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VIA E-MAIL

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C., 20549-1090

Re: Equity Market Structure Advisory Committee (EMSAC) (File No. 265-29)

Dear Mr. Fields:

The NYSE Group, Inc. ("NYSE" or "Exchange") appreciates the initiative that the Securities and Exchange Commission has taken to focus on U.S. equity market structure. We support the Commission's objectives in establishing the EMSAC "to provide the Commission with diverse perspectives on the structure and operations of the U.S. equities markets, as well as advice and recommendations on matters related to equity market structure."[1] Though NYSE believes the composition of the EMSAC and any recommendations of the Committee are severely flawed by not including representatives of retail investors, listed company interests and listing venues, NYSE will continue to participate in the public meetings of EMSAC and submit public comments when appropriate.

In this regard, the NYSE's comments concerning the recommendations of the EMSAC Regulation NMS Subcommittee ("NMS Subcommittee") for an access fee pilot and the Trading Venues Regulation Subcommittee ("TVR Subcommittee") are expressed below.

I. NMS Subcommittee Recommendations

As described in the NMS Subcommittee recommendations, the proposed access fee pilot ("Pilot") would reduce exchange access fee caps with the stated goal of measuring the impact on both market quality and marketplace behavior. For the reasons outlined below, NYSE strongly objects to the Pilot as proposed. Market structure reform should be constructed with the goal of providing measurable improvements to long-term

[1] Notice of Federal Advisory Committee Establishment (Release No. 34-74092; File No. 265-29) (January 20, 2015). Available at: https://www.sec.gov/rules/other/2015/34-74092.pdf.

investors and listed companies in terms of liquidity, efficiency, and capital formation, not to lower the direct costs of intermediaries at the expense of higher indirect costs to listed companies and investors.

A. The Premise for the Pilot Hurts Listed Companies and Investors

One of the NMS Subcommittee's stated premises for the Pilot asserts that "[m]any in the market believe that a motivation for ATS activity (not wholesaler activity) is economic, i.e., take fees are too high."[2] However, in reality, lower exchange access fees will not materially impact the use of off-exchange trading venues because these venues would continue to have advantages, as they are not bound by the same regulatory restrictions as exchanges. Off-exchange trading venues provide client discrimination, selective access, anonymity, and trading ahead of displayed liquidity – four powerful advantages that exchanges are strictly prohibited from offering due to regulatory restrictions that require fair treatment and open access to all participants. Consequently, these advantages, when combined with wider spreads as a result of lower rebates that degrade the quality of displayed liquidity, would enhance the attractiveness of dark trading venues and increase the volume of off-exchange trading, which is already at an all-time high.[3]

Broker-dealers have a best execution obligation when executing a transaction for or with a customer. In general, this duty requires a firm to use reasonable diligence to ascertain the best market so that the price to the customer is as favorable as possible under prevailing market conditions. Consistent with their best execution obligations, broker-dealers often seek out liquidity at non-exchange venues, as described below. In addition, the Order Protection Rule under Regulation NMS requires a broker-dealer to avoid trading through protected quotations and, thus, it must either execute a customer order at the prices of protected quotations or route to those protected quotations displayed on exchanges before executing a client order at a worse price.[4] Because when broker-dealers are unwilling to match the best price displayed on an exchange, the Order Protection Rule requires broker-dealers to access those best priced orders on exchanges, the SEC set a cap on the fee an exchange could charge for trading with those displayed orders. This cap is $0.003 per share, which means that when a retail investor places an order with their broker for 100 shares, if that order is routed to an exchange the most that the exchange will collect from the broker in executing that order is thirty cents, or about 1.5% - 4.3% of the average commission paid by the retail investor.[5] The remaining 95% of the commission is retained by the broker-dealer. As proposed, the Pilot recommended by the Subcommittee would ensure that brokers retain 99% of the commission.

[2] See NMS Subcommittee Recommendation at Pg. 3. Available at: https://www.sec.gov/spotlight/emsac/emsac-regulation-nms-subcommittee-recommendation-041916.pdf

[3] Off-exchange trading in the month of April, 2016 was at its all-time high of 37.4% of Consolidated Average Daily Volume.

[4] 17 CFR 240.611.

[5] This assumes a retail investor commission of $7-20 per trade.

