CITADEL | Securities

June 12, 2020

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549–1090

RE: File Nos. SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT-2020-08

Dear Ms. Countryman,

Citadel Securities submits this comment letter in response to a set of ten rule filings (the "Rule Filings") submitted on February 11, 2020 and February 19, 2020 by NYSE LLC, NYSE National, NYSE Arca, NYSE American, and NYSE Chicago (collectively, "NYSE") seeking Commission approval to establish fee schedules for the establishment of: (i) wireless connectivity services that transport market data; and (ii) private wireless bandwidth connection services, that can be purchased by market participants to connect to NYSE's Mahwah, New Jersey data center and three data centers located in Carteret, New Jersey, Secaucus, New Jersey, and Markham, Canada (the "Services"). Although other commenters have discussed a number of issues raised by the filings, including whether the fees proposed are fair and reasonable, and whether NYSE has met its evidentiary burden under the Securities Exchange Act of 1934 (the "Exchange Act"), we comment on a single issue: support for the Commission's preliminary determination that the Services proposed to be offered by NYSE meet the Exchange Act definition of "facility."

NYSE takes pains in its filing and its response to comments to argue that the Services are not a facility of the exchange, breaking down the Exchange Act's definition of facility into four components and attempting to argue in isolation that the Services meet none of those prongs. In the NYSE view: (i) the Services are not the premises of the exchange; (ii) the Services are not the property, tangible or intangible, of the exchange; and (iii) the exchange lacks the right to use the Services to effect or report transactions, or otherwise. However, it seems that in fact NYSE has constructed a scenario wherein it exclusively provides market data to a location, controls access to that location, and controls the means of communicating that market data out from that location. It also appears from available facts that no other provider of wireless services can compete with the NYSE offering from a latency standpoint, based on the geography of the construct. Other market participants that have studied the offering have argued that they have no choice but to subscribe to the Services. We agree. Yet despite these underlying facts, NYSE attempts to argue that the Services are not a facility of the exchange. At its most basic, what the NYSE is offering is a service to its market participants that delivers exchange market data, and does so in a way that other providers cannot match.

NYSE has argued that the Services themselves are not a facility of the exchange because they do not meet any of the prongs of the definition of a facility. Though this may be true of wireless services that are connected to widely-accessible public points, NYSE has failed to satisfactorily address that one terminus of the wireless connection is a pole that is situated on

NYSE premises co-located with the exchange data center; that NYSE maintains complete and exclusive control of access to this terminus point; and that this terminus is situated in a favorable position compared to other similar off-premise terminus points.

To find that such an offering is not a facility and is therefore outside the scope of the Exchange Act is to undercut the definition of both "exchange" and "facility" and to impair Commission oversight of the exchanges. Moreover, it is not difficult to argue that the service falls squarely within the plain language of the statutory definition. When it is understood that the very purpose of the Services is to provide specific content (exchange market data), without which the offering makes no economic sense, the only conclusion is that the Services include, as a central component, the property of the exchange being distributed for the purposes of effecting transactions. Further, and as covered in detail by other commenters, the fact that certain aspects of the offering are owned or operated by affiliates and not the exchange does not change that outcome, both because ownership is not a required element in the definition of exchange ("constitutes, maintains, or provides") and because the outcome, and the ability of exchanges to simply circumvent critical oversight, would be unacceptable. In fact, and to its credit, NYSE acknowledges this fact in its response to comments. A separate argument can easily be made that the Commission must look at the entirety of the offering, including all essential components, in making a determination as to whether the Services are a facility of the exchange. In doing so, those critical components that make the Services valuable start with the exchange pole. Because this terminus point is itself an access point to the exchange for the purpose of transmitting market data, it appears this physical access point is part of the overall data center infrastructure and is therefore part of the premises of the exchange.

Because it is a facility, NYSE is required to provide fair access to the terminus and should file rules related to such access, including fees and services. If it did ensure fair access (i.e., provide equivalent space on the pole to any qualified user on equal terms), we would agree that any wireless transmissions anchored to that terminus would not be facilities of the exchange (whether operated by the exchange, by affiliates of the exchange, or completely independent third parties), because the boundary of the facility (as defined by fair access to those points) ends at the terminus. However, NYSE has chosen not to provide fair access to this portion of its facility but instead has arranged for only one specific party to have access. By this choice, NYSE has thus effectively extended its access point, via exclusive control, to termini at the other ends of the wireless transmission points.

The plain language reading of section 3(a)(1) and 3(a)(2) also support the appropriate public policy outcome. The clear purpose of the facility definition is to ensure that the definition of "exchange" is construed broadly, to ensure proper oversight of these critical market utilities. Exchange registrations are a grant of significant authority by the SEC to exchange operators. Exchange registration essentially compels the vast majority of market participants to conduct business on that venue to meet their regulatory obligations and business purposes. This compulsion to participate must be accompanied by the careful oversight that the Exchange Act provides, to ensure, among other things, fair access, the imposition of reasonable fees, and the absence of unnecessary or inappropriate burdens on competition. Therefore, when the plain language of section 3(a)(2) is not directly on point (although we believe it is perfectly clear here), federal policymakers should evaluate whether the product or service is necessary for all or a subset

of market participants to trade on that venue. If market participants must interact on an exchange, and those participants cannot do so without subscribing to a certain product or service or program, policy compels, and the language of the statute facilitates, those offerings being considered facilities of the exchange. Stated another way, if the only way for similarly situated participants to compete with one another is by means of a certain exchange operated pathway (the modern version of the door of the exchange) then the operation of that pathway needs the benefit of rigorous regulatory oversight. And if the mandatory nature of that offering is unclear (as NYSE has at times suggested here), that ambiguity must be resolved in favor of oversight. The diverse elements that constitute an exchange have changed considerably since the adoption of the Exchange Act, and exchanges will continue to attempt to expand their footprint. That is not inherently troubling; it is only troubling when done without the benefit of oversight.

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We appreciate the opportunity to provide comments on the Rule Filings. Please feel free to call the undersigned at (646) 403-8200 with any questions regarding these comments.

Respectfully,

/s/ Stephen John Berger

Managing Director

Global Head of Government & Regulatory Policy