



March 25, 2021

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: File Nos. SR-NYSE-2021-14; NYSEArca-SR-2021-13; SR-NYSEAMER-2021-13; SR-NYSECHX-2021-03; SR-NYSENAT-2-21-04

Dear Ms. Countryman:

Investors Exchange LLC (“IEX”) is pleased to comment on the filing (the “Filing”) by New York Stock Exchange LLC (“NYSE”) and its affiliated exchanges to establish a sweeping new set of connectivity services (“Covered Services”) and fees by its ICE Data Services (“IDS”) affiliate.¹ IEX believes that the Filing raises more questions than it answers and that the Commission should reject it unless NYSE can provide substantially more justification as to whether the Covered Services and fees described in the Filing meet the standards for approval under the Securities Exchange Act of 1934 (“Exchange Act”). IEX identifies below some questions that we believe are relevant to this determination.

Description of Proposed Services and Fees

The Filing would add fees for connectivity to both NYSE and related exchange and third-party systems and market data at NYSE’s market data center located in Mahwah, New Jersey. The Covered Services include, among others: (i) circuits used by both “co-location” as well as non-colocation (“NCL”) customers to connect their systems in the Mahwah data center to other IDS access centers, including those located in other major data centers where competing exchange systems are located; (ii) IDS network ports allowing NCL customers to connect to the IDS network, which allows such customers to access the trading and execution systems of NYSE and affiliated exchanges and to receive market data products from such exchanges as well as consolidated market data feeds; and (iii) connectivity for NCL customers in the Mahwah data center to various third-party systems and market data feeds, including systems and data of various competing exchanges and other market venues.²

The fees covered by the Filing would vary widely based on the variations in the bandwidth and speed of particular connectivity options. For example, the total annual fees for a 1GB optic access circuit, including initial and monthly charges, total \$19,500, while annual charges for a low latency 40 GB circuit total \$104,000. Total annual charges for IDS network ports range from \$193,000 to \$247,000.

SEC Authority to Review the Proposed Services and Fees

NYSE argued in a previous filing for wireless connectivity services in the Mahwah data center that those services did not involve offerings by an “exchange” or “facility” of an exchange because they were offered by IDS, an affiliate of NYSE, rather than directly by the exchange, and that NYSE did not control the terms on which such services were offered. In that case, the NYSE affiliate would have gained monopoly control over the ability to offer the fastest wireless access to and from the Mahwah center. The

¹ See, e.g., Securities Exchange Act Release No. 91217 (February 26, 2021), 86 FR 12715 (March 4, 2021).

² *Id.*, 86 FR at 12720.

Commission approved that filing only after it was amended to allow competing vendors to offer an equivalent speed of wireless access to the data center.³ NYSE has not accepted these conditions or the Commission's jurisdiction and is challenging the Commission's order in federal court.⁴ In this Filing, NYSE references those same arguments and says that, for the same reasons, the services and fees covered by the Filing should not be subject to review.⁵

IEX strongly disagrees. The services and fees covered by the Filing concern access to exchange systems and market data, through an exchange affiliate, in NYSE's primary operations center. Further, access to third party systems and data is being offered to NYSE customers in the same data center. As explained below, NYSE has merely asserted, but not established, that competing providers can offer access to data and trading systems from the Mahwah data center as efficiently as NYSE's own affiliated exchange services provider. Even if it can make that case, this goes to the question of whether the fees are approvable, not whether they are reviewable. As the Commission explained in the Wireless Filing, "it is not important which corporate entity within the group holds a particular asset so long as that asset is provided as part of the relevant exchange market place".⁶ The position that SEC oversight of access to exchanges and market data should hinge on which legal entity invoices the fees makes no sense and would undermine the entire purpose for SEC authority over exchanges under the Exchange Act.

Questions Concerning Retrospective Review of Existing Fees

The Filing is not transparent on whether it is only prospective, or whether and to what extent it covers services and fees that are already in effect. The Filing consistently describes the Covered Services as services that IDS currently makes available in the Mahwah data center. IEX believes it is important that NYSE be clear as to whether it is seeking retrospective approval of offerings and fees that are already in effect. If so, understanding the history, including how long individual fees have been in effect and whether they have been increased over time, is relevant to understanding, among other things, whether they were fair and reasonable when instituted, the justification for any increases since they were instituted, and the level of fees in relation to the availability of competing offerings by other providers. We believe that market participants need this level of transparency to be able to provide informed comment on the Filing, and the Commission would benefit from this information to be able to make an informed judgment on whether the Filing should be approved.

We think, at a minimum, NYSE should answer the following questions:

- Which fees are already in effect, and how long have they been in effect?
- If previously charged by an entity other than IDS, which entity, and what was the purpose for the change?
- If any specific fees have increased, what were the dates and amounts of the increases, and what were the reasons for the increases?

³ See Securities Exchange Act Release No. 90209 (October 15, 2021), 85 FR 67044 (October 21, 2021) ("Wireless Order").

⁴ International Exchange, Inc. v. SEC, No. 20-1470 (D.C. Cir. 2020).

