UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

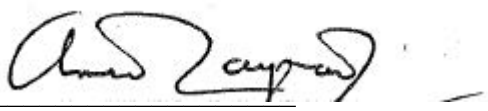
In the Matter of the: Order Directing The Exchanges And The Financial Industry Regulatory Authority To Submit A New National Market System Plan Regarding Consolidated Equity Market Data	File No. 4-757 Release No. 34-88827 (May 6, 2020) 85 Fed. Reg. 28,702 (May 13, 2020)

MOTION FOR STAY OF NMS GOVERNANCE ORDER BY THE NASDAQ STOCK MARKET LLC, NASDAQ BX, INC., AND NASDAQ PHLX LLC

The Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC ("Petitioners") hereby request that the Securities and Exchange Commission (the "Commission") stay its final Order Directing The Exchanges And The Financial Industry Regulatory Authority To Submit A New National Market System Plan Regarding Consolidated Equity Market Data, 85 Fed. Reg. 28,702 (May 13, 2020) (the "NMS Governance Order"). Petitioners request this stay pending final resolution of their petition for review challenging the NMS Governance Order, which Petitioners filed in the D.C. Circuit on June 1, 2020. Petitioners seek a stay of the NMS Governance Order in its entirety for the pendency of the litigation.

Dated: June 3, 2020

Respectfully submitted,



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Date: June 3, 2020

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INTRODUCTION

The Commission should stay implementation of the NMS Governance Order pending the resolution of the petition for review that Petitioners filed in the D.C. Circuit on June 1, 2020. A stay is appropriate because Petitioners are likely to succeed on the merits of their challenge to the NMS Governance Order—which establishes a voting framework for the new consolidated national market system ("NMS") plan that is inconsistent with both the Securities Exchange Act ("Exchange Act") and Regulation NMS—and because Petitioners will suffer irreparable injury if the NMS Governance Order is implemented during the pendency of judicial proceedings. Moreover, granting a stay would not present any risk of harm to others and would promote the public interest.

Petitioners are likely to succeed on the merits of their petition for review for at least two reasons. First, the NMS Governance Order grants non-self-regulatory organizations ("non-SROs") voting power on the operating committee of the New Consolidated Data Plan, in contravention of Congress's express direction in the Exchange Act that *SROs* will be responsible for "act[ing] jointly" to "develop[ ], operat[e], or regulat[e] a national market system." 15 U.S.C. § 78k-1(a)(3)(B); *see also* 17 C.F.R. § 242.608(a)(3)(iii) (authorizing SROs to "act jointly" to "[i]mplement[ ] or administer[ ]" NMS plans). In granting voting power to non-SROs, the Commission relied exclusively on the purported "statutory silence" in the Exchange Act, NMS Governance Order, 85 Fed. Reg. at 28,715, but silence cannot overcome Congress's unambiguous mandate that SROs—and only SROs—are authorized to implement NMS plans.

Second, even if the Commission could grant non-SROs some form of voting power, the NMS Governance Order would still violate the Exchange Act and Regulation NMS because its exchange-group-based voting structure divests SROs of their ability to "act jointly" in operating the New Consolidated Data Plan. The NMS Governance Order redefines "self-regulatory

organization" for purposes of allocating operating-committee voting power to focus not on individual exchanges, but on so-called "exchange groups," 85 Fed. Reg. at 28,713—a concept that is not found anywhere in the Exchange Act or Regulation NMS. In so doing, the Commission affords non-SROs on the operating committee the power to align themselves with a minority of SROs to cram down policies opposed by the majority of SROs. By the Commission's own reasoning—which recognizes that SROs must "have sufficient voting power to act jointly on behalf of the plan," *id.* at 28,721—this diminution of individual exchanges' voting power is unlawful.

In addition, Petitioners would suffer irreparable harm in the absence of a stay. The Commission acknowledges in the NMS Governance Order that SROs will "incur costs in the process of creating the New Consolidated Data Plan" and that those costs will not be recouped in the short term. 85 Fed. Reg. at 28,711. If Petitioners invest the time and money necessary to develop and implement the New Consolidated Data Plan, and the D.C. Circuit thereafter vacates the NMS Governance Order, all of those resources will have been wasted.