Knowing the highly likely outcome of the Pilot, supported by data analysis as described below, the Pilot appears to be designed to reduce the direct costs to intermediaries of paying fees for accessing displayed quotations and to reduce the competiveness of exchanges relative to dark pools by eliminating incentives (currently funded by access fees) for posting better displayed prices on exchanges. The singular focus of the Pilot -- reducing access fees -- will not address another stated premise of the Pilot, that actual and perceived conflicts of interest and marketplace behavior arising from trading venue pricing structures should be reduced.[6]

In fact, rather than getting to the heart of the questions the NMS Subcommittee cites, the Pilot is explicitly designed to test investors' and listed companies' tolerance for *worsening* market quality. The NMS Subcommittee itself states clearly that early termination is an area for "further exploration" in the event of "significant deterioration in any of the measurement criteria," suggesting that the NMS Subcommittee has reason to believe that the Pilot could bring about harm to the public companies' securities in the Pilot and to investors. We question the validity of an exercise that is already known to present such significant risk.

B. Reducing Access Fees Will Impair Liquidity Provision

Market making and market quality are largely driven by incentives and corresponding obligations. A genuine attempt at answering questions related to pricing structures and marketplace behavior should be focused on increasing market maker benefits and corresponding obligations, not reducing them.

Market making is a service to investors seeking the ability to buy and sell securities at any time at a fair price. Market makers continuously bid and offer for each security so that investors can immediately liquidate or establish a position. For example, an investor with a long position seeking immediate liquidity could sell shares to a market maker who then holds the position until it can be sold to another investor. This is the service that NYSE Designated Market Makers ("NYSE DMMs") provide and, in doing so, NYSE DMMs take on the highest level of obligations to commit capital and maintain fair and orderly markets for a basket of securities. Under NYSE Rules, NYSE DMMs are expected to, and do, step in during times of market stress.[7]

NYSE DMMs are willing to take on these higher obligations in exchange for offsetting benefits, including rebates. It is the combination of incentives and significant obligations that allow NYSE DMMs to make a meaningful contribution to liquidity provision and pubic market quality. Reducing access fees, and possibly eliminating rebates without any other offsetting incentives, as the NMS Subcommittee has proposed, will reduce

[6] NMS Subcommittee Recommendations regarding "Framework for Potential Access Fee Pilot," (April 19, 2016). Available at: https://www.sec.gov/spotlight/emsac/emsac-regulation-nms-subcommittee-recommendation-041916.pdf.

[7] NYSE Rule 104, Dealings and Responsibilities of DMMs, set forth, among other things, the requirement for DMMs to maintain continuous two-sided quotes and fair and orderly markets, as well as requirement for the opening, reopening, and closing of for the securities for which a DMM is registered.

market maker incentives to quote aggressively. We do not need the Pilot to know that such a lack of incentives will result in wider quoted spreads and degradation of the publicly available liquidity.

Not only will the Pilot harm liquidity for the active securities that will be included in the Pilot, it will cause collateral damage to other less active securities that are not part of the Pilot, as market makers who lose an incentive to provide liquidity on exchanges in active securities will also no longer be willing to provide liquidity in less active securities. In other words, the Pilot as proposed would reduce access fees, and thus financial incentives, in active securities but will have an outsized impact on those market makers who have agreed to undertake the most substantial obligations in less active securities. At NYSE, a significant percentage of the rebates received by NYSE DMMs are earned in a far smaller percentage of securities in which the NYSE DMMs are obligated to quote. The majority of securities in the NYSE DMM portfolio trade infrequently and, therefore, a very high rebate level would be required to directly incent participation in less active securities if the rebate incentive for active securities is no longer available.

C. <u>Reducing Access Fees will Reduce Market Quality</u>

Maintaining narrow spreads and liquidity while lowering access fees can only be achieved with additional positive incentives to provide displayed liquidity. The Pilot ignores this fact. The Pilot proposes to reduce access fees, without any corresponding positive incentive, such as a trade-at component, to display liquidity. Such a pilot will predictably result in wider spreads. Lower access fees will directly enrich intermediaries who will retain a larger portion of their trading commissions. The wider spreads, caused by the lower access fees, will have two effects: (1) they will indirectly benefit intermediaries by making it easier to trade on off-exchange venues and (2) they will harm investors' by widening the national best bid and offer ("NBBO") on which broker-dealers rely to execute orders on dark venues. As spreads widen on exchanges, an investor looking to sell will likely receive a lower price on off-exchange venues than they receive today because the broker-dealer is basing the execution price on the prices displayed on exchanges. For example, if the best displayed buy order in today's market is $10.05, the best displayed price in a market without incentives might be $10.04. Consequently, the broker executing a retail investor's sell order would only be required to execute that investor's order at $10.04. This may not sound like a lot of money individually, but the Pilot suggests that the broker-dealers should save $0.003 per trade while the retail investor should pay $0.01 more.

