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Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Submitted via email: rule-comments@sec.gov

**Re: Notice of Filing of Proposed Rule Changes to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections
Release No. 34-88168; File No. NYSE-2020-05;¹
Release No. 34-88171; File No. NYSESTAT-2020-03;²
Release No. 34-888172; File No. NYSECHX-2020-02;³
Release No. 34-88169; File No. NYSEAMER-2020-05;⁴
Release No. 34-88170; File No. NYSEArca-2020-08;⁵**

Dear Ms. Countryman:

Bloomberg L.P.⁶ respectfully submits this letter in response to the above-referenced proposed rule changes, submitted by the New York Stock Exchange and its exchange affiliates (collectively referred to as “NYSE” or the “Exchanges”), to establish fees for a new set of wireless connections

¹ Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections, Exchange Act Release No. 88168; File No. NYSE-2020-05 (February 11, 2020), *available at* <https://www.sec.gov/rules/sro/nyse/2020/34-88168.pdf> (the “Proposal”).

² Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections, Exchange Act Release No. 88171; File No. NYSESTAT-2020-03 (February 11, 2020), *available at* <https://www.sec.gov/rules/sro/nysestat/2020/34-88171.pdf>.

³ Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections, Exchange Act Release No. 888172; File No. NYSECHX-2020-02 (February 11, 2020), *available at* <https://www.sec.gov/rules/sro/nysechx/2020/34-88172.pdf>.

⁴ Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections, Exchange Act Release No. 88169; File No. NYSEAMER-2020-05 (February 11, 2020), *available at* <https://www.sec.gov/rules/sro/nyseamer/2020/34-88169.pdf>.

⁵ Notice of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections, Exchange Act Release No. 88170; File No. NYSEArca-2020-08 (February 11, 2020), *available at* <https://www.sec.gov/rules/sro/nysearca/2020/34-88170.pdf>.

⁶ Bloomberg – the global business, financial information, and news leader – increases access to market data by connecting market participants of all stripes to a dynamic network of information, people, and ideas. The company’s strength – quickly and accurately delivering data, news, and analytics through innovative technology – is at the core of the Bloomberg Terminal. The Terminal provides financial market information, data, news, and analytics to banks, broker-dealers, institutional investors, governmental bodies, and other business and financial professionals worldwide.

(the “Proposal”). The Proposal is extremely concerning for a number of reasons. Most importantly, NYSE is contending that the proposed services are not “facilities” of the exchange within the long-settled meaning of the Exchange Act of 1934, and therefore these services do not need to be included in the Exchanges’ rules, or comply with the requirements of the Exchange Act. According to NYSE, none of the regulations and customer protections, which are meant to apply to all exchanges in providing exchange services, should apply to NYSE in providing these core exchange services. The implications of this position are profound. The Securities and Exchange Commission would have no ability to oversee these services, and the comprehensive regulatory framework, that has been put in place by Congress and has served the market well since 1934, would be completely circumvented. For this reason, and for the reasons set forth in greater detail below, Bloomberg opposes the Proposal.

Overview

NYSE and each of its exchange affiliates, NYSE Arca, NYSE American, NYSE Chicago, and NYSE National, are proposing to establish a fee schedule for a new set of wireless connections (the “Wireless Connections”) between NYSE’s data center in Mahwah, New Jersey and three third party data centers located in New Jersey and Canada (the “Third Party Data Centers”). The Wireless Connections would facilitate the transmission of data through a series of towers equipped with wireless equipment, including one tower that is located on NYSE data center property.⁷ According to the Proposal, the Wireless Connections would be operated by ICE Data Services (“IDS”), an affiliate of ICE, which operates a global connectivity network.⁸ Only IDS will be permitted to access the roof and the tower on the NYSE data center property to operate the wireless equipment, and IDS will not sell rights to third parties to operate wireless equipment.⁹

In sum, NYSE is proposing to create a new high speed network that would have exclusive access to the NYSE data center property. Last year, NYSE had applied for, and was granted, a variance from the Township of Mahwah Board of Adjustment (“Zoning Board”) that would allow NYSE to install the Wireless Connections on the roof of its data center.¹⁰ There are two particularly troubling aspects of this application process: the location of the equipment on the roof of the data center and the scope of the variance. The location of the equipment on the data center roof would provide the lowest latency connections to the data center. “Competing” providers would not have access to the roof under NYSE’s Proposal, which would create a structural impediment to competition. In addition, the variance requested by NYSE only granted one provider access to the roof and the tower to operate wireless equipment. Since no other provider is permitted to operate equipment on the roof, the NYSE communications equipment would enjoy exclusive access and an inherent advantage.

NYSE even acknowledges that competitors would not be afforded equal access to the property and would therefore not be able to provide a service in a similar manner. In fact, throughout the

⁷ Proposal at 17.

⁸ Proposal at 4.

⁹ Proposal at 26.

