



July 6, 2018

Via Electronic Mail (rule-comments@sec.gov)

Mr. Brent J. Fields, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: Transaction Fee Pilot for NMS Stocks, File No. S7-05-18

Dear Mr. Fields:

The Healthy Markets Association<sup>1</sup> appreciates the opportunity to supplement our May 24, 2018 comments<sup>2</sup> to the Commission's transaction fee pilot proposal (the Proposal).<sup>3</sup>

In particular, we write to share our concerns with NYSE leveraging its unique position to solicit comments in furtherance of its efforts to resist the Proposal. We also wish to offer greater details and slight revisions to our views on the handling of ETFs and ATs, as well as the data and metrics to be utilized in the pilot.

### ***NYSE Is Leveraging Its Position As A Listing Exchange and Regulator***

In recent weeks, NYSE has solicited its corporate issuers to write the Commission in opposition to this rulemaking. An excerpt of an email that we understand was recently sent by a NYSE official to a representative of at least one of its regulated companies is attached as **Exhibit 1**.

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<sup>1</sup> The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets. To learn more about Healthy Markets, please see our website at <http://www.healthymarkets.org>.

<sup>2</sup> Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, May 24, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3704495-162465.pdf> (Healthy Markets Letter)..

<sup>3</sup> *Transaction Fee Pilot for NMS Stocks*, SEC, 83 Fed. Reg. 13008 (Mar. 26, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-03-26/pdf/2018-05545.pdf>.



We are troubled that NYSE is soliciting assistance from companies that are simultaneously subject to fees, burdens, oversight, and punishment<sup>4</sup> imposed by NYSE officials. Further, in soliciting issuer comments, NYSE has repeatedly argued that the pilot will cost investors \$1 billion per year or more--a number which has already been sufficiently debunked as purely fictional.<sup>5</sup> Put simply, NYSE is soliciting companies over which it has significant leverage, while also attempting to scare them into action by using an unsupportable number.

At the same time, NYSE does not appear to have informed the companies that investors are overwhelmingly demanding the pilot. This omission is significant. To date, over 50 asset owners and managers with trillions of dollars in assets under management have expressed their support for the pilot, including:

Abrams Capital Management,<sup>6</sup> AJO,<sup>7</sup> Alaska Permanent Fund Corporation,<sup>8</sup> Alberta Investment Management Corporation,<sup>9</sup> Ariel Investments,<sup>10</sup> Arizona State Retirement System,<sup>11</sup> Blackrock,<sup>12</sup> Birch Bay Capital,<sup>13</sup> Board of Education Retirement System of

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<sup>4</sup> For example, NYSE sets its listing standards and enforces them, including through delisting companies. We note that listing standards and delisting risks are often extremely important issues for smaller issuers.

<sup>5</sup> See, e.g., Letter from Haim Bodek, Decimus Capital Markets LLC, to Brent J. Fields, SEC, June 26, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3925055-167022.pdf>; Letter from John Ramsay, IEX, to Brent J. Fields, SEC, June 27, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3968434-167099.pdf>; see also Remarks by Doug Clark, Investment Technology Group (included in John McCrank, *NYSE says U.S. SEC plan to limit exchange rebates would hurt investors*, Reuters, June 1, 2018, available at <https://www.reuters.com/article/us-nyse-sec/nyse-says-u-s-sec-plan-to-limit-exchange-rebates-would-hurt-investors-idUSKCN1IX5X4>).

<sup>6</sup> Endorsement by Dennis Abrams, Abrams Capital Management (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 3, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>7</sup> Letter from Sean D. Paylor, AJO, to Brent J. Fields, SEC, May 7, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3595785-162344.pdf>.