NYSE analyzed data to demonstrate this point by looking at three groups of exchange pairs to evaluate differences in market quality. For purposes of our analysis, an "exchange pair" included two exchanges in the same exchange family with shared technology, market model, and data center location, but with different pricing structures (e.g., Nasdaq and NasdaqBX). Our market quality measures were quoted spreads, displayed shares, time at the NBBO, and time and size at the best price. We evaluated active common stocks and exchange traded products ("ETPs") for the first quarter of 2016, July 2015 and August 24, 2015. The Exchange's analysis of these exchange pairs shows that exchanges with higher rebates for providing liquidity had substantially better market quality during all tested time periods. A summary of NYSE's analysis is attached as Appendix.

With respect to shifting order flow to off-exchange venues, NYSE supports proposals designed to protect and reward displayed liquidity and foster the benefits of exchange trading, namely transparency and price discovery, for our listed companies and investors. The SEC Staff has acknowledged "displayed prices generated by exchanges therefore create a positive external reference and help assure the efficient functioning of our capital markets."[8] The Pilot, however, is clearly designed to impair the publicly displayed "external reference." By reducing access fees, the stated goal is to reduce rebates (i.e., incentives) for displaying liquidity; the result will be to widen spreads in displayed prices and drive order flow to less regulated off-exchange venues.

In addition, shifting more activity to off-exchange venues establishes a dangerous framework for when times of volatility arise. As data show, during times of uncertainty or volatility, market participants direct more order flow to exchanges. In fact, the SEC's Flash Crash Report[9] and the events of August 24, 2015 showed that broker-dealers, who on normal trading days execute orders by internalizing them or routing them to ATSs, were unwilling or unable to source liquidity through those venues and instead leaned on exchanges for liquidity because market makers on exchanges were willing to provide liquidity through the volatility. A primary reason that liquidity was available at exchanges is that exchanges are where market makers are required to display liquidity, some more than others, and those market-makers are compensated for providing that service in part through the use of rebates. We are concerned that lowering access fees and rebates could lead to greater fleeting liquidity and larger price distortions in more volatile periods.

D. <u>Application of Fee Limitations to Non-Displayed Orders on Exchanges</u>

The NMS Subcommittee recommendations also suggest that the Pilot should limit the fees charged by exchanges for trading with both displayed and non-displayed liquidity. Often overlooked is that the fee caps adopted by the SEC in Regulation NMS, and which the Pilot would reduce, sets the maximum transaction fee that exchanges can charge for trading with an exchange's displayed quotation. This rate-setting was justified by the Regulation NMS requirement that market participants could not trade at prices worse than these displayed quotations. Expanding the SEC's rate setting to non-displayed orders on exchanges would be a fundamental expansion of Regulation NMS, without any basis. The hypocrisy of the NMS Subcommittee in making this suggestion

[8] Memorandum from SEC's Division of Trading and Markets to EMSAC regarding Maker-Taker Fees on Equities Exchanges, (October 20, 2015), citing the SEC's Concept Release on Equity Market Structure (File No. S7-02-10 (January 14, 2010). Available at: https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf.

[9] "Findings Regarding the Market Events of May 6, 2010." Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues (September 30, 2010). Available at: https://www.sec.gov/news/studies/2010/marketevents-report.pdf.

is highlighted by the explicit rejection of applying the same fee caps to non-displayed liquidity on off-exchange venues.

E. Alternative Approaches to the Pilot

NYSE has consistently called for a balanced approach to addressing issues related to incentive structures in the marketplace. In July 2014, NYSE explicitly recommended the lowering of access fee caps in combination with, among other things, a ban on maker-taker pricing schemes and the introduction of a "trade-at" requirement. Our recommendations -- presented as part of a comprehensive package -- reflect the interconnectedness of the marketplace. Isolated changes to the equity markets should not be made; changes will inevitably affect other parts of the regulatory ecosystem. Understanding and balancing these considerations is the way that Regulation NMS was adopted and the way we would expect the SEC would move forward with any changes.

Relatedly, we note that the NMS Subcommittee recommendations do not include ideas to address widely perceived problems of conflicts between broker-dealers and customers. The recommended Pilot purports to investigate the impacts of lower access fees on order routing behavior, but would do nothing to investigate ways to benefit public investors without putting listed company displayed liquidity at risk. We understand that there may be another subcommittee that is considering issues pertaining to such broker/customer issues as best execution, payment for order flow, and disclosure requirements, and advise the Commission to review and incorporate those recommendations into any access fee Pilot that is designed to observe marketplace behavior related to pricing.

