

January 13, 2022

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Offer Wireless Connectivity to CME Group Data and Establish Associated Fees (File Nos. SR-NYSE-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, SR-NYSENAT-2021-23)

Dear Ms. Countryman:

McKay Brothers LLC (“McKay”) and its affiliate Quincy Data LLC (“Quincy”) (collectively, the “Firm”)¹ appreciate the opportunity to provide comments on the suspension of and order instituting proceedings to determine whether to approve or disapprove the above referenced filings by the NYSE Group, Inc. exchanges (collectively “the Exchanges” or each an “Exchange”).² As detailed below, the Firm believes that additional information from the Exchanges is necessary in order to adequately determine whether these filings are consistent with the Securities Exchange Act of 1934 (“Exchange Act”) and the rules thereunder.

Background

On November 12, 2021, the Exchanges amended their fee schedules regarding colocation services and fees to provide users with wireless connectivity to CME Group market data (“CME Group Data”) at the Exchanges’ data center in Mahwah, NJ (the “Data Center”) through immediately effective proposed rule changes (the “Proposals” covering “Proposed Services”).³ On December 17, 2021, the Commission suspended the effectiveness of these changes and instituted proceedings to determine whether to approve or disapprove the Proposals, noting that it is unclear whether the Exchanges had provided sufficient information to demonstrate that the Proposals are consistent with Exchange Act requirements. The Firm notes that Quincy also provides CME

¹ Quincy is a market data distributor that provides equal access to low latency US equities market data that helps subscribers make tighter markets. McKay is a telecom service provider, using microwave and fiber technologies to offer low-latency data transport services, which likewise allows our subscribers to manage risk more effectively and make tighter markets. We offer services on a level-playing field basis—meaning we make our best latencies available to all subscribers. We also provide small-firm discounts to support greater diversity of market participants with access to low latency market data.

² Securities Exchange Release No. [93819](#), 86 FR 73026 (Dec. 23, 2021) (“Suspension Order”).

³ Securities Exchange Act Release Nos. [93563](#) (November 12, 2021), 86 FR 64561 (November 18, 2021) (SR–NYSE–2021–67) (the “Notice”); [93561](#) (November 12, 2021), 86 FR 64580 (November 18, 2021) (SR–NYSEAMER–2021–43); [93564](#) (November 12, 2021), 86 FR 64570 (November 18, 2021) (SR–NYSEArca–2021–97); [93565](#) (November 12, 2021), 86 FR 64556 (November 18, 2021) (SR–NYSECHX–2021–17); and [93567](#) (November 12, 2021), 86 FR 64576 (November 18, 2021) (SR–NYSENAT–2021–23).

Group Data to its customers at the Data Center using the telecommunications infrastructure of McKay.

The Need for Additional Transparency, Precision, and a Commitment to a Level Playing Field

With respect to connectivity and the provision of market data within the Data Center, including the Proposed Services, the Firm writes to emphasize the need from the Exchanges for (i) greater transparency; (ii) precision regarding the details of infrastructure within the Data Center campus; and (iii) a commitment to a level playing field for all service providers operating within the Data Center campus.

As the Firm has previously explained, exchanges are uniquely able to tip the scales in their favor (sometimes via a preferred provider) against competitors.⁴ The Exchanges acknowledge that they control connectivity among various Exchange systems, customer equipment, and vendor equipment (e.g., matching engines, meet-me-rooms, colocation cabinets) inside the Data Center. The Exchanges also control the number and placement of meet-me-rooms, the number and placement of “Points of Entry” whereby external fiber connections enter the Data Center campus, and the cable pathways (“Conduits”) that interconnect the meet-me-rooms with the Campus Points of Entry (“Conduit System”).

