



February 4, 2021

Via Email

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

Re: File No. 4-757

Dear Ms. Countryman:

NYSE Group, Inc. (“NYSE”) respectfully submits this comment letter to the Securities and Exchange Commission (the “Commission”) on behalf of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (together, the “NYSE Exchanges”) in response to the Commission’s Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data (the “Order”).¹

In the Order, the Commission requested comment on a number of potential grounds for disapproval, including whether the Proposed NMS Plan² is consistent with Section 11A(1)(C)(iii) of the Securities Exchange Act of 1934 (the “Exchange Act”)³ and Rule 608 of Regulation NMS;⁴ whether any modifications to the Proposed NMS Plan would be required to make it consistent with Section 11A and Rule 608; and whether the Proposed NMS Plan addresses the supposed conflicts of interest identified by the Commission in the Governance Order.⁵

At the outset, because the Order offers no indication as to any changes the Commission may be considering with respect to the Proposed NMS Plan, NYSE cannot provide meaningful comment on those changes at this time. Indeed, in the Order, the Commission states that “the institution of proceedings does not indicate that the

¹ See Securities Exchange Act Release No. 90885 (January 11, 2021), 86 FR 4142 (January 15, 2021) (File No. 4-757) (the “Order”).

² See Securities Exchange Act Release No. 90096 (October 6, 2020), 85 FR 64565, at 64574-95 (October 13, 2020) (File No. 4-757) (the “Notice”), attaching the “Proposed NMS Plan” as Attachment A at 85 FR 64574-95.

³ 15 U.S.C. 78k-1(a)(1)(C)(iii).

⁴ 17 CFR 242.608(b)(2).

⁵ See Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data) (“Governance Order”).

Commission has reached any conclusions with respect to any of the issues involved.”⁶ To the extent the Commission is considering, or otherwise plans to make, any material changes to the Proposed NMS Plan prior to its adoption, NYSE urges the Commission to publish and provide notice of those changes—as required under Rule 608 and the Administrative Procedure Act—so that SROs, investors, and other interested market participants can provide comments.

With respect to the requests for comment that are contained in the Order, NYSE previously addressed the same topics in its November 16, 2020 comment letter.⁷ In that letter, NYSE urged the Commission to disapprove the Proposed NMS Plan because it contains numerous terms and provisions that are not consistent with the requirements of the Exchange Act and Rule 608, and would frustrate the purposes of the Exchange Act and the national market system.⁸

Under Rule 608(b)(2), the Commission may approve an NMS plan or amendment only

if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.⁹

For all the reasons cataloged in the NYSE Letter, the Commission cannot make such a finding here.¹⁰

In brief summary:

1. The Proposed NMS Plan’s Voting Provisions Are Inconsistent with the Exchange Act and Rule 608.¹¹

⁶ See Order, *supra* note 1, at 3.

⁷ See Letter to Vanessa Countryman, Secretary, Commission, from Elizabeth K. King, Chief Regulatory Officer, ICE, and General Counsel and Corporate Secretary, NYSE, dated November 16, 2020 (“NYSE Letter”), available here: <https://www.sec.gov/comments/4-757/4757-8022261-225489.pdf>. Capitalized terms in this letter have the same definitions as in the NYSE Letter.

⁸ As explained in the NYSE Letter, NYSE and the other SROs included such terms and provisions in the Proposed NMS Plan at the direction of the Commission, but NYSE reserved all rights to challenge the Proposed NMS Plan as inconsistent with the Exchange Act and Rule 608. See NYSE Letter at 4 n.13.

⁹ 17 CFR 242.608(b)(2).

¹⁰ Consistent with that view, the NYSE Exchanges and other SROs have petitioned the U.S. Court of Appeals for the D.C. Circuit to review the Governance Order. See Opening Brief of Petitioners in *Nasdaq Stock Market LLC v. SEC*, No. 20-1181 (D.C. Cir. 2020) (the “Governance Appeal”).

¹¹ See NYSE Letter at 5-10.