<sup>8</sup> Endorsement by Angela M. Rodell, Alaska Permanent Fund Corporation (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 14, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>9</sup> Endorsement by Richard Wan, Alberta Investment Management Corporation (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 16, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>10</sup> Endorsement by Cheryl Cargie, Ariel Investments (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 5, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>11</sup> Letter from Karl Polen, Arizona State Retirement System, to Brent J. Fields, SEC, May 21, 2018, (included Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 5, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>12</sup> Letter from Hubert De Jesus and Joanne Medero, Blackrock, to Brent J. Fields, SEC, May 23, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3701799-162463.pdf>.

the City of New York,<sup>14</sup> Brandes Investment Partners,<sup>15</sup> CalPERS,<sup>16</sup> CalSTRS,<sup>17</sup> Capital Group,<sup>18</sup> Chicago Equity Partners,<sup>19</sup> Copeland Capital Management,<sup>20</sup> Davis Selected Advisers,<sup>21</sup> Discovery Capital,<sup>22</sup> Driehaus Capital Management,<sup>23</sup> Franklin Templeton Investments,<sup>24</sup> Glenmede Investment Management,<sup>25</sup> GreenLight Capital,<sup>26</sup> Healthcare of Ontario Pension Plan,<sup>27</sup> Illinois Public Pension Fund Association,<sup>28</sup> Invesco,<sup>29</sup> Janus

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<sup>13</sup> Letter from Michael Jacejko, Birch Bay Capital LLC, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718526-162483.pdf>.

<sup>14</sup> Endorsement by Scott C. Evans, Board of Education Retirement System of the City of New York (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 5, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>15</sup> Letter from Brent Woods and Joseph Scafidi, Brandes Investment Partners, to Brent J. Fields, April 10, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3419059-162184.pdf>.

<sup>16</sup> Letter from Don Pontes, CalPERS, *et. al* to Brent J. Fields, SEC, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>.

<sup>17</sup> Endorsement by June Kim, California State Teachers Retirement System (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 4, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>18</sup> Letter from Matt D. Lyons and Peter D. Stutsman, Capital Group, to Brent J. Fields, May 30, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3732662-162505.pdf>.

<sup>19</sup> Endorsement by Tereck Fares, Chicago Equity Partners (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 6, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>20</sup> Letter from Anthony W. Godonis, Copeland Capital Management LLC, to Brent J. Fields, SEC, May 18, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3665664-162431.pdf>.

<sup>21</sup> Endorsement by Christopher C. Davis, Davis Selected Advisers (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 7, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>22</sup> Endorsement by Michael M. Liu, Discovery Capital (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 8, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>23</sup> Endorsement by Jason Vedder (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 9, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>24</sup> Endorsement by David A. Lewis, Franklin Templeton Investments (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 10, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>25</sup> Endorsement by Melissa Hinmon, Glenmede Investment Management (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 11, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>26</sup> Endorsement by Daniel Roitman, GreenLight Capital (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 12, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>27</sup> Endorsement by Adrian Mitchell, Healthcare of Ontario Pension Plan (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 9, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>28</sup> Endorsement by James M. McNamee, Illinois Public Pension Fund Association (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 1 5, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

Henderson Investors,<sup>30</sup> Maverick Capital,<sup>31</sup> MFS Investment Management,<sup>32</sup> Miller Value Partners,<sup>33</sup> New York City Employees' Retirement System,<sup>34</sup> New York City Fire Pension Plan,<sup>35</sup> New York City Police Pension Fund,<sup>36</sup> New York State Teachers Retirement System,<sup>37</sup> Nuveen,<sup>38</sup> Oaktree Capital,<sup>39</sup> Ontario Municipal Employees Retirement System,<sup>40</sup> Ontario Teachers Pension Plan,<sup>41</sup> OppenheimerFunds,<sup>42</sup> Pershing Square Capital Management,<sup>43</sup> San Diego City Employees' Retirement System,<sup>44</sup> San

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<sup>29</sup> Letter from Kevin Cronin, Invesco, to Brent J. Fields, SEC, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3712175-162394.pdf>.

<sup>30</sup> Endorsement by Daniel B. Royal, Janus Henderson Investors (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 13, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>31</sup> Endorsement by Lee Stanford Ainslie III, Maverick Capital (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 14, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>32</sup> Letter from Heidi W. Hardin, MFS, to Brent J. Fields, SEC, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3712713-162397.pdf>.

