INVESTMENT COMPANY INSTITUTE

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March 14, 2024

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1091

Re: Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Twenty-Third Amendment to the National Market System Plan to Address Extraordinary Market Volatility (Release No. 34-99545; **File No. 4-631**)

Dear Ms. Countryman:

The Investment Company Institute[1] is writing in support of the proposed amendments to the National Market System (NMS) Plan to Address Extraordinary Market Volatility (the "Plan") at issue in the Securities and Exchange Commission's (SEC) order instituting proceedings (the "Order") to determine whether to approve or disapprove such amendments.[2] The Plan, in general, governs the market-wide limit up-limit down ("LULD") mechanism that sets forth procedures to prevent trades in individual NMS securities from occurring outside of specified price bands. The proposed amendments were filed by the Financial Industry Regulatory Authority (FINRA) and the registered national securities exchanges (collectively, the "Plan

[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $33.4 trillion invested in funds registered under the US Investment Company Act of 1940, serving more than 100 million investors. Members manage an additional $9.2 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to certain collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London and carries out its international work through ICI Global.

[2] Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Twenty-Third Amendment to the National Market System Plan to Address Extraordinary Market Volatility by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., The Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, MIAX Pearl, LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc., Exchange Act Release No. 99545, 89 Fed. Reg. 13389 (Feb. 22, 2024), *available at* https://www.sec.gov/files/rules/sro/nms/2024/34-99545.pdf.

Participants") on October 24, 2023, with the filing being noticed for comment on November 14, 2023.[3]

The proposed amendments would amend Appendix A to the Plan to provide that all exchange-traded products ("ETPs") be assigned to Tier 1 of the Plan, except for single stock ETPs which will be assigned to the same tier as their underlying stock, and in each case adjusted for any leverage factor. Appendix A currently provides that Tier 1 includes all NMS stocks included in the S&P 500 Index, the Russell 1000 Index, as well as "eligible" ETPs, with Tier 1 ETP eligibility covering non-leveraged ETPs that trade over $2,000,000 notional consolidated average daily volume ("CADV") during a specified half year period. Non-eligible ETPs are classified as Tier 2. Tier 1 and Tier 2 classification results in different price bands for LULD trading halts, with Tier 1 ETPs having a 5% price band and Tier 2 ETPs having a 10% price band.[4]

ICI members, as the issuers of many of the ETPs that will be subject to the reduced-price bands under the proposed amendments,[5] have a strong interest in ensuring the integrity, quality, and well-functioning of the equity markets and ETF market structure specifically. Further, given the retail investor base of ETPs generally, ICI members have a strong interest in advancing market reforms that benefit and protect retail investors. For these reasons, ICI strongly supports the proposed amendments and believes the SEC should issue an order approving the proposed amendments. ICI's reasoning underlying its support aligns with the letter submitted jointly by multiple market participants (the "Joint Letter") in response to the Notice, and ICI strongly supports the arguments and rationale laid out in that letter.[6]

The SEC originally implemented LULD to protect retail shareholders from executing trades at aberrant prices, often caused by transitory gaps in liquidity or severe price volatility stemming from reasons unrelated to a security's fundamental value. The development of LULD directly

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[3] Notice of Filing of the Twenty-Third Amendment to the National Market System Plan to Address Extraordinary Market Volatility by Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, MIAX Pearl, LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc., Exchange Act Release No. 98928, 88 Fed. Reg. 81131 (Nov. 21, 2023), *available at* https://www.govinfo.gov/content/pkg/FR-2023-11-21/pdf/2023-25543.pdf ("Notice").

[4] These price bands apply to ETPs with a reference price of more than $3. During the last 25 minutes of the trading day, the Tier 1 price band for securities with a reference price of more than $3 increases to 10%. Price bands for Tier 1 and Tier 2 securities with a reference price of $3 or less are the same, with the price bands being broader based on the security's reference price.

[5] ICI members are limited to, with respect to those impacted by the proposed amendments, ETPs that are investment companies regulated under the 1940 Act.