⁵ 86 FR at 12716.

⁶ Wireless Order, 85 FR at 67048.

Insufficient Justification

The Filing is long in detail on the fees being charged but devoid of analysis or data to demonstrate the fees meet the standards for approval under the Exchange Act. Apart from asserting that the Covered Services do not involve the facilities of an exchange, the Filing offers two justifications. First, NYSE argues in a single sentence that the fees are reasonable because they are offered as a “convenience” to participants, and that “offering them requires the provision, maintenance, and operation of the Mahwah Data Center, including the installation, monitoring, support, and maintenance of the Services.”⁷ Second, throughout the Filing, NYSE states that competing providers offer similar services in the data center and that participants are free to choose a provider other than IDS in seeking connectivity into or out of the data center.

On both counts, NYSE’s justification amounts to conclusory assertions, unsupported by data or analysis that would allow the Commission or market participants to determine how these factors might support the Filing. These assertions also fall well short of the types of data and analysis suggested by SEC staff in its 2019 Guidance on SRO Filings related to Fees (“Guidance”).⁸ For example, the Guidance states that “A statement by an SRO in a filing that a proposed fee is subject to competitive forces must be supported by evidence, including data and analysis.” Similarly, with regard to cost justifications, the Guidance makes clear that “if an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO’s costs, or will not result in excessive pricing or supracompetitive profit, specific information, including quantitative information, should be provided to support that argument.”

Data Center Costs

NYSE has not provided any quantitative or other specific information to support its argument that fees for Covered Services are reasonable because of the need to recover data center costs. The following are some questions that we think would be relevant in this respect:

- Which cost components does NYSE believe are relevant to the Covered Services and why?
- What is the amount of those costs over some specified period of recent time (e.g., during the last year)?
- How do those costs compare to the amount of fees from Covered Services that has been collected or is expected to be collected over the same time period?

IEX has published an analysis of its own costs of operation that relate to market data and connectivity, segmented by type of product, with a detailed description of which cost elements were included for each segment and why.⁹ NYSE could provide data and analysis based on its own methodology, if it clearly explains the methodology and how its costs support the fairness and reasonableness of the fees to be charged. But we believe that NYSE cannot support market data and connectivity fees based on a mere reference to the fact it has costs to operate and maintain its data center. Instead, we think that NYSE

⁷ 86 FR at 12721-2.

⁸ See <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

⁹ See <https://iextrading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf>.

should be required to provide enough detail to identify those specific costs, explain how they are relevant to the proposed services and fees, and based on this detail, explain why they are fair and reasonable within the meaning of the Exchange Act.

Competition Arguments

NYSE also relies on the assertion that numerous competing providers offer connectivity services in the Mahwah data center. NYSE goes on to state that, if IDS did not provide the Covered Services, participants would have fewer options to connect in and out of its data center.¹⁰ That much is self-evident, but the statement says next to nothing about whether the specific fees in question are fair and reasonable. The following are some basic questions we think are relevant to the assertion about competition:

- Who are the other competing providers? Which, if any of them, provide all of the same functionality as is provided by IDS in terms of access to exchange systems, third market systems, and market data?
- How do the fees for Covered Services compare to the prices charged by competing providers for the same or similar services?
- Do competing providers have the ability to provide services that are equivalent to the Covered Services, in terms of latency or other characteristics, and if so, what is the basis for that conclusion? If not equivalent, what are the differences and how do they affect the question of whether the fees charged are fair and reasonable?

Concerning the last set of questions, NYSE does not specifically assert that other providers can offer the ability to transmit data or messages into or out of the Mahwah data center as quickly and efficiently as IDS can. IEX is a consumer of market data from NYSE and its affiliated exchanges, which IEX requires in order to operate its own exchange. IEX transmits this data using NYSE-sponsored connectivity because IEX has determined that this method is necessary to meet IEX's business needs. Many other active trading firms are in a position similar to IEX in terms of their need to receive market data from Mahwah as quickly and efficiently as possible.

The potential that competition can act to constrain fee increases depends on a determination that competitors are able to offer products that provide the same benefits. If this is true in this instance, NYSE should be able to provide a basis for the determination. With regard to the optic access circuits, NYSE asserts in the Filing that most third-party providers of circuits in the Mahwah data center charge lower fees than are set out in the Filing.¹¹ If this is the case, it raises the question of why IDS is able to charge more, and what benefits IDS may be able to provide that third parties cannot.

Conclusion

The Filing concerns important means to access exchange and other systems and market data that participants need to conduct business, and these means are no less important because they are offered through an affiliate, rather than NYSE directly. Exchanges bear the burden of demonstrating that fees are

¹⁰ 86 FR at 12723.

¹¹ Id. at 12722.

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fair and reasonable and meet all other requirements of the Exchange. IEX believes the Filing falls short of this standard.

Sincerely,

A handwritten signature in black ink that reads "John Ramsay". The signature is written in a cursive style with a large, looping initial "J".

John Ramsay
Chief Market Policy Officer, IEX