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November 20, 2018

By E-mail and FedEx

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Commission's Roundtable on Market Structure for Thinly-Traded Exchange-Listed Securities (File No. 265-31)

Dear Mr. Fields:

NYSE Group, Inc. ("NYSE Group") on behalf of New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("NYSE Arca"), and NYSE American LLC ("NYSE American"), appreciates the opportunity to submit its written comment in connection with the Securities and Exchange Commission's ("Commission") roundtable to address the market structure for thinly-traded exchange-listed securities, both equities and exchange-traded products, which the Commission hosted on April 23, 2018 (the "Roundtable"). NYSE Group supports the Commission's focus on ways to improve trading in these particularly hard-to-trade securities and thanks the Commission for the opportunity to participate in the Roundable.

The October 2017, U.S. Department of the Treasury Report on Capital Markets ("Treasury Report") recommended exploring policies that would consolidate liquidity for less-liquid stocks on a smaller number of trading venues.[1] To accomplish the goal of consolidating trading to fewer venues, the Treasury Report recommended that issuers of less-liquid stocks, in consultation with their underwriter and listing exchange, be permitted to partially or fully suspend unlisted trading privileges ("UTP") for their securites and select the exchange(s) and venue(s) upon which their securities will trade.

NYSE Group believes that issuers of thinly-traded securities should be permitted to determine that trading in their securities would benefit by limiting such trading to the primary listing exchange. However, the benefits from concentrating liquidity must be considered against the risks of prohibiting competition. Some market commenters have suggested that trading restrictions in less-liquid stocks should only apply to non-primary exchanges that trade pursuant to UTP and that off-exchange venues should not be similarly limited. NYSE Group does not support this approach, as we believe the benefit of concentrating liquidity for investors would only outweigh the costs of limiting competition if liquidity were aggregated into a single venue.

[1] *See* United States Department of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets*, Report to President Donald J. Trump (2017) (available at: https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf).

There are a large number of off-exchange venues for thinly-traded securities and, thus, not allowing issuers to restrict trading of their securities on off-exchange venues would fail to achieve the policy objective of consolidating liquidity. Our data, as well as that of the Commission, show that a restriction applied only to non-primary exchanges would not materially decrease the fragmentation of liquidity in thinly-traded securities.

The below statistics reveal that non-primary exchanges represent a minority of the discrete venues on which thinly-traded securities transact, and only about one third of their executed volume.

1. The primary listing exchanges currently account for 27% of all share volume in thinly-traded securities.[2]
2. Alternative Trading System ("ATS") currently account for approximately 13% of all share volume of thinly-traded securities, with that volume dispersed across an average of 18 ATS venues for the average thinly-traded security.
3. Another 26% of share volume in thinly-traded securities is executed on non-ATS over-the-counter ("OTC") venues through broker-dealer internalization, a substantial portion of executed share volume.
4. Non-primary exchanges are left with 34% of the remaining share volume, spread across 12 exchanges.

Any serious effort to reduce fragmentation and improve liquidity in thinly-traded securities must include off-exchange trading, as that portion of the U.S. equities market is far more fragmented than trading among the non-primary exchanges. A plan that restricts trading on UTP exchanges while allowing off-exchange venue trading to continue would address only part of the fragmentation problem and will not bring sufficient improvement to the trading environments of thinly-traded securities. Accordingly, NYSE Group believes that for any proposal that would restrict exchange competition in thinly-traded securities:

- UTP revocation for thinly-traded securities should be accompanied by higher criteria for off-exchange trading venues, such as providing material price or size improvement; and
- it should be the decision of an issuer whether to limit the trading of its securities to the primary listing exchange.

Market Characteristics of Thinly-Traded Securities

NYSE Group analyzed several data points related to thinly-traded securities. This analysis revealed that thinly-traded securities are already less fragmented across exchanges than their more active counterparts, meaning revoking only non-listed exchange UTP privileges for such securities may have less impact than anticipated.