Finally, a stay would cause no harm to others and would promote the public interest. The Commission has not explained why it believes there is a need for immediate action in establishing the New Consolidated Data Plan. To the contrary, the Commission acknowledges in the NMS Governance Order that the NMS plans have made, and are continuing to make, improvements to the data dissemination technology and protocols used by the existing exclusive Securities Information Processors ("SIPs"), which have performed well during the current public-health crisis. Furthermore, a stay would benefit the public because "unwinding" the New Consolidated Data Plan after it has been implemented would inevitably generate regulatory confusion and inefficiency. A stay would also provide the Commission with the opportunity to complete

consideration of its Market Data Infrastructure proposal, 85 Fed. Reg. 16,726 (Mar. 24, 2020)—which could have a far-reaching impact on the operations of the New Consolidated Data Plan—before the SROs establish the new plan, and would allow both the Commission and the SROs the opportunity to better understand and address how the two proposals will (or will not) work together. And in light of the ongoing pandemic, it would be prudent for the Commission to proceed cautiously with any changes to the current regulatory landscape governing the national market system.

DISCUSSION

The Commission has discretion under the Administrative Procedure Act (the "APA") to stay implementation of agency action when it "finds that justice so requires." 5 U.S.C. § 705. The Commission has applied a four-factor analysis in evaluating whether to grant a stay:

1. [W]hether there is a strong likelihood that a party will succeed on the merits in a proceeding . . . (or, if the other factors strongly favor a stay, that there is a substantial case on the merits);

2. [W]hether, without a stay, a party will suffer imminent, irreparable injury;

3. [W]hether there will be substantial harm to any person if the stay were granted; and

4. [W]hether the issuance of a stay would likely serve the public interest.

In re Am. Petroleum Inst., Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012). The Commission employs a flexible approach in assessing stay applications. *See id.* ("If the arguments for one factor are particularly strong, a stay may be appropriate even if the arguments on the other factors are less convincing."); *see also* Order Preliminarily Considering Whether to Issue Stay Sua Sponte and Establishing Guidelines for Seeking Stay Applications, Release No. 33870, 1994 WL 117920, at *1 (Apr. 7, 1994) ("The evaluation of these factors will vary with the equities and circumstances of each case.").

Here, all four factors weigh in favor of a stay.

I. Petitioners Are Likely To Prevail On The Merits Of Their Petition For Review.

Section 11A of the Exchange Act empowers the Commission to authorize or direct "self-regulatory organizations to act jointly with respect to matters as to which they share authority . . . in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof." 15 U.S.C. § 78k-1(a)(3)(B). Rule 608 under Regulation NMS likewise provides that "[a]ny two or more self-regulatory organizations, acting jointly, may file a national market system plan" and that "[s]elf-regulatory organizations are authorized to act jointly in" "[p]lanning, developing, and operating any national market subsystem or facility contemplated by a national market system plan," "[p]reparing and filing a national market system plan," and "[i]mplementing or administering an effective national market system plan." 17 C.F.R. § 242.608(a). The import of these parallel provisions is clear: SROs are responsible, through joint action, for "operating," "[i]mplementing," and "administering" NMS plans. *Id.*

Petitioners are likely to succeed in persuading the D.C. Circuit that the NMS Governance Order violates these statutory and regulatory provisions for at least two reasons: (1) the Exchange Act and Regulation NMS do not authorize the Commission to grant non-SROs voting power on the operating committee of an NMS plan, and (2) even if some form of non-SRO voting were permitted, the NMS Governance Order would still be unlawful because it allocates votes to "exchanges groups," rather than individual exchanges, and thereby impairs the ability of a majority of individual exchanges to take "joint[ ]" action in operating the New Consolidated Data Plan.[1]

[1] Petitioners may raise additional arguments in the D.C. Circuit regarding legal flaws in the NMS Governance Order.

A. The Commission Lacks Authority To Grant Non-SROs Voting Power In The New Consolidated Data Plan.

1. The Commission's authority with respect to the development of NMS plans is limited under the Exchange Act to "authoriz[ing] or requir[ing] self-regulatory organizations to act jointly . . . in planning, developing, operating, or regulating a national market system." 15 U.S.C. § 78k-1(a)(3)(B). Nowhere does the statute permit the Commission to direct SROs to "act jointly" with *non*-SROs in "operating" an NMS plan. *Id.* The Exchange Act is therefore plain on its face that the Commission's authority to direct joint action in the implementation of NMS plans extends only to "self-regulatory organizations."

