



September 11, 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 reiterate our objections to the above-referenced proposals by the NYSE-family of Exchanges to establish new wireless connectivity offerings (collectively, “Wireless Connectivity Filings”), including Amendment No. 1 to each of the proposed rule changes.¹²

The Exchanges initially proposed to establish a set of wireless connections to facilitate the transmission of market data, including through a tower located on the NYSE data center facility, which would be operated by the Exchanges’ affiliate, ICE Data Services. ICE Data Services would be given exclusive access to that equipment, which would reduce cabled transmission distances -- likely allowing for faster communications -- than the existing third-party services. The Exchanges have now revised their proposal, modestly, including by purportedly lengthening the cables used by the ICE Data Services to be no shorter than the distances used to transmit to the other third-party services.¹³

As revised, the Exchanges’ proposals’ remain deficient, and should be disapproved.

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 Securities Exchange Act Release Nos. 89458 (Aug. 3, 2020), 85 Fed. Reg. 48045 (Aug. 7, 2020) (“NYSE Amended Filing”); 89453 (Aug. 3, 2020), 85 Fed. Reg. 47992 (Aug. 7, 2020) (“NYSE Amended Filing II”); Securities Exchange Act Release Nos. 89460 (Aug. 3, 2020) (“NYSE Arca Amended Filing I”), 85 Fed. Reg. 48017 (Aug. 7, 2020); 89455 (Aug. 3, 2020), 85 Fed. Reg. 48035 (Aug. 7, 2020) (“NYSE Arca Amended Filing II”); Securities Exchange Act Release Nos. 89459 (Aug. 3, 2020) (“NYSE American Amended Filing I”), 85 Fed. Reg. 48052 (Aug. 7, 2020); 89454 (Aug. 3, 2020), 85 Fed. Reg. 48002 (Aug. 7, 2020) (“NYSE American Amended Filing II”); Securities Exchange Act Release Nos. 89457 (Aug. 3, 2020) (“NYSE National Amended Filing I”), 85 Fed. Reg. 47997 (Aug. 7, 2020); 89462 85 Fed. Reg. 48008 (Aug. 7, 2020) (“NYSE National Amended Filing II”); Securities Exchange Act Release Nos. 89461 (Aug. 3, 2020), 85 Fed. Reg. 48039 (Aug. 7, 2020); 89456 (Aug. 3, 2020) (“NYSE Chicago Amended Filing I”), 85 Fed. Reg. 48024 (Aug. 7, 2020) (“NYSE Chicago Amended Filing II”).

¹³ NYSE Amending Filing II, at 5-6.

Most importantly, the Exchanges’ assertion 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”¹⁴ has no basis in the law. As we explained in March,

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.¹⁵

Amendment No. 1 to the filings hasn’t changed this analysis. Again, we direct you to our March 2020 comment regarding the legislative history of the Exchange Regulatory Improvement Act, which shines a harsh light on the Exchanges’ bald claims that their affiliate can -- through use of corporate legal forms -- avoid the clear and undisputed obligations of the Exchange Act.¹⁶

Further, neither the Wireless Connectivity Filings, nor Amendment No. 1 comply with these basic obligations of the Exchange Act. The Wireless Connectivity Filings and Amendment No. 1 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,¹⁷ including, inter alia, that an exchange’s rules:

- “perfect the mechanism of a free and open market and a national market system,”¹⁸
- “protect investors and the public interest,”¹⁹
- “not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;²⁰ and

¹⁴ NYSE Filing I, at 2.

¹⁵ Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Mar. 9, 2020, available at <https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6925373-211372.pdf> (“Healthy Markets Letter I”).

¹⁶ Healthy Markets Letter I, at 6-8.

¹⁷ See *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

¹⁸ 15 U.S.C. § 78f(b)(5).

¹⁹ 15 U.S.C. § 78f(b)(5).

²⁰ 15 U.S.C. § 78f(b)(5).



- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act.²¹

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.²² 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.²³

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 Guidance²⁴ and its Disapproval Order of a BOX connectivity filing.²⁵ That guidance notes that the burden falls upon exchanges 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.²⁶ To level the playing field, would those unaffiliated wireless providers have the opportunity to install equipment on the roof of the exchange facility in

²¹ 15 U.S.C. § 78f(b)(8).

²² Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm’n, 17 CFR 201.700(b)(3).

²³ *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>.

²⁴ *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>.

²⁵ *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>.

²⁶ Statement of Sanjam Kaur.



the same way and under the same terms as ICE Data Services? If not, is this not facially discriminatory and burdensome on competition?

To what extent does Amendment No. 1 re-level the playing field between third-party providers and ICE Data Services? For example, to what extent would limitations on the tower access, if provided, discriminate against third-party services? Are there other factors -- beyond explicit cable length -- that might disadvantage other providers over the NYSE affiliate?

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? Would any costs or revenues from the provision of services by ICE Data Services accrue -- directly or indirectly -- to any of the Exchanges?

The Wireless Connectivity Filings and Amendment No. 1 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. We suspect that their recognition that they are likely unable to comply with the law is why the Exchanges are attempting to avoid it altogether.

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.

We urge the Commission to deny the Wireless Connectivity Filings, as modified by Amendment No. 1 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 (202) 909-6138.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch". The signature is fluid and cursive, written over a white background.

Tyler Gellasch
Executive Director