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July 31, 2020

**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. 88901 (May 18, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSEArca-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSEArca-2020-08) (Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Wireless Market Data Connections and Associated Fees) ("Order")

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE Group"), on behalf of the New York Stock Exchange LLC ("NYSE"), NYSE American LLC, NYSE Arca, Inc. ("NYSE Arca"), NYSE Chicago, Inc. and NYSE National, Inc. ("NYSE National" and together, the "NYSE Exchanges") submits this letter to respond to the comment letters submitted in connection with the Order.<sup>1</sup>

The Order instituted proceedings to determine whether to approve or disapprove the proposed rule changes in two sets of wireless filings (together, the "Wireless Filings").<sup>2</sup> In the first set, the NYSE Exchanges propose a schedule of Wireless Connectivity Fees and Charges (the "Wireless Fee Schedule") with wireless connections between the

<sup>1</sup> See letter from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Ms. Vanessa Countryman, Secretary, Securities and Exchange Commission ("Commission"), dated June 12, 2020 ("Bloomberg Letter"); letter from Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel Securities, to Ms. Vanessa Countryman, Secretary, Commission, dated June 12, 2020 ("Citadel Letter"); and letter from Jim Considine, Chief Financial Officer, McKay Brothers LLC ("McKay Brothers"), to Ms. Vanessa Countryman, Secretary, Commission, dated June 12, 2020 ("McKay Letter" and collectively, the "Letters").

<sup>2</sup> Unless otherwise defined herein, capitalized terms used herein have the same meaning as in the Wireless Filings.

Mahwah, New Jersey data center and three data centers that are owned and operated by third parties unaffiliated with the NYSE Exchanges (“Wireless Connections”).<sup>3</sup> In the second, the NYSE Exchanges propose to add wireless connectivity services that transport market data of the NYSE, NYSE Arca, and NYSE National (“Wireless Market Data Connections”) to the Wireless Fee Schedule.<sup>4</sup> Market participants that purchase a Wireless Connection or Wireless Market Data Connection would be subject to initial and monthly fees, as set forth in the Wireless Filings. NYSE Group submitted a previous letter in response to comments on the Wireless Filings.<sup>5</sup>

The NYSE Exchanges have filed partial amendments to each of the Wireless Filings (the “Amendments”).<sup>6</sup> For the reasons set forth below, in the May Letter and in the Wireless

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<sup>3</sup> Securities Exchange Act Release Nos. 88168 (February 11, 2020), 85 FR 8938 (February 18, 2020) (SR-NYSE-2020-05); 88169 (February 11, 2020), 85 FR 8946 (February 18, 2020) (SR-NYSEAMER-2020-05); 88170 (February 11, 2020), 85 FR 8956 (February 18, 2020) (SR-NYSEArca-2020-08); 88172 (February 11, 2020), 85 FR 8923 (February 18, 2020) (SR-NYSECHX-2020-02); 88171 (February 11, 2020), 85 FR 8930 (February 18, 2020) (SR-NYSEAT-2020-03) (notice of filing of proposed rule change to establish a Schedule of Wireless Connectivity Fees and Charges with wireless connections). See also Securities Exchange Act Release No. 88539 (April 1, 2020), 85 FR 19553 (April 7, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, and SR-NYSEAT-2020-03) (notice of designation of a longer period for Commission action on proposed rule changes to establish a schedule of Wireless Connectivity Fees and Charges with wireless connections between the Mahwah, New Jersey data center and other data centers).

<sup>4</sup> See Securities Exchange Act Release Nos. 88237 (February 19, 2020), 85 FR 10752 (February 25, 2020) (SR-NYSE-2020-11); 88238 (February 19, 2020), 85 FR 10776 (February 25, 2020) (SR-NYSEAMER-2020-10); 88239 (February 19, 2020), 85 FR 10786 (February 25, 2020) (SR-NYSEArca-2020-15); 88240 (February 19, 2020), 85 FR 10795 (February 25, 2020) (SR-NYSECHX-2020-05); and 88241 (February 19, 2020), 85 FR 10738 (February 25, 2020) (SR-NYSEAT-2020-08) (notice of filing of proposed rule change to amend the Schedule of Wireless Connectivity Fees and Charges to add wireless connectivity services). See also Securities Exchange Act Release No. 88540 (April 1, 2020), 85 FR 19562 (April 7, 2020) (SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, and SR-NYSEAT-2020-08) (notice of designation of a longer period for Commission action on proposed rule changes to amend the schedule of Wireless Connectivity Fees and Charges to add wireless connectivity services).