The Commission may not simply "read an absent word"—non-self-regulatory organizations—"into the statute." *Lamie v. U.S. Tr.*, 540 U.S. 526, 538 (2004). Indeed, it is well-settled that Congress's "mention of one thing implies exclusion of another thing." *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (internal quotation marks omitted). That Congress specifically authorized the Commission to direct *SROs* to take joint action, but omitted any parallel authorization for other entities, signals a deliberate congressional decision to exclude non-SROs from "developing [or] operating" an NMS plan. 15 U.S.C. § 78k-1(a)(3)(B). Congress's intent is further made clear by the fact that in Section 11A(a)(3)(A), the Exchange Act expressly permits the creation of *advisory* committees (which can and do include non-SROs), *see id.* § 78k-1(a)(3)(A), signaling that Congress viewed SROs as the backbone of the national market system and contemplated a discrete and limited role for non-SROs in administering the national market system.

The Commission acknowledges in the NMS Governance Order that the Exchange Act does not affirmatively authorize it to direct non-SROs to participate in "developing and administering

NMS plans." NMS Governance Order, 85 Fed. Reg. at 28,715. But the Commission contends that "in the context of a statute delegating rulemaking to an agency, statutory silence leaves discretion with the agency." *Id.* (citing *Nat'l Ass'n of Mfrs. v. SEC*, 748 F.3d 359, 368 (D.C. Cir. 2014); *Catawba County v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009)). The Commission's reasoning cannot withstand scrutiny because this is not a case of mere statutory silence. To the contrary, the Act *expressly* provides authorization for SROs—and no one else—to act jointly in the development and operation of NMS plans. Accordingly, the scope of the Commission's statutory authority is explicitly and unambiguously defined, and is not subject to supplementation by the Commission. *See Ethyl Corp.*, 51 F.3d at 1060 ("We refuse, once again, to presume a delegation of power merely because Congress has not expressly withheld such power.").[2]

The precedents that the Commission invokes to support reading "non-SROs" into the Exchange Act are inapposite because they apply the doctrine of *Chevron* deference. *See Nat'l Ass'n of Mfrs.*, 748 F.3d at 366 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), for the proposition that "if a statute is silent or ambiguous with respect to the specific issue at hand then the Commission may exercise its reasonable discretion in construing the statute"). But an agency's interpretation of a statute is owed no deference "unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic*

[2] The legal deficiencies in the Commission's decision to authorize non-SRO voting are not ameliorated by the Commission's adoption of an "augmented majority voting structure." NMS Governance Order, 85 Fed. Reg. at 28,708. The Exchange Act prohibits the Commission from affording *any* voting role to non-SROs. Moreover, under the Commission's "augmented majority voting structure," if a majority of all SROs, or even a majority of SRO votes under the new exchange-group-based voting model, believe that certain action is necessary to accomplish the purposes of the Exchange Act, they could be blocked from proceeding by the combined votes of the non-SROs and the dissenting SROs. Affording voting power to non-SROs—including using an "augmented majority voting structure"—therefore impairs the ability of SROs "to act jointly" in "developing [and] operating" an NMS plan. 15 U.S.C. § 78k-1(a)(3)(B).

Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1630 (2018) (quoting *Chevron, U.S.A., Inc.*, 467 U.S. at 843 n.9). Thus, courts "do not apply *Chevron* reflexively" and will "find ambiguity only after exhausting ordinary tools of the judicial craft." *Mozilla Corp. v. FCC*, 940 F.3d 1, 20 (D.C. Cir. 2019).

