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November 21, 2018

**VIA EMAIL AND FEDEX**

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

Re: Securities Exchange Act Release No. 34-84444 (October 17, 2018), 83 FR 52524 (October 23, 2018) (SR-NYSE-2018-49)

Dear Mr. Fields:

The New York Stock Exchange LLC (the “NYSE” or “Exchange”) appreciates the opportunity to write in support of the above-referenced immediately effective rule change to amend the Exchange’s Price List (the “Fee Filing”) and in response to the comment letter submitted by the Healthy Markets Association (“Healthy Markets”).<sup>1</sup> For the reasons set forth in the Fee Filing and herein, the Exchange believes that the Fee Filing meets all of the statutory requirements of the Securities Exchange Act of 1934 (the “Act”) and that no further action by the Securities and Exchange Commission (“Commission”) is required.

**The Exchange Met its Requirements Under the Act<sup>2</sup>**

The Exchange provided the required detailed and specific statement supporting the Fee Filing’s basis under the Act and the rules and regulations thereunder applicable to the Exchange.<sup>3</sup> Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which require the rules of an exchange to: (1)

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<sup>1</sup> See Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Brent J. Fields, Secretary, Securities and Exchange Commission, dated November 13, 2018.

<sup>2</sup> Healthy Markets conflates rule filings under Section 19(b)(2) and those under Section 19(b)(3) of the Act, and its reliance on Susquehanna Int’l Grp., LLP v. SEC, 866 F.3d 442 (D.C. Cir. 2017), is misplaced. Unlike Section 19(b)(2) of the Act, Section 19(b)(3) does not “require” the Commission “to make a finding as a prerequisite to” the non-suspension of an immediately effective SRO rule filing. Rather, Section 19(b)(3) allows the Commission to temporarily suspend an SRO rule change under specified circumstances. Because no decisions are necessary with respect to Section 19(b)(3) filings, Susquehanna does not create substantive obligations when the Staff exercises delegated authority to whether or not to take action with respect to a filing pursuant to Section 19(b)(3). Indeed, no Commission decision to not take action with respect to such a filing is even reviewable under Section 25 of the Act. See NetCoalition v. SEC, 715 F.3d 342, 353 (D.C. Cir. 2013).

<sup>3</sup> See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;<sup>4</sup> (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>5</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>6</sup> The Fee Filing satisfied each of these standards.<sup>7</sup>

First, the NYSE has shown that the changes are reasonable. As the Fee Filing makes plain, providing an additional way to qualify for the Tier 3 Adding Credit and introducing a slightly higher charge than the current lowest charge of \$0.00275 for non-Floor broker transactions that remove liquidity from the Exchange for member organizations with an Adding ADV, excluding DMM liquidity, of at least 250,000 ADV on NYSE Tape A and less than 500,000 ADV on the NYSE in Tape B and Tape C securities combined during the billing month are reasonable because the increased volume requirements would encourage and contribute to incenting member organizations to provide additional amounts of liquidity on a public exchange.<sup>8</sup> Moreover, Exchange members and member organizations and their customers benefit from the substantial amounts of liquidity that are present on the Exchange,<sup>9</sup> a fact Healthy Markets does not contest. In addition, the new Tier 3 Adding Credit would also encourage the submission of additional MPL orders that add liquidity, thus providing price improving liquidity to market participants and increasing the quality of order execution on the Exchange's market, which benefits all market participants. Healthy Markets does not address these arguments.

Second, the NYSE has demonstrated that the fees are equitably allocated. The filing not only makes clear when a particular fee applies to all member organizations in an equivalent manner, but also where a particular fee applies to all member organizations that engage in specific trading behavior, such as member organizations that add liquidity to the Exchange and do not currently meet the requirements for higher credits for Adding Tiers 1, 2, and 3 and those that add liquidity in Tape B or Tape C securities.<sup>10</sup> This does precisely what Healthy Claims is required — it explains when the new fees might affect different market participants in different way. The blanket assertion that tiered rates by definition “discriminate between customers who meet the articulated criteria and those who do not” misses the point. Although Healthy Markets continues to use “discriminate” with a negative connotation, that is not its primary meaning. The

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<sup>4</sup> 15 U.S.C. § 78f(b)(4).

<sup>5</sup> 15 U.S.C. § 78f(b)(5).

<sup>6</sup> 15 U.S.C. § 78f(b)(8).

