



January 26, 2022

VIA ELECTRONIC DELIVERY

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

RE: Investors Exchange LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend its Fee Schedule for Market Data Fees (Release No. 34-93883; File No. SR-IEX-2021-14)

Dear Ms. Countryman:

Virtu Financial, Inc. (“Virtu”)<sup>1</sup> respectfully submits this letter in response to the above-referenced order issued by the Securities and Exchange Commission (the “SEC” or “Commission”) on December 30, 2021 (the “Order”).<sup>2</sup> The Order relates to an immediately effective fee filing submitted by the Investors Exchange (“IEX”) on November 10, 2021, proposing to charge fees for the distribution of certain proprietary market data feeds.<sup>3</sup> In the Order, the SEC suspended IEX’s filing and initiated proceedings to determine whether to approve or disapprove IEX’s proposed fees.

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<sup>1</sup> Virtu is a leading financial firm that leverages cutting edge technology to deliver liquidity to the global markets and innovative, transparent trading solutions to its clients. Virtu operates as a market maker across numerous exchanges in the U.S. and is a member of all U.S. registered stock exchanges. Virtu’s market structure expertise, broad diversification, and execution technology enables it to provide competitive bids and offers in over 25,000 securities, at over 235 venues, in 36 countries worldwide. As such, Virtu broadly supports innovation and enhancements to transparency and fairness which enhance liquidity to the benefit of all marketplace participants.

<sup>2</sup> U.S. Securities and Exchange Commission, Release No. 34-93883; File No. SR-IEX-2021-14, *Investors Exchange LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend its Fee Schedule for Market Data Fees* (Dec. 30, 2021), available at <https://www.sec.gov/rules/sro/iex/2021/34-93883.pdf>.

<sup>3</sup> U.S. Securities and Exchange Commission, Release No. 34-93557; File No. SR-IEX-2021-14, *Investors Exchange LLC, Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fee Schedule for Market Data Fees*, Release (Nov. 10, 2021), available at <https://www.sec.gov/rules/sro/iex/2021/34-93557.pdf>.

Virtu has long been a strong and vocal critic of the imposition of unreasonable market data and connectivity fees by the leading U.S. exchanges. Virtu has publicly voiced its concerns and objections to these unfettered and unchecked “tariffs”, including petitioning the Commission (with 23 other diverse market participants) to engage in rulemaking to address fees charged by exchanges for market data and market access.<sup>4</sup> In addition, Virtu participated in the Securities and Exchange Commission’s Market Data Roundtable in 2018, and in conjunction submitted a letter expressing its position on this contentious issue.<sup>5</sup> And over the past several years, Virtu has submitted numerous letters to the Commission contesting unreasonable, anticompetitive, opaque, and monopolistic fees proposed by various U.S. equity exchanges.<sup>6</sup>

During Chairman Clayton’s tenure, we were strong proponents of the Commission’s efforts to pursue needed reforms in this space. In particular, the SEC’s approval of a National Market System Plan Regarding Consolidated Equity Market Data in August 2021 represented a significant step forward in introducing competition to the marketplace and expanding access to market data for all investors. Equally important, careful scrutiny of individual market data fee filings by Chairman Clayton’s Trading & Markets Division was critical to the identification of unreasonable and anticompetitive fee proposals and engendered a healthy and robust debate among investors and the industry through the public notice and comment process.

We are pleased to see that Chair Gensler intends to continue to apply scrutiny to fees for market data and market access as evidenced by the staff’s Order to initiate proceedings related to IEX’s filing. Despite the very significant strides that have been achieved to enhance the framework for market data and market access, it is essential that the SEC continue to play a leading role in ensuring that fee filings are fair, reasonable, and not unduly anticompetitive. Chair Gensler and his staff are to be commended for continuing to closely scrutinize proposed fees in the public forum and for inviting public comment.

We also would like to applaud IEX for being fully transparent in its filing about the exchange’s costs to collect and disseminate market data and to provide connectivity to market participants. For years, Virtu and other market participants have advocated that the exchanges should be required to disclose much more comprehensive data and information about their costs to collect and distribute market data and to provide connectivity to the marketplace. Without transparent disclosure of costs, it is impossible for the SEC to determine whether a proposed fee meets the requirement under the Exchange Act that the fee be fair, reasonable, and not unduly

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<sup>4</sup> See letter to Brent J. Fields, Secretary, Securities Exchange Commission (Dec. 6, 2017), *available at* <https://www.sec.gov/rules/petitions/2017/petn4-716.pdf>.

<sup>5</sup> 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>.