NYSE Group measured the primary listing exchange's shares quoted at the National Best Bid and Offer ("NBBO") relative to the total shares quoted at the NBBO on two groups of securities: (1) the S&P 100, comprising several of the most liquid securities, and (2) the securities included

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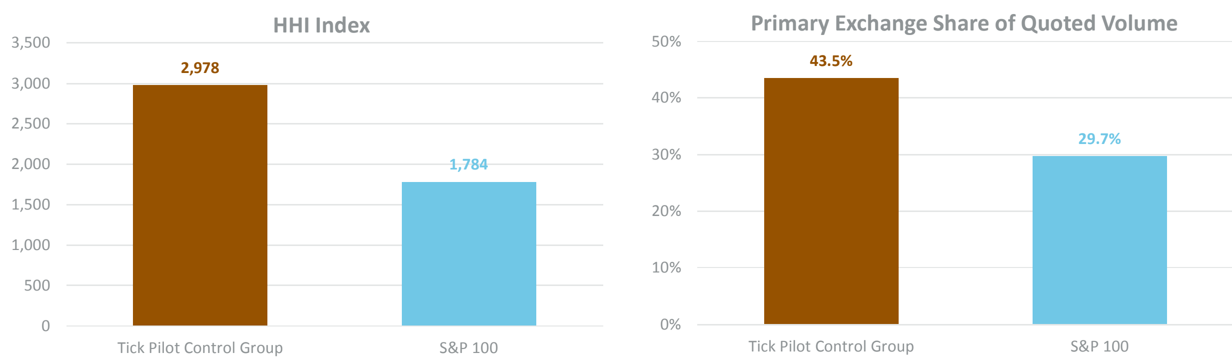
2 For purposes of this analysis, NYSE Group considered all securities included in the Tick Size Pilot Program ("Tick Pilot") during February 2018 to be "thinly-traded securities." *See* Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015). A list of securities included in Tick Pilot is ***available at*** http://www.finra.org/industry/oats/tick-size-pilot-data-collection-securities-files.

in the Tick Pilot's Control Group, comprising of 400 less-liquid securities. In the S&P 100 securities, the primary listing exchange accounted for 29.7% of total share volume quoted at the NBBO. In thinly-traded securities that comprise the Tick Pilot's Control Group, the primary exchanges accounted for <u>43.5%</u> of the total share volume quoted at the NBBO.

To measure the concentration of *quoting activity* across all exchanges, NYSE Group calculated a Herfindahl-Hirschman Index (HHI)[3] of the quoted shares available in both the S&P 100 securities and the securities included in the Tick Pilot's Control Group. Generally, HHI values indicate whether, among multiple market participants, activity is concentrated in one market marticipant. The level of concentration in a market is calculated by summing the squared market share of each market participant. HHI values between 1,500 and 2,500 indicate a moderately concentrated market; HHI values above 2,500 indicate a highly concentrated market.[4] For February 2018, the HHI calculation for share of displayed quote size in S&P 100 securities was 1,784, which indicates that liquidity in these securities is distributed across all exchanges in a moderately concentrated manner. By contrast, for the same period, the HHI calculation of displayed quote size in Tick Pilot Control Group Securities was <u>2,978</u>.[5] This HHI value indicates that liquidity in thinly-traded securities is distributed across exchanges in a highly concentrated manner.



NYSE Group also analyzed *trading* concentration among both exchanges and off-exchange venues by reviewing publicly-available data.[6] To accurately measure trading venue concentration as an HHI value, one would need to know the exact market share of every trading venue. However, publicly available data published by the Financial Industry Regulatory Authority ("FINRA") aggregates a substantial portion of off-exchange trading on venues that individually have little trading activity, and thus it is not possible for NYSE Group to know either the exact number of off-exchange venues that traded thinly-traded securities, or how much each venue trades.[7] Given this important limitation, NYSE Group could measure trading concentration only among exchanges or a grouping of exchanges plus ATS venues.[8] Non-ATS

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3 *See* https://www.justice.gov/atr/herfindahl-hirschman-index.

4 *Id*.

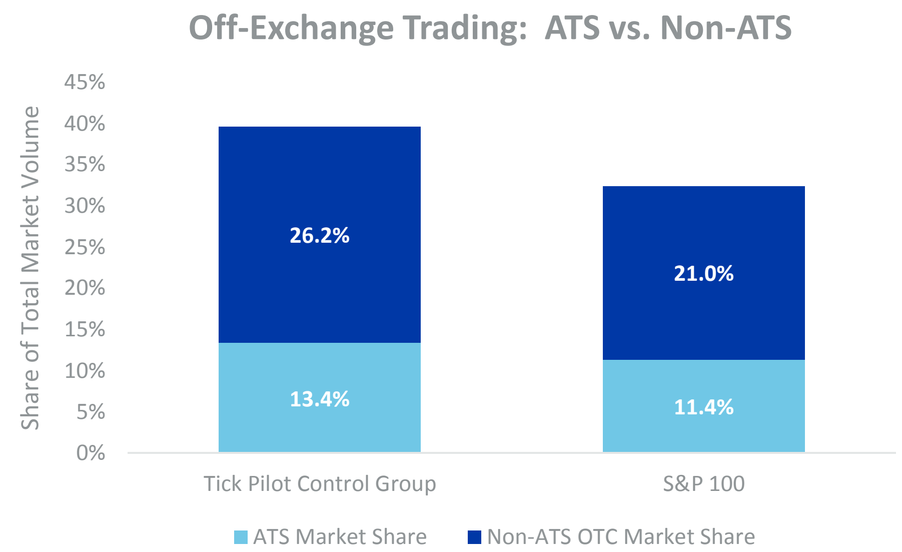
5 Source: NYSE TAQ, February 2018 trading activity.

