

April 13, 2022

Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: See Securities Exchange Act Release No. 93810 (December 17, 2021), 86 FR 73026 (December 23, 2021) (SR-NYSE-2021-67, SR-NYSEAMER-2021-43, SR-NYSEArca-2021-97, SR-NYSECHX-2021-17, SR-NYSENAT-2021-23) (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) (“Order”)

Dear Ms. Countryman:

NYSE Group, Inc. (“NYSE Group”), on behalf of the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc. (together, the “NYSE Exchanges”) submits this letter to respond to the above Order and the comment letter submitted in connection with it.¹

In early November 2021, each of the NYSE Exchanges submitted a proposed rule change to offer co-located customers wireless connectivity to CME Group, Inc. (“CME Group”) market data (“CME Group Data”) and establish associated fees.² In December 2021, the Commission suspended the rule change and

¹ See letter from Jim Considine, Chief Financial Officer, McKay Brothers, LLC (“McKay Brothers”), to Ms. Vanessa Countryman, Secretary, Securities and Exchange Commission (“Commission”), dated January 13, 2022 (“McKay Letter”).

² See Securities Exchange Act Release Nos. 93563 (November 12, 2021), 86 FR 64561 (November 18, 2021) (SR-NYSE-2021-67); 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) (Notice of Filing and Immediate Effectiveness of

instituted proceedings to determine whether to approve or disapprove the proposed rule changes. For the reasons set forth below and in the Filings the NYSE Exchanges respectfully request that the Commission approve the Filings.

The Proposal

Currently, market participants that request to receive co-location services directly from the NYSE Exchanges (“Users”) are offered wireless connections to eight market data feeds or combinations of feeds from third party markets. Users can also choose from wired connections to data feeds from 43 third party markets and other content service providers.

In the Filings, the NYSE Exchanges propose to add another wireless connection to the existing list of possible connections. Users would be offered such wireless connection to CME Group Data through connections into the colocation center in the Mahwah, New Jersey data center (“MDC”).³ For each wireless connection to CME Group Data, a User would be charged a \$5,000 non-recurring initial charge and a monthly recurring charge of \$6,000.⁴

The Competitive Environment

The Filings should be approved because competitive forces restrain the NYSE Exchanges’ fees for the proposed services. Under the Commission’s “market-

Proposed Rule Change To Amend the Exchange's Price List Regarding Colocation Services) (collectively, the “Filings”). Unless otherwise defined herein, capitalized terms used herein have the same meaning as in the Filings.

³ Through its ICE Data Services (“IDS”) business, Intercontinental Exchange, Inc. (“ICE”) operates the MDC in Mahwah, New Jersey. The NYSE Exchanges are indirect subsidiaries of ICE. The proposed service would be provided by IDS pursuant to an agreement with a non-ICE entity. IDS does not own the wireless network that would be used to provide the service.

⁴ The wireless connection would provide connectivity to a selection of CME Group market data. A User that wished to purchase the service would determine the symbols for which it would receive data, which could include data regarding some or all of the symbols for which IDS provides connectivity. Each wireless connection to CME Group Data would include the use of one port for the connectivity. See 86 FR 64561, supra note 2, at 64562.

based approach,”⁵ an exchange may demonstrate that its proposed services and related fees are reasonable because the exchange is subject to significant competitive forces in setting the terms of the proposal. Such competitive forces powerfully constrain unreasonable or unfair pricing behavior on the part of an exchange since customers may shift their business away from the exchange to one of its competitors if the exchange sets its fees too high.

In the present case, the proposed change would not affect competition among national securities exchanges or their members. Rather, the competition affected by the proposed change is between IDS and its commercial competitors—including the McKay Brothers.

As noted in the Filings, Users that do not opt to utilize the proposed wireless connection would still be able to obtain CME Group market data using another method. Their options include the following:

- A User could obtain CME Group market data over wireless, through (a) another third-party wireless connection, such as the McKay Brothers offering, or (b) a proprietary wireless connection.
- A User could also obtain CME Group market data over a fiber connection, through (a) another User, (b) the existing IDS fiber connection,⁶ or (c) a third-party fiber connection.
- Additional IDS competitors could respond to User demand for connectivity to CME group market data with new connectivity options. The NYSE Exchanges are not aware of any impediment to third parties doing so.
- A User may decide to change where it connects to CME Group market data, connecting to it in another data center instead of the MDC.

Together, the direct wireless competition, panoply of other options available to Users, and the fact that other providers could respond to User demand with new connectivity options, create a competitive environment for connectivity to CME

⁵ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

⁶ See Securities Exchange Act Release No. 81014 (June 23, 2017), 82 FR 29615 (June 29, 2017) (SR-NYSE-2017-25) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Add Access for Users to Two Third Party Systems and Connectivity to Six Additional Third Party Data Feeds). Fiber network connections may be more attractive to some market participants as they are more reliable and less susceptible to weather conditions. See 86 FR 64561, supra note 2, at 64565.