¹⁰ Township 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>.

application process before the Zoning Board, NYSE made it clear that the waiver request was all about providing the lowest possible latency to NYSE customers. The specialized access and placement of the antenna means that no one else can offer the same service. On this point, NYSE's testimony before the Zoning Board directly contradicts the assertion made in the Proposal that "the Exchange believes that the wireless communications offered by non-ICE entities provide connectivity at the same or similar speed as the Wireless Connections...."¹¹

Through this exclusive network, NYSE is proposing to provide connectivity and exchange market data. NYSE is proposing to charge market participants an initial fee of \$10,000 per connection and recurring monthly fees of up to \$45,000 per month per connection for these Wireless Connections depending upon bandwidth and type of service.¹²

The fact of the fees would seem to contradict the statements of NYSE's expert witness, as summarized in the Zoning Board meeting minutes of March 20, 2019 where the expert witness "confirmed that adding the antennas provided more stability, 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, there will be no commercial usage."¹³

The Wireless Connections are facilities of the exchange and therefore subject to the applicable requirements of the Exchange Act and Commission rules.

NYSE contends that the proposed Wireless Connections are not facilities of the Exchange within the meaning of the Exchange Act, and therefore the Wireless Connections do not need to be included in its rules.¹⁴

Under the Exchange Act, the term "facility" is defined broadly to include,

its 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."¹⁵

NYSE, in support of its position that the Wireless Connection are not facilities, erroneously argues that:

¹¹ Proposal at 17.

¹² Proposal at 14-15.

¹³ Township of Mahwah, Board of Adjustment Meeting Minutes, March 20, 2019, at 4-5, available at <http://www.mahwahtwp.org/uppages/BOA%20MINUTES%20MARCH%202020,%202019.pdf>.

¹⁴ Proposal at 2.

¹⁵ Exchange Act § 3(a)(2).

- (1) The Wireless Connections are not part of the premises because the premises is generally defined as referring to an entity's building, land, and appurtenances.¹⁶
- (2) The Wireless Connections are not the property of the Exchange: they are services.¹⁷
- (3) The third prong of the definition of "facility" does not capture the Wireless Connections because the Exchange does not have the right to use the Wireless Connections to effect or report a transaction on the Exchange.¹⁸

As an initial matter, the Staff of the Commission apparently disagrees with NYSE's analysis, and NYSE notes that the Staff of the Commission "has advised the Exchange that it believes the Wireless Connections are facilities of the Exchange and so must be filed as part of its rules."¹⁹

We fully support the staff in its position that the Wireless Connections are facilities of the Exchange. As a matter of statutory interpretation, the Wireless Connections fall squarely within the definition of facilities under the Exchange Act. As noted above, the definition of a facility of an exchange is quite broad and includes the premises, tangible or intangible property whether on the premises or not, and any right to use such premises or property or any service thereof, including any system of communication to or from the exchange. The Wireless Connections are physically located on the property of the data center. Under any interpretation of the word "premises," including NYSE's, the Wireless Connections would fall within this term. Likewise "services" are expressly covered. As to the third prong, it is clear that this is a system of communication to or from the exchange for "effecting or reporting a transaction of the exchange."

Finally, these connectivity services have been considered for some time, including in prior NYSE filings, to fall within the definition of facility. The acceptance of this new NYSE position would be an enormous departure from established precedent.

The Proposal attempts to establish new fees for market participants that are inconsistent with the requirements of the Exchange Act.

Under the Exchange Act, the fees for Wireless Connections: (i) should "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"²⁰ (ii) should not be "designed to permit unfair discrimination between customers, issuers, brokers or dealers;"²¹ and (iii) should "not impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act.²²

NYSE is proposing to establish fees for these new Wireless Connections without attempting to justify their basis under the statute. As noted above, IDS, a NYSE affiliate, would be the exclusive provider of the service at the exchange. Due to the proximity of the Wireless Connections to the

¹⁶ Proposal at 9.

¹⁷ Proposal at 10.

¹⁸ Proposal at 10.

¹⁹ Proposal at 2-3.

²⁰ Exchange Act § 6(b)(4).

²¹ Exchange Act § 6(b)(5).

²² Exchange Act § 6(b)(8).

NYSE data center, IDS would have an advantage over all competitors who are not permitted to operate on the property of the data center. Messages from the data center to the Wireless Connections would be faster and traverse a shorter distance than the alternative given optic connections that must travel off of the data center property. There are no alternatives that offer comparable speed to the proposed Wireless Connections.

Given the exclusivity of this service, it would be difficult for NYSE to demonstrate how these fees are fair and reasonable without providing an in depth assessment of the costs of the service. However, this analysis was not included in the Proposal. It would be even more difficult still for NYSE to justify how these fees are not unfairly discriminatory. NYSE is reserving for its own affiliate the exclusive right to operate Wireless Connections that are located on the data center property. Little to no attempt is made in the Proposal to discuss the implications of this exclusive privilege.