<sup>33</sup> Endorsement by William H. Miller III, Miller Value Partners, LLC (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 15, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>34</sup> Endorsement by Scott C. Evans, New York City Employees Retirement System (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 5, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>35</sup> Endorsement by Scott C. Evans, New York City Fire Pension Plan (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 5, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>36</sup> Endorsement by Scott C. Evans, New York City Police Pension Fund (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 5, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>37</sup> Letter from Thomas K. Lee, *et. al*, New York State Teachers Retirement System, to Brent J. Fields, SEC, May 23, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3701708-162391.pdf>.

<sup>38</sup> Letter from Mary E. Keefe, Nuveen, LLC, to Brent J. Fields, SEC, May 23, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3702570-162464.pdf>.

<sup>39</sup> Endorsement by William Kelly, Oaktree Capital (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 16, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>40</sup> Letter from Brent Robertson and Rob Gouley, OMERS, to Brent J. Fields, SEC, May 15, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3647325-162406.pdf>.

<sup>41</sup> Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>.

<sup>42</sup> Letter from Cynthia Lo Bessette, *et al*, OppenheimerFunds, to Brent J. Fields, SEC, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3713492-162479.pdf>.

<sup>43</sup> Endorsement by William Ackman, Pershing Square Capital Management, L.P. (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 5, Apr. 6, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>44</sup> Endorsement by Elizabeth Crisafi, San Diego City Employees' Retirement System (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 7, May 25, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

Francisco Employees' Retirement System,<sup>45</sup> Sawgrass Asset Management,<sup>46</sup> Scoggin Management,<sup>47</sup> Southeastern Asset Management,<sup>48</sup> SouthernSun Asset Management,<sup>49</sup> State of Wisconsin Investment Board,<sup>50</sup> Teachers Retirement System of the City of New York,<sup>51</sup> Third Avenue Management,<sup>52</sup> TRowePrice,<sup>53</sup> Vanguard,<sup>54</sup> Vontobel Asset Management,<sup>55</sup> Wellington Management Company,<sup>56</sup> and Wyoming Retirement System.

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Additionally, several investor-focused trade associations and organizations have also expressed their support for the pilot, including the Consumer Federation of America,<sup>58</sup>

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<sup>45</sup> Endorsement by Kurt Braitberg, San Francisco Employees' Retirement System (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 10, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>46</sup> Endorsement by Tim Christiansen, Sawgrass Asset Management (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 18, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>47</sup> Endorsement by Curtis Schenker, Scoggin Management, L.P. (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 19, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>48</sup> Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>.

<sup>49</sup> Endorsement by William P. Halliday, SouthernSun Asset Management (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 21, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>50</sup> Endorsement by Brian A. Hellmer, State of Wisconsin Investment Board (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 8, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>51</sup> Endorsement by Scott C. Evans, Teachers Retirement System of the City of New York (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 5, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>52</sup> Endorsement by Michael Warlan, Third Avenue Management, LLC (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 22, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>53</sup> Letter from Mehmet Kinak, TRowePrice to Brent J. Fields, June 12, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3832746-162769.pdf> (notably, pressing for the implementation of the pilot as both an asset manager and issuer of securities that could be subject to it).

<sup>54</sup> Letter from John Brennan, Vanguard, to Brent J. Fields, SEC, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3712174-162393.pdf>.

<sup>55</sup> Endorsement by Gary Thompson, Vontobel Asset Management (included in Letter from O. Mason Hawkins, Southeastern Asset Management, *et. al*, to Brent J. Fields, SEC, at 23, Apr. 6, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3393100-162164.pdf>).

<sup>56</sup> Letter from Lisa Mahon Lynch, Wellington Management Company LP, to Brent J. Fields, SEC, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3713138-162480.pdf>.

<sup>57</sup> Endorsement by Sam Masoudi, Wyoming Retirement System (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 13, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>58</sup> Letter from Micah Hauptman, Consumer Federation of America, to Brent J. Fields, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3712425-162475.pdf>.



