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June 16, 2021

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. 92033 (May 26, 2021), 86 FR 29601 (June 2, 2021) (File Nos. SR-NYSE-2021-14, SR-NYSEAMER-2021-10, SRNYSEArca-2021-13, SR-NYSECHX-2021-03, SR-NYSENAT-2021-04)

Dear Ms. Countryman:

New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc. (together, the "Exchanges") submit this letter to respond to the Securities and Exchange Commission's ("Commission") order instituting proceedings to determine whether to approve or disapprove the Exchanges' proposed rule changes to amend the schedule of Wireless Connectivity Fees and Charges to add circuits for connectivity into and out of the data center in Mahwah, New Jersey (the "Order").[1] This letter also responds to the comment letter submitted by Investors Exchange LLC ("IEX")[2] in connection with the filings underlying the Order.[3]

For the reasons set forth below and in the Filings, the Exchanges respectfully request that the Commission approve the Filings so that market participants, including IDS's current customers, do not lose the ability to purchase the proposed services, and so that

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1 Securities Exchange Act Release No. 92033 (May 26, 2021), 86 FR 29601 (June 2, 2021) (File Nos. SR-NYSE-2021-14, SR-NYSEAMER-2021-10, SRNYSEArca-2021-13, SR-NYSECHX-2021-03, SR-NYSENAT-2021-04) (the "Order").

2 See Letter from John Ramsey, Chief Market Policy Officer, IEX, to Vanessa Countryman, Secretary, Securities and Exchange Commission ("Commission"), dated March 25, 2021 ("IEX Letter").

3 Securities Exchange Act Release Nos. 91217 (February 26, 2021), 86 FR 12715 (March 4, 2021) (SR-NYSE-2021-14); 91218 (February 26, 2021), 86 FR 12744 (March 4, 2021) (SR-NYSEAMER-2021-13); 91216 (February 26, 2021), 86 FR 12735 (March 4, 2021) (SR-NYSEArca-2021-13); 90219 (February 26, 2021), 86 FR 12724 (March 4, 2021) (SR-NYSECHX-2021-01); and 90215 (February 26, 2021), 86 FR 12752 (March 4, 2021) (SR-NYSENAT-2021-04) (collectively, the "Filings"). Unless defined herein, capitalized terms herein have the same meaning as in the Filings.

competition as a whole does not suffer by the removal of IDS from the competitive market for the services at issue.

1. The Order Fails to Provide Notice of the Grounds for Disapproval Under Consideration

When instituting proceedings, the Exchange Act obligates the Commission to provide "notice of the grounds for disapproval under consideration."[4] The Commission's own regulations reinforce this statutory notice command.[5] This notice requirement serves important purposes: neither the Exchange, nor the public, should be forced to guess what the Commission believes may be lacking in a rule filing. Congress designed the notice requirement to ensure that interested parties know what issues are under consideration so that those issues can be fully addressed in the subsequent proceeding.

But the Order here leaves everyone guessing as to the Commission's concerns. The Commission's rote recitation in the Order of the content of the Filings and the requirements of the Act[6] does not satisfy the statutory and regulatory notice requirement

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4 15 U.S.C. 78s(b)(2)(B).

5 See 17 C.F.R. 201.700(b)(2) ("The grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission instituted the proceedings, including the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change or NMS plan filing.").

6 See Order, supra note 1, at 29606-07 ("Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange ''provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;''

- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to perfect the operation of a free and open market and a national market system'' and ''protect investors and the public interest,'' and not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers;'' and

- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].'').

(Internal footnote references omitted.)

because it offers no meaningful guidance on what, if anything, the Commission believes is lacking in the Filing. This defect renders the Order deficient.[7]

2. The Commission May Be Applying Improper Standards to the Rule Filing

Although the Commission has failed in the Order to put the Exchanges on sufficient notice of what information is lacking relating to the Filings or what the Commission's genuine concerns are, the Commission may be applying a misplaced assumption about the types of information necessary to satisfy the Exchange Act's requirements. In particular, the Commission may be improperly demanding that the Exchanges provide cost data in connection with all rule filings, even where the Exchanges have demonstrated that sufficient competition exists. If so, such a demand would be unlawful.

Neither the Exchange Act nor the Commission's regulations require presentation of cost data in connection with every rule filing.[8] And any demand for cost data in cases where evidence of a competitive market exists would be substantively unjustified.