NYSE’s prior efforts to reduce the SEC’s jurisdiction relating to facilities were not successful.

A number of exchanges, including NYSE, have attempted in recent years to change the definition of a “facility” of an exchange under the Exchange Act in order to limit the SEC’s authority in this space. This desire to remove “facilities” from SEC jurisdiction was no doubt animated by the Commission and the U.S. Court of Appeals for the District of Columbia having held in *NetCoalition II* that the proper means of challenging a potentially illegal fee was to assert a limitation of access to the “facility” of an exchange.²³

Fortunately for the investing public and the markets, the exchanges’ attempts were ultimately unsuccessful, but their prior advocacy here is instructive.

H.R. 3555, the “Exchange Regulatory Improvement Act”, was introduced in July 2017.²⁴ The bill, which was supported by NYSE, Nasdaq, and Cboe, would have amended the definition of “facility” under the Exchange Act for the first time since 1934. The goal of the legislation was to limit the SEC’s jurisdiction over the exchanges.

At the time, NYSE, Nasdaq and Cboe complained that the SEC had subjected certain products and services to the SEC’s “oversight and burdensome rule filing approval process.”²⁵ H.R. 3555 would have significantly limited SEC oversight and public protections.

On December 7, 2017, Chairman Clayton, in responding to an inquiry from Congressman Barry Loudermilk regarding H.R. 3555, noted that the definition of “facility” is “critically important as it sets the scope of Commission jurisdiction over exchanges. Therefore, any modifications to, or

²³ *NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) (*NetCoalition II*).

²⁴ *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>.

²⁵ See Letter to Jay Clayton, Chairman, Commission, from Reps. Barry Loudermilk, Greg Meeks, Randy Hultgren, David Scott, and Lee Zeldin (September 27, 2017).

clarifications of, this term should be carefully crafted to prevent important exchange functions from unintentionally being removed from Commission oversight, either now or in the future as the exchange business continues to evolve.”²⁶

Chairman Clayton further noted, “With respect to H.R. 3555, the current language of the bill, which excludes from the “facility” definition any line of business with a purpose other than effecting or reporting a transaction on an exchange, could be interpreted broadly. I believe care should be taken to ensure that the Commission retains oversight of important exchange functions, such as those relating to (1) exchange market data products, (2) listing standards, (3) member and market regulation, (4) co-location and connectivity services, and (5) order routing services, and that any modifications do not inadvertently exclude from Commission oversight exchange functions that do not currently exist but that may evolve in the future.”

The NYSE proposal presently before the Commission – providing connectivity for market data – falls squarely within the ambit of two exchange functions that Chairman Clayton expressly asserted are “facilities” of the exchange.

At the time the legislation was introduced, market participants and commenters noted that the language would limit the SEC’s oversight of the exchanges with potentially negative consequences for the cost and availability of market data, reducing enforcement tools, and depriving the Commission of jurisdiction over order types, among other potential negative consequences.²⁷

H.R. 3555 fortunately did not become law, as Congress wisely chose to leave the existing definition, and the current regulatory framework, in place. It appears that NYSE is moving forward with this Proposal as if the law had changed.

Conclusion

In recent years, the Commission has undertaken a number of serious and thoughtful reforms in the market data space.²⁸ This has spurred some exchanges to urge Congress to amend our foundational securities laws to eliminate SEC jurisdiction over many activities carried out through exchanges and their facilities.

Congress has not made the changes sought by the exchanges. Hence the subject matter of this Proposal remains subject to the Commission’s review. We urge the Commission to reject the Wireless Connectivity Proposal as contrary to law and the Commission’s Rules.

²⁶ See Letter from Jay Clayton, Chairman, Commission, to Rep. Barry Loudermilk (December 7, 2017).

²⁷ See Letter from David Oxner Managing Director, SIFMA, to Rep. Jeb Hensarling, Chairman, and Rep. Maxine Waters, Ranking Member, House Committee on Financial Services (July 10, 2018); See also Potential Ramifications of The Exchange Regulatory Improvement Act (November 14, 2017), available at https://www.hoganlovells.com/~/_/media/hogan-lovells/pdf/2017-general-pdfs/hr-3555.pdf?la=en

²⁸ See Equity Market Structure Roundtable on Market Data and Market Access (October 26, 2018), available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-marketdata-market-access-102618-transcript.pdf>; *In re SIFMA*, Exchange Act Release No. 84432 (October 16, 2018).

We appreciate the Commission's efforts with regard to this Proposal and the Commission's consistent interpretation of the definition of "facility." We also appreciate the opportunity to provide our comments on this Proposal, and would be pleased to discuss any question that the Commission may have with respect to this letter. Thank you again for the Commission's efforts.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gregory R. Babyak". The signature is written in a cursive, slightly slanted style.

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.