



January 16, 2020

Via Electronic Mail (rule-comments@sec.gov)

Vanessa Countryman
Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-87797; File No. SR-NYSENAT-2019-31

Dear Ms. Countryman:

The Healthy Markets Association¹ appreciates the opportunity to offer our comments to the above-referenced proposal regarding market data fees.² The information provided in the NYSE National Fee Proposal is inadequate to establish its compliance with the Exchange Act and Commission rules, and should be rejected.

Background on the Proposal

The NYSE National Fee Proposal would introduce a new set of fees for a relatively comprehensive, real-time view of events on NYSE National, which it calls the NYSE National Integrated Feed. This information includes “depth-of-book order data, last sale data, security status updates (e.g., trade corrections and trading halts), and stock summary messages.”³

The NYSE National Integrated Feed would impose:

1. “Access Fees” of \$2,500 per firm;⁴

¹ 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>.

² NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish Fees for the NYSE National Integrated Feed, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-87797, Dec. 18, 2019, available at <https://www.sec.gov/rules/sro/nysenat/2019/34-87797.pdf> (“NYSE National Fee Proposal” or the “Filing”).

³ Filing, at 2.

⁴ Filing, at 4.



2. “Redistribution Fees” of \$1,500 per month per redistributor;⁵
3. “User Fees” of \$10 per month per “Professional” users and \$1 per month per “Non-Professional” users;⁶
4. “Non-Display Use Fees” of \$5,000 to \$15,000 per month per feed recipient, depending upon how and by whom the feed is used;⁷ and
5. “Multiple Data Feed Fees” of \$200 per location beyond the first two at which a recipient seeks to have the feed sent.⁸

The Exchange would also require market participants who pay Access Fees to sign an annual “Non-Display Use Declaration”, and would impose a fee of \$1000 per month for failure to timely file such declarations.⁹

The NYSE National Fee Proposal Fails to Comply with the Exchange Act and Commission Rules

The NYSE National Fee Proposal provides insufficient information for the Commission to conclude that the Exchange has established that its 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,¹⁰ including, inter alia, that an exchange’s rules:

- are an equitable allocation of reasonable dues, fees, and other charges;¹¹
- “not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;¹² and
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act.¹³

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.¹⁴ 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

⁵ Filing, at 5.

⁶ Filing, at 5.

⁷ Filing, at 6-7.

⁸ Filing, at 9.

⁹ Filing, at 7-8

¹⁰ See *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

¹¹ 5 U.S.C. § 78f(b)(4).

¹² 15 U.S.C. § 78f(b)(5).

¹³ 15 U.S.C. § 78f(b)(8).

¹⁴ Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm’n, 17 CFR 201.700(b)(3).

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.¹⁵

To assist exchanges, the Commission staff has offered extensive guidance on how they may “ensure that they have clearly described their proposed fees and addressed how they satisfy Exchange Act requirements that, among other things, fees be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition.”¹⁶

The NYSE National Fee Proposal essentially ignores the Commission staff Guidance (which was proffered less than a year ago), and provides almost none of the information needed to make these determinations. Apart from broad generalizations and conclusory statements, the Exchange has offered no data or analysis to support either its logic or its conclusion that the Filing complies with the Exchange Act.¹⁷

Instead of providing its own analysis of the fees’ compliance, the Filing argues that

Firms that *choose to purchase* the NYSE National Integrated Feed do so for the primary goals of using it to increase their revenues, reduce their expenses, and in some instances to compete directly with the Exchange (including for order flow). Those firms are able to determine for themselves whether or not the NYSE National Integrated Feed or any other similar products are attractively priced.¹⁸

Put simply, the Exchange argues that, despite the reality that its quotes are protected under Reg NMS, market participants are somehow free to choose whether to connect or not to the NYSE National Integrated Feed. The Exchange further notes that 33 of the 56 users (as of October 2019) were using the data feed for their own proprietary trading purposes.¹⁹ Although not explicitly stated, the clear implication is that since those firms are trading on their own behalves, they could presumably opt out of buying the feed.

¹⁵ *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>.

¹⁶ *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>.

¹⁷ Somewhat ironically, the NYSE National Fee Proposal reminds the Commission of its prior emphasis on “the importance of market forces in determining prices and SRO revenues.” Filing, at 2-3.

¹⁸ Filing, at 11 (emphasis added).

¹⁹ Filing, at 12.

The Exchange's assertions are hogwash. The reality is that competitive and regulatory pressures compel proprietary traders and agency broker dealers to have the fastest, richest data available to any venue offering a protected quote. The NYSE National Integrated Feed is the fastest, richest dataset offered by the Exchange, and so a wide swath of market participants are going to have to buy it.

If one set of market participants has access to a faster, richer data set, then those without that information will not be as competitive. Further, those firms may not be able to quote or otherwise route orders in a manner that could effectively achieve "best execution." In fact, the Exchange itself acknowledges that subscribers to the feed do so to "reduce their expenses."²⁰ What expenses are those? Adding \$7500 or more per month in data costs -- as the Exchange is proposing -- doesn't facially reduce a broker's expenses. Nor does it facially increase the broker's revenues.