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[7] The Commission's general and vague description of the issues under consideration leaves the Exchange and other stakeholders in the dark as to what "grounds for disapproval" are actually "under consideration" by the Commission. This undermines the purpose of the review process and violates the statute and the Commission's implementing regulations. Cf. Gerber v. Norton, 294 F.3d 173, 180 (D.C. Cir. 2002) (interpreting notice requirement in Endangered Species Act to mean that "opportunity for comment must be a meaningful opportunity"). In addition, although it would not cure the Commission's failure to provide sufficient notice when it issued the Order, the Commission must also provide non-conclusory and detailed reasoning in approving or disapproving the Filings. In particular, were the Commission to disapprove the Filings, it must provide a reasoned explanation for how and why the Filings fail to satisfy particular statutory or regulatory standards. Indeed, this is "[o]ne of the most fundamental principles of administrative law." Sw. Airlines Co. v. Fed. Energy Regul. Comm'n, 926 F.3d 851, 855 (D.C. Cir. 2019). To satisfy this requirement, moreover, "conclusory statements" – of the type set forth in the Order – "will not do; an 'agency's statement must be one of reasoning.'" Amerijet Int'l, Inc. v. Pistole, 753 F.3d 1343, 1350 (D.C. Cir. 2014) (citation omitted). As the D.C. Circuit has made clear in the rule filing context, it is incumbent on the Commission to explain how a "proposed rule change is [or is not] consistent with the requirements of [the Act] and the rules and regulations issued under [the Act] that are applicable to [the Exchange]." 15 U.S.C. 78s(b)(2)(C)(i)-(ii).

[8] In May 2019, the Division of Trading and Markets issued "Staff Guidance on SRO Rule Filings Relating to Fees" (the "Guidance"), and that Guidance does refer to the potential use of cost data. See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees. However, the Exchanges do not have to meet the specific demands of the Guidance in their Filings in order for the Commission to approve those Filings. As then-Chairman Jay Clayton stated, the Guidance "is not a rule, regulation, or statement of the Commission." Chairman Jay Clayton, Statement on Division of Trading and Markets Staff Fee Guidance (June 12, 2019), available at

Of particular relevance is NetCoalition v. SEC.[9] In that case, the D.C. Circuit held that an exchange can establish that its fees for market data products are fair and reasonable through ***either*** a cost-based analysis ***or*** a "market-based approach" that examines whether the exchange is subject to significant competitive forces in setting its fees.[10] In other words, a cost-based analysis is separate and distinct from a market competition-based analysis. An exchange does not and should not have to demonstrate both – and here, the Exchange has provided ample evidence that the proposed services and their associated fees are constrained by competition.[11] It would be inconsistent with NetCoalition I and the Commission's embrace of market-based pricing for the Commission to require the Exchange to also satisfy a rigorous cost-based analysis.[12]

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https://www.sec.gov/news/public-statement/statement-division-trading-and-markets-staff-fee-guidance. Rather,

> [t]he SRO rule filings related to fees addressed by the TM Staff Guidance are governed by Exchange Act Section 19(b), Exchange Act Rule 19b-4, and court decisions interpreting those provisions. Like all staff guidance, the TM Staff Guidance has no legal force or effect: as it states, it does not alter or amend applicable law, and it creates no new or additional obligations for SROs or the Commission.

Id. (footnote omitted). Any effort by the Commission to apply the Guidance so as to inflexibly demand cost data in connection with all rule filings would be unlawful because the Guidance was not promulgated pursuant to notice and comment, as the Administrative Procedure Act requires of binding regulations. See, e.g., Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta, 785 F.3d 710, 717 (D.C. Cir. 2015) ("agency action that creates new rights or imposes new obligations on regulated parties or narrowly limits administrative discretion constitutes a legislative rule" is subject to the notice-and-comment requirements of the APA).

9 NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) ("NetCoalition I"). See also Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (approving proposed rule change to establish fees for a depth-of-book market data product).

10 NetCoalition I, 615 F.3d at 535.

11 See Point 3 below. See also Securities Exchange Act Release No. 90217 (October 16, 2020), 85 FR 67392, 67396 (October 22, 2020) (Order Approving a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed) (noting that ''[t]he inquiry into whether a market for a product is competitive . . . focuses on . . . the product's elasticity of demand'' (citing NetCoalition I, 615 F.3d at 542)).

