



March 12, 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: Exchange Act Release No. 34-88211; File No. SR-NYSENAT-2020-05¹

Dear Ms. Countryman:

The Healthy Markets Association² appreciates the opportunity to offer our comments to the above-referenced proposal regarding market data fees. The information provided in the Second NYSE National Fee Proposal -- much like the Initial Filing³ -- is inadequate to establish its compliance with the Exchange Act and Commission rules, and so the Commission should suspend it and initiate proceedings to disapprove it.⁴

Background on the Proposal

In December 2019, NYSE National filed to impose a broad swath of fees for its NYSE National Integrated Feed. The Initial NYSE National Fee Proposal would have introduced a new set of fees for a relatively comprehensive, real-time view of events on

¹ *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. 34-88211, Feb. 14, 2020, available at <https://www.sec.gov/rules/sro/nysenat/2020/34-88211.pdf> ("Second NYSE National Fee Proposal" or "Second Filing").

² 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>.

³ *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> ("Initial NYSE National Fee Proposal" or the "Initial Filing").

⁴ We also seek to reiterate our concern that exchanges appear to be abusing the procedures that permit certain types of changes, including fees, to become effective filing of those changes with the Commission. Specifically, we are troubled that an exchange would make a "new" filing and begin imposing fees that have been previously suspended or disapproved by the Commission in a substantively similar, prior filing. See, e.g., Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Mar. 19, 2019, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-5151485-183409.pdf>.



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.”⁵ This information is available only from or with the express permission of NYSE National.

Instead of providing the NYSE National Integrated Feed for free, as it has in the past, the Initial Filing would have permitted NYSE National to charge:

1. “Access Fees” of \$2,500 per firm;⁶
2. “Redistribution Fees” of \$1,500 per month per redistributor;⁷
3. “User Fees” of \$10 per month per “Professional” users and \$1 per month per “Non-Professional” users;⁸
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;⁹ and
5. “Multiple Data Feed Fees” of \$200 per location beyond the first two at which a recipient seeks to have the feed sent.¹⁰

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.¹¹

Healthy Markets¹² and SIFMA¹³ objected to the Initial Filing, which was thereafter suspended by the Commission staff.¹⁴ The next business day, on February 3rd, NYSE National filed to withdraw the Initial Filing,¹⁵ relieving customers of the obligation to pay the fees. However, that same day, the Exchange made the Second Filing, which is essentially the same as the Initial Filing. The Second Filing is currently effective.

⁵ Initial Filing, at 2.

⁶ Initial Filing, at 4.

⁷ Initial Filing, at 5.

⁸ Initial Filing, at 5.

⁹ Initial Filing, at 6-7.

¹⁰ Initial Filing, at 9.

¹¹ Initial Filing, at 7-8

¹² Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm’n, Jan. 16, 2020, available at <https://www.sec.gov/comments/sr-nysenat-2019-31/srnysenat201931-6663540-203934.pdf>.

¹³ Letter from Robert Toomey, Securities Industry and Financial Markets Association, to Vanessa Countryman, Sec. and Exch. Comm’n, Jan. 21, 2020, available at <https://www.sec.gov/comments/sr-nysenat-2019-31/srnysenat201931-6678406-204968.pdf>.

¹⁴ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Establish Fees for the NYSE National Integrated Feed*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88109, Jan. 31, 2020, available at <https://www.sec.gov/rules/sro/nysenat/2020/34-88109.pdf>.

¹⁵ *Notice of Withdrawal of a Proposed Rule Change to Establish Fees for the NYSE National Integrated Feed*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88118, Feb. 4, 2020, available at <https://www.sec.gov/rules/sro/nysenat/2020/34-88118.pdf>.

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

The Second NYSE National Fee Proposal -- like the first -- 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,¹⁶ including, inter alia, that an exchange's rules:

- are an equitable allocation of reasonable dues, fees, and other charges;¹⁷
- “not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;¹⁸ and
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act.¹⁹

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.²⁰ 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.²¹

To assist exchanges, the Commission staff has offered extensive Staff 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

¹⁶ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

¹⁷ 15 U.S.C. § 78f(b)(4).

¹⁸ 15 U.S.C. § 78f(b)(5).

¹⁹ 15 U.S.C. § 78f(b)(8).

²⁰ Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).

²¹ *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/cboeedqa/2019/34-86236.pdf>.

be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition.”²²

The Second NYSE National Fee Proposal essentially ignores the 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.²³

Instead of providing its own analysis of the fees’ compliance, the Second 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.²⁴

The Exchange argues that market participants are somehow free to choose whether to subscribe to the NYSE National Integrated Feed. Again, as the Exchange notes, it isn’t compelled to offer the data feed. 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%.²⁵ Yet, despite this low market share, the 57 then-existing subscribers to the NYSE National Integrated Feed comprised essentially all of the US equity trading volume.²⁶ 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?

