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NYSE
AN ICE EXCHANGE

February 26, 2024 (corrected version)

Via Electronic Mail: rule-comments@sec.gov

Ms. Vanessa Countryman
Deputy Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (Exchange Act Release No. 99403, 89 FR 5002 (January 25, 2024) (File No. 4-757)

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE"), behalf of the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (together, the "NYSE Exchanges"), appreciates the opportunity to submit comments to the U.S. Securities and Exchange Commission (the "Commission" or "SEC") regarding the proposed national market system ("NMS") plan (the "Proposed Plan")[1] submitted by the exchanges[2] and the Financial Industry Regulatory Authority ("FINRA") (each an "SRO" and collectively, the "SROs") on October 23, 2023, as required by the Commission's September 1, 2023 order.[3]

NYSE participated in the drafting and submission of the Proposed Plan in order to comply with the requirements of the 2023 Governance Order. However, NYSE believes that the Commission should reconsider one important attribute of the Proposed Plan's

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1 See Securities Exchange Act Release No. 99403 (January 19, 2024), 89 FR 5002 (January 25, 2024), File No. 4-757 (Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data) (hereinafter, the "Proposed Plan").

2 The exchanges are: Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC, Long Term Stock Exchange, Inc., MEMX LLC, MIAX Pearl LLC, Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, LLC, Nasdaq Stock Market, LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National Inc.

3 See Securities Exchange Act Release No. 98271 (September 1, 2023), 88 FR 61630 (September 7, 2023) (Amended Order Directing the Exchange and the Financial Industry Regulatory Authority, Inc., to File a National Market System Plan Regarding Consolidated Equity Market Data) (hereinafter, the "2023 Governance Order").

voting mechanism: the voting mechanism referred to in this letter as the "15% Voting Threshold." Under this threshold,

> Each Voting Representative shall be authorized to cast one vote on behalf of the SRO Group or Non-Affiliated SRO that he or she represents, provided, however, that each Voting Representative representing an SRO Group or Non-Affiliated SRO whose combined market center(s) have consolidated equity market share of more than fifteen (15) percent during four of the six calendar months preceding an Operating Committee vote shall be authorized to cast two votes.[4]

NYSE is concerned that the 15% Voting Threshold has already become stale, even before becoming enacted. In the four years since the Commission first proposed the 15% Voting Threshold, both the composition and landscape of the on-exchange equity markets has changed significantly, such that the 15% Voting Threshold no longer meets the standard that the Commission itself set: that the Proposed Plan's voting mechanism should reflect "*the significance within the national market system of those exchanges that, in their roles as SROs, oversee trading activity that generates a significant amount of equity market data*."[5]

The Proposed Plan should be designed to stand the test of time, but unfortunately, the 15% Voting Threshold is already outdated, and threatens to become even more outdated as the Commission's numerous pending equity market structure changes come into effect. NYSE accordingly asks the Commission to further consider voting alternatives that will make the Proposed Plan a reasonable and effective feature of the equity markets for years to come.

Background

The Commission first proposed the 15% Voting Threshold in its January 8, 2020 notice of its proposed order directing the exchanges and FINRA to submit a new NMS Plan regarding consolidated equity market data.[6] Importantly, the 15% Voting Threshold considers only an exchange's share of the consolidated equity market share, without regard to other crucial factors, like whether the exchange operates a primary listing market, the amount and value of quoting activity on the exchange, and the amount and

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4 Proposed Plan, supra note 1, at Section 4.3(a). Under the Proposed Plan, "'Voting Representative' means an individual designated by each SRO Group and each Non-Affiliated SRO pursuant to Section 4.2(a) to vote on behalf of such SRO Group or such Non-Affiliated SRO" (Section 1.1(82)); "'SRO Group' means a group of Members [i.e., SROs] that are Affiliates" (Section 1.1(73)); and "'Non-Affiliated SRO' means a Member that is not affiliated with any other Member" (Section 1.1(50)).

5 See Securities Exchange Act Release No. 92586 (August 6, 2021), 86 FR 44142 (August 11, 2021) (Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data) (hereinafter, "August 2021 Approval Order"), at 44164 (emphasis added).