The principle that Congress acts deliberately when it uses explicit and targeted language to define a statute's scope is unquestionably a "traditional tool[ ] of statutory construction." *Epic Sys.*, 138 S. Ct. at 1630 (internal quotation marks omitted). The Supreme Court has applied this interpretive tool in numerous cases, *see, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014); *Sebelius v. Cloer*, 569 U.S. 369, 378 (2013), as has the D.C. Circuit, *see, e.g.*, *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 644 (D.C. Cir. 2000); *Schumann v. Comm'r*, 857 F.2d 808, 811 (D.C. Cir. 1988). Thus, as a matter of fundamental administrative-law principles, the Commission cannot take advantage of "statutory silence" unless and until it has exhausted this "traditional tool[ ] of statutory construction." *Epic Sys.*, 138 S. Ct. at 1630 (internal quotation marks omitted).

The Commission does not dispute that application of this interpretive tool—that Congress's "mention of one thing implies exclusion of another thing," *Ethyl Corp.*, 51 F.3d at 1061 (internal quotation marks omitted)—would compel the conclusion that it lacks authority to direct non-SROs to participate in "developing [or] operating" an NMS plan. 15 U.S.C. § 78k-1(a)(3)(B). In fact, Section 11A of the Exchange Act is a classic example of a statute where the canon applies most forcefully: Congress expressly gave the Commission the carefully circumscribed power to direct "self-regulatory organizations" to "act jointly" in the development and operation of NMS plans. *Id.* It would make no sense to read this narrowly tailored provision to grant the Commission the open-ended authority to direct *anyone* to participate in developing

and operating an NMS plan, which is precisely how the Commission reads Section 11A. If the Commission were correct, Congress's focus on "self-regulatory organizations" would be meaningless.

To the extent the Commission is suggesting that this particular canon of statutory construction is inapplicable in the context of agency interpretations of a statute, the D.C. Circuit has already squarely rejected that blanket assertion. To be sure, in some administrative challenges, "the logic of the maxim—that the special mention of one thing indicates an intent for another thing not [to] be included elsewhere—simply d[oes] not hold up in the statutory context." *Hawke*, 211 F.3d at 644. But that does not mean that this canon "cannot preclude an otherwise reasonable agency interpretation"; rather, the canon applies with full force "where the context shows that the draftsmen's mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives." *Id.* (internal quotation marks omitted). Here, the statutory context is clear: Section 11A grants the Commission specific, carefully defined authority to direct the joint action of SROs in the development and operation of NMS plans, and grants the Commission no corresponding authority to inject non-SROs into that process.[3]

The NMS Governance Order is therefore impossible to square with the plain, unambiguous language of Section 11A.

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[3] This interpretation accords with the design and purpose of Section 11A, which was to give control of NMS plans to the Commission and SROs. SROs—unlike the non-SROs that would sit on the new operating committee—are statutorily obligated to "protect investors and the public interest," 15 U.S.C. § 78f(b)(5), and therefore are best equipped to oversee the design and implementation of NMS plans and, in so doing, advance "the public interest . . . and the maintenance of fair and orderly markets," *id.* § 78k-1(a)(2). Indeed, the Equity Market Structure Advisory Committee—a blue-ribbon panel of industry experts—considered and *rejected* a proposal granting votes to non-SROs.

2. Even if the Commission were correct that the purported "statutory silence" in Section 11A afforded it discretionary authority to regulate more broadly, the NMS Governance Order would still be invalid because the Commission has already promulgated a regulation that *excludes* non-SROs from the development and operation of NMS plans.

In Rule 608(a)(3) of Regulation NMS, the Commission described SROs' role in the preparation and administration of NMS plans:

> (3) Self-regulatory organizations are authorized to act jointly in:
>
> > (i) Planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan;
> >
> > (ii) Preparing and filing a national market system plan or any amendment thereto; or
> >
> > (iii) Implementing or administering an effective national market system plan.

17 C.F.R. § 242.608(a)(3). The regulation says nothing about participation by *non*-SROs in "[p]reparing . . . [i]mplementing or administering" NMS plans. *Id.* All of those responsibilities lie *exclusively* with SROs. The Commission cannot promulgate a regulation setting forth its view of how NMS plans will be developed and administered and then—without amending the regulation—disregard that provision in favor of a broader interpretation of its statutory authority. *See Service v. Dulles*, 354 U.S. 363, 372 (1957) ("[R]egulations validly prescribed by a government administrator are binding upon him . . . ."); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1507 (D.C. Cir. 1984) (same).

