NYSE

CHX CHICAGO STOCK EXCHANGE

January 15, 2016

VIA EMAIL

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Response to Comment Letters Received by the Securities and Exchange Commission Pursuant to Rule Filing SR-NYSE-2015-46 and Comments on SR-BATS-2015-108 and SR-FINRA-2015-047

Dear Mr. Fields:

New York Stock Exchange LLC ("NYSE"), on behalf of NYSE Arca, Inc., NYSE MKT LLC, and the Chicago Stock Exchange, Inc. (collectively, the "Exchanges"), respectfully submits this letter in response to two comment letters received by the Securities and Exchange Commission (the "SEC" or the "Commission") in connection with the above-referenced NYSE rule filing to establish quoting and trading rules to implement the Tick Size Pilot Program.[1] In addition, the NYSE includes its comments on proposed rule changes filed by BATS and FINRA to implement the quoting and trading requirements of the Tick Size Pilot Program.[2]

Summary of the Tick Size Pilot and Proposed Rule

The Plan approved by the Commission modified several provisions of the proposed Plan submitted by the Participants.[3] For example, the Commission extended the pilot to two years

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[1] See Securities Exchange Act Release No. 76229 (Oct. 22, 2015), 80 FR 66065 (Oct. 28, 2015) (SR-NYSE-2015-46) ("NYSE Proposal").

[2] See Securities Exchange Act Release Nos. 76483 (Nov. 19, 2015), 80 FR 73853 (Nov. 25, 2015) (SR-FINRA-2015-047) ("FINRA Trading & Quoting Proposal"), and 76552 (Dec. 3, 2015), 80 FR 76591 (Dec. 9, 2015) (SR-BATS-2015-108) ("BATS Trading & Quoting Proposal").

[3] On August 25, 2014, NYSE Group, Inc., on behalf of BATS Exchange, Inc. ("BATS"), BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc. ("FINRA"), NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, the Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc. (collectively, the "Participants"), filed with the Commission, pursuant to Section 11A of the Act, 15 U.S. C. 78k-1, and Rule 608 of Regulation NMS thereunder, the Plan to Implement a Tick Size Pilot Program (the "Plan"). See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014. The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014. See Securities Exchange Act Release No. 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014) (the "June 2014 Order"). The Plan was published for comment

rather than the one year proposed, removed the venue limitation from the Trade-at prohibition, which would have required price-matching executions to occur on the venue where the quotation is displayed, and reduced the size of block transactions eligible for the Trade-at exception to better reflect trading in smaller-cap stocks. The Commission also modified the market capitalization threshold for securities included in the tick size pilot and revised certain data elements concerning market maker profitability to make the collection less burdensome and assure the protection of confidential business information.[4]

The Plan requires the Participants to test several different quoting and trading scenarios for smaller public companies. Specifically, the Tick Size Pilot Program will consist of a control group of approximately 1400 Pilot Securities and three test groups with 400 Pilot Securities in each selected by a stratified sampling.[5] During the pilot:

- Pilot Securities in the control group will be quoted at the current tick size increment of $0.01 per share and will trade at the currently permitted increments.
- Pilot Securities in the first test group ("Test Group One") will be quoted in $0.05 minimum increments but will continue to trade at any price increment that is currently permitted.[6]
- Pilot Securities in the second test group ("Test Group Two") will be quoted in $0.05 minimum increments and will trade at $0.05 minimum increments subject to a midpoint exception, a retail investor exception, and a negotiated trade exception.[7]
- Pilot Securities in the third test group ("Test Group Three") will be subject to the same terms as Test Group Two and also will be subject to the "Trade-at" requirement to prevent price matching by a person not displaying at a price of a Trading Center's "Best Protected Bid or "Best Protected Offer," unless an enumerated exception applies.[8] In addition to the exceptions provided under Test Group Two, an exception for Block Size orders and exceptions that mirror those under Rule 611 of Regulation NMS will apply to the Trade-at requirement.

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in the Federal Register on November 7, 2014, see Securities and Exchange Act Release No. 73511 (November 3, 2014), 79 FR 66423 (File No. 4-657), and approved by the Commission, as modified, on May 6, 2015. See Securities and Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27514 (File No. 4-657) (the "Tick Plan Approval Order").

[4] Tick Plan Approval Order, supra note 3.

[5] See Section V of the Plan for identification of Pilot Securities, including criteria for selection and grouping.

[6] See Section VI(B) of the Plan. Pilot Securities in Test Group One will be subject to a midpoint exception and a retail investor exception.

[7] See Section VI(C) of the Plan.

[8] See Section VI(D) of the Plan.