[6] Letter from Samara Cohen, Chief Investment Officer of ETF and Index Investments, BlackRock, *et al.*, to Vanessa Countryman, Secretary, SEC (Dec. 18, 2023), *available at* https://www.sec.gov/comments/4-631/4631-316879-826042.pdf.

stemmed from the harms experience during the "Flash Crash" of 2010.[7] As stated by then-Chair Mary Schapiro:

> A staggering total of more than $2 billion in individual investor stop loss orders is estimated to have been triggered during the half hour between 2:30 and 3 p.m. on May 6. As a hypothetical illustration, if each of those orders were executed at a very conservative estimate of 10 percent less than the closing price, then those individual investors suffered losses of more than $200 million compared to the closing price on that day.[8]

LULD has largely been an extreme success in protecting retail investors from experiencing similar losses or aberrantly priced executions derived from temporary market dislocations.

ICI fully supports incremental and measured amendments to market structure that will further protect retail investors and strengthen investor reliance on US markets, which based on the submitted data the proposed changes will achieve. In particular, the Plan Participants submitted data, covering trading and quoting in all ETPs during the period from Q4 of 2019 through Q2 of 2021, demonstrating proposed market impacts. During market periods of extreme volatility, such as March 2020 during the COVID pandemic, the narrower price bands did result in more trading halts. However, over the entire study period, a median of nine ETPs per day were impacted by the narrower price bands. Over these periods of extreme volatility, the narrower price bands likely would have prevented retail investors from executing trades at inferior prices that may have been occurring due to transitory gaps in liquidity. In such cases, it may be beneficial to trigger a trading pause that will permit a reopening auction, which can more efficiently aggregate liquidity, determine equilibrium prices, reset the price bands, and further mitigate volatility. The data further underscores this investor protection aspect as after five minutes, more than 70% of the trades and nearly 75% of the shares that would have triggered a LULD trading pause had their last quote return to price levels prior to the move that caused the breach of the theoretical Tier 1 price band. Thus, a trading pause would have prevented investors from executing at those inferior prices.

Further, ICI does not believe the proposed amendments would impose any burden on market competition. As noted in the Joint Letter, when the Plan has previously been amended, such as when the LULD price bands were halved for all securities in the first 15 minutes of regular trading hours and for Tier 2 securities priced above $3.00 in the last 25 minutes of regular trading hours, there was no great market disruption or surge in trading halts. Instead, market participants adapted to the narrower price bands without material impact to market structure or competition. Actually, the proposed amendments may improve competition, as all ETPs, other

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[7] In fact, there is still fairly recent litigation related to the Flash Crash, with investors trying to be made whole from losses suffered during that extreme transitory gap in liquidity. *See, e.g.*, Kessev Tov, LLC v. Does(s), No. 20-cv-04947 (N.D. Ill. Jun. 30, 2022) (seeking recourse due to securities sold at volatile prices necessary to meet a margin call made during the Flash Crash); Grady v. United States, No. 15-746C (Fed. Cl. Nov. 23, 2015) (retail investor claiming losses of $106,935.92 during the Flash Crash).

[8] Mary L. Schapiro, Chairman, SEC, Speech at the Economic Club of New York: Strengthening Our Equity Market Structure (Sept. 7, 2010), *available at* https://www.sec.gov/news/speech/2010/spch090710mls.htm.

than single-security ETPs, will have consistent LULD parameters. For ETPs tracking the same reference index or underlying basket of securities, the fact that Tier 2 ETPs are allowed to have executions at a wider price band than Tier 1 ETPs may lead to disadvantageous executions that affect such Tier 2 ETPs' tracking error and related reference points retail investors consider when investing in a particular ETP. It is worth noting that ETPs were originally assigned to LULD Tiers based on an assumption that lower-volume ETPs were more suited for wider price parameters. The data included with the proposed amendments demonstrates that such an assumption was not accurate, as Tier 2 ETPs on average exhibit lower quote volatility than Tier 1 non-ETP stocks. ICI supports the proposed amendments as they will benefit competition by placing ETPs on a level competitive ground with one another.

Finally, in response to the SEC's question on leveraged ETPs, ICI emphasizes the importance of maintaining the leverage factor adjustment. Leveraged ETPs may be traded intra-day to access volatility or large price movements. While members did not raise concerns with leveraged ETPs being classified as Tier 1 ETPs, it is important that the leverage factor adjustment be maintained given the unique nature of leveraged ETPs.

We appreciate the opportunity to comment on the Order and urge the SEC to approve the proposed amendments. If you have any questions, please contact Kenneth Fang, Associate General Counsel, at kenneth.fang@ici.org, or Kevin Ercoline, Assistant General Counsel, at kevin.ercoline@ici.org.

Regards,

/s/ Kenneth Fang
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