Group market data.⁷ Commission approval of the Filings would only expand this competition.

This competitive market serves to constrain IDS' potential fees for connectivity to CME Group Data. If IDS were to charge an excessive fee, customers could opt to use the McKay Brothers wireless service or another of the other MDC connectivity options listed above, instead of IDS' proposed service. As a result, charging unreasonable fees for connectivity to CME Group Data would likely reduce the number of customers for the proposed service.

The proposed service would not just compete with connections in the MDC. The competitive market includes connectivity providers outside of the MDC. Indeed, most, if not all, Users already have a presence in at least one other data center.⁸ Based on its preferences, a User may opt to connect to CME Group market data in a different data center altogether. As a result, the relevant competitive market spans various data centers, not just the MDC. This wider competitive market puts additional downward pressure on IDS fees for connectivity to CME Group Data within the MDC: if Users can shift their connectivity to CME Group Data to another data center, IDS is incentivized to keep the cost of connecting to CME Group Data lower.

Moreover, a User may view the cost of the proposed connectivity to CME Group Data as part of its overall cost of trading. If IDS were to make trading on the NYSE Exchanges less attractive through charging higher fees, including for connectivity to third-party data products, it would reduce the demand for the IDS services in the MDC, as entities moved to other, less expensive, trading venues. Further, if fewer entities traded on the NYSE Exchanges, being in the MDC would become less attractive, creating a feedback loop reducing the demand for IDS services.⁹ The net result is to create constraints on IDS in setting all MDC fees, including the proposed fees for connectivity to CME Group Data.

⁷ The Commission has recognized that products do not need to be identical or equivalent to be considered substitutable; it is sufficient that they be substantially similar.

⁸ There are competing third party data centers in Secaucus and Carteret, New Jersey, and, to some extent, Chicago, Illinois. It is worth noting that the MDC does not hold a dominant position among these data centers: the other data centers lease space to markets that account for larger shares of the U.S. equities and options trading volumes than the MDC. The NYSE Exchanges' share of trading is approximately 20%.

⁹ A firm does not need to be located at the MDC in order to trade on, or connect to the data of, a NYSE Exchange. Order flow could be diverted to other trading venues instead of the MDC, or a customer could trade via

Cost and latency are not the only basis for competition among connectivity services. IDS and the other connectivity providers would compete on the latency, flexibility and reliability of the connectivity to CME Group market data that they offer. If IDS were to offer a product that did not compete with the other available services on these bases, Users could opt to use those other services instead, whether in the MDC or elsewhere.

The McKay Letter itself demonstrates that competition exists. As it states, a McKay Brothers affiliate “provides CME Group Data to its customers at the [MDC] using the telecommunications infrastructure of McKay [Brothers]”¹⁰—in short, the proposed service would directly compete with an existing McKay Brothers wireless service. Indeed, the NYSE Exchanges suspect that competition is the underlying motivation for the McKay Letter: it tries to cast doubt on the proposed rule change because if the Commission disapproves the Filings, the McKay Brothers will have succeeded in staving off a potential competitor.

Users, on the other hand, would lose. If the Commission disapproves the Filings, Users will not have the benefit of the more robust competition that an additional wireless option for connectivity to CME market data would provide. Users will not realize any of the potential cost, quality, or other benefits attendant to having two wireless connections to CME Group market data competing for their business, rather than just one. Similarly, a disapproval would limit the number of choices Users would have with respect to the latency, form, and reliability of the connectivity they use to receive CME Group market data. Given this, it is clear that Users would benefit from the increased competition that an approval would create, as they would be offered a wider variety of services, allowing them to choose the one that is most tailored to their needs, whether those needs are tied to cost, form, flexibility, latency, reliability, or something else entirely.

The McKay Letter

The McKay Letter demands that the NYSE Exchanges provide “additional transparency” and “precision in the description of the Exchanges’ internal infrastructure,” as otherwise “neither market participants nor the Commission can

indirect connections. The NYSE Exchanges believe that, as a result of the intense competition for order flow, customers are likely to switch trading venues (and therefore data centers) in response to cost increases.