The Exchanges have both the incentive and the ability to grant the Proposed Services with latency and other advantages in connectivity. The Exchanges have repeatedly resisted providing needed transparency, precision, and commitment to a level playing field regarding Data Center campus connectivity and the provision of market data.⁵ They have, in fact, sought to use their control over the Data Center campus to actively advantage their own services.⁶

For these reasons, the Firm believes that the Proposals require clarifications and representations regarding nondiscriminatory access to Exchange-controlled resources. Exercising control over the Data Center campus to advantage any market participants or service providers over others inappropriately burdens competition and unfairly discriminates against market participants who do not enjoy such advantage in contravention of Section 6(b) of the Exchange Act.⁷

⁴ See [Letter](#) from Jim Considine, Chief Financial Officer, McKay, to Vanessa Countryman, Secretary, Commission re: File No. SR-NYSE-2020-05, at 7 (March 10, 2020) (“McKay Letter I”).

⁵ See e.g., Securities Exchange Act Release No. [90209](#), 85 FR 67044 (Oct. 21, 2020) (order approving fees for wireless bandwidth services and wireless market data connections). Only after considerably pressure from commenters, including the Firm, did the Exchanges agree to neutralize the latency advantage provided to their preferred provider by a private communications pole on the premises of the Mahwah data center. The Exchanges have subsequently challenged the Commission’s approval order in the Federal Court of Appeals for the District of Columbia Circuit. See *Intercontinental Exchange, Inc. et al v. SEC*, No. 20-1470 (D.C. Cir.).

⁶ See e.g., McKay Letter I at 9-10 (evidencing direct statements made to the Township of Mahwah regarding plans to establish a wireless connection on the roof of the Data Center because the “new rooftop antenna provides a better latency,” “[t]he whole point is . . . to make the data delivery faster,” and “this is more desirable than the other three monopoles [east of the Mahwah data center].”). The “other” monopoles provide services which compete with the Exchange service.

⁷ 15 U.S.C. 78f(b)(5) and (8).

To be clear, the Firm does not have information to suggest that the Exchanges seek to advantage their Proposed Services. However, without additional transparency—and, critically, precision in the description of the Exchanges’ internal infrastructure—neither market participants nor the Commission can determine if the Proposals provide an advantage that is inconsistent with Exchange Act requirements. Competitive advantages in exchange connectivity are measured in nanoseconds. As a result, disclosure of specific details of internal infrastructure is required. Indeed, the only mechanisms in place to safeguard a free and open market, and fair competition, in the latency-sensitive provision of market data and intermarket connectivity, which are the foundations of the national market system, are through disclosures provided by the Exchanges to facilitate meaningful public comment and Commission oversight.⁸

Additional Information and Representations Needed to Promote Consistency with Exchange Act Requirements

As noted, based on past efforts by the Exchanges to advantage their services over those of competitors, and given the Exchanges’ exclusive control over the Data Center campus, the Firm is concerned that the Proposals may ignore subtle ways in which the service may be advantaged over competitors’ services.⁹ The Exchanges state in the Proposals that:

“The proposed connection to CME Group Data and the existing third-party wireless connection to CME Group Data would follow the same route within the Data Center: they would both enter through a meet-me-room, connect to equipment in co-location, and then connect to any Users that are customers. Because of this, the Exchange does not believe that IDS has an advantage over the third party in providing the connectivity. The proposed wireless connection would lead to a pole, from where a fiber connection would lead into the Data Center. The pole is owned by a third party and is not on the grounds of the Data Center.”¹⁰