II. TVR Subcommittee Recommendations

The TVR Subcommittee acknowledges in its report that "overall, the current regulatory structure for trading venues works well and generally is operating fairly and effectively." The TVR Subcommittee nevertheless makes four recommendations that, it says, will formalize and make more transparent interactions between trading venues and other market participants and address "potential conflicts and tensions." The TVR Subcommittee does not, however, identify, let alone attempt to analyze, these purported conflicts and tensions.

NYSE believes that these recommendations will not rectify any potential conflicts and tensions in the market. Instead, most of the recommendations are either unnecessary, because existing law already covers the issues and markets are operated in line with the views expressed by the TVR Subcommittee, or the recommendations are designed only to serve the narrow interests of the organizations represented on the TVR Subcommittee at the expense of exchanges. We comment in detail on the specifics of each of the recommendations below and believe that all but one of the recommendations should not be approved by the full EMSAC.

A. <u>Recommendation #1 – Evaluate and clarify exchange functions subject to SRO immunity and increase rule-based exchange liability levels.</u>

There is an unbroken line of rulings by United States courts recognizing the existence and importance of Self-Regulatory Organization ("SRO") immunity. The courts uniformly recognize that without immunity an SRO's "exercise of its quasi-governmental functions would be unduly hampered by disruptive and recriminatory lawsuits."[10] Immunity is designed to provide SROs with "breathing room to exercise their powers" without having to worry that regulatory decisions might "engender endless litigation."[11] And while the specific phrasing used in different cases may vary, the courts fundamentally agree that immunity applies whenever specific acts or practices undertaken by an SRO relate to or are connected with the exercise of regulatory power.[12] Importantly, SRO immunity does not turn on whether the particular conduct in question is mandated by the Commission or undertaken pursuant to a Commission directive; immunity turns instead solely on the nature of the SRO's action in question.[13]

All government agencies, including the Commission, have immunity when they exercise their statutory authority. This immunity is critical to the ability of agencies and their staff to confidently and effectively exercise governmental authority without the potential that a court would second guess such action years later. Any limits on the analogous immunity applicable to SROs would increase the risks of liability and costs associated with exercising the self-regulatory responsibilities required under the Exchange Act.

In light of the court decisions that establish the law of immunity and the important policy reasons underlying those decisions, the Commission should not attempt its own delineation of the contours of SRO immunity driven by recommendations from a committee consisting of firms involved in legal action challenging current law. Such an exercise would embroil the Commission in potential conflicts with a well-developed and growing body of controlling case law and put at risk the role that SROs play in enforcing their own rules and securities laws, allowing the Commission to focus its limited resources.

At the same time the TVR Subcommittee recommends that the Commission circumscribe SRO immunity, it also recommends that exchanges be required to increase their rule-based liability levels to uniform levels across the board. The TVR Subcommittee recommends that exchanges engaged in activity that may expose

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[10] *See*, e.g. *D'Alessio v. NYSE*, 258 F.3d 93, 105 (2d Cir. 2001).
[11] *See*, e.g. *In re NYSE Specialists Sec. Litig*., 503 F.3d 89, 97 (2d Cir. 2007).
[12] *See, e.g., Standard Inv. Chartered, Inc. v. Nat'L Ass'n of Sec. Dealers, Inc.*, 637 F.3d 112, 115-17 (2d Cir. 2011); *Weissman v. Nat'l Ass'n of Sec. Dealers*, *Inc.*, 500 F.3d 1293, 1297 (11th Cir. 2007); *DL Capital Grp., LLC v. Nasdaq Stock Market., Inc.*, 409 F.3d 93, 97 (2d Cir. 2005); *Sparta Surgical Corp., v. Nat'l Ass'n of Sec. Dealers, Inc.,* 159 F.3d 1209, 1215 (9th Cir. 1998).
[13] *See, e.g.*, *In re Barclays Liquidity Cross and High Frequency Trading Litig*., 126 F. Supp.3d 342, 358 (S.D.N.Y. 2015) (appeal pending); *Rabin v. Nasdaq OMX PHLX LLC*, 2016 WL 1619272 at **13-14 (E.D. Pa. April 21, 2016).

participants to increased risks of financial exposure, such as IPOs and opening and closing auctions, ought to be made to increase their rule-based liability levels even more. This recommendation is nothing more than a transparent attempt to make it more expensive for exchanges to operate without providing any facts or analysis demonstrating that existing liability levels are insufficient. Tellingly, the TVR Subcommittee does not suggest that other market participants, such as ATSs and broker-dealers whose operations pose far greater risks to investors on a continuing basis than the actions of exchanges, be required to increase their reserves to protect against the losses their conduct may cause.[14]

