



April 9, 2020

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE., Washington, DC 20549

Re: ***File No. 4-729; NYSE Corporate Actions Feed and Exchange Derived Data Policies***

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ respectfully submits this letter to the U.S. Securities and Exchange Commission (“Commission”) to notify the Commission of a New York Stock Exchange LLC (“NYSE”) Corporate Actions market data feed and related fees that we believe should be filed with the Commission. We also want to notify the Commission of a problematic practice undertaken by NYSE and other exchanges that requires market participants to consent to an exchange licensing interest in derived market data under their respective derived data policies.

NYSE drastically increased the cost of the Corporate Actions market data feed in early 2019, but failed to submit a rule filing to change the fees. Subscribers of the NYSE Corporate Actions feed were being charged a monthly access fee of \$1,000 and an internal use fee of \$1,500 – approximately \$2,500 per month for use of the feed. In January 2019, NYSE established a new monthly fee of up to \$30,000 per month for using the feed for multiple external uses. In addition to increasing the cost to each applicable market participant by up to \$360,000 per year, NYSE told the data recipients to sign the new updated licensing agreement with novel contract terms by a certain date near the end of 2019 or be cut-off from receiving the feed. SIFMA initially raised these concerns with NYSE in 2019 but to no avail. SIFMA believes that NYSE should have submitted a rule filing for its Corporate Actions market data feed and related fees to allow interested parties the opportunity to submit comments on the proposed rule change and allow the Commission to review the rule filing to ensure the fees meet the requirements of the Securities Exchange Act of 1934 (“Exchange Act”).²

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See, e.g. 15 U.S.C. 78f(b)(4); 78f(b)(5); and 78f(b)(8).

NYSE Should Submit a Rule Filing for Its Corporate Actions Feed and Related Fees

SIFMA believes NYSE's Corporate Actions feed falls within the definition of an exchange facility, and therefore NYSE should submit a rule filing to the Commission for the recent increase in fees for the product. NYSE, as a self-regulatory organization, must file with the Commission any proposed rules of the exchange,³ including to establish or change a fee,⁴ and the rules must provide for the equitable allocation of reasonable fees among persons using the market facilities maintained by the exchange.⁵ The Exchange Act defines the term "facility" as "its premises, tangible or intangible property whether on the premises or not, 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 any right of the exchange to the use of any property or service."⁶ Notably, the definition of a facility includes an exchange's tangible or intangible property whether on the premises or not.

NYSE's Corporate Actions feed fits this part of the definition of a facility because the feed is NYSE's intangible property that reports on corporate actions for NYSE-listed issuers.⁷ The NYSE Corporate Actions feed includes critical information about corporate actions (e.g., new listings, de-listings, name changes, dividends, etc.) that is necessary to ensure that trading and customer account information is accurate. Considering NYSE is responsible for corporate actions rulings for its listings, the NYSE data feed is the most reliable. Some market participants therefore find purchasing the NYSE Corporate Actions feed necessary to access the best source of "NYSE Proprietary Market Data"⁸ information. The intraday reports are provided every hour from 8:00am to 3:00pm ET and at 11pm ET and every 15 minutes from 3:00pm to 9:00pm ET.

Further supporting SIFMA's belief that the Corporate Action feed is a facility of the exchange, Nasdaq's Daily List provides similar information about Nasdaq-listed securities and was submitted to the Commission as a rule change.⁹ The fact the Nasdaq determined that a filing was necessary while NYSE determined that one was not leads to disparate treatment as to whether such fees should be put out for notice and comment.

³ 15 U.S.C. 78s(b)(1).

⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ 15 U.S.C. 78c(a)(1) (The term "exchange" includes the market facilities maintained by such exchange); 78f(b)(4).

⁶ 15 U.S.C. 78c(a)(2).

⁷ Although the discussion above focuses the second part of the definition of "facility," the NYSE's Corporate Actions feed may meet other parts of the definition of facility.

⁸ See NYSE, Corporate Actions of NYSE Group Listings Client Specification *available at* https://www.theice.com/publicdocs/NYSE_Group_Corporate_Actions_Client_Specification.pdf.

⁹ See Securities Exchange Act Release No. 79701 (Dec. 29, 2016); File No. SR-NASDAQ-2016-175.

Moreover, NYSE increased the fees for the Corporate Actions feed without complying with a prior Commission Order. SIFMA previously opposed NYSE's attempt to increase certain fees including the Corporate Actions feed in 2017 by filing an application for the Commission to set aside the fees for limiting access to exchange services pursuant to Section 19(d) of the Exchange Act.¹⁰ In 2018, the Commission found NYSE failed to meet their burden of establishing that the challenged fees were consistent with Section 6(b)(7) of the Exchange Act and accordingly remanded consideration of the fees for the Corporate Actions feed, among others, back to the exchange.¹¹ Despite this remand order, NYSE increased the fees for the Corporate Actions feed in 2019 without first complying with its legal obligation to submit a rule filing to demonstrating that the proposed fees were consistent with the Exchange Act, including Section 6(b)(7) of the Exchange Act.

