August 16, 2024

Submitted electronically

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Securities Exchange Act Release No. 99403 (File No. 4-757)

Dear Ms. Countryman:

MEMX LLC ("MEMX"), Investors Exchange LLC ("IEX"), MIAX Pearl LLC ("MIAX Pearl") and Long-Term Stock Exchange, Inc. ("LTSE") (collectively, the "Non-Legacy Exchanges") appreciate the opportunity to provide comments to the U.S. Securities and Exchange Commission ("Commission") on the above-referenced national market system ("NMS") plan regarding consolidated equity market data (the "Plan").[1] We submit this joint comment letter to

[1] See Securities Exchange Act Release No. 99403 (January 19, 2024), 89 FR 5002 (January 25, 2024) (File No. 4-757).

address comments submitted by Cboe Global Markets, Inc. ("Cboe"), NYSE Group, Inc. ("NYSE"), and Nasdaq, Inc. ("Nasdaq") (collectively, the "Incumbent Exchange Groups"). Those comments contend that the Commission must modify the allocation of votes among self-regulatory organizations ("SROs") represented on the Plan's operating committee using a methodology that deviates from the methodology originally prescribed by the Governance Order and the Consolidated Tape ("CT") Plan,[2] each as substantively upheld in a challenge filed by the Incumbent Exchange Groups in the Court of Appeals for the D.C. Circuit ("D.C. Circuit").[3] Given the fact that the Incumbent Exchange Groups have already had an opportunity to challenge this feature of the Plan, and lost in that portion of their challenge in court, there is no reason for the Commission to allow them to relitigate this issue in a last-ditch effort to maintain control over the Plan when required governance changes finally go into effect.

As initially formulated, the Governance Order and CT Plan would have allocated votes among both SROs and certain specified categories of non-SRO representatives, with SROs allocated two-thirds of the votes on the CT Plan's operating committee and non-SRO representatives allocated the remaining one-third.[4] In addition, SRO votes were to be allocated on the basis of corporate affiliation, with an unaffiliated SRO or SRO group each given one vote, and an additional vote given to an unaffiliated SRO or SRO group with a consolidated equity market share of more than 15% for four of the six consecutive months preceding the vote.[5] The Incumbent Exchange Groups took issue with both of these features and sued in the D.C. Circuit.

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2 See Securities Exchange Act Release Nos. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) ("Governance Order"); 92586 (August 6, 2021), 86 FR 44142 (August 11, 2021) ("CT Plan Approval Order") (File No. 4-757).

3 See Nasdaq v. SEC, 38 F.4th 1126, 1131 (D.C. Cir. 2022).

4 See supra note 2.

5 Id.

Although the court found that the Securities and Exchange Act of 1934 (the "Act") does not permit the Commission to allocate votes to market participants that do not share in regulatory responsibilities allocated to SROs, it separately rejected the challenge to the Commission's method of allocating voting rights among those SROs. On this issue, the court considered all the arguments made by the three petitioners and, in a detailed analysis, determined that the arguments were all "without merit."[6] The court held instead that "nothing in Section 11A appears to require the strict one-to-one voting representation by individual SROs contemplated"[7] by the Incumbent Exchange Groups. Moreover, the D.C. Circuit acknowledged the Commission's policy rationale for the chosen allocation of votes among SROs, including: (1) "the disproportionate influence affiliated exchange groups currently exercise"[8] over plan matters; and (2) that "bloc voting has diluted the voting power of unaffiliated SROs over time, and that this concentration of 'voting power in a small number of exchange group stakeholders, which also have inherent conflicts of interest,' has 'perpetuated disincentives… to make improvements to the SIP data products.'"[9]

The court's ruling is clear: the Commission is free to consider the policy objectives it identified in allocating votes, and the mandated allocation of votes among SROs was proper. However, the Incumbent Exchange Groups, having failed once, now seek multiple bites at the same apple. Non-SROs that do not "share authority…in planning, developing, operating, or regulating a national market system"[10] are excluded from plan governance under the D.C. Circuit's ruling, and the Commission has dutifully removed non-SRO votes under the Amended Order. With

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6 See supra note 3.

7 Id.

8 Id.

9 Id.

10 15 U.S. Code § 78k–1.

this change, the incumbents can no longer attack the Plan on the ground that it gives power to parties that lack self-regulatory responsibilities. So now they have shifted focus and argue that votes must be allocated based on market share thresholds that they believe better represent their competitive position within the U.S. equities market (and that coincidentally would allow them to maintain control over the Plan). But they ignore the fact that nothing in the Governance Order, nor the court's decision upholding the Governance Order's allocation of votes among SROs, was based on an assumption that the three Incumbent Exchange Groups would continue to maintain a specific market share level. Instead, both the Commission's order and the court's decision were based on the factors recited above, and the Commission is not required to now change course based on the same petitioners' self-interested complaints about current market share trends.

Regardless, the D.C. Circuit's order "grant[ed] the petitions for review"[11] solely "as to the inclusion of non-SROs on the CT Plan's operating committee."[12] While the court therefore "vacate[d] the CT Plan in its entirety,"[13] it did not do the same thing to the underlying Governance Order. "With respect to the Governance Order,"[14] the court instead "vacate[d] only those portions authorizing the invalid non-SRO representation, *leaving the remainder of the Governance Order intact*."[15] (Emphasis added) The Incumbent Exchange Groups have therefore already had their proverbial day in court. And the court has chosen to uphold the allocation of votes among SROs, including the fifteen percent threshold for receiving a second vote on the operating committee.

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11 See supra note 3.

12 Id.

13 Id.

14 Id.

15 Id.

The fact that the Incumbent Exchange Groups have continued to lose market share in the intervening years while the court and the Commission reviewed their complaints does not turn the Plan's voting structure on its head. For one, those trends started long before the D.C. Circuit reached its decision in the case and therefore do not somehow create a new legal or factual question for the Commission (or some future court). And relative market share trends are by their nature fluid and subject to constant change. Nothing in the D.C. Circuit's ruling suggests that a transitory change in market share between competitors is relevant to the question of how to properly effectuate the SROs' shared regulatory responsibilities in the Plan's voting framework, or that the proposed voting structure is now, after its long procedural history, inconsistent with the Act.

* * *

For the reasons discussed, the Non-Legacy Exchanges believe that the Plan's proposed allocation of votes, including the 15% cutoff for receiving a second vote, is consistent with the Act. We therefore respectfully request that the Commission approve this feature of the Plan without change. To do otherwise would continue to provide the three Incumbent Exchange Groups with "disproportionate influence"[16] over the Plan, exacerbating "inherent conflicts of interest"[17] and "perpetuat[ing] disincentives… to make improvements to the SIP data products"[18] to the detriment of public investors. The D.C. Circuit has already ruled that the proposed allocation of votes among SROs is consistent with the Act. Changing it at the behest of the Incumbent Exchange Groups would only perpetuate the very problems that the governance changes are designed to address.

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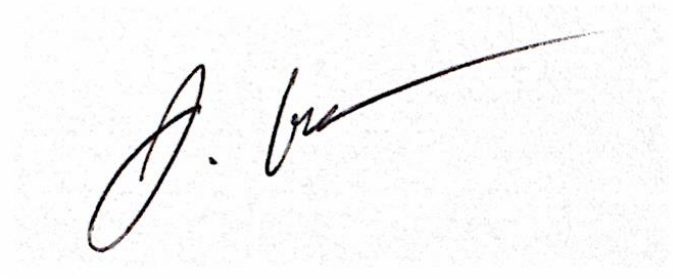
16 Id.

17 Id.

18 Id.

Sincerely



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