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Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Notice of Proposed Order Directing the Exchanges and FINRA to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (File No. 4-757)

Dear Ms. Countryman:

On behalf of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (together, the “NYSE Exchanges”), NYSE Group, Inc. (“NYSE”) respectfully submits this supplemental comment letter in response to the January 8, 2020 proposed order (the “January Proposal”) from the Securities and Exchange Commission (“SEC” or the “Commission”) ordering the creation of a new national market system plan for the consolidation and distribution of equity market data (the “New NMS Plan”).¹

NYSE submitted an initial comment letter regarding the January Proposal on February 5, 2020 (the “Initial Comment Letter”). Shortly after, on February 14, 2020, the Commission issued an unexpected, yet closely related, rulemaking proposal regarding “Market Data Infrastructure” (the “February Proposal,” together with the January Proposal, the “Proposals”).² While citing similar concerns and promising similar benefits, the Proposals appear to contain fundamentally different plans for the consolidation and distribution of equity market data.³ The Commission has not explained its expectations

¹ See Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (File No. 4-757).

² See Securities Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020) (File No. S7-03-20). NYSE intends to provide, in a separate comment letter, a more complete response to the myriad issues raised by the February Proposal.

³ Indeed, the Proposals are so closely related that the Commission itself noted that many of the NYSE’s comments submitted in response to the January Proposal address matters subsequently proposed in the February Proposal, but were submitted without the benefit of knowing the Commission’s intent to address these issues piecemeal. See February Proposal at 16728 n.8 (“In response to the [January Proposal], the NYSE submitted a

regarding the interaction between the Proposals, has not described how it analyzed the cumulative or comparative costs and benefits of the Proposals, and did not address how market participants should reconcile apparent fundamental inconsistencies in the Commission's plans for the consolidation and distribution of market data relating to the national market system.

Therefore, to provide sufficient information—and time—to allow market participants a full and fair opportunity to respond to the Commission's plans, NYSE writes to request that the Commission withdraw both Proposals and propose a single, unified, and well-reasoned rule to address the issues discussed in the January and February Proposals. As explained further below, taking action based on the current record would result in significant confusion, would deprive the Commission of valuable feedback and information, and would be inconsistent with the Commission's responsibilities under the APA.⁴

The Commission's Proposals Require Clarification

Both Proposals are aimed at the same asserted problems: that current market data delivered via the Securities Information Processors ("SIPs") is outdated and flawed, and that alleged conflicts of interest on the part of the exchanges and FINRA (collectively the "Self-Regulatory Organizations" or "SROs") are purportedly inhibiting improvements to the SIP data, including with respect to its speed, content, and pricing.⁵

But the Proposals take fundamentally different approaches to many of the same issues. The January Proposal operates under the assumption that the SIPs will continue serving as the exclusive consolidators of equity market data, while imposing various governance changes that are claimed to further mitigate any potential conflicts of interest. In stark contrast, the February Proposal—in the Commission's own words—"would fundamentally change the national market system and the role of the [NMS] Plans" by

comment letter that also discussed a number of market structure issues that are addressed in this release (e.g., expanding SIP data content and modernizing SIP data delivery such as through a potential competing consolidator model)... As with various other comments referenced herein ... [the NYSE comment letter] was not provided with reference to the specific proposals discussed in this release.")

⁴ The Commission asserts that the February Proposal "builds upon and complements" the January Proposal, but fails to offer any explanation or support for that characterization. See SEC Press Release, SEC Proposed to Modernize Key Market Infrastructure Responsible for Collecting, Consolidating, and Disseminating Securities Market Data.

⁵ See January Proposal at 2166 ("In the Commission's view, changes in the market have heightened an inherent conflict of interest between the Participants' collective responsibilities in overseeing the Equity Data Plans and their individual interests in maximizing the viability of proprietary data products that they sell to market participants."); February Proposal at 16764 ("The Commission preliminarily believes . . . [the February Proposal would] help mitigate the influence of certain conflicts of interest inherent in the existing exclusive SIP model.").

abandoning the exclusive-data-provider model, and seeking to foster instead a decentralized, competitive market for providers of consolidated data.⁶

The divergent Proposals create confusion and conflict because it is unclear how the Proposals interact with one another, including the extent to which the February Proposal would supersede or alter the January Proposal. For instance, the January Proposal requires the operating committee of the new single NMS Plan to “select plan processors and an independent plan administrator, and adopt a fee schedule.”⁷ However, the February Proposal would “remove references to a plan processor for NMS stock because under the proposed decentralized consolidation model, there would not be plan processors.”⁸ Similarly, the January Proposal includes governance changes meant to encourage the SROs to expand the categories of equity market data provided by the SIPs. But the February Proposal includes a new rule mandating specific changes to be made to the categories of consolidated equity data offered to market participants.⁹

For these and other reasons, it is simply not clear what the Commission is currently proposing. The Commission must clarify and harmonize the Proposals, and then there must be an adequate opportunity to comment on the Commission’s clarified plan.