- The Proposed NMS Plan's inclusion of six "Non-SRO Voting Representatives" on the Operating Committee is inconsistent with Section 11A of the Exchange Act,¹² under which the Commission may "authorize or require *self-regulatory organizations*" to act jointly in "planning, developing, operating, or regulating a national market system."¹³ It is also inconsistent with Rule 608(a)(3), which authorizes only SROs to act jointly in "planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan" or "implementing or administering an effective national market system plan."¹⁴ Neither provision authorizes non-SROs to act jointly along with SROs in performing these functions, as the Proposed NMS Plan would require.
- The inclusion of "Non-SRO Voting Members" also conflicts with the design and purpose of the Exchange Act. Congress entrusted responsibility for the planning, development, operation, and regulation of NMS plans to SROs, which are subject to comprehensive statutory obligations and regulatory duties under the Exchange Act. In contrast, the individuals who would be the "Non-SRO" voting members of the Operating Committee would have no general obligation to protect investors or further the public interest, nor to comply with the terms of the Proposed NMS Plan, and could choose to act in their own self-interest or in the interest of their employers.
- The Proposed NMS Plan's proposal to allocate one Operating Committee vote to each "exchange group" (plus a second vote if the exchange group trades more than 15% of consolidated equity market share) is inconsistent with the Exchange Act because it would subject certain exchanges to disparate treatment based solely on their affiliation with an "exchange group." It would also depart from the longstanding practice of treating each SRO individually for regulatory purposes, regardless of its corporate affiliation with other SROs. In addition, this "exchange group" structure would impermissibly tie the number of votes that each Non-Affiliated SRO or "exchange group" may cast to market share, although an SRO's responsibilities under the Exchange Act bear no relationship to its market share.
- This voting structure would also impair the ability of SROs to "act jointly" in administering the Proposed NMS Plan under both the Exchange Act and Rule 608.¹⁵ With the SRO votes diluted by function of "exchange groups," it would be possible for the Non-SRO Voting Representatives and a minority of Non-Affiliated SROs to force through plan actions and amendments without the assent of a majority of individual SROs.¹⁶

¹² 15 U.S.C. 78k-1 ("Section 11A").

¹³ Id. (emphasis added).

¹⁴ 17 CFR 242.608(a)(3)(i), (iii).

¹⁵ See 15 U.S.C. 78k-1(a)(3)(B); 17 CFR 242.608(a)(3)(iii).

¹⁶ See NYSE Letter at 9 n.35.

2. The Proposed NMS Plan's "Independent" Administrator Requirement Is Inconsistent with Rule 608(b).¹⁷

- The Proposed NMS Plan's requirement that the Administrator selected by the Operating Committee must be "independent" from any SRO that sells proprietary market data products does not satisfy the standard the Commission must apply under Rule 608(b) to approve an NMS plan, since it would disrupt the mechanisms of the national market system.¹⁸ The costs associated with abandoning the current, experienced Administrators and moving to a new, unproven, inexperienced entity outweigh any benefits. The Commission required the SROs to include this provision in the Proposed NMS Plan to address purported conflicts of interest facing the existing Administrators, but the Commission provided no evidence of any harms arising from such alleged conflicts. The Commission also did not allow the SROs to consider other ways to address the potential conflict, such as through information barriers. This change has the potential to disrupt the mechanisms of a national market system that, to date, has worked well.
- The Proposed NMS Plan's requirement for an "independent" Administrator is arbitrary and would not prohibit non-SRO data vendors from filling the Administrator role, even though such vendors may also separately sell market data and could also theoretically benefit from access to subscriber lists. As such, the Proposed NMS Plan's prohibition on an Administrator affiliated with an SRO imposes an unfair burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

3. The Proposed NMS Plan's Conflicts of Interest and Confidentiality Policies Are Inconsistent with Section 11A and Rule 608.¹⁹

- The conflicts of interest and confidentiality policies that the Commission ordered the SROs to include²⁰ in the Proposed NMS Plan are inconsistent with Section 11A and Rule 608.
- The confidentiality provision restricting SRO representatives to the Proposed NMS Plan from sharing Plan information with other individuals at the SRO would preclude the SROs from fulfilling their obligations under the securities laws and, in particular, Rule 608. The Commission claimed without basis that "such non-Plan personnel likely would have no need to know such information as they have no responsibilities to the Plan," but that assertion overlooks the fact that the SRO entities, not their individual employees, would

¹⁷ See id. at 10-12.