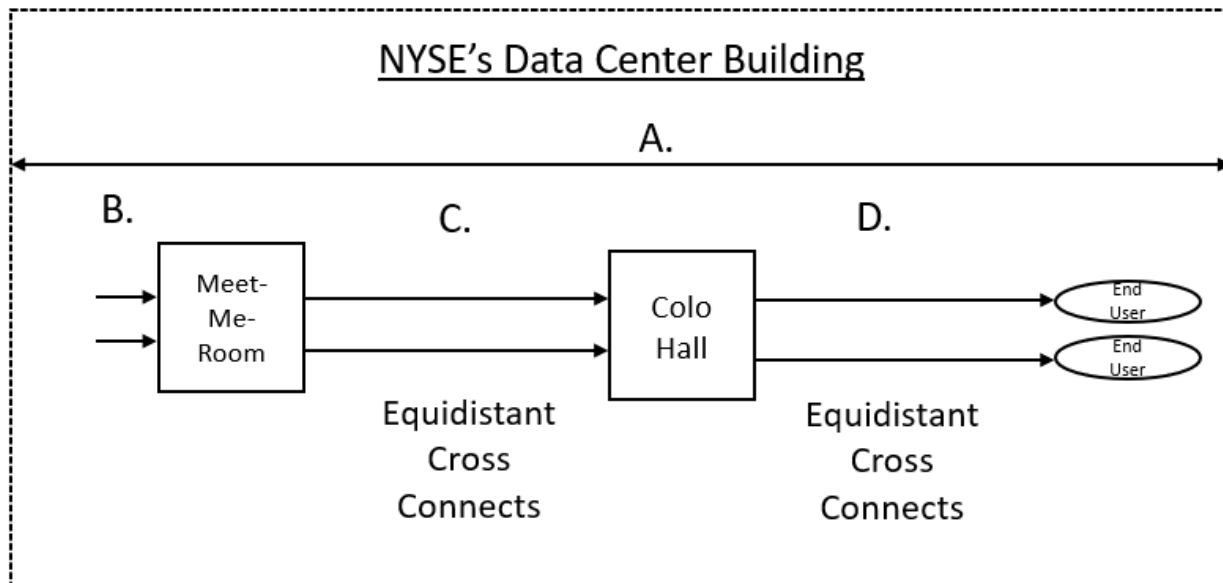
While these statements are helpful, they are incomplete to support the assertion that the Exchanges provide no connectivity advantage to the preferred provider. In Diagram 1 below, we illustrate our understanding of how the first sentence from the statement above applies to the Exchanges’ delivery of CME Group Data to users in the Data Center.

⁸ 15 U.S.C. 78k-1(a)(1)(D) (“The linking of all markets for qualified securities through communication and data processing facilities will foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors’ orders, and contribute to best execution of such orders.”). While futures market data is not necessarily contemplated as part of the national market system, the same principles hold true for the delivery of NMS securities market data in exchange data centers.

⁹ As the Firm has previously described, there are many ways that exchanges can provide its services (or a preferred provider) with a latency or other advantage, such as routing competitors through an additional network infrastructure or adding additional fiber lengths to competitors routes. See [Letter](#) from Jim Considine, Chief Financial Officer, McKay, to Vanessa Countryman, Secretary, Commission re: File No. SR-NYSE-2020-05, at 9 (June 12, 2020) (“McKay Letter II”).

¹⁰ Notice at 64562.

Diagram 1: Illustration of Exchange Resources, per Proposals



- A. Both “would follow the same route *within* the data center” (emphasis added)¹¹
- B. Both “would both enter through a meet-me-room”
- C. Both would “connect to equipment in co-location ...”
- D. “ ... and then connect to users”

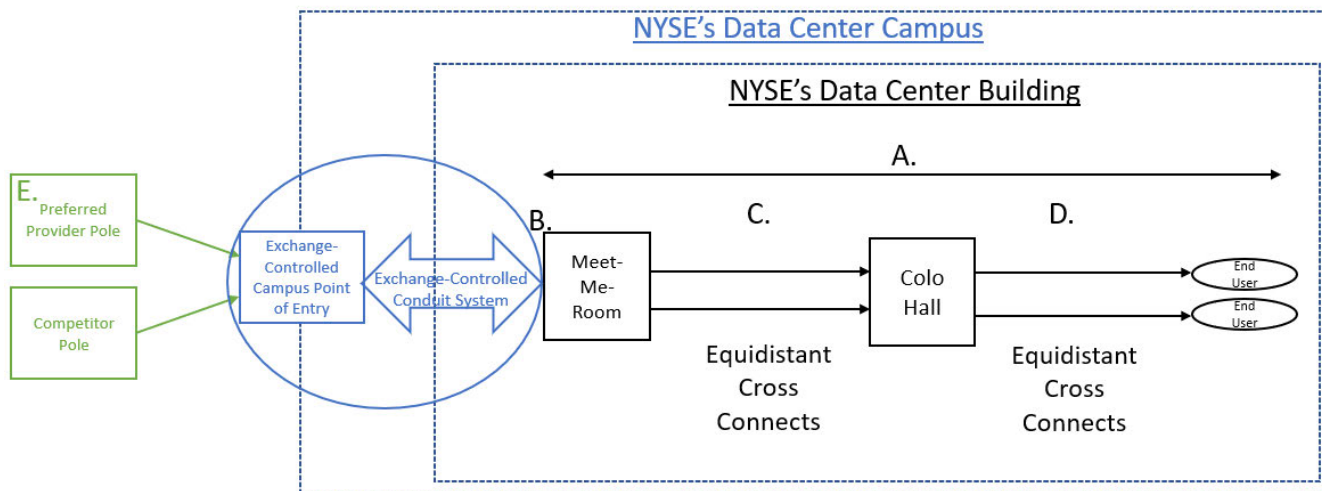
The Proposal continues: “Because of this, the Exchange does not believe that IDS has an advantage over the third party in providing the connectivity.”