Notably, the Commission did not address this regulatory language *at all* in assessing its authority to grant non-SROs voting power in the New Consolidated Data Plan, *see* NMS Governance Order, 85 Fed. Reg. at 28,715, even though this language was highlighted by Petitioners, *see* Letter from Joan C. Conley, Senior Vice President and Corporate Secretary,

Nasdaq, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission at 5 (Feb. 28, 2020) ("Nasdaq Letter"). The agency's silence on this fundamental question is a sufficient reason, standing alone, for the D.C. Circuit to vacate the NMS Governance Order. Indeed, it is axiomatic that an agency's failure "to consider an important aspect of the problem" is grounds for vacatur under the APA, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), and that an agency violates this standard "if it fails to respond to significant points and consider all relevant factors raised by the public comments," *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 344 (D.C. Cir. 2019) (internal quotation marks omitted). The Commission's complete failure to address whether the NMS Governance Order is compatible with its own regulations—which it manifestly is not—is an independent ground for vacatur.

In sum, Petitioners have a strong likelihood of persuading the D.C. Circuit that the NMS Governance Order violates both the Exchange Act and Regulation NMS because it impermissibly grants non-SROs voting authority on the operating committee of the New Consolidated Data Plan. At the very least, Petitioners have demonstrated that there is a "substantial case on the merits," *In re Am. Petroleum Inst.*, 2012 WL 5462858, at *2, which, in light of the fact that the other factors weigh strongly in favor of a stay, *see infra* Parts II-III, is sufficient to justify a stay of the NMS Governance Order.

B. The NMS Governance Order's Exchange-Group-Based Voting Structure Prevents SROs From Acting "Jointly" To Implement The New Consolidated Data Plan.

Even if the Commission did possess the statutory and regulatory authority to grant non-SROs voting power on an NMS plan operating committee, the NMS Governance Order would still violate the Exchange Act and Regulation NMS because the NMS Governance Order allocates votes to so-called "exchange groups," rather than to individual exchanges that share a corporate

affiliation, and therefore establishes a voting structure that prevents SROs from acting "jointly" to develop and implement the plan.

As discussed above, the Exchange Act provides that the Commission may authorize SROs to "act jointly" when "operating" NMS plans. 15 U.S.C. § 78k-1(a)(3)(B). And Rule 608 of Regulation NMS likewise authorizes SROs to "act jointly" when "[i]mplementing or administering" NMS plans. 17 C.F.R. § 242.608(a)(3)(iii). SROs cannot "act jointly" in developing and administering an NMS plan if an operating committee can approve a policy *opposed* by a majority of SROs. Yet, that is precisely the framework the Commission adopted.

This outcome is possible because the NMS Governance Order does not grant each SRO one vote on the New Consolidated Data Plan's operating committee but instead grants each "unaffiliated SRO" and each "exchange group"—defined by the Commission as "multiple exchanges operating under one corporate umbrella"—one vote (or two votes if they have "consolidated equity market share of more than 15 percent"). NMS Governance Order, 85 Fed. Reg. at 28,702, 28,730. Thus, instead of granting one vote to each of the 16 SROs, each of the four unaffiliated SROs gets one vote, the exchange group operated by Intercontinental Exchange gets two votes (for its five exchanges), the exchange group operated by Cboe gets two votes (for its four exchanges), and the exchange group operated by Nasdaq gets two votes (for its three exchanges). The NMS Governance Order further provides SROs with two-thirds of the votes on the operating committee and adopts an "augmented majority voting structure" that requires a two-thirds majority vote of the operating committee, and a majority of "SRO votes" (as redefined by the Commission), to approve a proposal. *Id.* at 28,720-22.

As a result, non-SROs and a minority of SROs may band together to force through plan actions and amendments without the assent of a majority of SROs. *See* Nasdaq Letter at 7; *see*

also NMS Governance Order, 85 Fed. Reg. at 28,712 n.174. For example, it is possible to conceive of a proposal that is supported by the five non-SRO votes, the four unaffiliated SROs, and one exchange group—and that therefore would have the support of the requisite two-thirds majority of all votes (eleven to four in favor) and a majority of SRO votes (six to four in favor)—but that would not be supported by a majority of SROs (nine to seven against). This obstacle to "joint[ ]" SRO operation of an NMS plan—which is directly attributable to the Commission's adoption of an exchange-group-based voting structure—is incompatible with the framework established by the Exchange Act and Regulation NMS.

