June 12, 2020

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

Re: 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 (File Nos. 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)

Dear Ms. Countryman:

McKay Brothers LLC ("McKay") and its affiliate Quincy Data LLC ("Quincy") (collectively, the "Firm")[1] appreciate the opportunity to provide comments on the order instituting proceedings to determine whether to approve or disapprove the proposals noted above by the NYSE Group, Inc. exchanges (collectively "the Exchanges" or each an "Exchange").[2] As detailed in our first comment letter, we believe that the wireless connections to third party exchange data centers (the "Wireless Connections") and the market data products available through those connections (collectively with the Wireless Connections, the "Wireless Services") are facilities of the Exchanges, but that the proposals lack critical statutory justification for the latency advantage afforded by the private pole that is approximately 700 feet closer to the Exchanges' systems than any available public pole (the "NYSE Private Pole").[3] We write to rebut several mischaracterizations in the Exchanges' comment letter (the "NYSE Letter"), including the fallacious assertions by the Exchanges that the Firm seeks to eliminate the Wireless

[1] Quincy is a market data distributor that provides equal access to low latency US equities market data that helps subscribers make tighter markets. McKay is a telecommunications service provider, using microwave and fiber technologies to offer low-latency data transport services, which likewise allow our subscribers to manage risk more effectively and make tighter markets. We offer services on a level-playing field basis—meaning we make our best latencies available to all subscribers. We also provide small firm discounts to support greater diversity of market participants with access to low latency market data.

[2] Securities Exchange Act Release No. 88901, 85 FR 31273 (May 22, 2020). *See also* Securities Exchange Act Release Nos. 88168 (February 11, 2020) (SR-NYSE2020-05); 88169 (February 11, 2020) (SR-NYSEAMER-2020-05); 88170 (February 11, 2020) (SR-NYSEArca-2020-08); 88172 (February 11, 2020) (SRNYSECHX-2020-02); and 88171 (February 11, 2020) (SR-NYSENAT-2020-03); 88237 (February 19, 2020) (SR-NYSE-2020-11); 88238 (February 19, 2020) (SR-NYSEAMER-2020-10); 88239 (February 19, 2020) (SR-NYSEArca-2020- 15); 88240 (February 19, 2020) (SR-NYSECHX-2020-05); and 88241 (February 19, 2020) (SR-NYSENAT-2020-08) (collectively, the "Filings").

[3] Letter from Jim Considine, Chief Financial Officer, McKay, to Vanessa Countryman, Secretary, Commission re: File No. SR-NYSE-2020-05 (March 10, 2020) (the "McKay Letter"), https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-6950634-212524.pdf.

Services as a competitor and that the Firm's call for transparency regarding latency advantages is disingenuous.[4]

The Exchanges Have Still Not Justified the Exclusive Latency Advantage

The NYSE Letter and the Filings fail to answer a simple question: why is it fair for the Wireless Services to have an exclusive ~700 foot latency advantage in connecting to the Exchanges? More precisely, the question is why this latency advantage does not constitute unfair discrimination or a burden on competition not necessary or appropriate in furtherance of the Securities Exchange Act of 1934 ("Exchange Act")?[5] Instead of attempting to address this question, the Exchanges instead rely on their previous arguments for why they believe the Proposal is consistent with the Exchange Act.[6]

For example, in attempting to address burden on competition concerns, the Exchanges state that other providers are not permitted on the NYSE Private Pole "due to space limitations, security concerns, and the interference that would arise between equipment placed too closely together."[7] These may be arguments for the use of an exclusive pole, but none are arguments for the use of an exclusive pole that enjoys a latency advantage in connecting to the Exchanges' data center. In other words, an exclusive pole in the public right-of-way that was no closer than any other public pole would seem capable of addressing the Exchanges' concerns regarding space limitations, security, and interference. The exclusive latency advantage consequently requires separate justification. It is very likely not possible to justify this latency advantage under the high burden of the Exchange Act, which we believe is why the Exchanges have not attempted to do so.