B. <u>Recommendation #2 – Changes should be implemented to the NMS Plan governance structure and the role of NMS Plan Advisory Committees (AC) should be expanded, formalized and made uniform.</u>

The second recommendation of the TVR Subcommittee consists of a series of proposals designed to transform advisors to the NMS Plans into decision-makers. The TVR Subcommittee, for example, would give the AC the right to vote on matters coming before the NMS Plan Operating Committees (OC) and would require the NMS Plan Participants ("Participants") to justify any actions they decide to take inconsistent with the vote of the AC. Likewise, the TVR Subcommittee would require any proposals initiated by the AC to be voted upon and formally responded to by the Participants. And on top of all that, the TVR Subcommittee would make the advisors a self-perpetuating group because the TVR Subcommittee would give the advisors the right to nominate their own successors once the original group was in place. This is certainly a unique approach to how advisors should function and we question whether broker-dealers or portfolio managers who have direct oversight of investor assets would accept the same advisory committee structure.

The Congress designated SROs as the entities best suited to develop and operate NMS Plans because, unlike broker-dealers or other market participants, SROs have the obligation to enforce compliance with the Exchange Act, the rules promulgated under the Exchange Act by the Commission, and the SROs' own rules.[15] Under Section 6(b) of the Exchange Act, as well as Commission rules, an SRO, for example, must establish and maintain a rulebook outlining the operations of the SRO. Those rules must be filed with the Commission prior to implementation and are subject to the notice-and-comment review procedures of the Commission.

Importantly, SRO rules are required by the Exchange Act to be *"designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the*

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[15] *See* 15 U.S.C. §78f(b)(1).

public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers…."[16] Broker-dealers are not subject to any such obligations.

Moreover, the 1975 amendments to the Exchange Act specifically required the Commission to rely on SROs to design and operate NMS Plans.[17] That is why Rule 608 of Regulation NMS only authorizes two or more SROs acting jointly to file NMS Plans, and that is why the Rule goes on to require each SRO to comply with the terms of any effective NMS Plan of which the SRO is a sponsor or a participant. Broker-dealers or other industry advisors to the Plans simply have no such obligation. In fact, other than ensuring their own compliance with the securities laws and rules of SROs, broker-dealers and other industry participants are free to and do act entirely in their own commercial interests unfettered by statutory or public interest concerns. If the advisors to the NMS Plans were allowed effectively to interfere with the actions of the operating committees of the Plans, the advisors might be able to block or slow down changes the SROs felt were necessary to discharge their statutory obligations.

In adopting Regulation NMS, the Commission balanced the need for public input with the regulatory nature of the NMS Plans by mandating that certain NMS Plans be amended to include a minimum of five AC members representing: (1) a broker-dealer with a substantial retail investor customer base; (2) a broker-dealer with a substantial institutional customer base; (3) an ATS; (4) a data vendor; and (5) an investor.[18] In addition, all NMS Plan OCs regularly seek input from industry participants to help in the development and implementation of the Plans. The structure established by the Commission is working as intended. For example:

- The Advisory Committee for both the CTA and UTP operating committees consist of eight industry representatives, including representation from a retail broker, vendor, institutional investor, alternative trading system and prime broker. These representatives are a mix of market structure and market data experts.[19] The advisors provide valuable input considered by the SRO Plan participants. In turn, the advisors are provided advance notice of all agenda items, and discussion and resolution of those items occur within the presence of the advisors. The CTA and UTP Plans permit executive sessions of the operating

[16] 15 U.S.C. §78f(b)(5).

[17] *See* Section 11A(a)(3) of the Exchange Act states, "The Commission is authorized in furtherance of the directive in paragraph (2) of this subsection [the directive to facilitate the establishment of a national market system]—(B) … to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this Act 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).

[18] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 Fed. Reg. 37496 (June 29, 2005), at 277.

[19] Available at: https://www.ctaplan.com/advisory-committee; http://www.utpplan.com/DOC/UTP%20ADVISORY%20COMMITTEE%2010.24.15.pdf

committee when a majority of the participants determine that the business in question requires confidential treatment, but the items discussed at those executive sessions are limited and no material actions affecting the operations of the Plans are undertaken without disclosure to, and discussion with the advisors.

- The Consolidated Audit Trail Operating Committee created the Development Advisory Group (DAG) to assist in the development of the Consolidated Audit Trail. The DAG is comprised of the SROs, as well as 24 representative firms (broker-dealers, market makers, vendor firms, and a clearing firm) and three industry trade associations (FIF, SIFMA, and STA). Industry trade associations represent numerous securities firms, banks, asset managers, traders, vendors, exchanges ATSs, and broker-dealers.[20]

- The Tick Size Pilot Operating Committee created a Data Collection Advisory Committee to include input from a vendor, market maker, prime broker and industry association representative to assist in the development of data collection FAQs. Several adjustments were made to the NMS Plan requirements mandated by the Commission as a result of the feedback received from the advisory committee members.