The paragraph proceeds to reference a transmission pole (“E.” in Diagram 2 below) not on the grounds of the Data Center campus, suggesting that the Exchanges may believe that connectivity from the Points of Entry through the Conduit Systems to the meet-me-rooms—all of which is controlled by the Exchanges—may be outside of the “no-advantage” claim of the prior sentence and need not be considered as part of the Commission’s analysis of competitive impact.

The additions in Diagram 2, highlighted by the blue circle, attempt to fill the gap in the Proposal’s description of the Exchanges’ delivery of CME Group Data. Missing was the Exchanges’ exclusive control over each Point of Entry and each Conduit for the preferred provider and for any Exchange competitor.

¹¹ In other words, “within” the Data Center could mean from the meet-me-room into the Data Center, but not from the meet-me-room to the Exchange-controlled Points of Entry.

Diagram 2: Illustration of Exchange Resources, including Connectivity Components not referenced in the Proposal



For purposes of the Proposals, one key question is if the Exchanges provide to their preferred provider any advantage not available to other providers, such as from the Exchange-controlled campus Point of Entry to the meet-me-room. The Proposed Services should cross onto—and traverse within—the Data Center campus only through infrastructure that is made known and available by the Exchanges to any registered telecommunications service provider.¹² Another key question is if the Exchanges provide advantages through selective information sharing about the Data Center campus. To these ends, the Firm believes that the Proposals should include the following representations:

- *Level Playing Field Policy* – The Exchanges should declare that they do not and will not use their control over the Data Center campus to advantage or disadvantage any connectivity or market data provider from a latency perspective or otherwise.¹³ The declaration should include the Exchange’s control over the physical infrastructure (e.g., Points of Entry, the Conduit System, meet-me-rooms, cross-connections) as well as control over the timely release of relevant information (e.g., the simultaneous release of announcements regarding changes to infrastructure, or the policies and procedures which govern them). Such a direct commitment would go a long way towards assuring market participants that the Exchanges meet their burden of non-discrimination and imposing no undue burden on competition. Conversely, the absence of such a commitment leaves unanswered the question of whether the Exchanges may be granting exclusive advantages,

¹² The Firm notes that the Exchanges provide, manage, and control the Conduit Systems and Points of Entry through which registered telecommunications companies, like McKay (“Telecoms”), run physical connections to the meet-me-rooms. Telecoms supply the fiber installed in the Conduit Systems connecting the Points of Entry to the meet-me-rooms. Connections between the meet-me-rooms and the colocation halls, within the colocation halls, and between the colocation halls and Exchange trading systems all rely on fiber and Conduit Systems provided, managed, and controlled by the Exchanges.

¹³ The Firm has previously called for such a principles-based commitment from the Exchanges. See [Letter](#) from Jim Considine, Chief Financial Officer, McKay, to Vanessa Countryman, Secretary, Commission re: File No. SR-NYSE-2020-05, at 2-4 (August 28, 2020) (“McKay Letter IIP”).

or may grant exclusive advantages, to a preferred provider to the disadvantage of competitors.

