



August 28, 2020

VIA ELECTRONIC DELIVERY

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: NYSE Rule Filings Seeking SEC Approval to Establish Fee Schedules for the Provision of Wireless Connections

Dear Ms. Countryman:

Earlier this year, the New York Stock Exchange (“NYSE”) submitted a set of five rule filings (the “Rule Filings”)¹ to the SEC seeking approval to establish fees for the provision of wireless connections between NYSE’s Mahwah, New Jersey data center and three data centers located in Carteret and Secaucus, New Jersey, and Markham, Canada (the “Wireless Connections”). By letter dated March 10, 2020, Virtu registered its strong objections to the Rule Filings on the basis that they are anticompetitive and inconsistent with the Exchange Act, which mandates that fees for market data and market access be “fair and reasonable” and not “unfairly discriminatory.”² In that letter, we explained (i) that the Wireless Connections are “core functions” of NYSE and therefore constitute facilities of an exchange under the Exchange Act, and (ii) that the proposal would grant a NYSE-affiliated vendor an insurmountable latency advantage by placing its Wireless Connection directly next to NYSE’s data center compound, with competitors having to make do with a connection outside of the compound fence nearly a quarter of a mile away. Numerous other commenters lodged similar complaints.³

¹ See February 11, 2020 Notices of Filing of Proposed Rule Change to Establish a Schedule of Wireless Connectivity Fees and Charges with Wireless Connections, New York Stock Exchange LLC (Release No. 34-88168; File No. SR-NYSE-2020-05), NYSE Arca, Inc. (Release No. 34-88170; File No. SR-NYSEArca-2020-08), NYSE American LLC (Release No. 34-88169; File No. SR-NYSEAMER-2020-05), NYSE Chicago, Inc. (Release No. 34-88172; File No. SR-NYSECHX-2020-02), NYSE National, Inc. (Release No. 34-88171; File No. SR-NYSENAT-2020-03); February 19, 2020 Notices of Filing of Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services, New York Stock Exchange LLC (Release No. 34-88237; File No. SR-NYSE-2020-11), NYSE Arca, Inc. (Release No. 34-88239; File No. SR-NYSEArca-2020-15) NYSE American LLC (Release No. 34-88238; File No. SR-NYSEAMER-2020-10), NYSE Chicago, Inc. (Release No. 34-88240; File No. SR-NYSECHX-2020-05), NYSE National, Inc. (Release No. 34-88241; File No. SR-NYSENAT-2020-08).

² See letter from Thomas Merritt to Vanessa Countryman (Mar. 10, 2020), available at <https://www.virtu.com/uploads/documents/Virtu-Comment-Letter-03-10-20.pdf>.

³ See, e.g., Healthy Markets (Mar. 9, 2020), available at <https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6925373-211372.pdf>; IMC (Mar. 12, 2020), available at <https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6978487-214393.pdf>; McKay Brothers LLC (Mar. 17, 2020), available at <https://www.sec.gov/comments/sr-nysearca-2020-15/srnysearca202015-6964539-212847.pdf>; SIFMA (Apr. 3, 2020), available at <https://www.sec.gov/comments/sr-nyse-2020-11/srnyse202011-7043670-215347.pdf>; FIA Principal Traders Group (May 8, 2020), available at <https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-7168812-216597.pdf>; Bloomberg (June 12, 2020), available at <https://www.sec.gov/comments/sr-nyse-2020->

Earlier this month, NYSE filed a set of amendments (the “Amendments”) to the Rule Filings that appear to address the anticompetitive features of its original proposal.⁴ Specifically, the Amendments would add a requirement that “the length of the connection from the data center pole to the point inside the Mahwah data center where Exchange market data is produced be no less than the length of the connection from the closest commercial pole to the same point.”⁵ Our understanding is that NYSE intends to satisfy this requirement by extending the length of the fiber cable running between the data center and the connection equipment inside the data center compound, thereby equalizing latency with the commercial connections outside the compound.