The Exchange further notes that 34 of the 57 users were using the data feed for their own proprietary trading purposes.²⁷ Although not explicitly stated, the clear implication is

²² *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>.

²³ 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.

²⁴ Second Filing, at 11 (emphasis added).

²⁵ Second Filing, at 4.

²⁶ Second Filing, at 4. Notably, the Exchange has separately explained that five firms have subsequently cancelled their subscriptions. See Second Filing, at 16. We are unaware of how these statistics have changed, based upon the subsequent cancellations. As detailed below, we believe that the Exchange, having offered these cancellations to support its assertion of a “competitive” service, should now provide updated information about its services, as well as details about the current subscribers and cancelled firms.

²⁷ Second Filing, at 13.

that since those firms are trading on their own behalf, they could presumably opt out of buying the feed.

In support of this assertion that customers can “opt out” of buying the feed, the Exchange points out that facing the imposition of the new fees, five subscribers canceled their subscriptions, with each telling “the Exchange that the reason for ending its subscription was the imminent imposition of fees.”²⁸ A sixth customer threatened to cancel its subscription if the fees were permitted, and would “instead subscribe to the NYSE National BBO feed, which will remain available for free.”²⁹ Similarly, NYSE National cites to a paper that it funded,³⁰ which concluded that,

[a]lthough there are regulatory requirements for some market participants to use consolidated data products, there is no requirement for market participants to purchase any proprietary market data product for regulatory purposes.³¹

These assertions are dangerously misleading.

The Commission has, in fact, brought enforcement action when a trading firm has represented that it has provided the “best price” to its customers when it was providing customers with inferior prices that were contained on the slower public market data stream (as opposed the proprietary data feeds).³² Similarly, as the Commission has repeatedly heard from market participants that a broker cannot be reasonably expected to be aware of the best prices in the market -- and fulfill its best execution obligations -- if it does not have timely access to the most complete data set.

We appreciate the Exchange’s admission that its proposed fees are so high that they are pushing some customers to drop the service, and creating a clearly discriminatory impact on its customers. The question isn’t whether, as a factual matter, a firm can *choose* to not pay the fees in return for the data--in the same way that a person of limited means could *choose* to not eat. Neither choice is truly voluntary. And neither leads to a good outcome.

Oddly, after acknowledging the cancellations, the Exchange stopped far short of providing the necessary details to assess what happened. The Exchange has not provided any relevant information about those customers. Why were those firms subscribed in the first place? Were those firms proprietary trading firms or agency brokers? Were they data vendors? Did those firms ever send any orders to the

²⁸ Second Filing, at 16.

²⁹ Second Filing, at 16.

³⁰ Charles M. Jones, *Understanding the Market for U.S. Equity Market Data*, Aug. 31, 2018, available at <https://www0.gsb.columbia.edu/faculty/cjones/papers/2018.08.31%20US%20Equity%20Market%20Data%20Paper.pdf> (“NYSE-Funded Paper”).

³¹ Second Filing, at 18 (citing NYSE-Funded Paper, at 2).

³² *In the Matter of Citadel Securities LLC*, Sec. and Exch. Comm’n, Admin. Proc. File No. 3-17772, Jan. 13, 2017, available at <https://www.sec.gov/litigation/admin/2017/33-10280.pdf>.

Exchange? How often? The Commission should focus on the impact on the firms that have cancelled, if any. Similarly, the Exchange should update and further detail information about its remaining subscribers. Given that the Exchange thought that this information was important enough to include in the Initial Filing, it should be updated now.

The imposition of thousands of dollars in new fees per month is material to many market participants. Certainly, each of those cancelling subscribers will no longer receive essential information in a timely manner. If those firms are proprietary in nature, they may simply recognize that the increased risk of missing better prices on such a small volume exchange is minimal. However, brokers with best execution obligations may become materially less competitive if they lose access to the NYSE National Integrated Feed.

As one large investment adviser explained to the Commission:

Practically speaking, broker-dealers do not have the option to forego buying this proprietary data because the lower priced information required to be provided by securities information processors ("SIPs") is not as expansive and the SIP feeds are slower. As a fiduciary, it is important to us that our broker-dealers have the fastest and deepest possible information for a full and accurate view of the market so that we can best serve our clients' interests. Some market participants (see the October 23, 2018 comment letter from Clearpool) have rightfully acknowledged that even if the SEC provided a safe harbor that best execution requirements may be satisfied by relying on SIP data, they believe they have a business and commercial obligation to obtain the more robust, faster data offered by the exchanges' proprietary data feeds.³³

Nevertheless, the Exchange relies on the NYSE-Funded Paper to assert that

[t]he market [for exchange market data] is characterized by robust competition: exchanges compete with each other in selling proprietary market data products. They also compete with consolidated data feeds and with data provided by alternative trading systems ('ATs'). Barriers to entry are very low, so existing exchanges must also take into account competition from new entrants, who generally try to build market share [as NYSE National has done with its Integrated

³³ Letter from Mehmet Kinak and Jonathan Siegel, T. Rowe Price, to Brent J. Fields, Sec. and Exch. Comm'n, Jan. 10, 2019, available at <https://www.sec.gov/comments/4-729/4729-4844471-177204.pdf>.