12 NetCoalition I does state in passing that costs might be relevant to a determination of the reasonableness of fees, but that statement appears to have been based on the record in that case (which did not contain direct evidence of proprietary data product competition and platform competition) as well as the questionable assumption that "in a competitive market, the price of a product is supposed to approach its marginal cost." NetCoalition I, 615 F.3d at 537. But the economic theory that "price equals marginal cost" has limited real-world application outside of agricultural commodity

Indeed, as basic rate regulation theory and economics explain, cost-based regulation is simply unnecessary in a competitive market because market forces – rather than rate regulators – will help to ensure competitive pricing.

Instead, the Exchanges looked to the Act, Rule 19b-4, and relevant court decisions, including NetCoalition I in assessing the information it provided in the Filings. Based on their review, the Exchanges believe that the Filings provide sufficient information demonstrating that the proposed rule changes are consistent with the Act. Nevertheless, by this letter, the Exchanges are supplementing the Filings with additional information.

3. The Market for the Proposed Services Is Competitive, with Substitute Services Available from Third-Party Providers

In the Filings, the Exchanges seek prospective[13] approval of several IDS services that it already offers to customers.[14] Currently, numerous IDS customers purchase the circuits identified in the Filings as "Optic Access" and "Optic Low Latency" circuits. In addition,

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products. As highlighted by Professor Kenneth Elzinga, "[f]ew firms fit the textbook definition of perfect competition," and in fact, marginal-cost pricing in "technology-driven industries . . . is neither feasible nor desirable." Kenneth G. Elzinga & David E. Mills, The Lerner Index of Monopoly Power: Origins and Uses, 101 Am. Econ. Rev. 558, 560 (2011). Moreover, the statement in NetCoalition I simply reflects the reality that, in a competitive marketplace, market forces should work to ensure that firms cannot engage in supra-competitive pricing, whereas the question at issue here is not whether or how prices should bear some relationship to costs, but whether market forces or a rate regulator should make that determination.

[13] The IEX Letter claims that the Filings are "not transparent" about whether they seek only approval of IDS's prospective fees for the proposed services or also seek review of IDS's past fees for such services. To the contrary, the Filings are clear that they seek approval of the proposed services on a prospective basis only. For this reason, information about fees previously or currently charged for IDS for services other than the proposed services, as IEX requests (IEX Letter at 2), is not relevant.

[14] As noted in the Filings, the Exchanges made the Filings solely as a result of their determination that the Commission's recent interpretations of the Act's definitions of the terms "exchange" and "facility," as expressed in the Wireless Approval Order (defined below), apply to services described in the Filings by entities other than the Exchanges. The Exchanges, along with other affiliates of Intercontinental Exchange, Inc., disagree with the Commission's interpretations and have sought review of the Commission's interpretations in the Court of Appeals for the District of Columbia Circuit. See Intercontinental Exchange, Inc. v. SEC, No. 20-1470 (D.C. Cir. 2020); see also Securities Exchange Act Release No. 90209 (October 15, 2020), 85 FR 67044 (October 21, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT-2020-08) ("Wireless Approval Order").

several IDS customers purchase IDS Network Ports, and several non-colocation customers purchase IDS cross-connects in the Mahwah Data Center.

In its letter, IEX claims that the Exchanges have not properly supported their arguments that the proposed services are subject to competitive forces. This is not the case. In the Filings, the Exchanges amply demonstrated the existence of competition in the markets for the proposed services, and explained that substitutes for the proposed services are readily available from various third-party providers.[15]

For instance, the Filings specify that IDS is not the only entity that sells access to the data feeds that are available over the IDS Network Ports. The IDS Network Ports provide connection to various systems and data feeds, including the Exchanges' trading and execution systems, but customers have many other choices besides the IDS Network Ports for establishing such connectivity. The Filings state:

- "The market for connecting with the Exchange's trading and execution systems is competitive, and the proposed IDS Network ports that IDS provides are merely one of several options that market participants may choose."[16]

- "As alternatives to the IDS Network ports, a market participant would be able to access or connect to Exchange Systems, Third Party Systems, Included Data Products, Third Party Data Feeds, third party testing and certification feeds, and DTCC through (a) a connection to an IDS access center outside of the Mahwah Data Center, *(b) a third-party access center, (c) a third-party vendor, (d) a Hosting User*, or (e) colocation."[17]

While items (a) and (e) on that list are alternative services provided by IDS, the remaining alternatives – i.e., *third-party access centers, third-party vendors, and Hosting Users* – are all services provided by IDS's competitors.