Virtu supports and applauds the steps that NYSE has taken through the Amendments to equalize access to its data center and eliminate the unfair and anticompetitive advantage the original proposal would have conferred on NYSE and its affiliated vendor. However, we continue to have some questions about how the changes will be implemented and believe that the Amendments would benefit from some additional details and transparency. For example, it would be useful to have more information about how the changes will apply to the network row – e.g., whether or not the ICE Data Services products have to follow the same path as third party networks after the network row, and whether the network row itself would be subject to equal-cable-length. Furthermore, while the proposed changes appear on their face to normalize the latency advantage, we believe it is still technically possible for the NYSE to have a material “over-the-air” advantage depending on how the changes are implemented. If, for example, the NYSE were to build a monopole on its own property to the south, it could “normalize” the latency as proposed, but still have a material advantage on the over-the-air distance to Carteret. There are reasonable steps NYSE could take to address this, such as by buffering connections based on the geographic placement of the monopole, or by simply allowing participants to co-locate on NYSE’s on-premises poles. In addition, the steps NYSE is taking to equalize access should apply not only to the bandwidth offerings, but also to inbound market data delivered within the Mahwah premises and outbound market data delivered from the Mahwah premises to external locations. In sum, we believe that the Amendments should be supplemented with additional details explaining how NYSE intends to ensure that any competitive advantage – no matter how small – is eliminated.

[05/srnyse202005-7309774-218227.pdf](https://www.sec.gov/comments/sr-nyse-2020-11/srnyse202005-7309774-218227.pdf); Citadel (June 12, 2020), available at <https://www.sec.gov/comments/sr-nyse-2020-11/srnyse202011-7310311-218248.pdf>.

⁴ See August 3, 2020 Notices of Filing of Partial Amendment No. 1 to Proposed Rule Change to Amend the Schedule of Wireless Connectivity Fees and Charges to Add Wireless Connectivity Services, NYSE Arca, Inc. (Release No. 34-89460; File No. SR-NYSEArca-2020-15); New York Stock Exchange LLC (Release No. 34-89458; File No. SR-NYSE-2020-11); NYSE Chicago, Inc. (Release No. 34-89461; File No. SR-NYSECHX-2020-05); NYSE National, Inc. (Release No. 34-89462; File No. SR-NYSEAT-2020-08); NYSE American LLC (Release No. 34-89459; File No. SR-NYSEAMER-2020-10); August 3, 2020 Notices of Filing of Partial Amendment No. 1 to Proposed Rule Change to Establish a Wireless Fee Schedule Setting Forth Available Wireless Bandwidth Connections and Associated Fees, NYSE Arca, Inc. (Release No. 34-89455; File No. SR-NYSEArca-2020-08); New York Stock Exchange LLC (Release No. 34-89453; File No. SR-NYSE-2020-05); NYSE Chicago, Inc. (Release No. 34-89456; File No. SR-NYSECHX-2020-02); NYSE National, Inc. (Release No. 34-89457; File No. SR-NYSEAT-2020-03); NYSE American LLC (Release No. 34-89454; File No. SR-NYSEAMER-2020-05).

⁵ See, e.g., New York Stock Exchange LLC (Release No. 34-89458; File No. SR-NYSE-2020-11) (Aug. 3, 2020) at 5-6.

We would also like to take this opportunity to reassert our strong view that the Wireless Connections constitute “facilities” of the exchanges under the Exchange Act and therefore are subject to the notice and comment process afforded under Rule 19b-4. As many commenters argued, the sole purpose of the Wireless Connections, which are located on NYSE’s premises, is to provide market data or a private bandwidth connection to NYSE customers to assist them in effecting transactions on an exchange. The Wireless connections therefore are “core functions” of an exchange that are directly related to trading activities. The law requires activities that are inextricably tied to the function of effecting transactions on an exchange be subject to the rule filing process for a reason – to promote transparency and fairness in the marketplace and to offer a forum for the public to object to proposed activities that are anticompetitive, unfair, or unreasonably discriminatory. In the instant case, NYSE proposed to undertake an activity that impinged on competition. Through the notice and comment process, NYSE was apprised of concerns identified by market participants and took steps to modify its proposal to address those concerns. This is an example of smart regulation, where market participants are working together to resolve their differences using the notice and comment process to land in the right place.⁶

We urge other exchanges to follow NYSE’s lead in working collaboratively with market participants to identify and eliminate business practices and product offerings that are anticompetitive. For example, NASDAQ currently does not offer equal access to the rooftop of one of its data centers.⁷ We would hope that NYSE’s leadership in the instant matter will inspire NASDAQ and other exchanges to undertake a holistic review of their practices related to market data and market access to ensure that they are fair, transparent, and not anticompetitive.