- The Limit-Up/Limit-Down Operating Committee created an Advisory Committee that mirrors representation and operation of other Advisory Committees.

Finally, the TVR Subcommittee also recommends that NMS Plan provisions requiring unanimous votes be limited, and that voting rights among plan participants should be reallocated so that each "exchange family" is allocated only one vote instead of one vote for each individual exchange participant. Neither proposal is justified. The CTA and UTP Plans, for example, appropriately provide for unanimity only for amendments to the Plans themselves and for termination of the UTP SIP. Two-thirds votes are required for changing the fees charged by the Plans. Most other matters require only majority votes. And the Exchange Act and the Commission's rules all treat each registered exchange, regardless of ownership, as a separate entity; there is no principled basis for altering that treatment when exchanges become NMS Plan Participants.

C. Recommendation #3 – If a rule change will require technology changes by the industry that will be prescribed through the publication of Technical Specifications, the SEC and the SROs should link the implementation date of those rule changes to the

[20] http://www.catnmsplan.com/web/groups/catnms/@catnms/documents/appsupportdocs/sro_cat_background_112315.pdf. at 6.

publication of Technical Specifications or FAQs where appropriate.

The TVR Subcommittee's third recommendation essentially is to ensure that the industry is provided sufficient advance notice of technology changes, accompanied by FAQs and required technical specifications. While seemingly appropriate and reasonable, the recommendation is overly broad and designed to cover both NMS Plan technology changes as well as individual SRO technology changes. NYSE appreciates that when NMS Plans are implemented or amended, there can often be timelines established by the Commission that interfere with technology planning for both SROs and broker-dealers. Because NMS Plans are by design market-wide, the recommendation is appropriate for the Commission to consider for NMS Plans.

However, as it pertains to individual SROs, broker-dealers are members of SROs and are not required to be a member of all SROs. In fact, many broker-dealers are only members of a single SRO and, as it applies to fulfilling their best-execution obligations, can use that SRO to route orders in compliance with Reg NMS on the member's behalf. In cases where a broker-dealer is a member of an SRO and may need to make systems changes to operate with the exchange systems, SROs work with their members to ensure that they have plenty of time to code for those changes.

Finally, the TVR Subcommittee offers no evidence that NMS Plans or SROs are routinely imposing technology changes without sufficient advance notice that technology changes are on the horizon.[21] Therefore, while one aspect of the recommendation might warrant further review by the Commission, it is unclear that this recommendation will have any positive impact on the regulation of trading venues, which is what the TVR Subcommittee was tasked with reviewing.

D. Recommendation #4 -- SEC should work to formalize by Rule the centralization of common regulatory functions across SROs into a single regulator.

The TVR Subcommittee's final recommendation is that the Commission should work to formalize by rule the centralization of common regulatory functions across SROs into a single regulator. In making this suggestion the TVR Subcommittee recognizes, however, that removing all regulatory functions from exchanges is not warranted. Indeed, NYSE recently re-insourced regulatory functions it had previously delegated to

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[21] In fact, the CTA and UTP OCs regularly consult with their advisors and market participants about technology changes in advance of implementation. The UTP Operating Committee, for example, recently announced a migration by its SIP to Nasdaq's INET technology platform. Available at: http://www.nasdaqtrader.com/TraderNews.aspx?id=utp2016-01. The committee made this announcement on February 1, 2016, a full eight months in advance of the scheduled October 2016 implementation. The eight months' notice was twice as much as the 120 days advance notice FISD recommends for major technology changes. *See* FISD Best Practice Recommendations on Market Data Service Levels, Response Times and Communication Procedures, http://www.siia.net/Portals/0/pdf/FISD/Service%20Level%20and%20Communications/Public%20Documents/BPR%20Exchange%20Level%20Service%20Improvement%20v5.0.pdf, at p. 6.

FINRA because, for among other reasons, NYSE is able to handle surveillance of its own markets much more efficiently and can be more proactive in raising with its members potential problems based on its real time surveillance of its markets. The result will be healthier markets.