Similarly, the Filings detail the existence of competition in the market for wired circuits into and out of the Mahwah Data Center:

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[15] Only the proposed NCL NMS Network ports do not have a substitute, and the Exchanges supported these proposed services with specific cost information. As explained in the Filings, the Exchanges "funded the capital and operational expenses to build and operate the NMS Network. The implementation costs of approximately $3.8 million are applicable only to the NMS Network, which is used for the sole purpose of providing access to the NMS feeds. None of the implementation costs are applicable to any other Exchange services." See, e.g., Securities Exchange Act Release No. 91217 (February 26, 2021), 86 FR 12715 at 12722 (March 4, 2021) (SR-NYSE-2021-14). Accordingly, the Exchanges have adequately supported their argument that the proposed fees for NMS Network ports for NCL Customers are reasonable to recoup the costs of building and maintaining the NMS Network.

[16] Id. at 12722.

[17] Id. (emphasis added).

- "Both IDS and numerous third-party telecommunications service providers offer circuits into and out of the Mahwah Data Center."[18]

- "The market for circuits into and out of the Mahwah Data Center is competitive, and the proposed IDS offerings are merely one of several options from which market participants can choose. Each of the third-party telecommunications providers that has a presence in the Mahwah Data Center's 'Meet Me Rooms' offers similar circuits to market participants, in competition with the IDS offerings proposed here. Each market participant considering whether to purchase a circuit directly can weigh that option against similar circuits offered by those third-party carriers, and can choose which circuit to purchase based on which combination of latency, bandwidth, price, and other factors best meets its business needs."[19]

- "Indeed, the Exchange understands that most of the third-party telecommunications providers that provide circuits do so at fees lower than those proposed herein, and that most NCL Customers and colocation Users use such third party telecommunication circuits into and out of the Mahwah Data Center."[20]

Taken together, these statements demonstrate that substitutes to the proposed services are available to market participants. Because such substitutes exist, IDS would be unable to impose supra-competitive pricing for its services without causing customers to shift their business to the numerous other providers of similar services.

Despite this robust showing, IEX argues that the Exchanges must provide more detail, including (i) identification of the specific providers that sell services that compete with the IDS's proposed services, (ii) proof that the services of the competing providers are "equivalent" to IDS's proposed services "in terms of latency or other characteristics," and (iii) a comparison between the proposed fees for IDS's services and the prices charged by the competing providers for similar services.[21]

On the first point, IEX does not seriously dispute that such competitors exist; it simply attempts to raise a hurdle that Commission regulations do not impose. In any event, in order to connect to the Exchange's trading and execution systems, customers may opt to connect through a port at a third-party access center, or through a Hosting User or third-party vendor that accesses the Exchange's trading and execution systems itself and then redistributes the data to customers.[22] These third-party access centers,

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[18] Id. at 12716.

[19] Id. at 12722.

[20] Id.

[21] See IEX Letter, supra note 1, at 4.

[22] To preserve customer confidentiality, the Exchanges are not identifying these entities in this public comment letter. Should the Commission wish to know the identities of

Hosting Users, and vendors all provide access and connectivity to the Exchange's trading and execution systems in direct competition with the proposed IDS Network Ports at issue here. In addition, there are approximately 15 third-party telecommunication providers that have established a presence in the Mahwah Data Center's "Meet Me Rooms." Each of them does provide, or could readily begin providing, circuits into and out of the Mahwah Data Center in direct competition with IDS's proposed "Optic Access" and "Optic Low Latency" circuits.[23]

Regarding IEX's second point, the Commission has recognized that products may be substantially similar to be considered substitutable, and do not need to be identical or "equivalent," as IEX suggests. Here, the services at issue are clearly substitutable: third-party vendors, third-party access centers, and Hosting Users can all provide connections to the same Exchange Systems and data feeds that can be accessed by the proposed IDS Network Ports. Similarly, customers seeking circuits to transmit data into and out of the Mahwah Data Center can choose from numerous service providers that sell circuits to perform precisely that function. The providers of such services design them to perform with particular combinations of latency, bandwidth, price, and other factors that they believe will attract customers, and customers choose from among these competing services on the basis of their business needs. There is nothing singular about the proposed IDS services that would make the competitors' services inadequate substitutes.

