December 6, 2011

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: Release No. 34-65672; File No. SR-NYSE-2011-55 (the "Proposal"); and NYSE Exemptive Application Pursuant to Rule 612(c) of Regulation NMS, dated October 19, 2011 (the "Petition").

Dear Ms. Murphy:

BATS Global Markets, Inc. ("BATS") appreciates the opportunity to comment on the above referenced Proposal and Petition by the New York Stock Exchange LLC ("NYSE") proposing a one-year pilot establishing a retail liquidity program (the "Retail Program"). As proposed under the Retail Program, the NYSE would create two new classes of market participants, Retail Member Organizations ("RMOs") and Retail Liquidity Providers ("RLPs"). NYSE would retain discretion to designate an NYSE member firm as an RMO or an RLP. RMOs would be eligible to submit certain retail order flow ("Retail Orders") to the NYSE, and RLPs would be required to provide, at least a set percentage of the time, orders with non-displayed price improvement (an "RPI order") over the protected best bid and offer ("PBBO") by at least $0.001 for incoming Retail Orders. Other member organizations would be permitted but not required to submit RPI orders. While the RPI order is non-displayed, NYSE is proposing to provide an indication of interest ("IOI") on its proprietary market data feeds when an RPI order is present on the order book. Finally, when multiple RPI orders are on the display book at different prices, incoming Retail Orders will execute in their entirety at the single worst price among the RPI orders necessary to completely fill the Retail Order.

BATS supports the NYSE's efforts to enhance price competition for retail customer orders, including efforts to permit exchanges to offer better competition in some securities at subpenny increments. However, BATS has several concerns with the Proposal and Petition put forward by NYSE, and questions whether they promote just and equitable principles of trade as required by Section 6(b)(5) of the Exchange Act. In particular, BATS is concerned that as proposed (i) NYSE's Retail Program is unlikely to actually result in greater price competition for Retail Orders, (ii) NYSE's proposal to issue an IOI on its proprietary data feed when RPI orders are present invokes elements of "flash orders" and raises serious questions about two-tiered markets and best execution obligations, and (iii) NYSE's Petition to allow it to accept and rank subpenny orders may be too broad to overcome concerns previously articulated by the Securities and Exchange Commission ("SEC" or "Commission").

While BATS has several concerns with the Proposal and Petition, BATS also recognizes that the marketplace is highly competitive and if the Commission approves the NYSE's Proposal and Petition they are likely to immediately be implemented by other exchanges. BATS would likely be compelled to do the same to remain competitive. We urge the Commission to consider the full range of policy concerns raised by the Proposal.

1. Price Competition

As noted in the Proposal, a significant percentage of the orders of retail investors are currently executed in the over-the-counter market. These orders neither contribute to the public price discovery process nor benefit from the diversity of order flow provided on the registered national exchanges' continuous auction markets. Rather, these orders today are internalized by other broker-dealers and executed at prices derived from orders displayed on registered national exchanges. Consequently, such orders are not subject to the price competition offered by the exchanges and, hence, may be subject to disadvantageous pricing.

BATS supports efforts to bring Retail Orders onto the exchanges where they can interact with a greater diversity of order flow and potentially benefit from price competition. However, certain aspects of NYSE's Retail Program raise concerns about the extent to which it would actually result in greater competition for Retail Orders. First, while technically there is no limit to the number of RLPs that could participate in the Retail Program, NYSE would limit the potential universe of NYSE members that would be eligible to be considered an RLP to current designated market makers and supplemental liquidity providers. In addition, while NYSE has proposed certain objective criteria in connection with maintaining RLP status, NYSE has also reserved for itself, in its sole discretion, the ability to determine whether and when an RLP is disqualified from service.

Second, while any NYSE member firm is permitted to submit RPI orders to compete with RLPs, BATS fully expects that NYSE will require a higher access fee from non-RLPs for executions with Retail Orders, which in turn will negatively impact a non-RLP's ability to post aggressive prices and compete with an RLP. In combination, the limited pool of potential RLPs, NYSE's discretion to disqualify a member from acting as an RLP, and the anticipated higher access fees for non-RLPs attempting to compete for Retail Orders, raise doubts about the extent to which NYSE's Retail Program would result in meaningful price competition for Retail Orders.

Third, under the Proposal, neither RLPs nor other members submitting RPI orders are required to maintain, for any amount of time, a publicly displayed quote at the national best bid or offer ("NBBO"). BATS believes that a just and equitable implementation of the Retail Program would require that those members who are receiving the benefit of posting non-displayed orders that are only executable against Retail Orders must also be required to contribute to the public price discovery process.

