currently, data from the Exchanges travels by fiber optic cable to a tower about 1000 feet away, after which it is beamed out to the world. By adding the communications capabilities to the actual physical facility of the exchange data center, ICE Data Services would be able to send communications more quickly to other data centers than any other party, because all other parties would have to first connect using fiber optic cables to the tower outside of the facility.³⁰

In fact, NYSE Group's wireless communications expert expressly acknowledged that the importance of physical proximity (and the shorter distance of fiber optic cables) makes the new connectivity option on the roof "more desirable" than the three existing towers.³¹

Put simply, the "services" contemplated by the filings are little more than exclusive access to the physical portal that is located on the roof of the facility where the Exchanges operate. And, as the Exchanges' own witness has explained, it's going to be faster and "more desirable" than other options.

Obviously, the "facility" of an exchange should cover access to the physical facility.

²⁹ Town of Mahwah, Board of Adjustment Regular/Work Session Meeting Agenda, May 1, 2019, *available at* <http://www.mahwahtwp.org/uppages/BOA%20May%201,%202019%20Agenda.pdf>.

³⁰ Town of Mahwah, Board of Adjustment Meeting, Mar. 20, 2019, (Statement of Sanjam Kaur), *webcast available at* <http://mahwahnj.swagit.com/play/03202019-1419>.

³¹ Statement of Sanjam Kaur; *accord* Town of Mahwah, Board of Adjustment Meeting Minutes, Mar. 20, 2019, at 4-5, *available at* <http://www.mahwahtwp.org/uppages/BOA%20MINUTES%20MARCH%2020,%202019.pdf> ("[A]dding the antennas ... would increase speed of data transmission, no service is being added, no business is being added, just faster speed which is the best alternative, and that the data being transmitted is strictly for NYSE data and its customers...")(summarizing statements of Sanjam Kaur, witness called by Exchanges' affiliate requesting variance).

But even further than that, the “facility of an exchange” clearly encompasses any operation that includes access to or information from the exchange—whether physical or not. In fact, the Exchanges: (1) have long accepted that connectivity offerings are within the definition of a “facility” of the exchange, (2) are aware of legislation pushed by some exchanges to redefine “facility” in a manner more aligned with their new interpretation,³² and (3) are well aware that the legislation didn’t become law.

In recent years, some exchanges have sought to avoid the Commission’s oversight in certain product offerings. By way of example, at the urging of these exchanges, in July 2017, U.S. House Representatives Loudermilk (R-GA), Meeks (D-NY), Hultgren (R-IL), Scott (D-GA), and Zeldin (R-NY), introduced legislation that would have amended Section 3(a)(2) of the Securities Exchange Act of 1934 to redefine the “facility” of an exchange under the Exchange Act. That legislative draft would narrow the definition to only “facilities” that are:

for the purpose of effecting or reporting a transaction on an exchange. Such term does not include any premises or property, or the right to use any premises, property, or service, to the extent such premises or property is used with respect to, or such right relates to use with respect to, a line of business the purpose of which is not to effect or report a transaction on an exchange.”³³

At the time of introduction, the bill’s lead sponsor, Representative Loudermilk, explained that “the bill will not exempt functions of exchanges that are material to securities trading from Securities and Exchange Commission supervision, such as market data, listing standards, and colocation.”³⁴

Nevertheless, after introduction, in response to concerns raised by Bloomberg, SIFMA, Healthy Markets Association, and others, that language was dramatically altered. The revised language would instead direct the Commission:

to further interpret the term “facility” under section 3(a) of the Securities Exchange Act of 1934. Such regulations shall set forth the facts and circumstances the Commission considers when determining whether any premises or property, or the

³² *Clients Lobbying on H.R.3555: Exchange Regulatory Improvement Act*, OpenSecrets, available at <https://www.opensecrets.org/federal-lobbying/bills/summary?id=hr3555-11> (last viewed Mar. 3, 2020).

³³ *Exchange Regulatory Improvement Act* (H.R. 3555) 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/3555/text/ih?q=%7B%22search%22%3A%5B%22s.+488%22%5D%7D&r=65> (as introduced).

³⁴ Press Release, Rep. Loudermilk Introduces Legislation to Modernize the Securities Exchange Act, Aug. 11, 2017, available at <https://loudermilk.house.gov/news/documentsingle.aspx?DocumentID=1167>.

right to use any premises, property, or service is or is not a facility of an exchange.³⁵

While that revised legislation was included in a package that passed the House of Representatives, it was never taken up by the Senate. In the Wireless Connectivity Filings, the Exchanges are essentially pretending that the introduced version -- which was specifically revised -- had somehow become law and that the law was even more broad than the bill's lead sponsor intended.