10 McKay Letter, supra note 1, at 2-3. IDS does not have visibility into how many customers for connectivity to CME Group market data McKay Brothers has in the MDC.

determine if the Proposals provide an advantage that is inconsistent with Exchange Act requirements.”¹¹

First, the McKay letter misstates the requirements of the Exchange Act. The NYSE Exchanges are not required to prove to the satisfaction of all market participants, much less competitors, that a proposed rule change meets the requirements of the Exchange Act. Only the Commission can make that determination. Nonetheless, the NYSE Exchanges address the points the McKay Letter raises regarding the proposed connectivity to CME Group Data below.¹²

In a series of illusory statements and questions, the McKay Letter makes much of the control of the MDC, with which it incorrectly credits the NYSE Exchanges instead of IDS. Yet one would be hard pressed to find a data center operator that did *not* control its data center. Operator control over a data center allows for greater security, consistent standards, and uniformity. Indeed, safeguarding the security of the U.S. national market system—in this case, the data center where the NYSE Exchanges maintain trading engines and publish market data, and where the Securities Industry Automation Corporation (“SIAC”) publishes the National Market System (“NMS”) data feeds for which it is the exclusive securities information processor—is a key part of the operation of a free and open market and national market system and protecting investors and the public interest.

¹¹ Id., at 3.

¹² The NYSE Exchanges do not address the aspects of the McKay Letter that are irrelevant to the services proposed in the Filings, including comments regarding cross-connects and the internal infrastructure of the NYSE Exchanges. See, e.g., McKay Letter, *supra* note 1, at 2, 3 and 6. Many of these comments relate to services addressed in separate filings. See, e.g. Securities Exchange Act Release Nos. 74222 (February 6, 2015, 80 FR 7888 (February 12, 2015) (SR-NYSE-2015-05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Include Internet Protocol Network Connections and Fiber Cross Connects Between a User's Cabinet and Non-User's Equipment as Co-Location Services), and 90209 (October 15, 2020), 85 FR 67044 (October 21, 2020) (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) (Notice of Filings of Partial Amendment No. 3 and Order Granting Accelerated Approval to Proposed Rule Changes, Each as Modified by Partial Amendment No. 3, To Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections).

The MDC structure furthers that security goal. First, having IDS control the MDC limits third parties' need to enter the MDC, minimizing security risks. IDS controls who can place equipment inside the MDC, who can access that equipment, and what path they follow once on the data center grounds. Second, its control allows IDS to establish and enforce usage policies designed to protect the MDC's security and treat Users equally and consistently. Third, the MDC structure reduces security risks because it allows the trading engines of the NYSE Exchanges, SIAC's NMS market data publishers, and the ICE Global Network, including the IDS circuits, to be physically and logically segregated from vendors and other third party service providers. Ultimately, the objection to IDS having control over its own MDC is a red herring.

The real question is whether the proposed connectivity to CME Group Data would have "latency and other advantages in connectivity"¹³ with respect to the MDC. To that end, the McKay Letter contends that "[f]urther 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."¹⁴ It asks whether "the Exchanges provide to their preferred provider any advantage not available to other providers, such as from the [NYSE] Exchange-controlled campus Point of Entry to the meet-me-room"¹⁵ and posits that "the [NYSE] Exchanges may believe that connectivity from the Points of Entry through the Conduit Systems to the meet-me-rooms . . . may be outside of the 'no-advantage' claim . . . and need not be considered as part of the Commission's analysis of competitive impact."¹⁶

The proposed service for connectivity to CME Group Data does not have any special access to or within the MDC. It follows the same path into the MDC that is available to any customer, and within the MDC it is the same as any other customer. As explained in the Filings,¹⁷ like the McKay Brothers service, the proposed IDS service would convert from a wireless connection to a fiber connection at a commercial pole, from where the fiber connection would lead into the MDC using one of the disclosed entry points that are available to all

¹³ McKay Letter, supra note 1, at 2.

¹⁴ Id., at 6.

¹⁵ Id., at 5.

¹⁶ Id., at 4.

¹⁷ See 86 FR 64561, supra note 2, at 64562.

customers.¹⁸ Depending on what commercial poles IDS and the McKay Brothers use, the poles may be different distances from the MDC, but both services would enter the MDC using conduits available to all customers. In short, the proposed connectivity to CME Group Data would use the same points of entry and travel through the same conduits as all other connectivity—in the words of the McKay Letter, “infrastructure that is made known and available by the [NYSE] Exchanges to any registered telecommunications service provider.”¹⁹ Within the MDC the proposed connection to CME Group Data would follow the same route as the McKay Brothers connection: they would both enter through a meet-me-room (“MMR”), connect to equipment in co-location, and then connect to any Users that are customers.

Further, all distances in the MDC are normalized. Existing NYSE Exchange rules also apply, as they require that the distance from the Patch Panel Point to each customer cabinet in the co-location space be the same.²⁰ Every provider of wireless connectivity to Users, including IDS, is connected to the Patch Panel Point, and the length of the fiber path from the Patch Panel Point to each User cabinet in co-location is the same.²¹

This information is available not just from the NYSE Exchange rules, but also from IDS. For example, in the publicly available *ICE Global Network & Colocation Technical Specifications*, IDS describes the entry options and internal connections to the co-location areas.