- *Same Access to All Exchange Resources* – The Exchanges state that the Proposed Services would “follow the same route *within* the Data Center” (emphasis added) as competitors and both would “enter through *a* meet-me-room” (emphasis added).
 - As the Exchanges have pointed out in recent filings, there are three publicized Points of Entry onto the Data Center campus, and there are two publicized meet-me-rooms.¹⁴ Further transparency is needed to ensure that the Exchanges have publicized and provide equal access to all relevant Points of Entry, all relevant meet-me-rooms, and all relevant Conduits.
 - Exchanges should confirm that the cross connects they generally describe as “equidistant” (*e.g.*, those between a meet-me-room to a colocation hall, those from a colocation hall to customer equipment) are also of the same physical medium. In other words, the fiber used for such connections are each standard “solid core” fiber, and none are made of the faster “hollow core” variety.
 - It is unclear from the Proposals whether the Proposed Services would use only the publicized Point(s) of Entry, only the publicized Conduit(s), and only the publicized meet-me-room(s) that are available for competitor services. As the Firm has previously noted, Exchanges could use their control over the Data Center campus to withhold from service competitors the most direct routes, thereby adding additional latency to the latter’s services.
- *Avoid vague references to “Same or Similar Speed”* – Nanoseconds matter. Where the Exchanges provide fiber cabling or Conduit System access, such infrastructure should be equidistant within a stated and reasonable tolerance (*e.g.*, one foot of fiber or one nanosecond of latency).¹⁵ Where Exchanges compare the speed over Exchange-controlled infrastructure on the Data Center campus for a preferred provider or Exchange service versus another service, the Exchanges should quantify and explain the cause of any differences.
- *No Market Data Distribution from a Meet-Me-Room* – The Exchanges should affirmatively represent that their prohibition on market data distribution from a meet-me-room (per the Exchanges’ “US Liquidity Center Operating Policies and Procedures”¹⁶) applies also to the

¹⁴ See *e.g.*, Exchange Act Release No. [91598](#), 86 FR 21373, 21374 (April 22, 2021) (SR-NYSE-2021-25) (“There are currently three IDS conduit paths leading into the Mahwah Data Center.”) and at 21378 (“The Exchange believes the proposed fees are reasonable because to offer the MMRs, IDS must provide, maintain and operate the Mahwah Data Center technology infrastructure.”) (emphasis added).

¹⁵ As the Firm has previously noted, a tolerance of one foot should account for any imprecision in measuring and cutting fiber and is a commonly used standard in financial markets colocation. See McKay Letter IV at n.24. It is not intended to limit the magnitude of an intentional advantage.

¹⁶ ICE Global Network and Colocation US, US Liquidity Operating Policies and Procedures (October 2021), https://www.theice.com/publicdocs/IGN_Colocation_Mahwah_Operating_Policies.pdf. These policies provide in Section 1.3.4 that “A Telco Provider may not distribute Market Data from the MMR [meet-me-room].”

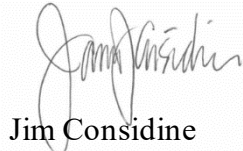
Proposed Services. A waiver of this prohibition for a preferred provider would constitute a considerable advantage.

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The Firm strongly supports the Commission's increased scrutiny in the areas of exchange connectivity and the provision of market data, as demonstrated by the Suspension Order. This scrutiny is essential to promoting competition in this space and furthering the goals of the national market system. We believe that an amendment to the Proposals providing the additional representations and clarifying information described above would help demonstrate consistency of the Proposals with Exchange Act requirements.

Thank you for the opportunity to contribute to this important discussion. Please contact me at [REDACTED] with any questions.

Sincerely,



Jim Considine
Chief Financial Officer
McKay Brothers, LLC

cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Elad L. Roisman, Commissioner
The Hon. Allison Herren Lee, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner

Mr. Haoxiang Zhu, Director, Division of Trading and Markets
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