<sup>6</sup> See, e.g., Douglas Cifu to SEC Secretary Vanessa Countryman (Aug. 28, 2020) (contesting NYSE rule filing to establish fee schedule for wireless connections), *available at* <https://virtu-www.s3.amazonaws.com/uploads/documents/Virtu-Comment-Letter-08-28-20.pdf>; Tom Merritt to SEC Secretary Vanessa Countryman (Mar. 10, 2020) (same), *available at* <https://virtu-www.s3.amazonaws.com/uploads/documents/Virtu-Comment-Letter-03-10-20.pdf>; Douglas Cifu to SEC Deputy Secretary Eduardo Aleman (Apr. 25, 2019) (contesting fees proposed by NYSE Arca for certain co-location services to provide access to the Global OTC execution system), *available at* <https://virtu-www.s3.amazonaws.com/uploads/documents/Virtu-Comment-Letter-04-25-19.pdf>.

competitive – a topic that was the subject of years of litigation initiated by SIFMA and Susquehanna International Group, culminating in decisions by the Commission and the D.C. Circuit, respectively, setting forth the criteria exchanges must satisfy to meet their obligations under the law.<sup>7</sup>

In 2019, following the SIFMA decision, the SEC’s Division of Trading and Market issued staff guidance on SRO rule filings relating to fees.<sup>8</sup> In that guidance, the staff clearly explained:

*As an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.... If a Fee Filing proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces, the SRO must provide a substantial basis, other than competitive forces, demonstrating that the fee is consistent with the Exchange Act. One such basis may be the production of related revenue and cost data....*

*A qualitative and general description of the categories of costs “offset” by the proposed fee is not sufficient, nor is an unsupported representation that increased fees are “revenue neutral.”*

*Rather, the SRO should provide an analysis of the SRO’s baseline revenues, costs, and profitability (before the proposed fee change) and the SRO’s expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question. As part of its analysis, the SRO should describe, among other things, its methodology for determining the baseline costs and revenues for the product or service, as well as its methodology for estimating the expected costs and revenues for the product or service.*

IEX’s filing does just that. In significant detail, IEX provides data about three cost components: “1) direct costs, such as servers, infrastructure, and monitoring; 2) enhancement initiative costs (e.g., new functionality for IEX Data and increased capacity for the proprietary market data feeds...); and 3) personnel costs.”<sup>9</sup> IEX published similar information in a cost study released in 2019, but to our knowledge, the present filing represents the first time an exchange has comprehensively offered such information in connection with a proposed fee filing.

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<sup>7</sup> See *In the Matter of the Application of Securities Industry and Financial Markets Association*, Securities Exchange Act Release No. 84432 (Oct. 16, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-84432.pdf> (holding that neither NYSE Arca, Inc. nor Nasdaq Stock Market LLC had met its burden to show that fees for certain proprietary market data products were fair and reasonable under the Exchange Act); *Susquehanna Int’l Grp., LLC v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) (emphasizing that “unquestioning reliance” on a self-regulatory organization’s representations in a proposed rule change is not sufficient to support a Commission finding that a proposed rule change is consistent with the Exchange Act).

<sup>8</sup> U.S. Securities and Exchange Commission, Division of Trading and Markets, *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#\\_ftnref13](https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees#_ftnref13).

<sup>9</sup> *Id.* at n. 3.

IEX also is to be commended for being fully transparent about its intention to charge a markup over its costs to realize a profit. Today, exchanges are for-profit businesses. Just like Virtu, exchanges have an obligation to their shareholders to run their businesses responsibly and maximize shareholder value. Like most other businesses, exchanges make profits by applying a markup to the sale price vs. their costs. This “cost-plus” model is what drives American businesses, but it only works if customers believe that they are getting a fair deal and are armed with sufficient information to make such a determination. Unfortunately, exchange fee filings historically have been remarkably opaque not just about costs, but about how much profit the exchanges expect to realize from the sale of market data and access. Again, credit to IEX for transparently acknowledging that it intends to offer a service in exchange for a profit, and to be specific as to how much profit it intends to seek – a step no other exchange has taken to date, to our knowledge.

At this early stage of the proceedings, Virtu is not yet prepared to take a position as to whether the cost information provided by IEX is fully adequate or how much markup is an appropriate markup. There might be additional information on costs that would be helpful. However, we do want to applaud IEX for advancing a fee filing that could be a model for other exchanges, and the Commission for initiating proceedings. This is an important filing deserving of a public comment process and thoughtful and deliberate SEC analysis and consideration.

In our view, the SEC’s Order solicits comment on a number of very important questions that could advance the dialogue around the nature and scope of cost transparency that exchanges ought to be required to include in fee filings. For example, “has IEX provided sufficient detail about the specific direct costs it has assigned to market data to justify its proposal?” Has “IEX provided sufficient information regarding its current market data subscriber base as well as sufficient information to support its projections regarding what types of current subscribers (i.e., individuals, vendors, members, and non-members) may terminate or modify their current subscriptions and why?” And “what are commenters’ views regarding what factors should be considered in determining what constitutes a reasonable rate of return for proprietary market data fees?” We look forward to seeing how commenters respond to these and other questions posed by the Order, and to hearing more from IEX in their rebuttal.

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For far too long, the exchanges have enjoyed a monopoly on market data and market access by charging high fees that are opaque and fail to promote competition because of this lack of transparency. Finally, an exchange that is willing to do the right thing and transparently disclose its costs and disclose that it is charging a markup has raised its hand. We look forward to the healthy debate that surely will ensue and encourage the Commission to use this process to establish a baseline for the disclosure that should be included in future fee filings.

Respectfully submitted,



Douglas A. Cifu  
Chief Executive Officer

cc: The Honorable Gary Gensler, Chair  
The Honorable Hester M. Peirce, Commissioner  
The Honorable Allison H. Lee, Commissioner  
The Honorable Caroline A. Crenshaw, Commissioner  
The Honorable Elad L. Roisman, Commissioner  
Mr. Haoxiang Zhu, Director, Division of Trading and Markets