<sup>5</sup> Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, to Ms. Vanessa Countryman, Secretary, Commission, dated May 8, 2020 (the “May Letter”).

<sup>6</sup> See Partial Amendment No. 1 to SR-NYSE-2020-05 (July 27, 2020); Partial Amendment No. 1 to SR-NYSEAMER-2020-05 (July 27, 2020); Partial Amendment No. 1 to SR-NYSEArca-2020-08 (July 27, 2020); Partial Amendment No. 1 to SR-NYSECHX-2020-02 (July 27, 2020); Partial Amendment No. 1 to SR-NYSEAT-2020-03 (July 27, 2020); Partial Amendment No. 1 to SR-NYSE-2020-11 (July 27, 2020); Partial Amendment No. 1 to SR-NYSEAMER-2020-10 (July 27, 2020); Partial Amendment No. 1 to SR-NYSEArca-2020-15 (July 27, 2020); Partial Amendment No. 1 to SR-NYSECHX-2020-05 (July 27, 2020); and Partial Amendment No. 1 to SR-NYSEAT-2020-08 (July 27, 2020);

Filings, the NYSE Exchanges respectfully request that the Commission approve the Wireless Filings as amended.

The McKay Letter argues that the Wireless Filings and May Letter contest that the Wireless Services are not facilities of the NYSE Exchanges “based on technical arguments interpreting the definition of a facility under the Exchange Act.” Contrary to the assertions made in the McKay Letter, the NYSE Exchanges’ arguments based on the Act do not “fail to make meaningful distinctions of the type, purpose, and use of a particular asset or service of an exchange or its affiliate/parent.”<sup>7</sup> Rather, the arguments analyze each Wireless Service carefully and deliberately before concluding that it is not a facility as defined under the Act. After reaching that conclusion, however, the Wireless Filings, and the Amendments, go on to do exactly what they conclude is not required under the Act: file the Wireless Services as changes to the rules of an exchange.

#### The Letters Object to the Proximity Advantage Offered by the Data Center Pole

The McKay Letter admits that the McKay Brothers have the fastest wireless network—including in comparison to the network for the Wireless Services.<sup>8</sup> Nonetheless, the Letters contend that, because IDS has the use of a pole on the grounds of the Mahwah data center (the “Data Center Pole”), IDS has an exclusive advantage.<sup>9</sup> Accordingly, they propose that the Data Center Pole be opened to third party use. Although they take a different approach, the NYSE Exchanges believe that the rules proposed in the Amendments would both address the concerns raised in the Letters with the Data Center Pole and allow for continued competition in the market for these services. As previously noted, approval of the Wireless Filings would enhance competition, while disapproval would reduce it—and in some cases leave customers without wireless connectivity options.<sup>10</sup>

The Data Center Pole has been in place since 2016.<sup>11</sup> The equipment on the Data Center Pole belongs to IDS and Anova Technologies, LLC (“Anova”), the non-ICE entity that owns the wireless network used for the Wireless Connections to the data centers in Secaucus and Carteret.<sup>12</sup> No other third parties have access to the Data Center Pole.<sup>13</sup>

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<sup>7</sup> McKay Letter, at 7.

<sup>8</sup> Id., at 4.

<sup>9</sup> See Bloomberg Letter, at 2; Citadel Letter, at 2-3; McKay Letter, at 2.

<sup>10</sup> For a discussion of the potential impact on competition if the Commission disapproves the Wireless Filings, see the May Letter, at 2-3.

<sup>11</sup> See Securities Exchange Act Release No. 76748 (December 23, 2015), 80 FR 81609 (December 30, 2015) (SR-NYSE-2015-52) (order approving proposed rule change to the co-location services offered by the NYSE (the offering of a wireless connection to allow users to receive market data feeds from third party markets) and to reflect changes to the NYSE’s price list related to these services).

<sup>12</sup> The Wireless Connections with Markham, Canada do not use equipment on the Data Center Pole.

<sup>13</sup> Equipment for services Anova offers under its own name is not allowed on the Data Center Pole.

Rather, they utilize commercial poles located outside the grounds of the Mahwah, New Jersey data center.