The Commission does not dispute this potential outcome. And it acknowledges that it must "ensure that at all times the *SROs have sufficient voting power to act jointly* on behalf of the plan pursuant to the requirements of Section 11A of the Act and Rule 608 of Regulation NMS." NMS Governance Order, 85 Fed. Reg. at 28,721 (emphasis added; footnote omitted); *see also id.* at 28,716. According to the Commission, "[t]he requirement for an augmented majority vote" accomplishes that purpose. *Id.* at 28,721. But, as demonstrated above, when coupled with exchange-group-based voting, the Commission's "augmented majority vote" is inadequate to prevent non-SROs from banding together with a minority of SROs to override the will of the majority of SROs and, in so doing, prevent them from "act[ing] jointly on behalf of the plan." *Id.*

There is no support in the Exchange Act for the Commission's implementation of an exchange-group-based approach to voting. The Act does not define or otherwise refer to "exchange groups." And the statutory definition of "self-regulatory organization" refers to "*any* national securities exchange," 15 U.S.C. § 78c(a)(26) (emphasis added), not to "multiple exchanges operating under one corporate umbrella," NMS Governance Order, 85 Fed. Reg. at 28,702.

Thus, when the Exchange Act empowers the Commission to authorize or require "self-regulatory organizations to act jointly with respect to . . . developing [and] operating . . . a national market system," 15 U.S.C. § 78k-1(a)(3)(B), it means that the Commission may direct *individual* national securities exchanges to undertake the development and operation of an NMS plan—not groups of affiliated exchanges fused together in a manner that suits the Commission "from a policy perspective," NMS Governance Order, 85 Fed. Reg. at 28,713. The Commission has no authority to amend the Exchange Act's definition of "self-regulatory organization" so that it refers to "any national securities exchange *or group of affiliated exchanges*." *See FAIC Sec., Inc. v. United States*, 768 F.2d 352, 362 (D.C. Cir. 1985) ("A general authority to define terms . . . does not confer power to *redefine* those terms that the statute itself defines . . . .").

The Commission's exchange-group-based voting structure is also incompatible with the Commission's treatment of affiliated exchanges in other regulatory settings. As noted by commenters, *see* Nasdaq Letter at 7, the Commission requires affiliated SROs to preserve their separate identities and operations by, for example, maintaining separate pools of liquidity, *see* Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, 73 Fed. Reg. 74,770, 74,790 (Dec. 9, 2008), and separate rebate schedules, *see* Order Disapproving Proposed Rule Change To Offer a Rebate Based on Members' Aggregate Customer Volume, 79 Fed. Reg. 42,578, 42,586 (July 22, 2014). And, as the Commission has emphasized, it "historically has reviewed whether a proposed exchange rule is consistent with the provisions of Section 6 of the [Exchange] Act on an exchange-by-exchange basis—that is, an exchange's proposed rule change is analyzed at the individual level of the registered securities exchange and not at the group level of exchanges." *Id.* at 42,585. Yet, in this—and only this—context, the Commission proposes to group exchanges by affiliation.

The Commission does not dispute that, for all other purposes, it treats affiliated SROs as separate entities. The Commission's only explanation for its abrupt departure from its settled regulatory approach is that it "believes . . . that a meaningful legal distinction exists between, on one hand, each SRO's individual responsibility [under the Exchange Act] . . . and, on the other hand, the responsibility of the SROs to jointly operate the NMS plans pursuant to Section 11A of the Act." NMS Governance Order, 85 Fed. Reg. at 28,713. But the Commission never identifies what that "legal distinction" *is*, or the basis for drawing it. The Commission simply assumes the correctness of its position. The Commission's failure to "articulate[ ] an adequate explanation" for its disparate regulatory treatment of affiliated exchanges is arbitrary and capricious, *see Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992), as is the Commission's failure to explain and justify its abrupt departure from its longstanding approach to the regulation of affiliated exchanges, *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (where an agency changes position, it "must show that there are good reasons for the new policy").