The three test groups are designed for the purpose of collecting meaningful data to analyze. As the SEC stated in the Approval Order:

> The Tick Size Pilot Program will provide the Commission and interested parties with real-world data regarding the effect of wider tick sizes on trading, liquidity and market quality for small-capitalization companies, and this empirical data will inform analyses and potential future regulatory action to, among other things, capture any benefits from wider tick sizes on a permanent basis.[9]

The Plan and Rule 608(c) of Regulation NMS require the Participants to comply with, and enforce by their members, the provisions of the Plan.[10] In addition, as set forth in section III(C) of the Plan, the Operating Committee, which consists of one individual from each of the Participants, is responsible for establishing the specifications and procedures for the implementation and operation of the Plan. The Plan states that any decisions made by the Operating Committee must be approved by a simple majority vote.[11] As required by the Plan, the Operating Committee was convened and agreed upon a process by which the Participants would draft and file with the Commission, proposed SRO rules to implement the Plan.

Specifically, the Operating Committee agreed in June 2015, in consultation with SEC staff, that one of the SROs would lead in proposing quoting and trading rules,[12] while another SRO would lead in proposing the data collection rules. The Operating Committee agreed that, after SEC approval of the lead SRO's proposed rules, each of the other SROs would file an identical version of those rules. In this way, all SROs would have uniform rules for implementation of the Plan. We note that, in addition to suggestions on how the differences among the NYSE, FINRA and BATS proposed rule changes should be resolved, SIFMA commented that "in any event, all of the participants of the Tick Size Plan must have consistent rules in place well before the start date of the pilot." The Exchanges agree. It is because of this need for consistency that the Operating Committee established the implementation approach described above. The competing proposals before the Commission today are because those SROs that disagreed with the specifications and procedures approved by a majority vote of the Operating Committee, filed

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9 See Tick Plan Approval Order, supra note 3, at 27516.

10 Section II(B) of the Plan.

11 Section III(C) of the Plan also vests in the Operating Committee the responsibility to monitor the procedures established pursuant to the Plan and advise the Participants with respect to any deficiencies, problems, or recommendations as the Operating Committee may deem appropriate.

12 With respect to Test Group Three, the Commission specifically contemplated that "the Participants would be required to adopt rules prohibiting trading centers operated by Participants and members of the Participants from executing a sell order for a Pilot Security at the price of a protected bid, or from executing a buy order for a Pilot Security at the price of a protected offer, unless such executions fall within certain enumerated exceptions." See Tick Plan Approval Order, supra note 3, at 27518.

proposals with the Commission that are not consistent with the decisions of the Operating Committee and not consistent with the approved Plan.

Consistent with this agreed-upon approach, on October 9, 2015, the Operating Committee approved the NYSE proposal to establish a model set of trading and quoting rules that the other Participants would adopt after the NYSE proposal is approved.[13] Separately, and with the approval of the Operating Committee, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed a rule proposal to establish the requirements for collecting and transmitting data to the Commission and the public in compliance with Appendix B.1 to the Plan.[14] Also with approval of the Operating Committee, the BATS Exchange, Inc. ("BATS") filed a rule proposal intended to establish the requirements for collecting and transmitting data to the Commission and the public that would serve as the model set of data collection rules for exchange Participants.[15]

In addition to the proposals approved by the Operating Committee and filed with the Commission, BATS and FINRA each filed separate rule proposals to address requirements for its members to comply with the trading and quoting requirements of the Plan.[16] The content of these rule proposals do not reflect the specifications and procedures for the implementation and operation of the Plan that were approved by a majority vote of the Operating Committee, as required under Section III(C) of the Plan.[17]

The FINRA and BATS trading and quoting proposals are substantively identical to the NYSE proposal, except for one proposed subsection. Specifically, with respect to Test Group Three, the NYSE proposed that a member organization may execute a sell order for a Pilot Security in Test Group Three at the price of a Protected Bid or execute a buy order for a Pilot Security in Test Group Three at the price of the Protected Offer if any of the exceptions in the Plan are present.[18] The first proposed exception, as set forth in proposed NYSE Rule 67(e)(4)(C)(i), would be when:

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13 NYSE Proposal, supra note 1.

14 See Securities Exchange Act Release No. 76484 (Nov. 19, 2015), 80 FR 73858 (Nov. 25, 2015) (SR-FINRA-2015-048) ("FINRA Data Proposal").

15 See Securities Exchange Act Release No. 76524 (Nov. 25, 2015), 80 FR 75141 (Dec. 1, 2015) (SR-BATS-2015-102) ("BATS Data Proposal").

