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December 21, 2016

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Release No. 34-79316; File No. SR-NYSE-2016-45; Release No. 34-79378, File No. SR-NYSEMKT-2016; Release No. 34-79379, File No. SR-NYSEArca-2016-89, File No. SR-NYSEArca-2016-89

Dear Mr. Fields:

Investors Exchange LLC ("IEX") is pleased to respond to the Commission's request for further comment on a proposal contained in various rule filings (the "Proposal") by the New York Stock Exchange ("NYSE") and its affiliated exchanges.[1] We are also writing to comment more generally on the impact of exchange rebate and market data practices on costs to the industry and market competition. We appreciate the Commission's willingness to critically examine these issues.

Among other matters, the Proposal contains new provisions concerning access to exchange systems and market data feeds by users who are co-located in NYSE's market data center, and also proposes new fees related to these access arrangements. IEX previously submitted a comment letter on this matter, to which NYSE responded, and NYSE filed an amendment to clarify certain points.[2] Subsequently, the Commission issued an order (the "Proceedings Order") instituting proceedings under Section 19(b)(2) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether to approve or disapprove the Proposal and to seek additional comment on the proposed rule changes.[3] NYSE has recently amended and restated the Proposal to remove specific fees that would have been required to access certain "premium" data products, while continuing to propose various additional fees, including charges for firms seeking direct access to execution systems and data of other markets.[4]

IEX believes that NYSE has failed to show that the fees it continues to propose imposing on market participants are consistent with the standards established by the Exchange Act because it has failed to show that alternatives to receiving services and data directly from NYSE are equally viable for many market participants.

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[1]Securities Exchange Act Release Nos. 78556 (August 11, 2016), 81 FR 54877 (August 17, 2016); 78628 (August 22, 2016), 81 FR 59004 (August 26, 2016); and 78629 (August 22, 2016), 81 FR 58992 (August 26, 2016).
[2] All comment letters are available at https://www.sec.gov/comments/sr-nyse-2016-45/nyse201645.shtml.
[3] *See* Securities Exchange Act Release No. 79316 (November 15, 2016), 81 FR 83303 (November 21, 2016).
[4] *See* Letter to Brent J. Fields, Secretary, SEC, from Martha Redding, Associate General Counsel, NYSE, dated December 12, 2016 (attaching Amendment No. 3 to File No. SR-NYSE-2016-45).

The Alternatives Cited by NYSE are not Viable Substitutes

NYSE continues to argue that the Proposal is not anti-competitive, unreasonable, or discriminatory because any participant can choose not to use co-location, or can choose to receive market access and data indirectly through another user, vendor, or access center. NYSE also argues that firms can send their order flow to other markets if it sets fees too high, and that this threat limits its ability to increase co-location fees. It uses these arguments to support all the access and fee requirements contained in the Proposal, not just those that have been omitted from the latest version.

NYSE still has provided no data or objective evidence that any of the alternatives it cites are equivalent to the means of access it controls. The fact that alternative providers exist does not mean that proprietary trading firms, electronic market makers, and many agency brokers can effectively compete in those businesses without using NYSE's products. The fact that *some* participants with certain types of business could exercise this choice does not mean that it is a practical choice for firms that trade actively on all of the interconnected markets that form the national market system.[5]

NYSE could provide data that would be relevant to this question. For example, we think it would be appropriate for NYSE to provide data on the expected latency (or range of latencies) in receiving data or transmitting orders directly from NYSE, compared to the equivalent latency (or range) for firms that rely on a third party access center. We also think it would be appropriate to require NYSE to explain whether it believes that this difference would not affect the ability of electronic market makers and other trading firms and active agency brokers to compete with firms in the same businesses that have faster access, and if so how it reached this conclusion. The same analysis could be applied to any new "faster" products NYSE offers as replacements for the less expensive, slower version of the same products. If it claims that the new products are truly "optional" for all members, NYSE should be able to define the latency difference and defend the claim that members will not be compelled to use them to remain competitive. In fact, we think that NYSE understands that it can charge a continued premium for the "fastest" speed, as controlled by NYSE, and that members accounting for the majority of their trading volume will be forced to pay for it.