6 Source: CTA/CQ, Nasdaq SIP, FINRA ATS & Non-ATS OTC Market Share data.

7 *See* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4386.

8 The Commission staff, however, would have access to data not publicly available and could analyze trading concentration without this restriction.

off-exchange trading venues cannot be analyzed on an individual basis, despite the fact that they account for two-thirds of all volume done away from exchanges in the Tick Pilot Control Group. With the limited information available, NYSE Group calculated an HHI value of 2,629 when it included both exchanges and ATS venues, further suggesting that the market is highly concentrated.



In total, NYSE Group has observed that thinly-traded securities already have a high concentration of quoted share volume on primary exchanges and above-average off-exchange trading activity. Given this current state, NYSE Group does not believe that prohibiting trading on non-primary exchanges, without also prohibiting trading on off-exchange venues, would materially consolidate liquidity. NYSE Group believes this could result in an increase in off-exchange trading of thinly-traded securities, which is often done on a bilateral basis. NYSE Group also believes this could dampen spread-tightening quote competition, resulting in increased fragmentation of liquidity fragmentation on off-exchange venues and wider spreads.

Therefore, to prevent this undesirable potential outcome, NYSE Group believes that any proposal relating to restricting trading of thinly-traded securities should account for trading on both non-primary exchanges and off-exchange trading venues.

Issuer Focus

NYSE Group urges the Commission to emphasize issuer choice and flexibility when considering this significant change to market structure. Market structure is a frequent topic in NYSE Group's conversations with its listed companies, and several have expressed concern with the impact of the various market structure changes currently being discussed. This concern is also held by issuers of exchange-traded products ("ETPs"), who fear that the relative attractiveness of their products could be diminished if competing products are able to trade under a superior market structure.

To address this concern, NYSE Group believes that any program to limit the trading venues on which a security trades should be the issuer's choice. Issuers would be able to assess the impact of their decision on the trading environment for their securities, and be able to allow their securities to trade on multiple trading centers if they find that the results of limiting their security to a single market undesirable. This would provide issuers with flexibility for program usage; if revocation of trading on non-primary exchanges and off-exchange venues is beneficial for thinly traded securities, this design would allow those securities to continue to choose this option while trading in more highly liquid securities is unaffected.

Thinly-Traded ETPs

NYSE Group believes that the majority of ETPs could be considered "thinly-traded securities" and this is nothing new. NYSE Group notes that the traded volume of an ETP does not alone fully describe the ETPs trading characteristics or its liquidity profile. Rather, an ETP's trading environment is a function of the liquidity of the individual securities that comprise the ETP.

To improve the trading environment for thinly-traded ETPs, NYSE Group suggests that, in addition to providing issuer choice regarding non-primary exchange and off-exchange venue revocation, the Commission should also consider one or more of the following:

- extend the availability of relief from certain provision of Regulation M for basket creation/redemption sizes to all ETPs;[9]
- offer exemptions to funds from Rule 22e-4 under the Investment Company Act of 1940[10] when the fund transacts in small creation/redemption transactions in cash; and
- allow for bona fide market makers to mark an order in an ETP "short exempt" when the short sale order is in connection with ETP arbitrage activity involving ETP shares and/or securities underlying the ETF, which would require relief from Rule 201 of Regulation SHO.

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NYSE Group appreciates the opportunity to comment on the Commission's roundtable to address the market structure for thinly-traded exchange-listed securities.

Respectfully submitted,

Elizabeth K. King

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cc: Honorable Jay Clayton, Chairman
Honorable Kara M. Stein, Commissioner
Honorable Robert J. Jackson, Jr., Commissioner
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Brett Redfearn, Director, Division of Trading and Markets

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9 The Commission has provided such relief for certain index-based exchange-traded funds. *See* Securities Exchange Act Release No. 34-82234 (December 7, 2017) (File No. TP 18-04) (Order granting limited exemptions from Exchange Act Rule 10b-17 and Rules 101 and 102 of Regulation M to certain index-based ETFS), at n. 4.

10 17 CFR 270.22e-4.