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Via Email

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

Re: Securities Exchange Act Release No. 93883 (December 30, 2021), 87 FR 523 (January 5, 2022) (SR-IEX-2021-14) (Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend IEX's Fee Schedule for Market Data Fees)

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE"), on behalf of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (together, the "NYSE Exchanges"), appreciates the opportunity to comment on the Order¹ of the Division of Trading and Markets ("Division") of the Securities and Exchange Commission ("Commission") to temporarily suspend and institute proceedings to determine whether to approve or disapprove the proposed rule change by Investor Exchange LLC ("IEX") to amend its fee schedule for market data fees.²

In NetCoalition I,³ the United States Court of Appeals for the District of Columbia Circuit held that an exchange can establish that its fees for market data products are fair and reasonable through a market-based approach showing that the fees are constrained by competition or a cost-based analysis. IEX has sought to support the Proposal through a cost-based analysis.

NYSE does not object to the Commission approving the Proposal. NYSE does take issue, however, with IEX's too narrow view of how to approach the analysis of costs to produce market data. In the Proposal, IEX states that it used a "conservative methodology (i.e., that strictly considers only those costs that are most clearly directly related to the production and

¹ See Securities Exchange Act Release No. 93883 (December 30, 2021), 87 FR 523 (January 5, 2022) (SR-IEX-2021-14) (Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend IEX's Fee Schedule for Market Data Fees) (the "Order").

² See Securities Exchange Act Release No. 93557 (November 10, 2021), 86 FR 64268 (November 17, 2021) (the "Proposal").

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

distribution of IEX Data) to estimate such costs,”⁴ and therefore opts only to address “(1) direct costs (servers, infrastructure, monitoring), (2) enhancement initiative costs (new functionality and capacity), and (3) personnel.”⁵ But this methodology is neither conservative nor realistic. Exchange market data is produced by operating all parts of an exchange, and operating an exchange requires, at a minimum, expenditures to: attract listings (if it is a listing market); build, test, and operate technology; run and regulate trading floors (if applicable); operate and maintain a matching engine; monitor trading operations; provide incentives for market maker quoting; attract order flow; provide for cybersecurity; comply with Regulation NMS, Regulation SCI, and all other securities laws; and regulate the exchange’s members and issuers through surveillance and enforcement. These costs are not ancillary to the creation of market data products; they are necessary to creating a vibrant trading environment whose resulting market data outputs have value to market participants.

IEX likely opted to omit analysis of these core operating costs given the impossibility of determining how to allocate the indirect costs of operating its exchange to specific market data feeds.⁶ NYSE has long pointed to this impossibility as a reason it has consistently opted to support its own market data fee filings with the “market-based” approach permitted by NetCoalition I. NYSE does not keep data regarding its costs of operating its exchanges in a disaggregated manner, with “costs to provide market data” in one column and other costs of running an exchange in another. Artificially dividing costs between such categories would result in data that is inaccurate and unreliable.

Moreover, experts have recognized that exchange market data products are “joint products” with exchange transaction services, meaning that they are two sides of the same coin. In a February 2014 report on the “Pricing of market data services” prepared for the European Commission, consulting firm Oxera observed that market data products and trading services are “joint products,” because “it is not possible to provide transaction services without generating market data, and it is not possible to generate trade transaction – or market depth – data without also supplying an execution service.”⁷ Oxera further noted:

⁴ Proposal, supra note 2, at 64270.

⁵ Id. at 64270-71.

⁶ See generally Letter from James E. Buck, Senior Vice President of NYSE, to Jonathan G. Katz, Secretary, Commission, regarding Concept Release on Regulation of Market Information Fees and Revenues (File No. S7-28-99) (April 10, 2000), available at <https://www.sec.gov/rules/concept/s72899/buck1.htm>.

⁷ See Letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission, regarding Proposal to Establish Fees for the NYSE National Integrated Feed (SR-NYSENAT-2020-05) (August 14, 2020) (the “NYSE National Integrated Feed Letter”), Attachment E (February 2014 report from Oxera on “Pricing of market data services”) at vi, available at <https://www.sec.gov/comments/sr-nysenat-2020-05/srnysenat202005-7644319-222351.pdf>.

With joint products, the production costs of the outputs cannot be separated – i.e., they are joint costs. . . . Joint costs are incurred when production facilities simultaneously produce two or more products in fixed proportions, such that an increase in the output of one product will necessarily mean a corresponding increase in the output of the other product. This means that the recovery of costs by a trading venue cannot be assessed effectively by the independent analysis of either trade execution services or market data services. The appropriate frame of reference for the economically efficient recovery of the costs of the secondary market activities of trading venues is at the level of combined transaction revenues and data revenues.⁸

The impossibility of reliably allocating IEX's operating costs to the two market data feeds at issue may explain why IEX opted to ignore such costs in its Proposal. But that does not make those costs any less real. Exchanges have a reasonable expectation to recover some of their costs of operation through their sale of market data products.