16 FINRA Trading & Quoting Proposal, supra note 2; BATS Trading & Quoting Proposal, supra note 2.

17 As set forth in Section III(C)(2) of the Plan, the Operating Committee monitors the procedures established pursuant to the Plan and advises the Participants with respect to any deficiencies, problems, or recommendations as the Operating Committee may deem appropriate. This same section provides that the Operating Committee is responsible for establishing the specifications and procedures for the implementation and operation of the Plan that are consistent with the operation of the Plan. The Plan provides that decisions under Section III(C)(2) are made by a simple majority vote.

18 NYSE Proposed Rule 67(e)(4)(C) (implementing Section VI(D) of the Plan).

> The order is executed by a Trading Center within a member organization that has a displayed quotation for the account of that Trading Center on a principal basis, via either a processor or an SRO quotation feed, at a price equal to the traded-at Protected Quotation, that was displayed before the order was received, but only up to the full displayed size of the Trading Center's previously displayed quote.

By contrast, FINRA and BATS have proposed that the exception would apply when:

> The order is executed within the same independent aggregation unit of the member that operates the Trading Center that displayed the quotation via either a processor or an SRO Quotation Feed, to the extent such member uses independent aggregation units, at a price equal to the traded-at Protected Quotation that was displayed before the order was received, but only up to the full displayed size of that independent aggregation unit's previously displayed quote. A Trading Center that is displaying a quotation as agent or on a riskless principal basis may only execute as agent or riskless principal, and a Trading Center displaying a quotation as principal (excluding riskless principal) may execute as principal, agent or riskless principal. "Independent aggregation unit" has the same meaning as provided under Rule 200(f) of SEC Regulation SHO.[19]

SIFMA and FIF have identified the differences between the NYSE and FINRA/BATS proposals on this point. FIF and SIFMA argue that the NYSE proposed language, which limits the previously-displayed quote exception to principal quotes, was not contemplated by either the Commission or the Plan, and they are opposed to this requirement.

Discussion

The Exchanges believe that the Commission should approve the NYSE proposal and that the proposals by BATS and FINRA are not consistent with the Plan and, therefore, with the Securities Exchange Act of 1934 ("Act").

A. BATS and FINRA Proposals would permit a market participant to price match without displaying an order, undermining data quality.

In approving the Plan, the Commission found that including the Trade-At Prohibition should enhance the utility of the Tick Size Pilot because the data generated by Test Group Three "should inform the Commission, the public, and market participants on the incremental impact of the Trade-At Prohibition on trading characteristics and liquidity of Pilot Securities when the quoting and trading increments are widened."[20] In addition, the Commission stated that "[t]he

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19 See Proposed FINRA Rule 6191(a)(6)(D)(ii)(a) and Proposed BATS Rule 11.27(a)(6)(D)(ii)(a).

20 Tick Plan Approval Order, supra note 3, at text accompanying note 324.

Trade-At Prohibition should test whether market participants are incentivized to display more liquidity in a wider tick environment."[21] Importantly, the Commission noted that the data generated by Test Group Three would allow the Commission and the public to test the incremental impact on displayed liquidity and market quality in a wider tick environment when compared to Test Groups One and Two. Because trading in Test Groups One and Two will likely migrate to dark venues, the Commission expressed its view that "it is important to test whether given larger quoting and trading increment, market quality could be enhanced by an incentive to display liquidity such as the Trade-At Prohibition."[22]

The Exchanges believe that the NYSE proposed rule is in compliance with the goals of the Pilot and Test Group Three whereas the exception to the Trade-At Prohibition in Pilot Group Three proposed by BATS and FINRA is contrary to the Commission's stated goals in approving the Plan. Rather, the BATS and FINRA proposals would create an incentive for trading in Test Group Three to migrate to dark venues, undermining the Commission's stated goal in its Order approving the Plan.

As noted above, the BATS and FINRA proposals for Test Group Three would apply the display exception to the Trade-At Prohibition to trades executed by a non-exchange Trading Center where the Trading Center is displaying a quotation in an agency, riskless principal or principal, capacity. By proposing to allow price matching based on a quotation in an agency capacity, the BATS and FINRA proposals would allow an alternative trading system ("ATS") to execute matched trades of any of its participants at the Traded-at Protected Quotation if it is displaying, on an agency basis, a quotation of another participant at the Protected Quotation. All participant orders displayed by an ATS are agency orders of that ATS. And, trades matched by ATS participants without display are also agency orders of that ATS. For this reason, the BATS and FINRA proposals would allow trades by ATS participants at the Traded-at Protected Quotation without that participant displaying a Protected Quotation, but instead free-riding on the Protected Quotation of another ATS participant that is displayed, on an agency basis by the ATS. If broker-dealers avail themselves of the expanded exception to the Trade-At Prohibition, the requirement for dark pools to trade with displayed quotations would be eviscerated as they would be able to rely on a single agency quote for all other agency orders within that dark pool. As a result, trading would continue within that dark pool at the prices of displayed liquidity without first trading with those orders that have been displayed on Trading Centers.