¹⁸ As noted in the Filings, the proposed wireless connection would use a commercial pole owned by a third party which is not on the grounds of the MDC. See id. It would not use the MDC pole on the grounds of the MDC.

¹⁹ McKay Letter, supra note 1, at 5.

²⁰ See NYSE Rule 3.13(c), NYSE American Rule 3.13E(c), NYSE Arca Rule 3.13(c), NYSE Chicago Rule 3.13(c), and NYSE National Rule 3.13(c) (MDC Pole Restrictions—Connectivity to Co-Location Space). “Patch Panel Point” is defined as “the patch panel where fiber connections for wireless services connect to the network row in the space used for co-location in the MDC.” Id. The proposed service would not use the MDC pole, so Rule 3.13(b) would not apply. See also 85 FR 67044, supra note 12.

²¹ See Partial Amendment No. 3 to SR-NYSE-2020-05 (September 29, 2020), at 6 (stating that Rule 3.13 “would apply to . . . the previously filed wireless services that allow co-located users to receive market data feeds from third party markets through a wireless connection.”).

The McKay Letter seems to be looking for ambiguity where there is none. For example, it requests that the NYSE Exchanges “affirmatively represent that their prohibition on market data distribution from a meet-me-room . . . applies also to the Proposed Services.”²² Yet the IDS provision that the McKay Letter points to provides for no exceptions.²³ Given this, it is not clear why the McKay Letter asserts one would be possible. Similarly, the McKay Letter asks whether the NYSE Exchanges or IDS “provide advantages through selective information sharing about the MDC campus” to the third party that IDS has contracted with for the service.²⁴ They do not. All third party telecommunications service providers are treated the same, irrespective of whether they have contracted with IDS for services IDS offers in the MDC.

Finally, the McKay Letter objects to the Filings’ statement that the NYSE Exchanges believe that the wireless connection offered by this third party entity provides connectivity at the same or similar speed as the proposed connection to CME Group Data.²⁵ It wants a more specific statement:

Where [NYSE] Exchanges compare the speed over [NYSE] Exchange-controlled infrastructure on the Data Center campus for a preferred provider or [NYSE] Exchange service versus another service, the [NYSE] Exchanges should quantify and explain the cause of any differences.²⁶

As we stated above, all distances inside the MDC are normalized. In terms of the network used for the entire service, however, providing the information the McKay Letter requests is not possible: even if the NYSE Exchanges could foresee exactly what the speed of the proposed connection would be at all times, they could not describe the magnitude of an advantage or disadvantage unless they had something to measure against. McKay Brothers currently is the only provider of wireless connectivity to CME Group market data in the MDC, and it is not obligated to make its latency figures public. The request is particularly disingenuous given that McKay Brothers’ own website claims that its Illinois-New

²² McKay Letter, supra note 1, at 6-7.

²³ *ICE Global Network and Colocation US Liquidity Operating Policies and Procedures* (October 2021) at 5, available at https://www.theice.com/publicdocs/IGN_Colocation_Mahwah_Operating_Policies.pdf.

²⁴ McKay Letter, supra note 1, at 5.

²⁵ See 86 FR 64561, supra note 2, at 64562.

²⁶ McKay Letter, supra note 1, at 6.

Jersey network and New Jersey Metro network both have the “Lowest known latency.”²⁷

The fact that McKay Brothers is not required to make information public underscores its position. Even if the Commission approved the proposed rule change, McKay Brothers would still have greater flexibility in competing with the proposed service, because McKay Brothers is not regulated by the Commission. McKay Brothers can adjust its pricing, provide discounts or credits, and make changes in response to changes in demand or market prices without prior action by a regulator. At the same time, McKay Brothers is not obligated to make its fees publicly available or uniform, and any changes or adjustments it makes are not subject to Commission review.²⁸

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For the reasons set forth above and in the Filings, the NYSE Exchanges believe that they have given the Commission the information it needs to make the relevant findings, and respectfully request that the Commission approve the Filings.

Respectfully submitted,



Martha M. Redding

²⁷ McKay Brothers website, at <https://www.mckay-brothers.com/product-page/> (last visited on April 8, 2022).

²⁸ The NYSE Exchanges recognize that the McKay Letter asserts that McKay Brothers “offer[s] services on a level-playing field basis” by making its “best latencies available to all subscribers” and that it “provide[s] small-firm discounts.” McKay Letter, supra note 1, at note 1. Nonetheless, even if the McKay Letter asserted that all customers were charged the same price, which it does not, McKay Brothers could change this policy at any moment, with no public notice. In other words, even if McKay Brothers *opted* to act in accordance with the strictures of the Exchange Act, it could abandon that stance at any moment, because unlike the NYSE Exchanges it is not *required* to do so.

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