Aside from the missing latency justification, the reasons of space limitations, security concerns, and interference to justify the exclusive use of any pole are highly dubious and warrant further explanation. For example, with respect to space limitations, the Exchanges assert that it is improper to compare the 160 foot height of the NYSE Private Pole to 350 foot commercial towers and cite having had to "rework the placement" of equipment in order to more than double the dishes from four to nine on the NYSE Private Pole as evidence of space limitations.[8]

It may be that the NYSE Private Pole was designed to have such a limited capacity, but poles of comparable or shorter height are fully capable of hosting significantly more equipment than nine dishes. For example, just outside of their Mahwah facility, there is a 175-foot pole that presently holds 41 wireless radios and 20 dishes. Another pole of the same height and with the same capacity stands in close proximity as well. The equipment on these public poles operate without interference through the operation of, and compliance with, rigorous regulations and procedures of the Federal Communications Commission ("FCC") governing, among other things, permissible types of equipment, use of particular frequencies, the rights of other

[4] Letter from Elizabeth K. King, Chief Regulatory Officer ICE, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission re: the Wireless Filings (May 8, 2020), https://www.sec.gov/comments/sr-nyse-2020-05/srnyse202005-7168807-216593.pdf.

[5] 15 U.S.C. 78f(b)(5).

[6] NYSE Letter at 18 ("The requested [statutory justification] is already in the Wireless Filings.").

[7] *Id.* at 7. *See also, e.g.*, Securities Exchange Act Release No. 88168, 85 FR 8938, 8945 (Feb. 18, 2020).

[8] NYSE Letter at 7.

telecommunications providers, and enforcement mechanisms to address interference.[9] Standard telecommunication industry practice and FCC regulation effectively address the concerns that the Exchanges' assert as the rationale for its exclusive use of the latency-advantaged NYSE Private Pole.

Moreover, telecommunications equipment must be placed on numerous sites between to the Exchanges' datacenter in Mahwah to reach other exchange data centers, as the Exchanges acknowledge.[10] Any concerns of space limitations, security, and potential interference would apply equally to each of these other wireless equipment locations for the Wireless Services. It is unclear, therefore, why the first outbound (and last inbound) connection (*i.e.*, the NYSE Private Pole) gives rise to special concerns regarding space limitations, security, and interference warranting the use of an exclusive pole or an exclusive pole with a latency advantage.

Given that it is technologically feasible, and in fact common, to place substantially more equipment on a pole of comparable height to the NYSE Private Pole without interference, the Exchanges' (or IDS's) decision to build the NYSE Private Pole as they did indicates that any space limitations of that pole were intentional and very likely motivated by a desire to reserve an exclusive latency advantage for the Wireless Services.[11] If not so motivated, the Exchanges should be able to articulate with precision why the Wireless Services merit such a favored position and why commonly available pole design, standard industry controls, and FCC oversight addressing these same issues of space limitations, security, and interference for all other providers are insufficient to address the Exchanges' concerns.

Additionally, the Exchanges have yet to explain why the latency advantage afforded to the Wireless Services does not constitute unfair discrimination. Declining to offer any further support or explanation on the issue of unfair discrimination in the NYSE Letter, the Exchanges have offered only that the Wireless Services "would apply to all market participants equally," use of the service is "completely voluntary," and market participants can therefore choose from at least two other providers' services "at the same or similar speed."[12] Even if true, these statements in no way explain why it is not unfairly discriminatory for users of the Wireless Services to have

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[9] *See e.g.*, 47 U.S.C. 301 and the rules and regulations thereunder ("no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.").

[10] NYSE Letter at 6 ("the determinants of a wireless network's latency also include the wireless equipment utilized; the route of, and number of towers or buildings in, the network; and the fiber equipment used at either end of the connection.").