¹⁸ See 17 CFR 242.608(b)(2).

¹⁹ See NYSE Letter at 12-32.

²⁰ See Governance Order, supra note 5, at 28730. NYSE is currently appealing similar provisions that the Commission ordered into effect concerning the existing NMS Plans. See New York Stock Exchange LLC v. SEC, No. 20-1242 (D.C. Cir. 2020) (the "Amendments Appeal").

be members of the Proposed NMS Plan. The SROs would be obligated under Rule 608 to jointly administer the Proposed NMS Plan, and to do so, an SRO's senior management must have access to all information that may be necessary to make decisions concerning the Plan. The Commission may not approve a Proposed NMS Plan that prohibits SROs' senior management from having access to information that may be necessary to their informed decision-making related to regulatory obligations.²¹

- The recusal provision in the Proposed NMS Plan's conflicts of interest policy impermissibly impairs SROs' abilities to choose how to manage their businesses and fulfill their regulatory responsibilities. The recusal provision appears to require a complete separation of an SRO's proprietary data business from its Plan responsibilities, in order to ensure, as the Commission put it, the "impartiality of the representative." But this too ignores that it is the SROs as entities – not any individuals appointed as the SROs' representatives to an NMS plan – that would be members of the Proposed NMS Plan, and that "impartiality" of the person casting the SRO's vote is irrelevant. Moreover, there is no requirement in Section 11A or Rule 608 for an SRO to be "impartial" in this manner. Rather, when discharging its obligations under Section 11A and Rule 608, an SRO must do so in a manner that protects investors and the public interest or to enforce compliance with the terms of the NMS plan. As such, the recusal provision is inconsistent with the SRO's obligations under the securities laws.²²
- Numerous other provisions of the conflicts of interest and confidentiality provisions included in the Proposed NMS Plan would create impediments to the mechanisms of the national market system and would be inconsistent with the purposes of the Exchange Act. Among others: (i) the requirement that all natural persons sign an undertaking under the confidentiality policy imposes onerous and impractical burdens on Agents that would provide services to the Plan, including auditors, bankers, and outside counsel; (ii) the confidentiality policy's prohibition on sharing Restricted and Highly Confidential Information with Agents would impede the Administrator's ability to hire independent auditors and outside counsel to perform its administrative functions; (iii) the Proposed NMS Plan would limit the sharing of Confidential Information only with persons who have "responsibilities to the Plan," while many of the service providers who would need access to such information have no such "responsibilities to the Plan"; (iv) the confidentiality provisions purport to cover the Non-SRO Voting Representatives and their employers, but such parties have no regulatory obligations under the Plan and there is no way to monitor their compliance; (v) the requirement that the Administrator decide the confidentiality designation of information unlawfully delegates the power of the Operating Committee to the Administrator; and (vi) the Proposed NMS Plan would require disclosures by Members, Processors,

²¹ See NYSE Letter at 15-18.

²² See id. at 18-20.

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Administrators, Service Providers, and Subcontractors that serve no purpose and impose substantial costs and burdens without any benefit.²³

In sum, the Proposed NMS Plan contains numerous terms and provisions that would impede the mechanisms of a national market system and are inconsistent with the purposes of the Exchange Act. Accordingly, NYSE does not believe that the Commission can make the necessary finding under Rule 608(b) to approve the Proposed NMS Plan.

Respectfully submitted,



Elizabeth K. King

cc: Honorable Allison Herren Lee, Acting Chair
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
Christian Sabella, Acting Director of the Division of Trading and Markets

²³ See id. at 20-32.