Finally, NYSE disagrees with IEX's statements that it "does not believe that exchange market data fees are constrained by competitive market forces"⁹ and that "each exchange has a natural monopoly over its own data."¹⁰ NYSE has shown these assertions to be untrue. Exchange proprietary data feeds compete against each other both directly, and also as a result of platform competition between exchanges.

Regarding direct competition, the pricing for exchange proprietary data feeds is constrained by the highly competitive markets for exchange trading and exchange market data. The competitive market for exchange trading is undeniable; as the D.C. Circuit recognized in NetCoalition I, "[n]o one disputes that competition for order flow is fierce."¹¹ And competition for market data is similarly intense, as was made clear by the Antitrust Division of the U.S. Department of Justice's 2011 determination that the market for real-time proprietary market data is a distinct "relevant market" for antitrust purposes, wherein exchanges compete with each other for the provision of proprietary market data products.¹² The Antitrust Division reached this conclusion at a time when it noted there were only four "major competitors" supplying proprietary market data products, a determination that has become stronger in the intervening

⁸ Id., Attachment E at vii.

⁹ Proposal, supra note 2, at 64272.

¹⁰ Id. at 64269.

¹¹ NetCoalition I, supra note 3, at 539.

¹² See NYSE National Integrated Feed Letter, supra note 6, at 4-6. Among other things, the Antitrust Division's complaint alleged that "[e]ach exchange (or other trading platform) owns non-core data and can distribute it voluntarily for a profit in competition with data from other exchanges." See id. at 6.

years with the entry of numerous new exchanges, including IEX itself.¹³ If IEX's assertion that market data fees are not constrained by competitive market forces were correct, it would have to be the case that IEX was itself not a viable competitor to other exchanges. Notably, IEX neither cites evidence for its opinion that market data prices are not constrained by competition nor disputes the evidence of such competition. It is also notable that IEX followed the established pattern of exchanges starting up, offering their market data for free to attract order flow, and then seeking to charge for market data when they reached a certain amount of order flow.

Exchanges also compete against one another as platforms, with the costs of order execution and proprietary market data products both contributing to the total cost of trading on one exchange platform versus another exchange platform. As platforms, no exchange can raise its prices to supracompetitive levels on one side of the platform (i.e., market data) without losing sales on the other side of the platform (i.e., trading volume). This has been demonstrated by numerous economists in recent years,¹⁴ including by Professor Marc Rysman, whose 2019 study was submitted in support of the proposal by NYSE National, Inc. to establish market data fees for its proprietary Integrated Feed market data product.¹⁵ Among other things, Professor Rysman concluded that "[t]he platform nature of stock exchanges means that data fees cannot be analyzed in isolation, without accounting for the competitive dynamics in trading services"; "[c]ompetition is properly understood as being between platforms (i.e., stock exchanges) that balance the needs of consumers of data and traders;" and "[c]ompetition for order flow can discipline the pricing of market data, and vice versa."¹⁶

¹³ See id. at 6-9.

¹⁴ See NYSE National Integrated Feed Letter, supra note 6, Attachment B (Hendershott and Nevo, Statement Regarding the SEC's Proposed Order Concerning the Pricing of Depth-of-Book Market Data, In re SIFMA, Admin. Proc. File No. 3-15350 ¶¶ 37-70); and Attachment C (Expert Report of Janusz A. Ordover, In re SIFMA, Admin. Proc. File No. 3-15350, ¶¶ 6-19, 33-41, 58-59). The versions appearing as Attachment B and Attachment C are the redacted "public" versions of those documents, unredacted versions of which were submitted to the Commission under seal and remain under seal in File No. 3-15350.

¹⁵ See Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR-NYSE-NAT-2020-05), Exhibit 3B (Marc Rysman, "Stock Exchanges as Platforms for Data and Trading," December 2, 2019 (the "Rysman Report")). NYSE incorporates the entire Rysman Report here.

¹⁶ See Rysman Report, supra note 14, ¶ 98. See also Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285-86 (2018) ("Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest

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As noted above, NYSE does not object to the Commission approving IEX's Proposal. But for the reasons explained herein, the Commission should not treat the IEX Proposal as a model for future exchange market data fee proposals. The IEX Proposal side-steps key costs that underlie an exchange's creation of market data products and denies the intensely competitive nature of the market for exchange market data.

Respectfully submitted,

A handwritten signature in cursive script that reads "Hope M Jarkowski".

Hope M. Jarkowski

cc: Honorable Gary Gensler, Chair
Honorable Allison Herren Lee, Commissioner
Honorable Hester M. Peirce, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
Haoxiang Zhu, Director of the Division of Trading and Markets

anticompetitive effects without some evidence that they have increased the overall cost of the platform's services.").