SIFMA requests the Commission to compel NYSE to submit a rule filing to the Commission pursuant to Section 19(b)(1)¹² of the Exchange Act so a proper review of the fees can be conducted to determine whether the fees meet the requirements of the Exchange Act. In determining whether the proposed rule change is consistent with applicable statutory requirements under the Exchange Act, the Commission should ensure the proposed fees are (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition. NYSE must provide enough information upon which to base a determination that the fees are consistent with the requirements of the Exchange Act. The information may follow the examples of necessary information set forth in the recent Staff Guidance on SRO Rule Filings Relating to Fees,¹³ or another acceptable means. If the SEC determines that the new fees do not meet the requisite standards, NYSE should retroactively refund firms for the prior amounts that they were charged.

The Commission Should Prohibit the NYSE and Other Exchanges from Compelling Market Participants to Give the Exchange a Continuing License for Derived Market Data

The Commission should be aware of, and take appropriate steps to prevent, a new business practice whereby exchanges force market data purchasers to consent to a licensing interest in derived market data. For example, NYSE and other exchanges are seeking to charge for derived data,¹⁴ and in some instances require a derived data license,¹⁵ for purchasers who

¹⁰ SIFMA Application for an Order Setting Aside Rule Changes of Certain Self-Regulatory-Organizations Limiting Access to Their Services, Admin. Proc. File No. 3-17787 (Jan. 17, 2017).

¹¹ Securities Exchange Act Release No. 84433 (Oct. 16, 2018).

¹² 15 U.S.C. 78s(b)(1).

¹³ SEC's Division of Trading and Markets, *Staff Guidance on SRO Rule Filings Relating to Fees* ("Staff Guidance") (May 21, 2019).

¹⁴ U.S. Market Data Policies, Cboe Global Markets at 16 (April 1, 2020) available at https://cdn.batstrading.com/resources/membership/Market_Data_Policies.pdf. See also UTP Data Policies at 8 (Oct. 2018) available at <http://utpplan.com/DOC/Datapolicies.pdf>.

manipulate or combine the exchange's data with other market data to create new information or a product, such as an index. Derived data is created from exchange market data and cannot be reverse-engineered to be used as a substitute for exchange market data. Exchanges are now requiring market participants to grant the exchanges a licensing interest in data that is derived from that market data through contractual terms. Unlike other, typical contract negotiations, market participants are forced to agree to such terms as a condition to purchasing the market data from an exchange that is an exclusive purveyor of that data. Once exchanges establish a contractual interest in derived data, they have the ability to audit firms' internal use of data to determine whether the firm is in compliance or if additional fees can be assessed.

To continue or expand the exchange practice of charging license fees for derived data, the Commission should require exchanges to submit a rule filing for Commission review pursuant to Section 19(b) of the Exchange Act, as such fees are not covered by the exchanges' existing fee schedules.¹⁶ In the rule filing, the exchange would need to show that imposing this licensing fee does not "impose any burden on competition not necessary or appropriate in furtherance of the purposes"¹⁷ and meets other requirements of the Exchange Act. Here, exchanges' use their dominant position as market data purveyors to effectively compel market participants to agree to pay the license fees for derived data which creates additional revenue for the exchange at no additional cost in providing that data. Further, this licensing fee burdens competition by imposing an additional fee on market participants that create or use alternative products or services based on derived data, such as an index or benchmarking and performance measurement.

Market participants should be allowed to use and share derived data without restrictions. Currently, most equities exchanges typically do not charge fees for derived data except when that data contains pricing information or is based on a single security symbol. A market participant should be allowed to create and share products or information based on derived data without an exchange assessing fees to each follow-on user of such derived data. Permitting exchanges to force a license agreement on data purchasers who create derived information or products would be akin to allowing steel companies to require auto manufacturers to give a licensing interest that allows the steel company to charge every car purchaser for using its steel. This ongoing licensing interest in market data provides exchanges with another unsubstantiated means to use their power as exclusive purveyors of market data to charge for market data outside of the Commission's purview.

Additionally, any exchange audit into a broker dealer's usage of exchange market data product should be limited to whether the market participant has or has not paid for the market data. Because of this licensing interest, market participants would need to unnecessarily spend money to monitor compliance with the exchanges' approved uses for derived data and whether

¹⁵ Derived Data License Fees, CME Group (Jan. 1, 2020) available at <https://www.cmegroup.com/market-data/files/derived-data-fees.pdf>.

¹⁶ 15 U.S.C. 78s(b). Such fees are not reasonably and fairly implied by exchanges' existing fee schedules.

¹⁷ 15 U.S.C. 78f(b)(8).

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any additional reporting would be necessary. Rather than require this additional expense for asset managers and broker-dealers, any audit into the use of derived market data should only consider whether the fees were paid. Further, exchanges should not be empowered to require that market participants be subject to fees for all subsequent usage of derived market data. Not only will prohibiting this contract term reduce unnecessary costs, it will promote fair competition.

* * *

SIFMA greatly appreciates the Commission's consideration of the issues raised above and would be pleased to discuss these comments in greater detail. If you have any questions or need any additional information, please contact me at 212-313-1287 or egreene@sifma.org.

Sincerely,



Ellen Greene
Managing Director

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

Brett Redfearn, Director, Division of Trading and Markets