On IEX's third point, the Exchanges cannot detail the prices and specifications of IDS's *competitors'* because the prices and specifications of IDS's competitors' services are not publicly known. What information IDS has, it gleans through anecdotal communications and by observing customers' purchasing choices in the competitive market, and cannot confirm its accuracy.

Regarding the circuits into and out of the Mahwah Data Center, the Filings explain that most customers purchase such circuits from IDS's competitors, and the Exchanges believe that IDS's competitors generally charge lower fees than IDS for substantially similar services.[24] These facts demonstrate a competitive market at work, and are proof that customers can and do weigh IDS's circuits against similar circuits offered by IDS's competitors, and make their purchasing decisions after weighing whatever combination of latency, bandwidth, price, and other factors best suits their particular business needs. In the end, more than 90% of the circuits that customers have purchased into and out of the Mahwah Data Center are supplied by IDS's competitors, not IDS.

IEX argues that the fact that *any* customers purchase IDS's circuits "raises the question of why IDS is able to charge more, and what benefits IDS may be able to provide that

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these entities, the Exchanges would be willing to provide that information in a confidential submission.

[23] See supra note 22.

[24] IDS has gleaned this information through anecdotal communications, and also through its own experience as a purchaser of circuits to build IDS's own networks.

third parties cannot."[25] Contrary to IEX's implication, the Exchanges do not believe that IDS's circuits have any latency or bandwidth advantage over the circuits of its competitors.[26] Several of IDS's customers have informed IDS that they utilize IDS circuits out of convenience because they are already contracting with IDS for other services. If this is the case, then this attribute is merely one of the several factors customers consider before choosing a circuit. And given that more than 90% of the circuits that customers have purchased into and out of the Mahwah Data Center are supplied by IDS's competitors and not by IDS, it appears to be a factor that not many customers prioritize.

IEX goes on to identify itself as a customer that has purchased circuits from IDS, as opposed to from IDS's competitors, "because IEX has determined that this method is necessary to meet IEX's business needs."[27] But as noted above, the Exchanges do not believe that IDS's circuits have any latency or bandwidth advantage over the circuits of IDS's competitors. Further, the fact that IEX has chosen IDS's circuits to meet IEX's business needs does not mean that a different customer, differently situated, would make the same choice. Nor is the choice between providers all-or-nothing; a customer may choose IDS circuits for some uses, and other providers' circuits for others. Presumably, IEX selected which circuit to use for which function based on its own assessment of the circuits' attributes and of IEX's business needs.

In sum, the Filings clearly demonstrate the existence of competition from third parties that can and do provide substitutes for the proposed services in the Filings.

4. Disapproval of the Proposal Would Harm Competition and IDS's Customers

If the proposed services in the Filings are not approved, IDS would be forced to cease offering these services, causing dislocation for the current customers and a reduction of competition in the market for those services. Any customers that wanted to retain the connectivity they had lost would be compelled to purchase substitute services from IDS's competitors. Those competitors are not regulated by the Commission, and so they would be free to increase prices, negotiate individual rates, or favor some customers with faster connections.

The Exchanges believe that competition is best served by allowing IDS to continue to compete freely with the other providers of connectivity services, without the proposed services being singled out as "facilities" of an "exchange" and accordingly subject to Commission regulation, including the filing of services and fees. Indeed, the Exchanges do not believe such a conclusion is consistent with the Exchange Act, or the Commission's regulations implementing the Exchange Act, for reasons that the Exchanges have already explained. But to the extent that the Commission requires the

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[25] IEX Letter, supra note 1, at 4.

[26] Again, IDS has gleaned this information through anecdotal communications, and also through its own experience as a purchaser of circuits to build IDS's own networks.

[27] IEX Letter, supra note 1, at 4.

Exchanges to file such services, it would be harmful both to competition overall and to IDS's current customers for the Commission to disapprove them.

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For the foregoing reasons and the reasons stated in the Filings, the Exchanges request that the Filings be approved.

Respectfully submitted,

Elizabeth K. King

cc: Honorable Gary Gensler, Chair
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
David Saltiel, Acting Director, Division of Trading and Markets