Council of Institutional Investors,<sup>59</sup> Investment Company Institute,<sup>60</sup> Healthy Markets Association,<sup>61</sup> Managed Funds Association,<sup>62</sup> and the National Conference on Public Employee Retirement Systems.<sup>63</sup>

In light of this significant support from investors and their advocates, NYSE's self-serving assertions that it opposes the pilot -- and corporate issuers should too -- because NYSE wants to save investors money is absurd. Further, NYSE's outreach places executives of corporate issuers in a position wherein they may either please their listing exchange or their shareholders,<sup>64</sup> but not both.

Over the longer term, the Commission should view this latest maneuver by NYSE as just another example of the conflicts of interest inherent in having for-profit exchanges also serve as market regulators. Despite years of discussions and statements by Democratic and Republican Commissioners alike,<sup>65</sup> these issues have never been fully examined or addressed by the Commission.

In fact, when the Commission first explicitly authorized the demutualization of exchanges in 1998,<sup>66</sup> there was almost no discussion of the conflicts of interest that

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<sup>59</sup> Letter from Jeff P. Mahoney, Council of Institutional Investors, to Brent J. Fields, SEC, May 10, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3621501-162362.pdf>.

<sup>60</sup> Letter from Susan M. Olsen, Investment Company Institute, to Brent J. Fields, SEC, May 23, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3696206-162389.pdf>.

<sup>61</sup> Healthy Markets Letter.

<sup>62</sup> Letter from Stuart J. Kaswell, Managed Funds Association, to Brent J. Fields, SEC, May 15, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3649250-162410.pdf>.

<sup>63</sup> Endorsement by Hank Kim, National Conference on Public Employee Retirement Systems (included in Letter from Kevin Duggan, Ontario Teachers Pension Plan, *et. al*, to Brent J. Fields, SEC, at 12, May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718537-162487.pdf>).

<sup>64</sup> Collectively, these investors and organizations represent trillions of dollars in assets under management, and many of these firms are likely to be some of the largest shareholders in many US public companies.

<sup>65</sup> See, e.g., Remarks by Hon. Robert J. Jackson, Jr., SEC Commissioner, Before the Healthy Market Structure 2018, June 27, 2018. These concerns are not partisan. Six years ago, former Republican Commissioner Dan Gallagher declared that “[f]or decades now, we’ve been building upon a self-regulatory framework premised on circumstances that no longer exist, a framework that permeates every aspect of market structure.” Remarks of Hon. Dan Gallagher, SEC Commissioner, Before the SIFMA 15th Annual Market Structure Conference, Oct. 4, 2012, available at <https://www.sec.gov/news/speech/2012-spch100412dmghtm>.

<sup>66</sup> *Regulation of Exchanges and Alternative Trading Systems*, SEC, 63 Fed. Reg. 70844 (Dec. 22, 1998), available at <https://www.gpo.gov/fdsys/pkg/FR-1998-12-22/pdf/98-33299.pdf> (amending the process for registering as an exchange).

were created by having exchanges serve as both for-profit market participants and regulators.<sup>67</sup>

At the time, it would have been difficult to predict the extremes to which exchanges' conflicts of interest would drive the evolution of market structure. For example, there was no discussion about the potential proliferation of order types, market data costs, connectivity fees, order routing incentives, or pricing tiers. Nor was there any discussion of exchange sovereign immunity.

Two decades later, all of these issues are in need of Commission intervention.

We question whether it is possible to reconcile and effectively manage the conflicts of interest inherent in having for-profit market participants also serving as regulators. No market regulator should be permitted to leverage its position over third parties to shape regulations so as to preserve its profit margins. Not with this Proposal.<sup>68</sup> Not ever.

### ***The Pilot Should Include Comprehensive Data Collection From ATs***

As we previously wrote, we agree with the Commission's decision to collect data on all equities exchanges. We also understand that including ATs in the full pilot could lead to "significant complexity and delays." While the Commission could wholly include or wholly exclude ATs from the pilot based upon the already well-established public record,<sup>69</sup> we believe a middle ground may be most effective.