Virtu also encourages all of the U.S. exchanges, including NYSE, to ensure fairness and competition in their connectivity offerings with data centers in diverse geographies. For example, NYSE is currently the sole provider of wireless connectivity from the U.S. data centers to its TSX data center site in Markham, Canada. Based on our experience, there appears to be a level playing field for all market participants choosing to access NYSE’s offering in Markham. However, any future changes NYSE makes to this offering – and for that matter to any contemplated links to other sites by NYSE or its affiliates – should be subject to the same notice and comment process to ensure transparency to give market participants an opportunity to offer input. In sum, we encourage NYSE and other exchanges be vigilant in ensuring that such offerings continue to be made available on fair and reasonable terms.

⁶ On the topic of what constitutes a “facility” of an exchange, we would note that in the Amendments, NYSE has introduced new definitions of a “Commercial Pole” vs. a “Data Center Pole”, the former allowing access by third parties and the latter not permitting such access. We are strongly of the view that both definitions constitute facilities of the NYSE exchanges, and caution against any interpretation that make a distinction that would exclude either from the requirements applicable to facilities of exchanges.

⁷ See, e.g., NASDAQ “Wireless Connectivity – Metro Millimeter Wave FAQs”, at p. 4 (“Q. Can I put my own microwave or millimeter dishes on the Nasdaq Data Center roof? A. No, we do not have the space, height, and necessary local approvals to satisfy fair and equal treatment for all requested client dishes on the data center roof... As a result, clients are not able to place their own or their vendor’s dishes on the data center roof.”), *available at* https://www.nasdaq.com/docs/2020/01/15/Metro_Millimeter_Wave_FAQ.pdf

* * *

While not directly related to the topics addressed above, we would also like to take this opportunity to underscore our support for the SEC’s Market Data Infrastructure Proposal.⁸ In particular, we applaud the SEC’s efforts to introduce competition to the marketplace through the competing consolidator model. Virtu proposed a similar framework in 2018 in connection with our participation in the SEC’s Roundtable on Market Data and Market Access,⁹ and we remain of the view that competing consolidators will contribute significantly in leveling the playing field for market participant access to market data, will add transparency to the process, and will result in fairer pricing because of competitive forces.

In fact, if the proposal is adopted by the Commission, Virtu plans to establish a competing consolidator to provide competitive market data products. Virtu’s offering will be fully transparent in documenting its costs, and pricing will be based on a fully disclosed “cost plus” basis. We hope that our leadership in this endeavor will inspire other private market participants to step up to the plate and announce their intention to offer competing services.

* * *

Virtu appreciates the opportunity to submit this letter commenting on NYSE’s decision to amend the Rule Filings and to ensure fair and reasonable competition with respect to the Wireless Connections. As we have repeatedly stated, competition in the market results in significant benefits to investors, such as lower trading costs, price improvement opportunities, execution speed and enhanced service. We strongly urge other exchanges and market participants to take the high road, as NYSE appears to have done here, in ensuring that access to the markets and access to market data remains “fair and reasonable” and not “unfairly discriminatory”.

Respectfully submitted,

A handwritten signature in black ink that reads "Doug A Cifu".

Douglas A. Cifu
Chief Executive Officer

⁸ SEC Proposed Rule, Market Data Infrastructure (Release No. 34-88216; File No. S7-03-20) (Feb. 14, 2020).

⁹ See letter to Brent J. Fields, Secretary, Securities Exchange Commission (Oct. 23, 2018), available at <https://www.virtu.com/uploads/2019/02/2018.10.23-Virtu%E2%80%99s-Comment-Letter-Roundtable-on-Market-Data-and-Market-Access.pdf>.