[11] As highlighted in our first comment letter, there is testimony of representatives of the Exchanges (or IDS) that the efforts to install wireless equipment on the roof of the Mahwah data center were in fact motivated by reducing latency, strongly suggesting that the advantaged location of the NYSE Private Pole was similarly motivated. Remarks of Sanjamjit Kaur before the Township of Mahwah Board of Adjustment Hearing, at 46:18, http://mahwahnj.swagit.com/play/03202019-1419 ("the whole point of doing the wireless links [to the rooftop] is to reduce the reliance on fiber and make the data delivery as fast as it can be…"). In a subsequent variance hearing on April 3, 2019, in explaining why the rooftop location was chosen, NYSE Group Inc. counsel, Michael Levine of Fox Rothschild stated that "[t]he proximity of the antennas to the data center … is what enables the low latency aspect of the plan that our expert testified to is critical to its performance in furtherance of transmitting market data for the stock exchange." Remarks of Michael Levine before the Township of Mahwah Board of Adjustment Hearing at 23:35 (April 3, 2019), http://mahwahnj.swagit.com/play/04032019-1173.

[12] *See e.g.*, Exchange Act Release No. 88168, 85 FR 8938, 8944 (Feb. 18, 2020).

a faster means of connectivity for order-related messages and market data than those that use a different provider. Where an exchange (with or through an affiliate) provides an exchange service to its members that competes with other providers of that service, the question of unfair discrimination has two prongs of application: (i) among users of that exchange service; and (ii) between users of that exchange service and users of other available providers of the service.[13] The Exchanges have made no attempt to address the latter prong.[14] That all market participants are able to switch to a latency-subsidized exchange service does not render that service free from unfair discrimination.

Evidence of Competition Is Not Evidence of Fair Competition

In the NYSE Letter, the Exchanges claim that if the ~700 foot geographic latency advantage of the NYSE Private Pole were meaningful, IDS would have the fastest connections to the third party exchange data centers, but that the Wireless Connections are instead only "second or third [fastest] among the three commercial competitors."[15] The Exchanges reason, therefore, that the inferior service "demonstrates that use of the Data Center Pole is not required for third parties to compete with the Wireless Connections."[16] The Exchanges also abdicate any responsibility or control over the NYSE Private Pole because it was built by IDS on the grounds that their mutual parent company, Intercontinental Exchange Inc. ("ICE"), had leased.[17]

Evidence of competition is not evidence of fair competition. It is true that the Firm has the fastest wireless network *despite* the NYSE Private Pole latency advantage. This is the result of extensive work, time, and investment to create the best and most efficient network. If we imagine the provision of these wireless connections as a track and field race, then the Firm is Usain Bolt in a race hosted by the Exchanges on ICE's track. In this race, the Exchange's sprinter, IDS, is provided with a 700 foot head start. When asked to explain why the 700 foot head start for IDS is justified, the Exchanges' response amounts to saying: (i) Usain Bolt is faster,

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[13] For example, if the use of an exchange's affiliated routing broker-dealer to reach away markets to comply with Rule 611 afforded special benefits to users (*e.g.*, a discount on exchange fees, or, as was nearly the case with the IEX-affiliated routing broker-dealer, a latency advantage in outbound routing), an exchange must explain why those that do not use its service are not unfairly discriminated against. *See* Exchange Act Release No. 77406, 81 FR 15765, 15768 (Mar. 24, 2016) (noting the SEC's interest in commenter's further views regarding "concerns that IEX's routing functionality and IEXS would have an advantage over other routing broker-dealers that would be unfairly discriminatory and an inappropriate burden on competition").

[14] The dual prongs of the application of unfair discrimination in this context (*i.e.*, an exchange service to its members that has competing providers), closely parallels the difference between intramarket and intermarket competition. *See*, Staff Guidance on SRO Rule Filings Related to Fees (May 21, 2019), https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees (noting that an exchange "should address both intramarket and intermarket competition" to demonstrate consistency of a proposed fee with the prohibition against imposing a burden on competition not necessary or appropriate in furtherance of the Exchange Act (15 U.S.C. 78f(b)(8)). Prong one addresses unfair discrimination "intra" (or "within/among") users of a service and is appropriate where the exchange is the sole provider of a service made available to its members. Where there are competing providers of that same exchange service, such as here or in the case of an exchange's affiliated routing broker-dealer, the second prong is necessary to address unfair discrimination "inter" (or "between") users of the exchange's service and users of competitors' services.

[15] NYSE Letter at 5.

[16] *Id.* at 6.