The Exchanges' proposals thus ignore the plain meaning of the statute, decades of legal precedent, and a common sense understanding of the term "facility." The result of this erroneous analysis would be to effectively permit the Exchanges to exploit their monopolistic control over the fastest method of communicating data from their venues to the outside world in a manner that could be discriminatory, anti-competitive, and result in unreasonable and inequitable fees. That is precisely what the Exchange Act was designed to prohibit.

The Wireless Connectivity Filings are Inadequate to Establish Their Compliance With the Exchange Act and Commission Rules

The Wireless Connectivity Filings provide insufficient information for the Commission to conclude that the Exchanges have established that their proposed changes are consistent with the Exchange Act.

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,³⁶ including, inter alia, that an exchange's rules:

- "perfect the mechanism of a free and open market and a national market system,"³⁷
- "protect investors and the public interest,"³⁸
- "not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers";³⁹ and
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.⁴⁰

³⁵ *Exchange Regulatory Improvement Act* (H.R. 3555) 115th Cong. (2017), available at <https://www.congress.gov/bill/115th-congress/house-bill/3555/text/rh?q=%7B%22search%22%3A%5B%22s.+488%22%5D%7D&r=65> (as Reported in the House).

³⁶ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

³⁷ 15 U.S.C. § 78f(b)(5).

³⁸ 15 U.S.C. § 78f(b)(5).

³⁹ 15 U.S.C. § 78f(b)(5).

⁴⁰ 15 U.S.C. § 78f(b)(8).

The Commission’s Rules of Practice clearly place the “burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder” on the Exchange proposing a rule change.⁴¹ In addition

[t]he 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 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.⁴²

Over the past several months, the Commission has also provided significant guidance to exchanges regarding how it will review exchange fee filings for compliance with the Exchange Act, including in its May 21, 2019 SRO Fee Filing Guidance⁴³ and its Disapproval Order of a BOX connectivity filing.⁴⁴

In this guidance, the Commission staff has made it clear that exchanges need to establish, at a minimum, what an offering is, including in relation to other similar offerings, who is using the offering and why, how the costs are determined, and the impact of the offering (and associated costs) on market participants.

For example, the Exchanges explain that they are offering merely “connectivity” and note that there are currently two other wireless connectivity providers. Yet, an expert for the Exchanges’ affiliate has expressly acknowledged that by moving the start of the wireless network to the roof, it would be “more desirable” than the wireless networks that currently start outside.⁴⁵ To level the playing field, would those unaffiliated wireless providers have the opportunity to install equipment on the roof of the exchange facility in the same way and under the same terms as ICE Data Services? If not, is this not facially discriminatory and burdensome on competition?

⁴¹ Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm’n, 17 CFR 201.700(b)(3).

⁴² *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, available at <https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf>.

⁴³ *Staff Guidance on SRO Rule Filings Relating to Fees*, Sec. and Exch. Comm’n, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

⁴⁴ *Order Disapproving Proposed Rule Changes 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. and Exch. Comm’n, Mar. 29, 2019, available at <https://www.sec.gov/rules/sro/box/2019/34-85459.pdf>.

⁴⁵ Statement of Sanjam Kaur.



Similarly, what would be the timing difference between their competing offerings and that of ICE Data Services or the public Securities Information Processor?

How many subscribers to the new offerings would Exchanges predict?

What is the impact on the subscribers versus the admittedly slower third-party wireless connectivity offerings?

What is the impact on subscribers versus non-subscribers through any mechanism?

How did the exchanges establish those price points?

The Wireless Connectivity Filings offer almost none of the information needed to establish that they are compliant with the Exchange Act, including that they are not discriminatory, impose reasonable and equitably allocated fees, and don't pose undue burdens on competition. To the contrary, the limited information available suggests strongly that the filings are inconsistent with those requirements.

Apart from broad generalizations and conclusory statements that the law simply doesn't apply to them, the Exchanges have offered no data or analysis to support either their logic or their conclusion that the filings comply with the Exchange Act or Commission Rules.

Conclusion

We urge the Commission to deny the Wireless Connectivity Filings as contrary to the law and Commission Rules. Further, because the Exchanges have inaccurately suggested that the law does not apply to them, we urge the Commission to use this opportunity to remove any doubt regarding the longstanding, historically accepted definition of the "facility of an exchange." Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact me at

[REDACTED]

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch
Executive Director

Cc: Geraldine Entrup, Administrative Officer, Township of Mahwah, New Jersey