Feed] by offering their proprietary market data products for free for some period of time.³⁴

Setting aside that the NYSE-Funded Paper was funded by “NYSE”,³⁵ we think that the issues raised deserve consideration. Can third-party truly “compete” with NYSE National in offering data related to activity on NYSE National?

The NYSE-Funded Paper does not provide any details to support its conclusion that there is such “competition.” Similarly, the Exchange doesn’t offer any relevant data. For example, the paper does not consider what data is made available by each exchange, nor does it compare that to the market data available from other exchanges. It similarly doesn’t look at the comparative pricing of those different options. Nor does it examine the various costs and benefits to purchasers of the different options, if any.

The NYSE-Funded Paper does not consider whether and to what extent one of those “competitors,” presumably other exchanges, provides competition for market data that exclusively relates to activity on NYSE National. The NYSE-Funded Paper ignores the contractual reality that NYSE National controls who, under what terms, and when, anyone other than NYSE National can obtain essential order-related information about NYSE National.³⁶

As SIFMA clearly explained in its response to the Initial Filing:

Contrary to NYSE National’s claim, its Integrated Feed is not subject to competitive forces because there are no available substitutes to the exchange’s depth-of-book products. First, NYSE National lists inferior products that do not contain depth-of-book information as “alternatives” to its Integrated Feed. This depth-of-book information is essential for many broker-dealers to provide customers with the best and most competitive order routing capabilities and execution quality, and NYSE National is the exclusive purveyor of that information. Second, considering data vendors must first purchase the data from NYSE National, subject to NYSE National’s terms and pricing, before being able to resell that

³⁴ Second Filing, at 18 (citing Charles M. Jones, *Understanding the Market for U.S. Equity Market Data*, August 31, 2018), available at <https://www0.gsb.columbia.edu/faculty/cjones/papers/2018.08.31%20US%20Equity%20Market%20Data%20Paper.pdf> (“NYSE-Funded Paper”).

³⁵ NYSE-Funded Paper, at 1, n.1 (“The NYSE provided financial support for this research.”). We do not know whether NYSE National or some other affiliate was the entity that paid for the report.

³⁶ In addition to the different time of receipt of data, the NYSE National Integrated Feed provides significantly more information than is contained in the SIPs. For example, the Commission has separately recognized the importance of depth-of-book, auction, and odd-lot information to many market participants. See, e.g., *Market Data Infrastructure*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88216, Feb. 14, 2020, available at <https://www.sec.gov/rules/proposed/2020/34-88216.pdf>.

data, these data vendors cannot offer a competing product. NYSE National's de facto monopoly over its data precludes the development of competing products to constrain its pricing.³⁷

Furthermore, while we disagree with the Exchange's assertion that the overall market for market data is somehow subject to competitive forces, that still does not satisfy the Exchange's burden to provide sufficient information to establish that the fees contemplated in the Second Filing are "reasonable," "equitably allocated," "non-discriminatory," and not "unduly burdensome on competition."

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."³⁸ 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?

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."³⁹

Despite spending a whopping twenty-two pages of the fifty-page Second 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;

³⁷ SIFMA Letter, at 2.

³⁸ Second Filing, at 13.

³⁹ See, SRO Fee Filing Guidance.



- 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."⁴⁰ 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?

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.⁴¹

The Exchange 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.

Lastly, we wish to address the Exchange's clear misapplication of theoretical construct as somehow supporting the "reasonability" of its fees. The supply and demand functions

⁴⁰ Second Filing, at 31.

⁴¹ 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, 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.



for order flow and market data are separate. Some -- indeed, many -- firms may need to access the data without ever sending an order to the Exchange. At the same time, there may be firms who may seek to send orders to the Exchange, perhaps in search of a rebate, that may not rely on the market data.

As SIFMA explained in its objection to the Initial Filing:

SIFMA further disagrees with NYSE National's claim that the price for the integrated feed will be constrained by the competition for order flow under the "platform theory" of competition. Among other reasons, the competition for order flow will not constrain the cost of market data because the decision of where to trade occurs in milliseconds, while market data fees are purchased and charged monthly independent of decisions on where to trade. Further, not all purchasers of market data execute trades solely on exchanges, which limits the theoretical ability to constrain market data prices by routing order flow to other exchanges. Also, as evidenced in Professor Glosten's study, exchanges have little incentive to reduce the prices for their own market data because any theoretical increase in demand would be shared with other exchanges. Additionally, exchanges have yet to show an increase (or decrease) in their trading volume after reducing (or increasing) its price of market data.⁴²

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

Conclusion

We urge the Commission to suspend the Second NYSE National Fee Proposal and initiate proceedings to disapprove it. We further urge the Commission to 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

⁴² SIFMA Letter, at 2.