The Commission should consider requiring ATs to participate in the same information reporting regime as the exchanges,<sup>70</sup> even if they are not participating in the other substantive portions of the pilot itself. This information would not just improve the transparency of ATs, but would also allow for much more comprehensive data collection and analysis of order routing and execution behavior. This improved data

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<sup>67</sup> *Regulation of Exchanges and Alternative Trading Systems*, SEC, 63 Fed. Reg. 70844, 70880 (Dec. 22, 1998), available at <https://www.gpo.gov/fdsys/pkg/FR-1998-12-22/pdf/98-33299.pdf> (stating that "[t]he Commission believes that it is possible for a for-profit exchange to meet the standards set forth in Section 6(b) of the Exchange Act.").

<sup>68</sup> The facts as we understand them raise questions as to whether NYSE's efforts to solicit comments in this instance are consistent with its legal and regulatory obligations.

<sup>69</sup> For example, as noted in the Proposal, the Commission could continue to distinguish ATs because they are currently subject to a different regulatory regime, and operate with different economic parameters. Alternatively, the Commission could elect to include ATs (and even other execution venues) in the pilot based upon the simple fact that the essential service they provide, matching buyers and sellers for execution, is similar to that offered by registered exchanges.

<sup>70</sup> See Proposal, at 13029 (re transaction fee summary) and 13031 (re order routing data).

collection and analysis would directly address concerns raised by the exchanges as to both the differential treatment of ATSs and the lack of potentially critical information.

### ***ETPs Should be Rotated Through Various Buckets***

We have reviewed many of the comments regarding the potential inclusion of ETPs. Some have argued for their complete inclusion, while others have argued for their complete exclusion. Others have argued for rotating ETPs through the different buckets during the life of the pilot. And still others have argued to put similar ETPs in the same buckets.

We urge the Commission to rotate ETPs throughout the various buckets during the life of the pilot. We believe strongly that ETPs must be included in the pilot. At the same time, we also worry that consistent, sustained fee and rebate differences between otherwise similar ETPs could potentially negatively impact some issuers.

If the Commission elects to not rotate ETPs, as a next best alternative, we would urge the Commission to attempt to place similar ETPs in the same bucket, even though it may be difficult to clearly and consistently define “similar” ETPs. If this approach is taken, we urge the Commission to adopt a clear, written guideline to define “similar” ETPs for the purposes of the pilot.

### ***The Commission Should Expand Its Data and Metrics Collection***

An obvious goal of the pilot is to determine the impacts of financial conflicts of interest on order routing behavior, execution quality and market quality.

As currently structured, the pilot will not sufficiently capture the effects on execution quality and routing behavior. We therefore reiterate our request for the Commission to bolster metrics to capture execution quality to better understand behavior and associated conflicts of interest. In particular, we were struck by the overwhelming sensibility of the submission provided by Pragma Securities, and urge the Commission to adopt clearly articulated measures for execution quality along the lines of those outlined in their letter.<sup>71</sup>

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<sup>71</sup> Letter from David Mechner, Pragma Securities to Brent J. Fields, SEC, May 14, 2018, *available at* <https://www.sec.gov/comments/s7-05-18/s70518-3643358-162401.pdf>.



We further believe that this additional information would more directly address some of the concerns raised by the exchanges regarding the economic analysis, particularly as it may relate to the utility of the pilot in exploring the impact of the pilot on execution quality and market quality.

### ***Conclusion***

Thank you for the opportunity to highlight our concerns with the comment process in this rulemaking and to supplement our prior comments.

We urge the Commission to revise and adopt the Proposal without delay.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch  
Executive Director

Cc: Hon. Jay Clayton, Chairman  
Hon. Michael S. Piwowar, Commissioner  
Hon. Kara M. Stein, Commissioner  
Hon. Hester Peirce, Commissioner  
Hon. Robert J. Jackson, Jr., Commissioner  
Brett Redfearn, Director of the Division of Trading and Markets  
Stephanie Avakian, Co-Director of the Division of Enforcement  
Steven Peikin, Co-Director of the Division of Enforcement

# Exhibit 1: NYSE Email

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## **RE: Important SEC issue that could impact trading in your stock**

On behalf of my colleagues at the New York Stock Exchange, the listing venue for your company's stock, I'm writing to alert you to an important issue that may negatively impact trading in a broad cross-section of securities trading on U.S markets. We view this matter with urgency, and believe you will too.