These flaws in the Commission's exchange-group-based voting structure constitute a second, independent reason that Petitioners are likely to succeed in their challenge to the NMS Governance Order and, at a bare minimum, raise serious legal questions regarding the validity of the Order.

II. Petitioners Would Suffer Imminent, Irreparable Injury In The Absence Of A Stay.

A stay is necessary because Petitioners would suffer imminent, irreparable harm if the NMS Governance Order were permitted to take effect during the pending D.C. Circuit proceedings.

Implementation of the NMS Governance Order would impose substantial costs on Petitioners, without affording them any immediate, countervailing benefits. The Commission has established an aggressive 90-day timetable for the SROs to submit the proposed New Consolidated

Data Plan. *See* NMS Governance Order, 85 Fed. Reg. at 28,729. Thus, in the absence of a stay, Nasdaq will incur immediate and significant upfront costs in drafting the New Consolidated Data Plan, seeking Commission approval of the plan, and, if approved, implementing the plan. *See* Letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission at 19 (Feb. 5, 2020) (describing costs associated with "hiring outside counsel . . . , replacing current contracts with data recipients, and filing to obtain Commission approval of the draft new Plan").

The Commission "acknowledges that SROs would incur costs in the process of creating the New Consolidated Data Plan," NMS Governance Order, 85 Fed. Reg. at 28,711, but seeks to minimize the impact of those costs by emphasizing the "long-term cost-savings for the SROs in the administration of the Plans," *id.* The Commission further acknowledges, however, that "*initially*, the implementation cost of combining the Equity Data Plans may exceed the short-term cost savings from the reduction of existing redundancies, inefficiencies, and inconsistencies." *Id.* (emphasis added). In other words, the burdens that the NMS Governance Order imposes on Petitioners will be off-set, if at all, only in the long run—well after the D.C. Circuit has concluded its consideration of Petitioners' challenge to the NMS Governance Order. And, if the D.C. Circuit vacates the NMS Governance Order, none of the purported benefits of the New Consolidated Data Plan would ever come to fruition, leaving Petitioners with no opportunity to recoup the costs they had already expended in complying with the invalid order. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (explaining that the irreparable-harm inquiry looks to whether "adequate compensatory or other corrective relief will be available at a later date") (internal quotation marks omitted).

A stay is therefore warranted to shield Nasdaq from the impossible-to-recover, imminently pending expenditures necessitated by the NMS Governance Order until the D.C. Circuit has had the opportunity to consider the validity of that Order.

III. No Substantial Harm Would Result From A Stay, And Its Imposition Would Further The Public Interest.

There is no risk that a stay would result in substantial harm to others. On the contrary, a stay would promote the public interest in several respects.

The NMS Governance Order is premised on the Commission's view that the current members of the NMS plan operating committees that oversee the exclusive SIPs are conflicted in their incentives "to meaningfully improve the provision of core data." NMS Governance Order, 85 Fed. Reg. at 28,704. But the Commission also acknowledges "recent efforts by the Equity Data Plans to improve the performance of the SIPs." *Id.* at 28,705. The Commission's position is simply that the NMS plans' actions to date "have not fully mitigated [the Commission's] concerns with SIP performance." *Id.* Although Petitioners disagree with the Commission's assessment of SIP performance, even if those concerns are credited, they do not indicate that the current distribution of core data is so seriously flawed that a stay of the NMS Governance Order would materially impair investors' ability to access core data or otherwise harm nonparties. The SROs' ability to adapt to the current public-health crisis—during which core data has remained readily available despite market turmoil—confirms that the existing market-data framework is functioning well and is not in urgent need of substantial modification.

In fact, the public interest would benefit from a stay in multiple respects. First, it would be difficult, if not impossible, to unwind all of the actions taken by the New Consolidated Data Plan if the NMS Governance Order is ultimately vacated by the D.C. Circuit. The NMS Governance Order envisions a wholesale restructuring of the current SIP governance structure,