<sup>7</sup> Healthy Markets raises no objections to any of the specific fee changes described above and does not claim that any individual fee or credit is unreasonable or burdensome. Moreover, Healthy Markets raises no objections to the clarifying, non-substantive changes the Exchange proposed. See note 8, infra.

<sup>8</sup> See Securities Exchange Act Release No. 34-84444 (October 17, 2018), 83 FR 52524, 53526 (October 23, 2018) (SR-NYSE-2018-49).

<sup>9</sup> See id.

<sup>10</sup> See id.

first three definitions given by the Oxford English Dictionary are positive or neutral,<sup>11</sup> and it is these forms of “discrimination” that are encouraged by the Act. Under the Act, fees must not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and it would not have added “unfair” if Congress intended to prohibit positive or neutral discrimination.<sup>12</sup> As the Commission acknowledged, volume-based rebates and fees have been widely adopted in the cash equities markets,<sup>13</sup> and the NYSE’s proposal is no different. Indeed, none of the NYSE’s exchange competitors have uniform pricing across all market participants. Moreover, volume-based rebate and fee arrangements provide additional benefits or discounts that Healthy Markets chooses to ignore. These benefits, which include higher levels of liquidity provision and/or broader participation in the price and volume discovery processes, are reasonably related to the value to an exchange’s market quality associated with higher levels of market activity.

Third, the Exchange has shown that the rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>14</sup> The Exchange represented that the fee change would foster liquidity provision and stability in the marketplace, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations, and that the transparency and competitiveness of attracting additional executions on an exchange market would encourage competition. Competition for order flow among trading venues is already fierce as a result of the regulatory scheme governing equity trading, including Regulation NMS and Regulation ATS. There are currently 13 registered equity exchanges, five of which were approved after Regulation NMS was adopted. Moreover, there are 33 registered ATSS and an additional 36 off-exchange trading venues that trade equity securities over-the-counter (“OTC”), including broker-dealers that internalize customer order flow.<sup>15</sup> The Exchange believes that pricing initiatives like those contained in the Fee Filing encourage additional competition and thereby increase the amount of order flow to transparent and well-regulated exchanges consistent with the purposes of the Act.

Finally, the Exchange operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free

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<sup>11</sup> See Oxford English Dictionary, available at <http://www.oed.com/view/Entry/54058?rskey=e40NwF&result=2&isAdvanced=false#eid> (“[o]f a feature, quality, etc.: to serve to differentiate; to distinguish,” “[t]o distinguish with the mind or intellect; to perceive, observe, or note the difference in or between”).

<sup>12</sup> See 15 U.S.C. § 78f(b)(5). Put differently, the statutory canon *expressio unius est exclusio alterius* requires this text to be interpreted so as to permit reasoned and reasonable “discrimination.”

<sup>13</sup> “As competition among trading centers intensified in the late 1990s, ATSS, and then exchanges, began to offer rebates to attract order flow.” See Securities Exchange Act Release No. 82873 (Mar. 14, 2018), 83 FR 13008, 13009 (Mar. 26, 2018) (File No. S7-05-18).

<sup>14</sup> See 83 FR at 46980.

<sup>15</sup> See Financial Industry Regulatory Association (“FINRA”), OTC Transparency Data – OTC (Non-ATS) Data, available at <https://otctransparency.finra.org>.

to modify their own fees and credits in response, some without the requirement of making a filing with the Commission, and because market participants may readily adjust their order routing practices, the Exchange believes that any degree to which fee changes in this market may impose any burden on competition would be extremely limited.<sup>16</sup> Healthy Markets' comment letter ignores these realities of today's equities marketplace, and is equally silent in the face of the fact that, as a result of all of these considerations, the Fee Filing did not impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

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The Exchange appreciates the opportunity to respond to Healthy Markets' comment letter and respectfully requests the Commission take no action with respect to the Fee Filing.

Sincerely,



cc: Honorable Jay Clayton, Chairman  
Honorable Kara M. Stein, Commissioner  
Honorable Hester Peirce, Commissioner  
Honorable Robert J. Jackson, Jr., Commissioner  
Honorable Elad L. Roisman, Commissioner  
Brett Redfearn, Director of the Division of Trading and Markets  
John Roeser, Associate Director, Division of Trading and Markets

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<sup>16</sup> Indeed, the NYSE, its affiliates and competitors have made numerous modifications to tiered pricing, including the wholesale elimination of tiers, in the past year in response to the highly competitive environment in which exchanges operate today.