6 See Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2202 (January 14, 2020) (File No. 4-757).

significance of the market data that the exchange generates. NYSE and numerous other commenters submitted comment letters critiquing various portions of the Commission's proposal, including the 15% Voting Threshold.

On May 6, 2020, the Commission formally ordered the exchanges and FINRA to submit such a new NMS Plan.[7] In its order, the Commission considered various commenters' criticisms of the 15% Voting Threshold for granting an SRO Group or Non-Affiliated Exchange a second vote. Among those, the Commission considered IEX's suggestion that the threshold for a second vote should be 10 percent of consolidated equity market share, which is the same threshold that had previously been proposed by the Commission's Equity Market Structure Advisory Committee ("EMSAC") in 2018.[8] As IEX put it, "in the current fragmented market structure, 10 percent represents a very significant threshold that we believe would justify a slightly stronger voice in governance."[9]

The Commission rejected this suggestion. The Commission reasoned that *"[a] 15 percent threshold [for a second vote] signifies the importance to the national market system of those exchanges that, in their roles as SROs, therefore oversee trading activity that generates a significant amount of equity market data* and, as noted below, each exchange group would have an additional vote."[10] The Commission further stated that it "disagrees that 10 percent consolidated equity market share is sufficiently significant to warrant a second vote, particularly given the trend toward exchange consolidation." The Commission observed that as of April 20, 2020, the "consolidated equity market share of the largest exchange groups is already well above 10 percent and continues to range from 17 percent to 22 percent," with the Cboe exchanges at 16.63 percent, the Nasdaq exchanges at 17.84 percent, and NYSE exchanges at 22.65 percent.[11] The Commission claimed that "[s]etting the threshold for a second vote at 10 percent consolidated equity market share would create the expectation that exchange groups should receive a third vote," and that the "10 percent threshold may be too easy to achieve through consolidation, which would result in too low a threshold for obtaining an additional vote and could lead to a continuing concentration of voting power."[12]

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7 See Securities Exchange Act Release No. 88827 (May 16, 2020), 85 FR 28702 (May 13, 2020) (File No. 4-757) (hereinafter, "May 2020 Governance Order").

8 Id. at 28714; see SEC Equity Market Structure Advisory Committee's Recommendations Regarding Enhanced Industry Participation in Certain SRO Regulatory Matters, dated June 10, 2016, available at https://www.sec.gov/spotlight/emsac/emsac-trading-venues-regulation-subcommittee-recomendation-61016.pdf.

9 IEX comment letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, dated March 4, 2020, at 2, available at https://www.sec.gov/comments/4-757/4757-6909842-211187.pdf.

10 May 2020 Order, supra note 7, at 28714 (emphasis added).

11 Id. The Commission cited Cboe U.S. Equities Volume Data, available at https://markets.cboe.com/us/equities/market_share/, for these figures, explaining that the percentages listed were month-to-date volume summaries as of April 20, 2020.

12 May 2020 Order, supra note 7, at 28714.

In the comment period following the May 2020 Governance Order, many commenters, including NYSE, submitted additional comment letters. NYSE argued, among other things, that "the 15% market share threshold specified in the Proposed NMS Plan is arbitrary and may quickly become meaningless in light of ongoing changes to the exchange marketplace." NYSE noted that:

> In 2020 alone, three additional equities exchanges commenced operations. If additional exchanges continue to enter the market, the 15% threshold may become unattainable for even the largest "exchange groups." In that event, even the largest "exchange groups" would receive only one vote under the Proposed NMS Plan, diluting those SROs' voting power even further.[13]

Despite such comments, on August 6, 2021, the Commission issued an order approving the NMS plan containing the 15% Voting Threshold.[14] In this approval order, the Commission repeated its earlier rationale for favoring the 15% requirement for a second vote:

> In response to the comment that objects to tying market share to the number of votes an SRO Group or Non-Affiliated SRO is allocated, . . . the Commission disagrees, because using a threshold amount of consolidated equity market share of more than 15 percent over a specified period of time to provide a second vote to an SRO Group or Non-Affiliated SRO *reflects the significance within the national market system of those exchanges that, in their roles as SROs, oversee trading activity that generates a significant amount of equity market data*.[15]