[17] *Id.* at 10.

so the head start should not matter; and (ii) the Exchanges have no ability to control or influence the track or the start lines.

Someone must be accountable for this head start. The first leg of the race to other exchange data centers cannot be both free from competitive forces and outside of Commission purview. If there is no accountability, the Exchanges will continue to expand their advantage until it becomes insurmountable. If, for example, the Exchanges were to move forward with installing wireless equipment on the roof of the Mahwah data center without allowing others to similarly place equipment there, this head start would be sufficient to obtain the fastest wireless connections to third party data centers.[18] In such event, would the Exchanges still say that there is competition for the Wireless Services?

If not constrained by the requirements of the Exchange Act, the Exchanges will win this race because they control their data centers and competitors have no ability to replicate a head start (or shorter finish) provided at the data center.[19]

The Exchanges also argue that they will be at a competitive disadvantage relative to other wireless providers if the Wireless Services are considered to be facility of the Exchanges because its competitors will not be subject to the rule filing process with respect to their services. This disparity only arises because the wireless connections are a facility of the Exchanges. If the Wireless Services were not operated as a facility of the Exchanges – *e.g.*, by operating in the same manner as competitors do today without a latency subsidy or other advantage provided by the Exchanges and otherwise not operate as a facility of the Exchanges, they would similarly not be subject to the rule filing process.[20]

The Exchanges also fail to address the chilling effect that providing an affiliate with a structural latency advantage has on competition. No one wants to participate in a game rigged against them. After approval in 2013 of a proposal by The Nasdaq Stock Market LLC ("Nasdaq") to place wireless equipment for a single provider on the roof of its data center over objections from the Firm, it took the Firm six years to create a connectivity network that it believed could compete with the Nasdaq's latency advantaged preferred vendor.[21] Other prospective competitors

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[18] Or, rather, as the Exchanges attempt to make clear, it was IDS's plan to expand to the data center roof notwithstanding NYSE Group Inc.'s name on the variance application and the apparent confusion as to which subsidiary or affiliate the NYSE Group Inc. engineers and counsel were representing in the Township of Mahwah Board of Adjustment hearings. NYSE Letter at n.37. NYSE Group Inc. now writes for all of the Exchanges in a single voice while advocating that it still be allowed to seek shelter among its various corporate entities when convenient.

[19] This control may be indirect, such as through an affiliate or parent company.

[20] Thus, it is the requirements of the Exchange Act that create this disparity – and for good reason. Where an entity or service gets privileged access to use the premises or property of an exchange, it may have available to it a number of advantages unavailable to competitors – *e.g.*, use of the exchange's imprimatur or access to a pole closer to the exchange's systems. It is precisely because these benefits may be afforded to such a service that the protections of the Exchange Act are necessary.

[21] *See e.g.*, Exchange Act Release No. 68735, 78 FR 6842 (Jan. 31, 2013) (SR-NASDAQ-2012-119), *and* Letter Anthony Nuland, Partner, Seward & Kissel LLP as counsel for Quincy, to Elizabeth M. Murphy, Secretary, Commission, re: SR-NASDAQ-2012-119 (Jan. 17, 2013), https://www.sec.gov/comments/sr-nasdaq-2012-119/nasdaq2012119-1.pdf.

have doubtless been deterred from even trying to compete because of these preferential latency advantages.

The Exchanges Falsely Suggests That Commenters Seek Disapproval of the Filings to Eliminate a Competitor

The Exchanges allege that if the Filings are disapproved, IDS "will have to cease offering" the Wireless Services, and that the Firm seeks disapproval to eliminate IDS as a competitor.[22] Both assertions are incorrect.

The Exchanges believe that either the Filings must be approved or, if disapproved, that IDS must cease operation of the Wireless Services. This is a false dichotomy. The Exchanges appear to have at least four options available to them:

(1) Sufficiently justify why the existing latency-advantaged Wireless Services are consistent with the Exchange Act to allow the Commission to approve the Filings;

(2) Modify the operation of the Wireless Services so that they can be found consistent with the Exchange Act;

(3) Modify the operation of the Wireless Services so that they are unambiguously not a facility of the Exchanges;

(4) Cease operating the Wireless Services (upon a Commission disapproval or otherwise).