The Securities and Exchange Commission (SEC) has proposed what's known as a "Transaction Fee Pilot" which we believe, if adopted by the SEC, would harm the quality of the prices displayed by public, lit equities exchanges such as the NYSE. It should alarm you that, in turn, the Pilot could harm companies, like yours, that list and trade on these exchanges by interfering with liquidity and price formation.

Ultimately, we believe the SEC's proposed action would be costly to investors and companies alike who depend on our markets functioning at their best. In advance of initiating this ill-considered experiment, the SEC has requested public comment. We have submitted ours, which is linked here. We urge you to comment as well to share your views. Your voice will bring serious weight to this issue. In the remainder of this note, please allow us to provide some context to the issue.

### Background

Trading in securities markets has become increasingly complex in the U.S. A broker can now trade your company's stock on 13 licensed exchanges and more than 50 off-market venues, or "dark pools," run by investment banks and brokers. When brokers are routing an order, they must consider each of these different venues with the aim of ensuring the best trade execution for their client. A core role for regulated exchanges, like the New York Stock Exchange, is to attract trading interest and set prices in a transparent manner. Investors and their brokers rely on the prices displayed on the NYSE's equity markets when trading on our markets, other exchanges, or even the dark pools.

To fulfill our mission, the NYSE uses a range of tools that are subject to regulatory oversight, including trading fees and rebates, to attract participation and activity to our



markets. These mechanisms are designed to benefit investors and issuers by establishing high quality, transparent prices for securities.

#### The SEC Transaction Fee Pilot

The SEC, in this unprecedented example of governmental price-setting, is proposing to undertake a two-year pilot program to examine the role these well-functioning pricing mechanisms play in broker routing behavior. This Pilot would dictate new price controls on the trading fees and rebates relating to public exchanges (but not “dark pools”) and will impact many, but not all, securities. To conduct its experiment, the SEC proposes creating three test pilot groups, each comprised of 1,000 listed stocks, or 3,000 in total. Each test group would employ varying levels of allowable access fees and rebates. The 5,200 remaining stocks not selected for a test group would comprise the control group.

We believe the negative impact of reducing incentives to liquidity providers is clear: market makers will be willing to buy at slightly lower prices and sell at slightly higher prices. As a result, investors building a position in pilot securities will pay more, and receive less, when they exit.

#### Taking Action

The NYSE, along with other licensed exchanges, has filed its comment letter with the SEC. We have voiced our concerns for listed companies included in the pilot, and for the health of our financial markets generally.

We believe the pilot would impair market quality by widening spreads in stocks, adding costs for both investors and companies. In particular, by causing spreads to widen in securities selected for the test groups, companies conducting a repurchase program or secondary offering would incur higher costs. In addition, a company’s peers will likely be in different groups - or not included in one of the test groups - biasing share performance and executive compensation between comparable benchmarks.

What is at stake? We estimate the added burden on investors could exceed \$1 billion. The pilot may also disadvantage companies selected for one of the test groups while their peers or competitors could escape that fate. As currently envisioned, it does not appear that companies could opt-out of the pilot. A detailed comparison is also available [here](#).



The fundamental question for your organization is this: do you want your company's stock included in this experiment? If your answer is no, now is your time to act.

We encourage you to learn more about this important issue. If you share our concerns, we urge you to voice them through a comment letter to the SEC, or request exclusion from the Transaction Fee Pilot.

Our team stands ready to discuss this issue with you in more detail.

Warmest regards,

John Tuttle  
Mobile: +1 (248) 891-6863  
E-mail: [John@nyse.com](mailto:John@nyse.com)