NYSE and other exchanges subsequently challenged that order in the Court of Appeals for the D.C. Circuit. The court vacated the August 2021 Approval Order and portions of the underlying May 2020 Governance Order, but left the 15% Voting Threshold undisturbed.[16]

On September 1, 2023, the Commission issued the 2023 Governance Order, directing the exchanges to once again submit a proposed NMS plan that included the 15% Voting Threshold.[17] The exchanges submitted the Proposed Plan on October 23, 2023, and the Commission published it for comment on January 19, 2024.[18]

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[13] NYSE comment letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, dated November 16, 2020, at 9, available at https://www.sec.gov/comments/4-757/4757-8022261-225489.pdf.

[14] August 2021 Approval Order, supra note 5.

[15] Id. at 44164 (emphasis added).

[16] See Nasdaq Stock Market LLC v. SEC, No. 21-1167 (D.C. Cir. 2022).

[17] See Proposed Plan, supra note 1, at Section 4.3(a).

[18] Id.

Discussion

In both the May 2020 Governance Order and the April 2021 Approval Order, the Commission justified the 15% Voting Threshold on the basis that it "*reflects the significance within the national market system of those exchanges that, in their roles as SROs, oversee trading activity that generates a significant amount of equity market data*." NYSE respectfully submits that this assertion, born in 2020, is no longer true in 2024, given the significant changes in equity market structure since that time. These changes since 2020 include: (1) the proliferation of Non-Affiliated Exchanges; (2) the decline in SRO Group market share; and (3) the potential impacts of the Commission's many pending equity market structure changes when they become enacted.

First, in its 2020 and 2021 orders, the Commission cited "the trend toward exchange consolidation"[19] as a reason for rejecting both a third vote for some exchanges and a 10% voting threshold for a second vote. Yet the intervening years have showed that the Commission's concern with further exchange consolidation was unfounded. While in January 2020, the only Non-Affiliated Exchange was IEX, three additional independent exchanges have launched since then: LTSE, MEMX, and MIAX Pearl. In 2022, the BOX Exchange LLC received approval to operate an equities exchange, but it is not yet operational.[20] In addition, at least three other entities have announced plans to launch U.S. equities exchanges.[21] These developments show that the former "trend toward exchange consolidation" has been reversed, and that such additional exchanges can and will act as a powerful check on the ability of the existing SRO Groups to control voting in the Proposed Plan.

Second, the years since 2020 have shown a decline in the market share held by the SRO Groups. As noted above, the Commission argued in 2020 that the 15% Voting Threshold was justified by pointing to the market shares of the three SRO Groups, which were then 16.63 percent (Cboe), 17.84 percent (Nasdaq), and 22.65 percent (NYSE) – all comfortably above. Today, however, those groups' market shares have all fallen: to

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19 May 2020 Order, supra note 7, at 28714.

20 See Securities Exchange Act Release No. 94278 (February 17, 2022) (SR-BOX-2021-14) (Order approving BSTX LLC as a facility of BOX to operate a market for the trading of securities).

21 For example, NYSE understands that 24X National Exchange LLC ("24X") is pursuing an application for registration as a national securities exchange in order to launch an equities exchange. Other potential exchanges include the Green Impact Exchange ("Coming out of Stealth Mode," September 14, 2022, available at https://www.tradegix.com/news/gix-generates-buzz-with-public-announcement) and The Dream Exchange ("The First Black-Owned Stock Exchange in U.S. History is Opening Soon," July 22, 2020, available at https://www.blackenterprise.com/the-first-black-owned-stock-exchange-in-u-s-history-is-opening-soon/).

13.15 percent (Cboe), 16.29 percent (Nasdaq), and 19.84 percent (NYSE),[22] such that Cboe is now below the 15% threshold, and the other groups are creeping closer to it.

The Commission clearly did not foresee this turn of events. The Commission justified the 15% Voting Threshold as reflecting the *significance* of these SRO Groups in the trading ecosystem, allocating them each a second vote in light of the significance of the quoting and trading activity they oversee and the market data they generate. By the Commission's own reasoning, if the Proposed Plan does not allocate a second vote to the SRO Groups that oversee the vast majority of on-exchange quoting, trading, and related market data creation, then the voting threshold is incorrectly set. Yet already, one of those groups (Cboe) has been stripped of a vote, and the other two may face the same fate in the future.