Rather than take deliberate steps toward any of the first three of these options, the Exchanges instead urge approval of the Filings to entrench the Wireless Services' existing latency advantage over competitors while boldly accusing the Firm of anticompetitive motivations.

To be clear, the Firm's letter did not advocate for disapproval of the Filings. The Firm supported the conclusion that the Wireless Services are facilities of the Exchanges and the attendant submission of the Filings. The Filings can only be approved, however, if the Exchanges fulfill their statutory obligation to demonstrate that the Wireless Services are not unfairly discriminatory, do not inappropriately burden competition and are otherwise consistent with applicable Exchange Act requirements.[23] We do not believe that the Exchanges have satisfied these requirements of the Exchange Act—specifically, by failing to justify or otherwise address the ~700 ft. latency advantage afforded to the Wireless Services through the exclusive use of the NYSE Private Pole.

To the extent the Exchanges fail in this task and the Exchanges conclude that IDS must cease offering the Wireless Services, it is the Exchanges that will have eliminated a competitor. We seek only fair competition in this case, and gladly welcome competition with IDS where it does not enjoy preferential treatment bestowed by its exchange affiliates.[24]

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[22] NYSE Letter at 2 ("This reduction in competition may be what some of the letter writers prefer.").

[23] 17 CFR 201.700(b)(3)("mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.").

[24] Concerns of fair competition can also arise where an exchange provides exclusive preferential treatment or an exclusive advantage to an unaffiliated provider(s) as well, as we discuss in our letter on the Commission's Market Data Infrastructure proposal. *See* Letter from Jim Considine, Chief Financial Officer, McKay, to Vanessa

The Scope of an Exchange Facility under the Exchange Act

The Exchanges seek to have the Wireless Services operate in a zone of exclusivity where they are free from fair competition and outside the purview of the Commission. Thus, the Exchanges continue to argue that the Wireless Services are not facilities of the Exchanges based on technical arguments interpreting the definition of a facility under the Exchange Act.[25] For example, the Exchanges argue that the Wireless Services cannot be the "premises" of the Exchanges because they are "services" rather than premises.[26] The Exchanges also argue that the Wireless Services are not the property of the Exchanges because IDS owns the pole, built on a leasehold interest of ICE, and that the services therefore do not use any tangible or intangible property of the Exchanges.[27] In addition, the Exchanges argue that if the assets of the Exchanges' affiliates are deemed to be facilities then the Commission will suddenly have jurisdiction over hundreds of the Exchanges' subsidiaries.[28]

These arguments fail to make meaningful distinctions of the type, purpose, and use of a particular asset or service of an exchange or its affiliate/parent. A connectivity point to the Exchanges' systems located on the premises of the Exchanges' data center is categorically different than the assets of an affiliate of the Exchanges that are unrelated to the functions of an exchange. It is through that connectivity point that market participants receive market data, submit orders for potential execution, and connect to other exchange data centers. Connections for these purposes and to other exchanges are core functions of the national market system, a central purpose of which is the "linking of all markets for qualified securities through communication and data processing facilities" to, among other things, "enhance competition."[29] It is against this backdrop of a national market system designed to link markets that the Exchanges have taken the position that an affiliate providing such services with a latency-subsidy provided by the Exchanges' shared parent cannot be considered a facility of the Exchanges.

Countryman, Secretary, Commission re: Exchange Act Release No. 88216, File No. S7-03-20, at 4 (May 31, 2020), https://www.sec.gov/comments/s7-03-20/s70320-7253887-217548.pdf.

[25] Section 3(a)(2) of the Exchange Act defines the term "facility" as follows:

> "The term 'facility' when used with respect to an exchange includes [1] its premises, [2] tangible or intangible property whether on the premises or not, [3] any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and [4] any right of the exchange to the use of any property or service." 15 U.S.C. 78c(a)(2).