requiring the dismantling of the three equity-data NMS plans currently in effect and the establishment of a single New Consolidated Data Plan in their place. That process is not a matter of mere paperwork. For example, as the Commission recognizes (indeed, mandates), the SROs will have to transition existing contracts and facilities to a new plan administrator, which will assume responsibility for the administration of the New Consolidated Data Plan. NMS Governance Order, 85 Fed. Reg. at 28,723. If the NMS Governance Order is implemented and then vacated, all of those efforts—including the plan administrator's newly executed contracts—would need to be unwound. In addition, it is unclear how vacatur of the NMS Governance Order would affect the decisions made by the new operating committee in the interim—whether those decisions would be automatically nullified, whether the old operating committees would be required to review and potentially ratify those decisions, or whether some other action would be appropriate to minimize the disruptive effects of the court's decision. A stay would eliminate the complexities and uncertainties that would accompany the process of unwinding the actions of the New Consolidated Data Plan. *Cf. In re The Options Clearing Corp.*, Release No. 81628, 2017 WL 4097911, at *2 (Sept. 14, 2017) (denying stay where "the task of unwinding the [approved plan] would be no more difficult if done after remand rather than immediately") (internal quotation marks omitted).

Second, a stay would promote the public interest by enabling the SROs and the Commission to take account of the Market Data Infrastructure proposal when establishing the New Consolidated Data Plan. That proposal would implement sweeping changes in the way in which both core data and proprietary data are disseminated to market participants. *See* Market Data Infrastructure, 85 Fed. Reg. 16,726 (Mar. 24, 2020). Although the Commission maintains that these two proposals are formally distinct from one another, *see* NMS Governance Order, 85 Fed.

Reg. at 28,708, the fact remains that the adoption of the Market Data Infrastructure proposal—which would transform the operating committee of the New Consolidated Data Plan from a body that oversees the consolidation and dissemination of core data into one that sets the rates that competing consolidators and self-aggregators pay to exchanges for their market data—would dramatically affect the terms and operations of the New Consolidated Data Plan. Indeed, it would be a profound waste of SROs' resources if they were to develop and secure approval of a New Consolidated Data Plan that governs the consolidation and dissemination of core data, only to be required in short order to rework the entire plan to take account of the far-reaching changes that would be mandated by the adoption of the Market Data Infrastructure proposal. A stay would conserve resources by making it more likely that, if the NMS Governance Order survives judicial review, the SROs will not be required to implement it until after the Commission has decided whether to move forward with the Market Data Infrastructure proposal.

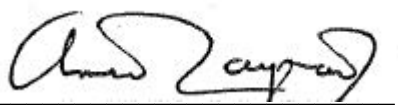
Finally, the ongoing global pandemic counsels in favor of a cautious approach to the implementation of major changes to the national market system. Commissioner Lee has called upon the Commission to "proceed with great caution in considering whether to take regulatory action outside of that called for by the current dire and pressing public health crisis and its ramifications for the public, investors, markets, and the economy." Commissioner Allison Herren Lee, *Regulatory Priorities and COVID-19*, U.S. Securities & Exchange Commission (Apr. 3, 2020), https://www.sec.gov/news/public-statement/statement-lee-regulatory-priorities-covid-19-2020-04-03. The NMS Governance Order does not address issues that require immediate resolution in light of the global pandemic. Granting a stay would permit both the SROs and the Commission to focus their finite resources on the more pressing issue of ensuring the stable, safe,

and secure operation of the Nation's securities markets during these challenging and unprecedented times.

CONCLUSION

The Commission should stay the implementation of the NMS Governance Order pending resolution of Petitioners' petition for review in the D.C. Circuit.

Respectfully submitted,



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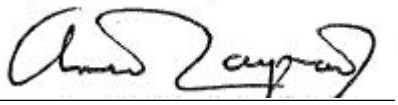
Date: June 3, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 201.154(c) of the Securities and Exchange Commission's Rules of Practice, Petitioners certify that the foregoing Motion for Stay and Brief in Support of Motion for Stay is 5,835 words in length, exclusive of the Table of Contents and Table of Authorities.

Dated: June 3, 2020



Amir C. Tayrani

CERTIFICATE OF SERVICE

I, Amir C. Tayrani, counsel for The Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC, hereby certify that on June 3, 2020, I served copies of the foregoing Motion for Stay and Brief in Support of Motion for Stay as indicated below:

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U.S. Securities and Exchange Commission
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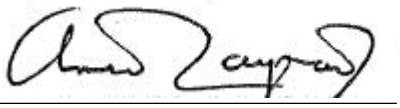

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