The February Proposal Presents New APA Concerns with the January Proposal

NYSE previously commented on the APA concerns raised by the January Proposal. The issuance of the February Proposal heightens and compounds those concerns. By way of illustration only:

- ***Failure to explain why both Proposals are needed*** – The premise of the January Proposal is that the SROs are “monopolistic providers” of market data and that the current NMS Plans are constrained by conflicts of interest.¹⁰ But the February Proposal suggests that it would “foster competition” and purportedly

⁶ See February Proposal at 16792.

⁷ See January Proposal at 2185.

⁸ See February Proposal at 16750.

⁹ See February Proposal at 16736 (“[U]nder proposed Rule 600(b)(20), core data would be defined as the following information with respect to quotations for and transactions in NMS stocks: (1) quotation sizes; (2) aggregate quotation sizes; (3) best bid and best offer; (4) national best bid and national best offer; (5) protected bid and protected offer; (6) transaction reports; (7) last sale data; (8) odd-lot transaction data disseminated pursuant to the effective national market system plan or plans required under Rule 603(b) as of [date of Commission approval of this proposal]; (9) depth of book data; and (10) auction information.”)

¹⁰ See January Proposal at 2168.

address the alleged conflicts of interest.¹¹ Thus, the January Proposal seeks to mitigate a problem that the February Proposal hopes to eliminate. The Commission has offered no explanation for why the January Proposal remains necessary in light of the February Proposal, in violation of the fundamental APA rule that an agency must consider alternative approaches and explain why they are rejected.¹² Here, the Commission not only does not explain why the February approach was rejected in January, it proposed both sequentially without analyzing why both are necessary.

- ***Failure to analyze first Proposal in light of the second*** – The Commission purported to justify the January Proposal in light of the *current* exclusive data SIP distribution model. For example, the January Proposal argues that its proposed governance changes are appropriate in a context where the SIPs operate as the sole and exclusive providers of consolidated market data. Nowhere does the January Proposal explain or analyze why the same governance changes would be reasonable or necessary under the model envisioned by the February Proposal—one in which the NMS Plans are expected to serve a fundamentally different purpose.¹³ By failing to analyze or justify the January Proposal in light of *all* of the relevant changes contemplated, the Commission acted arbitrarily and capriciously.
- ***Failure to reconcile or explain inconsistencies*** – As noted above, there are apparent contradictions and inconsistencies between the two Proposals, each envisioning a future state that is inconsistent with the other. Failure to address these issues is an independent APA violation.¹⁴
- ***Failure to provide meaningful opportunity for comment*** – Given the lack of clarity and other failures described above, industry participants have not been afforded a meaningful opportunity to comment on the Commission’s plans, and they will not have such an opportunity until the above deficiencies are addressed.

¹¹ See February Proposal at 16764.

¹² See City of Brookings Mun. Tel. Co. v. F.C.C., 822 F.2d 1153, 1169 (D.C. Cir. 1987) (holding the rule arbitrary and capricious based on the agency’s failure to consider or discuss an alternative discussed in detail in two comment letters); Yakima Valley Cablevision, Inc. v. F.C.C., 794 F.2d 737 n. 36, 746 (D.C. Cir. 1986) (“The failure of an agency to consider obvious alternatives has led uniformly to reversal.”)

¹³ See February Proposal at 16793 (explaining that the expected role of “the effective national market system plan(s) for NMS stocks” would be to “monitor[] the overall performance of competing consolidators to seek to ensure that the decentralized consolidation model is operating soundly.”).

¹⁴ See Bus. Roundtable v. SEC, 647 F.3d 1144, 1153-54 (D.C. Cir. 2011) (Commission’s discussion of the impact of the rule on the frequency of director nominations was “internally inconsistent[,]” and therefore arbitrary).

Implementation of either or both Proposals before interested parties are given a full and fair opportunity to participate in the rulemaking process would constitute an independent APA violation.¹⁵

* * *

As explained in NYSE's Initial Comment Letter, NYSE continues to support and encourage the Commission's efforts to meaningfully evaluate and consider improvements to key components of the national market system, including to the content and the delivery of market data products. However, the confusion caused by the Commission's issuance of these two parallel, inherently intertwined, and incompatible proposals further supports NYSE's view that the Commission should pursue its desired policy through a formal, consolidated, rulemaking process. NYSE asks that the Commission withdraw its existing Proposals and propose a single, unified, well-reasoned rule, and then provide interested parties with a full and fair opportunity to respond, as required by the APA.

Respectfully submitted,



Elizabeth K. King

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

¹⁵ Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n, 921 F.3d 1102, 1115 (D.C. Cir. 2019) ("To meet the rulemaking requirements of section 553 of the APA, an agency "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully." (internal quotation marks omitted)).