The Exchanges believe this loophole created by the FINRA and BATS proposals is contrary to the Commission's intent for the Trade-At Prohibition to test whether market participants are incentivized to display more liquidity in a wider tick environment because trading behaviors for Test Group Three would end up similar to trading behaviors for Test Group Two, undermining

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21 Id.

22 Id.

the utility of the Tick Size Pilot to provide quality data to test the incremental impact of Test Group Three on displayed liquidity and market quality when compared to Test Groups One and Two. Accordingly, the Exchanges believe there is a substantial risk that if the Commission approves the FINRA and BATS proposals, the data from Test Group Three would not test whether larger quoting and trading increments could enhance market quality through a Trade-At Prohibition because market participants could free-ride on the quotes of other market participants.

In addition, the Commission removed the Venue Limitation in approving the Plan because of its view that the Venue Limitation[23] would have unnecessarily restricted the ability of off-exchange market participants to execute orders in the Pilot Securities of Test Group Three.[24] The Commission stated that it believes that "the Size Limitation[25] . . . should be sufficient to incentivize displayed liquidity because price matching generally would be permitted only if the market participant otherwise was publicly displaying an order in a size at least as large as the size of the matching transaction."[26] The BATS and FINRA proposals, however, would not require a market participant to publicly display an order to execute a matching transaction in Pilot Securities of Test Group Three. Instead, a market participant would be permitted to price match in a dark pool without displaying an order because a market participant would be permitted to execute a matching transaction in a dark pool that displayed an order of another market participant equal to the Traded-at protected quotation. Consequently, the Exchanges do not believe that the Commission should find the BATS or FINRA proposals are consistent with the Plan.

The Exchanges note that FIF raised a concern in its comment letter that the NYSE proposal would present problems complying with the customer limit order protection obligations. FIF, however, did not further explain what problems would be presented. In addition, neither FINRA nor BATS described compliance with customer limit order protection obligations as a basis for their proposals.

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23 The Venue Limitation, as proposed by the Participants, would have limited trading centers' ability to execute an incoming order by requiring that executions occur on the venue where the protected quote was displayed. The Commission removed the Venue Limitation when it approved the Plan.

24 Tick Plan Approval Order, supra note 3, at text accompanying notes 338-39.

25 The Size Limitation limits the exception from the Trade-At Prohibition by allowing a trading center that is displaying a quotation at a price equal to the traded-at protected quotation to execute an order for a Pilot Security at a price equal to the protected bid or protected offer only up to the trading center's full displayed size.

26 Tick Plan Approval Order, supra note 3, at text accompanying notes 338-39.

B. BATS and FINRA's Proposed Rules Would implement the Plan in a manner inconsistent with the specifications and procedures approved by a majority vote of the Operating Committee

As discussed above, under the Plan, the Operating Committee has responsibility for establishing specifications and procedures for the implementation and operation of the Plan that are consistent with the provisions of the Plan. With respect to these responsibilities, the Plan provides that Operating Committee decisions must be approved by a simple majority vote. The proposals filed by BATS and FINRA do not reflect the decisions of the Operating Committee regarding the Plan's implementation. Thus, the proposals are inconsistent with the Plan. Without an amendment to the Plan to allow the Commission to modify the decisions of the Operating Committee, the Commission cannot approve the BATS and FINRA proposals as consistent with the Exchange Act and the Plan.

C. Other Comments

Retail Investor Orders. FIF requested clarification on whether the retail investor exemption would apply to clients of both broker-dealers and exchanges. The Exchanges agree with FIF that FINRA's rules would allow for the retail investor exemption would apply to OTC trading. We do not, however, support FIF's suggestion to amend the Plan and believe it is unnecessary.

Block Size Exemption. FIF commented on the NYSE's proposed rules for the Trade-at exemption for block size orders. In particular, FIF believes that a trading center should be permitted to facilitate a block cross that aggregates multiple smaller orders, provided only that one component of the block meets the definition of a "block size order." FIF's suggestion would allow a broker-dealer with a single block size order to add, on the same side of the trade, unlimited non-block orders and execute under the block size exemption. The Exchanges believe the FIF suggestion is inconsistent with the Plan.

Closing

The Exchanges believe that the NYSE proposed rule should be approved by the Commission because it is consistent with the decision of the Operating Committee and the Plan and addresses the goals of the Pilot and, in particular, Test Group Three with regard to data quality.

Sincerely,

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