For a potentially hefty price, the Exchange is offering the opportunity for market participants to reduce their trading costs and increase their trading revenues. Without purchasing the NYSE National Integrated Feed, a broker or other market participant would be at a persistent competitive disadvantage to the firms who have purchased it. When better prices may be available on NYSE National, a non-purchasing broker would not be aware of it, and would thus nearly certainly lose the opportunity to take advantage of that price to a broker or other trader who did purchase the feed. Worse, how can a non-purchasing broker provide "best execution" to its customers when it is consistently missing out on those opportunities?

Again, as the Exchange notes, it isn't compelled to offer the data feed.²¹ But once the Exchange offers that feed, many market participants are effectively compelled -- by both competitive pressures and their best execution obligations -- to buy it. This reality is clearly illustrated by the Exchange's limited disclosures. As of October 2019, NYSE National's equity trading market share was just 1.9%.²² Yet, despite this low market share, the 56 then-existing subscribers to the NYSE National Integrated Feed comprised essentially all of the US equity trading volume.²³ In what other industry would a firm comprising such a low percentage of market share essentially be able to count every major participant as a customer?

As we previously explained, once the Exchange opts to offer the feed, the burden then falls on the Exchange to establish that the prices it charges for the feed are (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition."²⁴

²⁰ Filing, at 11.

²¹ Filing, at 11.

²² Filing, at 4.

²³ Filing, at 4.

²⁴ See, SRO Fee Filing Guidance.

Despite spending a whopping 21 pages of the 48-page Filing on its discussion on the purported “reasonability” of the proposed fees, the Exchange does not provide any material justification that the fees are reasonable. Instead, the entire crux of the Exchange’s arguments seem to boil down to four basic assertions:

- The proposed new fees are reasonable because an affiliated exchange charges similar fees;
- An arguably competitive marketplace for order flow between different venues somehow means there is a competitive market for market data exclusively controlled by the Exchange;
- Despite the Exchange’s express acknowledgement that the NYSE National Integrated Feed confers a material advantage to market participants, other data options are available; and
- The “reasonableness” of a fee in a purportedly competitive market has no relation to the costs of production.

None of these assertions support a finding of “reasonableness.” For example, the fact that the Exchange has an affiliate that is charging certain fees should have no bearing on whether the proposed fees are reasonable. Similarly, in a competitive marketplace, the sales prices should be largely impacted by the costs of production. Yet, the Exchange offers no information about the costs of production. Why not?

Instead, the Exchange explicitly states that the Access Fee, for example, “is reasonable to charge access fees because of the value of the data to data recipients in their profit-generating activities.”²⁵ This is a ridiculous assertion. Would it be “reasonable” for an emergency room doctor to first demand \$25 million from a would-be emergency room patient because he knows that his services are valuable -- perhaps essential -- to the patient?

Over the course of the Filing, the Exchange is saying on the one hand that the NYSE National Integrated Feed is very valuable to market participants, and so it can charge these new, high fees for it, while on the other hand arguing that the feed is somehow not essential for market participants and is easily replaced by substitution. Only one of these arguments can be true.

Today, the Exchange charges nothing for the data feed. The Exchange does not detail how much total revenue it projects to generate from the new fees. It does not detail how the new fees, which would range from a likely minimum of \$7500 per month to potentially much more, would impact its subscribers or the competition between them. It doesn’t explain why going from collecting nothing for the feed to collecting millions of dollars a year for the same feed is reasonable.²⁶

²⁵ Filing, at 29.

²⁶ Not surprisingly, the Exchange does not detail how much it projects to collect from the assortment of fees it is seeking to impose. However, if one were to assume 50 firms paid \$7500 per month for the feed,



It doesn't explain how the proposed new fees aren't burdening competition or are equitably allocated. The Exchange does not detail, for example, the latency between the NYSE National Integrated Feed and the SIP or other methods of getting the data. It does not detail how its imposition of these fees will impact the competitive balance between the firms that are able to pay the fee and remain subscribers, and those who don't. However, the Exchange does expressly recognize that there is a material difference that does impact those firms' costs and revenues.²⁷

Ultimately, the Exchange has substituted its own self-serving rhetoric for the essential information needed to evaluate the Filing's compliance with the Exchange Act and Commission Rules. The Exchange has not satisfied its burden.

Conclusion

We urge the Commission to deny the NYSE National Fee Proposal and reaffirm its commitment to ensuring that all SRO fee filings comply with both the Exchange Act and Commission Rules.

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact me at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch
Executive Director

the Exchange would raise \$4.5 million per year. However, given the various user fees, we would expect the revenues gained to be significantly greater than that. Unfortunately, we are deprived of this basic information.

²⁷ Filing, at 11.