The TVR Subcommittee's recommendation implies that enhanced cross market surveillance and the consistent application of SRO rules are drivers for more centralization of common regulatory functions. While NYSE acknowledges that there can be benefits to consistent rules and the elimination of "rule arbitrage," it believes that centralization is not the only means to accomplish these goals. In particular, we note that FINRA currently performs regulatory functions for a number of exchanges through regulatory services agreements and is allocated regulatory responsibilities under 17d-2 agreements that are approved by the Commission. Importantly, NYSE believes that the technical expertise with regard to individual exchange activities (such as options market making on the NYSE Amex Options and NYSE Arca options exchanges) should not be sacrificed for a central regulator.

<u>Conclusion</u>

NYSE appreciates having been invited to participate in the public meetings of the EMSAC and will continue to be a vocal proponent of recommendations that are focused on improving the experience for listed companies and investors.

Sincerely,

Elizabeth K. King

cc: Mary Jo White, Chair
Michael Piwowar, Commissioner
Kara Stein, Commissioner
Stephen Luparello, Director, Division of Trading & Markets
Gary Goldsholle, Deputy Director, Division of Trading & Markets
David Shillman, Associate Director, Division of Trading & Markets
Dan Gray, Senior Special Counsel, Division of Trading & Markets

Appendix

1250 Common Stocks with Market Cap above $3 billion
Q1 2016

	Rebate/ Fee for Adding Liquidity (non-tier)	Rebate / Fee for Removing Liquidity (non-tier)	Market Share (volume weighted)	Intraday ADV	Average Quoted Spread (time weighted)	Displayed Shares at NBBO	% Time at NBBO	% Time Best Price & Largest Size
Nasdaq	($0.0020)	$0.0030	16.4%	639,545,774	17.0	946.2	72.0%	31.8%
BX	$0.0020	($0.0006)	2.0%	87,793,691	554.8	129.5	23.4%	2.2%
Difference			14.4%	628.5%	-96.9%	630.7%	48.5%	29.5%
EDGX	($0.0020)	$0.0029	6.7%	285,376,888	50.4	639.4	41.6%	5.8%
EDGA	$0.0005	($0.0020)	2.4%	102,439,400	174.2	201.0	22.1%	1.4%
Difference			4.3%	178.6%	-71.1%	218.1%	19.5%	4.5%
BZX	($0.0020)	$0.0030	6.7%	567,862,132	27.7	632.9	47.0%	6.7%
BYX	$0.0018	($0.0015)	4.2%	181,813,406	78.6	257.8	32.7%	3.8%
Difference			2.4%	212.3%	-64.7%	145.5%	14.3%	3.0%

130 ETPs with AUM above $3 billion
Q1 2016

	Rebate/ Fee for Adding Liquidity (non-tier)	Rebate / Fee for Removing Liquidity (non-tier)	Market Share (volume weighted)	Intraday ADV	Average Quoted Spread (time weighted)	Displayed Shares at NBBO	% Time at NBBO	% Time Best Price & Largest Size
Nasdaq	($0.0020)	$0.0030	10.6%	106,234,400	4.6	7525.2	77.9%	14.0%
BX	$0.0020	($0.0006)	2.6%	27,109,335	62.7	1568.1	37.4%	0.8%
Difference			8.0%	291.9%	-92.7%	379.9%	40.5%	13.1%
EDGX	($0.0020)	$0.0029	7.8%	80,871,188	5.1	6497.7	80.0%	14.5%
EDGA	$0.0005	($0.0020)	3.6%	37,950,774	20.2	2525.4	46.1%	1.8%
Difference			4.2%	113.1%	-74.6%	157.3%	33.9%	12.7%
BZX	($0.0020)	$0.0030	9.2%	567,862,132	4.8	7815.0	78.0%	14.0%
BYX	$0.0018	($0.0015)	5.6%	58,776,738	7.5	2158.0	51.6%	2.8%
Difference			3.6%	866.1%	-36.4%	262.1%	26.4%	11.3%

1250 Common Stocks with Market Cap above $3 billion
Jul-15

	Rebate/ Fee for Adding Liquidity (non-tier)	Rebate / Fee for Removing Liquidity (non-tier)	Market Share (volume weighted)	Intraday ADV	Average Quoted Spread (time weighted)	Displayed Shares at NBBO	% Time at NBBO	% Time Best Price & Largest Size
Nasdaq	($0.0020)	$0.0030	16.8%	501,805,488	12.7	1,023.3	73.0%	31.0%
BX	$0.0020	($0.0006)	2.1%	69,614,927	98.7	129.0	28.0%	2.4%
Difference			14.7%	620.8%	-87.2%	693.2%	45.1%	28.6%
EDGX	($0.0020)	$0.0029	5.8%	187,371,283	94.4	605.8	42.0%	5.2%
EDGA	$0.0005	($0.0020)	2.7%	87,695,328	112.4	216.7	24.4%	1.3%
Difference			3.1%	113.7%	-16.0%	179.6%	17.6%	4.0%
BZX	($0.0020)	$0.0030	7.0%	464,233,123	23.6	733.7	49.8%	7.3%
BYX	$0.0018	($0.0015)	4.1%	137,052,010	53.3	223.1	32.6%	2.3%
Difference			2.9%	238.7%	-55.7%	228.9%	17.3%	5.0%