The Citadel Letter states that if the Data Center Pole was opened to third party use, it would not argue that the Wireless Services were facilities of the NYSE Exchanges, as there would be no perceived latency advantage in using the Data Center Pole:

If [each NYSE Exchange] did ensure fair access (i.e., provide equivalent space on the pole to any qualified user on equal terms), we would agree that any wireless transmissions anchored to that terminus would not be facilities of the exchange . . . , because the boundary of the facility (as defined by fair access to those points) ends at the terminus.<sup>14</sup>

The McKay Letter makes a similar point:

Were IDS to operate the Wireless Services using a pole in the public right of way (IDS's own exclusive pole or a shared pole) without preferential treatment or other special advantage provided by the Exchanges, its parent company(s), or other affiliates, there would be compelling reasons to believe that the Wireless Services are not facilities of the Exchanges.<sup>15</sup>

The McKay Letter raises the concern that the Wireless Services may also benefit from "less obvious and more discreet types of latency advantages" due to infrastructure inside the Mahwah data center, noting that "some connections may have a longer fiber route than others within a data center or may have to go through various equipment or meet me rooms that an affiliate or preferred provider of an exchange do not."<sup>16</sup>

#### The Amendments Would Remove any Proximity Difference Attributable to Use of the Data Center Pole

The NYSE Exchanges do not propose that IDS open up the use of the Data Center Pole to third parties or move to a commercial pole, as the McKay and Citadel Letters suggest. Instead, in the Amendments the NYSE Exchanges propose new rules that would negate any proximity differences and articulate a connectivity policy that requires the length of the connection into the data center from the Data Center Pole to be no less than the connection from the closest commercial pole to the same point. More specifically, the proposed rules would require that:

- With respect to the Wireless Market Data Connections, the length of the connection between (a) the base of the Data Center Pole and (b) the point inside the Data Center where Exchange market data is produced

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<sup>14</sup> Citadel Letter, at 2.

<sup>15</sup> McKay Letter, at 8. The Bloomberg Letter objects to the use of the Data Center Pole as well, contending that the NYSE Exchanges do not "meaningfully evaluate . . . why NYSE should be able to reward its own affiliate with an advantage over this 'one factor,'" i.e. having a Data Center Pole closer to the Mahwah data center. Bloomberg Letter, at 4.

<sup>16</sup> McKay Letter, at 9.

shall be no less than

the length of the connection between (x) the base of the closest commercial pole and (y) the point inside the Data Center where Exchange market data is produced.

- With respect to the Wireless Connections, the length of the connection between (a) the base of the Data Center Pole and (b) the network row in the space used for co-location in the Mahwah data center

shall be no less than

the length of the connection between (x) the base of the closest Commercial Pole and (y) the network row in the space used for co-location in the Mahwah data center.

Although they take a different approach than suggested in the Letters, the proposed rules would squarely address the focus of the objections.<sup>17</sup> Accordingly, the NYSE Exchanges believe that the proposed new rules would adequately address the issues raised in the Letters.

#### The Letters Raise No Valid New Arguments

The Letters make various additional contentions and assumptions regarding the Wireless Services that merely reiterate points made in previous letters, including arguments on what constitutes the premises of an exchange, whether the Wireless Services are basic exchange services, and whether the Wireless Filings demonstrate that the proposed fees are consistent with the Act.<sup>18</sup> As these arguments were addressed in the May Letter and Wireless Filings, the present letter does not address them again here.

The NYSE Exchanges believe that the Wireless Filings meet the requirements to justify why the Wireless Services are consistent with the Act.<sup>19</sup> Nonetheless, the NYSE Exchanges have proposed new rule changes in the Amendments that would modify the Wireless Filings, to remove any proximity differences.

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<sup>17</sup> Id., at 7 and 33.

<sup>18</sup> See, e.g., Citadel Letter, at 2-3, Bloomberg Letter, at 2-3, and McKay Letter, at 7-9. Similarly, the Letters include various incorrect statements. For example, they erroneously assert that the Wireless Services would be a new network using the roof of the Mahwah data center; IDS has the fastest wireless connections on the Mahwah-Carteret and Mahwah-Secaucus routes; the NYSE Exchanges exclusively provide market data to the Data Center Pole; the NYSE Exchanges did not disclose the existence of the Data Center Pole; and other market participants have no choice but to subscribe to the Wireless Services. See Citadel Letter, at 2, and Bloomberg Letter, at 2-3. As each of these points was corrected in the May Letter, the present letter does not do so again here.

<sup>19</sup> See McKay Letter, at 6.

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For the reasons set forth above and in the Wireless Filings, Amendments, and May Letter, the NYSE Exchanges respectfully request that the Commission approve the Wireless Filings as amended.

Respectfully submitted,



Elizabeth K. King

cc: Honorable Jay Clayton, Chairman  
Honorable Hester M. Peirce, Commissioner  
Honorable Elad L. Roisman, Commissioner  
Honorable Allison Herren Lee, Commissioner  
Brett Redfearn, Director, Division of Trading and Markets