IEX agrees with the letter submitted by the Securities Markets and Financial Markets Association ("SIFMA"),[6] which we believe reflects an industry consensus that exchanges can and do exercise enormous pricing leverage over firms that must rely on speed of access to compete. The realistic choice these firms face is to agree to the terms for the most direct access or to exit certain business lines (which in some cases are these firms' only business lines). We think that in order to meet Exchange Act standards, at a minimum, NYSE and other exchanges should have to show that they have seriously addressed the market and competitive impact of their rule changes. This

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[5] *See* NetCoalition v. SEC, 615 F.3d 525, 542 (D.C. Cir. 2010) ("[W]hether a market is competitive notwithstanding potential alternatives depends on factors such as the number of buyers who consider other products interchangeable and at what prices").

[6] Letter to Brent J. Fields, Secretary, SEC, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated December 12, 2016.

is particularly the case where exchanges, by controlling data center access, can exercise so much control over which firms can compete, not just how they compete.

Broker-Dealers Can Not Choose to Avoid NYSE

Because of the same market realities, NYSE's argument that broker-dealers that object to fee increases can easily direct their orders to other markets is not credible. The firms that account for the overwhelming proportion of market volume are generally prohibited by regulation from "trading through" any exchange quote at the best price, regardless of the cost to trade there.[7] Taking into account the nearly $1 billion dollars in annual rebates that NYSE and its affiliates pay to their members to post liquidity, NYSE pays for liquidity that brokers are obligated to interact with.[8] NYSE members cannot participate effectively in a national market system if they refuse to engage with exchanges that constitute a portion of that system. Ultimately, the "threat" that major participants will take their business elsewhere is an empty one, so long as NYSE continues to pay huge sums to manufacture liquidity that regulation forces brokers and traders to access.

NYSE Has Not Shown How its Own Costs Are Relevant

NYSE also continues to rely on its costs of maintaining its data center as a factor justifying the new fees and stresses that it is only one factor. But citing cost as a factor is not the same thing as demonstrating how and why it is relevant in a particular case. As the Commission pointed out in the Proceedings Order, relying on data center costs to justify new fees on access to premium market data was contradicted by the fact that NYSE did not propose to charge new fees for other data, although the administrative and other costs of providing both types of data would seem to be similar.[9] And NYSE has provided no better or fuller explanation of how much its costs have impacted the need for the other fees that are contained in the Proposal. Without transparency about what those costs actually are relative to the burden placed on members, this is not a factor that should carry any weight.

Exchanges Must be Held to a Higher Standard than Unregulated Entities

Finally, NYSE argues that when an exchange provides data through "regulated" co-location arrangements, it ensures that the data is available on terms that are fairer and less discriminatory than would be available by an unregulated co-location provider.[10] In fact, we think the opposite is true: given the constantly rising cost of co-location and other ancillary services, exchange co-

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[7] Regulation NMS Rule 611, 17 C.F.R. § 240.611.

[8] Although precise data from individual markets is not publicly available, the Form 10-Q filed by Intercontinental Exchange, Inc., NYSE's parent company, discloses aggregate "cash liquidity payments, routing and clearing" through the first nine months of 2016 of $823 million. https://www.sec.gov/Archives/edgar/data/1571949/000157194916000029/ice201693010q.htm

[9] Proceedings Order, 81 FR at 83307-8.

[10] *But see* In the Matter of New York Stock Exchange LLC, NYSE Arca, Inc., NYSE MKT LLC, and Archipelago Securities, LLC, File No. 3-15860; Securities Exchange Act Release No. 72065 (May 1, 2014),

location practices and market data fees perpetuate a two-tiered system between those who need incremental speed advantages and those who cannot afford or have no use for them.

Conclusion

NYSE has not shown that there are viable alternatives to the services it sells, and it has provided no transparency on the costs it incurs to offer those services. Further, its payment of rebates for posted liquidity, coupled with regulatory requirements that affect where participants must route their orders, means that its ability to force price increases on its members is not checked by normal market forces. In effect, exchanges are by definition monopoly providers of co-location services in their own data centers, and the products they sell as monopoly providers should be subject to heavy scrutiny.

Sincerely,

John Ramsay
Chief Market Policy Officer