Given the increasing fragmentation of the market, an exchange group that manages to achieve 14, or 12, or even 10 percent market share should qualify for a second vote. An increasingly large percentage of the whole is taken up by off-exchange venues (currently over 45 percent, up from 43 percent in April 2020). And while the four independent exchanges have collectively managed to achieve almost 8 percent market share, none of them individually has had a market share of more than 4 percent, and one of them has essentially zero percent.

Moreover, the Commission should consider more than just trading market share in evaluating the "significance" of exchanges and SRO Groups to the national market structure. In the current market, it is not reasonable for the Commission to conclude that an exchange group that operates one or more listing exchanges, attracts significant quoting and trading activity, generates a substantial portion of equity market data, and commands more than 10 percent of trading market share is no longer "significant" enough within the national market system to merit a second vote, and should instead have only the same voting power as an exchange with no more than a 3 percent – and, in one case, zero percent – share of the equity market.

Third, since the Commission first proposed the 15% Voting Threshold in 2020, the Commission has proposed and/or adopted a long slate of additional reforms to equity market structure and consolidated data. Many of these regulatory proposals will impact the market share of exchanges, both in relation to each other and to off-exchange trading platforms. Foremost among these is the Commission's October 2023 proposal regarding volume-based exchange transaction pricing for NMS stocks,[23] which, as NYSE[24] and a myriad of other commenters have noted, would further drive trading volumes away from exchanges, where volume-based incentives would be prohibited for

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22 See Cboe U.S. Equities Volume Data, available at https://markets.cboe.com/us/equities/market_share/, month-to-date volume summaries as of February 23, 2024.

23 See Securities Exchange Act Release No. 98766 (October 18, 2023), 88 FR 76282 (November 6, 2023) (File No. S7-18-23).

24 NYSE comment letter from Hope M. Jarkowski, General Counsel, NYSE, dated January 5, 2024, available at https://www.sec.gov/comments/s7-18-23/s71823-356919-882162.pdf.

agency order flow, to off-exchange venues where volume-based pricing would still be available. In addition, the Commission's proposed changes to on- and off-exchange minimum pricing increments and exchange access fees, as proposed in its December 2022 Regulation NMS proposal,[25] are likely to further impact the distribution of trading over on- and off-exchange venues, as well as the market shares of individual exchanges and SRO Groups.

Given all of these changes since 2020, NYSE believes that the Commission should reconsider the 15% Voting Threshold. That threshold is based solely on a level of consolidated transaction market share, without considering whether an exchange operates a primary listing market, has significant quoting activity, or generates significant market data. And, as this letter demonstrates, the market share landscape on which the 15% Voting Threshold would be applied in 2024 is not what it was in 2020 and is not what it will be in the future, particularly if the Commission's additional proposals are adopted without change.

NYSE accordingly requests that the Commission reexamine the 15% Voting Threshold in depth and detail, by taking into account the considerations raised in this letter, the letters of other commentors, and the Commission's own EMSAC recommendations from 2018. Rubber-stamping the 15% Voting Threshold that the Commission proposed in 2020 without careful consideration of the current reality would be arbitrary and capricious. Only by reconsidering that standard and contending with the many changes that have happened over the past four years will the Commission arrive at a plan that gives fair and appropriate weight to the voices of some of its most important stakeholders, whose market data informs trading throughout the entire equities market.

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NYSE Group appreciates the opportunity to provide our comments to the Commission regarding the Proposed Plan and we are available to meet with the Commission or its staff to discuss our comments.

Respectfully submitted,

Hope M. Jarkowski
General Counsel
NYSE Group, Inc.

cc: Honorable Gary Gensler, Chair

25 See Securities Exchange Act Release No. 96494 (date), 88 FR 80266 (December 29, 2022) (Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders).

Honorable Hester M. Peirce, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
Honorable Mark T. Uyeda, Commissioner
Honorable Jaime Lizárraga, Commissioner
Haoxiang Zhu, Director, Division of Trading and Markets