[26] NYSE Letter at 8. This argument is incoherent because most every function an exchange performs is a service – *e.g.*, order matching, public listing. These services occur on, or otherwise use, the premises of the exchange. Exchange related functions (*i.e.*, those that relate to the bringing together the orders of multiple buyers and sellers using nondiscretionary methods (17 CFR 240.3b-16)) that occur on the premises of an exchange generally must be considered facilities of the exchange and the mere use of an affiliate cannot be all that is required to overcome such conclusion. Under the Exchanges reasoning, one also wonders what would constitute the premises of the Exchanges, particularly if ICE were the lessee for the Mahwah data center. The Exchanges would then have no premises, or it would be necessary to pierce the corporate veil to establish some "premises" of the Exchanges.

[27] NYSE Letter at 10.

[28] *Id.* at 11.

[29] 15 U.S.C. 78k-1(a)(1)(D).

We believe that it is necessary to root the analysis of what is a facility of an exchange in some rational framework that considers the functions of the particular asset or service in question, its manner of use with respect to an exchange, and the existing market structure. Two interpretive points should be obvious from the definition: (1) an exchange cannot be able to merely house its premises, property, and services in affiliates to avoid those assets/services from being considered a facility because the definition could lose all meaning; and (2) the definition should not be read so broadly as to include in the most literal sense, as may be conceivable under the fourth prong, all of the Exchanges' property (*e.g.*, the Exchanges' software license to use Microsoft Office). It is between these poles that reasonable minds can converge on the appropriate scope of a "facility" of an exchange.

The application of the definition of a "facility" also need not necessarily be a binary decision—*i.e.*, that an asset, right, or service is categorically either a facility or not a facility of an exchange. There is no reason why part of a service, asset, or property interest could not simultaneously have components that are a facility of an exchange and others that are not or be a facility in one context but not another.[30] If, for example, IDS were to move its equipment located at one of the third party exchange data centers from one public pole to another or alter part of its route half-way between Mahwah and another exchange data center, it does not seem necessary that such aspects of the Wireless Services should be subject to a rule filing absent other circumstances (*e.g.*, some advantaged arrangement with the third party exchange). However, where the service, asset, or property interest operates on an exchange's premises with an advantage unavailable to its competitors, that component of the service, asset, or property is a facility of the exchange.

In this regard, the "premises" of an exchange matters significantly because an exchange can exercise direct or indirect control over its premises. We believe, at a minimum, that the premises of an exchange should generally include the full extent of its leasehold interest at its data center irrespective of whether an affiliate or parent is technically the lessee. In the present case, it is primarily by right of the location of the NYSE Private Pole on the premises of the Mahwah data center and IDS's exclusive use of that pole that render the Wireless Services facilities of the Exchanges. 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. The alternative is to allow continued gamesmanship whereby an exchange may shuffle its organizational structure to alter the scope of what is considered a facility.

[30] This concept is rooted in the definition itself. For example, assume Exchange A owns a proprietary software system for matching orders for securities and also licenses this system to Exchange B for its use as an exchange. The software would certainly be a facility when used with respect to Exchange A's own use of that system. With respect to Exchange B's use of that software system as a licensee, the software would most reasonably be considered to be the facility of Exchange B under prong four as a right to the use of the software notwithstanding that Exchange A owns the intellectual property of the software and retains certain rights in Exchange B's use pursuant to the license agreement. Conceivably, it could be property of both Exchange A and B, but it is unclear what the utility or purpose would be in treating Exchange B's use of the software as a facility of Exchange A.

The Exchanges' Resistance to Provide Necessary Transparency Thwarts Oversight

The Exchanges argue that the Firm's call for transparency with respect to latency advantages in connectivity is disingenuous and motivated by the Firm's desire to gain a competitive advantage over IDS.[31] To the contrary, the Exchanges' failure to meaningfully describe the geographic latency advantage in any of its filings related to the Wireless Services is disingenuous, denies the public information necessary to solicit comment, and limits the Commission's the ability to evaluate the Filings for consistency with Exchange Act requirements.