130 ETPs with AUM above $3 billion
Jul-15

	Rebate/ Fee for Adding Liquidity (non-tier)	Rebate / Fee for Removing Liquidity (non-tier)	Market Share (volume weighted)	Intraday ADV	Average Quoted Spread (time weighted)	Displayed Shares at NBBO	% Time at NBBO	% Time Best Price & Largest Size
Nasdaq	($0.0020)	$0.0030	11.0%	71,214,818	4.0	9422.7	77.2%	15.5%
BX	$0.0020	($0.0006)	3.1%	21,083,817	48.9	2662.1	34.6%	1.5%
Difference			7.9%	237.8%	-91.9%	254.0%	42.6%	14.0%
EDGX	($0.0020)	$0.0029	6.9%	46,448,206	12.2	8359.3	73.7%	13.8%
EDGA	$0.0005	($0.0020)	4.1%	27,621,091	30.1	3504.7	39.1%	1.4%
Difference			2.9%	68.2%	-59.4%	138.5%	34.5%	12.5%
BZX	($0.0020)	$0.0030	9.8%	464,233,123	4.6	10455.1	74.8%	16.5%
BYX	$0.0018	($0.0015)	5.7%	38,841,123	9.2	2501.2	43.5%	2.6%
Difference			4.1%	1095.2%	-50.0%	318.0%	31.3%	13.9%

1250 Common Stocks with Market Cap above $3 billion
Aug 24, 2015

	Rebate/ Fee for Adding Liquidity (non-tier)	Rebate / Fee for Removing Liquidity (non-tier)	Market Share (volume weighted)	Intraday ADV	Average Quoted Spread (time weighted)	Displayed Shares at NBBO	% Time at NBBO	% Time Best Price & Largest Size
Nasdaq	($0.0020)	$0.0030	19.9%	1,287,630,335	28.9	674.8	66.6%	30.5%
BX	$0.0020	($0.0006)	2.1%	144,597,171	175.5	85.3	24.7%	2.9%
Difference			17.9%	790.5%	-83.6%	690.9%	41.9%	27.7%
EDGX	($0.0020)	$0.0029	6.9%	477,825,809	152.4	377.8	34.6%	6.4%
EDGA	$0.0005	($0.0020)	2.5%	174,330,277	169.2	136.7	19.3%	1.5%
Difference			4.4%	174.1%	-9.9%	176.4%	15.3%	4.9%
BZX	($0.0020)	$0.0030	8.0%	1,164,289,662	46.8	405.0	40.9%	7.7%
BYX	$0.0018	($0.0015)	3.8%	266,735,349	90.3	136.9	30.4%	3.3%
Difference			4.2%	336.5%	-48.1%	195.9%	10.6%	4.3%

130 ETPs with AUM above $3 billion
Aug 24, 2015

	Rebate/ Fee for Adding Liquidity (non-tier)	Rebate / Fee for Removing Liquidity (non-tier)	Market Share (volume weighted)	Intraday ADV	Average Quoted Spread (time weighted)	Displayed Shares at NBBO	% Time at NBBO	% Time Best Price & Largest Size
Nasdaq	($0.0020)	$0.0030	12.7%	303,364,435	16.2	3,715.4	61.7%	13.6%
BX	$0.0020	($0.0006)	2.6%	66,116,064	153.4	1,439.7	25.5%	1.4%
Difference			10.1%	358.8%	-89.4%	158.1%	36.2%	12.2%
EDGX	($0.0020)	$0.0029	7.4%	183,387,043	22.8	3,073.7	56.9%	13.1%
EDGA	$0.0005	($0.0020)	3.6%	91,541,281	89.0	1,729.0	30.9%	2.4%
Difference			3.7%	100.3%	-74.4%	77.8%	26.0%	10.7%
BZX	($0.0020)	$0.0030	11.8%	1,164,289,662	18.0	4,164.2	58.4%	14.1%
BYX	$0.0018	($0.0015)	4.8%	120,668,158	39.3	1,329.8	42.2%	5.6%
Difference			7.0%	864.9%	-54.2%	213.1%	16.2%	8.5%