The Exchanges' suggestion that the Firm's call for transparency is motivated by its competitive interest is true only insofar as the Firm seeks fair competition. The Firm is perfectly capable of roughly estimating the latency advantage (~1 microsecond) we can see,[32] but it is unequivocally the responsibility of the Exchanges under the Exchange Act to provide these details to facilitate public review. **More importantly, there are many different ways that an exchange can provide its services or a preferred provider with latency advantages that are less obvious than the NYSE Private Pole** – *e.g.*, 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. For these less obvious and more discreet types of latency advantages, there is effectively no way to know whether they exist or how material they may be without disclosure by an exchange.

It is therefore essential for exchanges to quantify and disclose latency subsidies provided to certain market participants and not others to solicit meaningful commentary and facilitate Commission oversight of exchanges. While our call for transparency regarding latency advantages was intended to be general and apply to all exchanges, in the instant case, the relevant comparison is (a) the length and latency of the connection between the matching engine and the NYSE Private Pole relative to (b) the length and latency of the connection between the matching engine and the nearest public pole.[33] The Exchanges routinely use optical reflectometry[34] to validate the latency of different cross connects within the Mahwah data center today, so there is no reason why the Exchanges could not use the same equipment and techniques here.[35]

It is disheartening to see the Exchanges, as critical market infrastructure and self-regulatory organizations with the authority to fine, discipline, and demand the transparency of

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[31] NYSE Letter at 16-18.

[32] We note, however, that this is just an estimate of the geographic feet, but the length of a fiber connection (and attendant latency) would of course be longer (*e.g.*, to account for the vertical feet up the pole and the path of the fiber connection into the data center). There is really no substitute for the precise information.

[33] We believe the Exchanges may have misinterpreted our letter's request for this latency information regarding the NYSE Private Pole relative to the public poles as a request for the end-to-end latency of the Wireless Services to the third party data centers. Measuring end-to-end latency would comingle the segment of the market data journey that is not subject to competition (*i.e.*, from the Exchanges' data center to the NYSE Private Pole) with the segments that are subject to competition (*i.e.*, the segments outside the Exchanges' data center). The subject of the discussion is the latency advantage on the segment closest to the Exchanges' data center that no competitor can replicate.

[34] In this context, optical reflectometry refers to the process of sending light down a length of fiber, reflecting it back to the source, and measuring the duration of this journey to calculate latency and fiber length.

[35] To the extent certain assumptions are necessary to make such calculation (*e.g.*, assuming the same type and quality of fiber connections), the Exchanges can provide an estimate with their stated assumptions.

their members resist providing the public and Commission with relevant facts. This discourse should not have to proceed based only upon the eye-ball approximation from several commenters of a 700 foot exclusive advantage.

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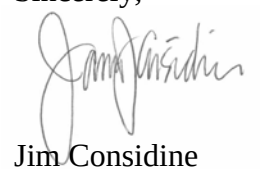
The issue here is very simple. The Exchanges provide Wireless Services with or through an affiliate that has been afforded a latency subsidy unavailable to all providers and that arises from the Exchanges' and their affiliates'/parents' control of the Mahwah data center. The Exchanges have not offered a statutory basis for why this geographic latency advantage does not unfairly discriminate against market participants that do not use the Wireless Services or inappropriately burden competition against other providers.[36] Accordingly, the Exchanges must adequately justify the advantage under these and other requirements of the Exchange Act, a task we do not believe they can do, or eliminate the advantage. Approval of the Wireless Services as they currently stand would set a harmful precedent, allowing the Exchanges to entrench their existing advantage and provide further advantages for their affiliated services, while elimination of the advantage would help restore fair competition, consistent with the purposes of the Exchange Act.

Thank you for the opportunity to contribute to this important discussion. Please contact us with any questions at (312) 948-9188.

Sincerely,



Jim Considine
Chief Financial Officer
McKay Brothers, LLC

cc: The Hon. Jay Clayton, Chairman
The Hon. Hester M. Peirce, Commissioner
The Hon. Elad L. Roisman, Commissioner
The Hon. Allison Herren Lee, Commissioner

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Mr. David S. Shillman, Associate Director, Division of Trading and Markets
Mr. John Roeser, Associate Director, Division of Trading and Markets

S.P. Kothari, Director, Division of Economic and Risk Analysis

[36] 15 U.S.C. 78f(b)(5).