Finally, BATS is concerned about that aspect of the Proposal that would require execution of a Retail Order against multiple RPI orders at the worst RPI order price necessary to complete the entire order. This construct flies in the face of the price/time priority auction mechanisms offered by the exchanges during their continuous auctions through which an incoming marketable order will execute against resting orders on the order book at the best prices available, thereby giving the incoming marketable order the benefit of these competitive prices. BATS expects the net result will be a further reduction in true price competition for Retail Orders as RLPs and others will simply be incented to post RPI orders with the least amount of price improvement required (one-tenth of a penny), knowing that this will be sufficient most of the time to allow them participation in an execution against a Retail Order. Accordingly, BATS does not believe the Proposal is likely to foster true, robust price competition for Retail Orders.

2. IOIs Disseminated on NYSE Proprietary Market Data Feeds

As part of the Proposal, NYSE would disseminate an IOI on its proprietary market data feeds whenever it has a non-displayed RPI order on the order book in a particular security. NYSE would not submit this IOI to the Consolidate Quote Stream ("CQS"). Similar to so-called "flash orders", NYSE would disseminate information to a private network about its best priced orders that is unavailable to anyone outside of that network. Broker-dealers who are unable or unwilling to pay for NYSE's proprietary market data feeds, but instead rely on the CQS for top of book information, would be at a disadvantage to NYSE members taking NYSE's proprietary market data feeds. As a consequence, many of the concerns raised in the past regarding flash orders are equally raised by the Proposal.

In particular, the Proposal represents a further step toward disconnecting the CQS from the reality of what are in fact the best prices available. The CQS has long been considered the industry reference for the market's top of book quotes, and while its relevance has been challenged in a post-Regulation NMS environment, it has dramatically improved its latency to meet this challenge. Those efforts will be for naught if the exchanges ultimately revert to a market structure whereby their best prices are reserved for their private networks. The net result could be a two-tiered market where only those market participants who can afford to take in and process each exchange's proprietary market data feed have access to the best prices. The implications of this for the fulfillment of best execution obligations are potentially profound – must a broker-dealer take each exchange's proprietary market data feeds in order to fulfill its obligations in this regard? Not doing so would seem hard to defend if the future landscape includes this component of the Proposal. And, what would this mean for the relevance of the CQS? These are significant market structure questions that should be considered by the Commission.

The Proposal also implicates questions previously raised by the Commission regarding IOI use among over-the-counter market centers or market makers, and whether Exchange Act quoting requirements apply to these actionable IOIs.[1]

3. Subpenny Ranking

Rule 612 of Regulation NMS prohibits an exchange from accepting, ranking, or displaying an order priced in an increment less than $0.01 unless the bid or offer for the security is priced less than $1.00 (the "Subpenny Rule"). As noted by the NYSE in its Petition, the core of the Subpenny Rule's purpose was to address the SEC's concerns with the potential of subpenny increments to erode the incentives of investors to display limit orders. The Commission proposed the Subpenny Rule in an effort to "limit the ability of a market participant to gain execution priority over a competing limit order by stepping ahead by an economically insignificant amount."[2] Moreover, the Commission was further motivated by concerns about "flickering" quotes and attendant best execution concerns, as well as a potential decrease in market depth at the inside.

As part of NYSE's proposed Retail Program, NYSE has filed the Petition with the Commission seeking an exemption from the Subpenny Rule to permit NYSE to accept and rank, but not display, RPI orders at subpenny increments, namely, at $0.001, or one-tenth of a penny. NYSE argues in its Petition that the Commission's policy concerns underlying the Subpenny Rule are not implicated by its proposed Retail Program because the core of the Commission's concerns relate to the display, not the acceptance and ranking of a subpenny order. According to the NYSE, the mere ranking of an order in a subpenny increment does not raise concerns that a

1 Exchange Act Release No. 60997 (Nov. 13, 2009) ("Regulation of Non-Public Trading Interest").

2 Exchange Act Release No. 51808 (June 9, 2005), 70 FR 124 (June 29, 2005) ("Regulation NMS Adopting Release").

market participant could gain execution priority over a competing limit order by stepping ahead by an economically insignificant amount, nor does it raise concerns about flickering quotes or a potential decrease in market depth at the inside.

BATS disagrees with NYSE's position in this regard. In particular, regardless of whether a subpenny order is displayed, once it is ranked on the order book, the Commission's policy concerns regarding stepping ahead of a displayed limit order for an insignificant amount of price improvement are implicated. Thus, BATS believes the relevant question the Commission must decide in connection with this Petition is whether one-tenth of a penny is an economically significant amount to justify allowing a market participant to gain execution priority over a displayed limit order. BATS submits that the answer largely depends on an analysis of the security in question. And, in fact, in the order adopting the Subpenny Rule the Commission confirmed this individualized approach by specifically addressing the circumstances under which it might grant an exemption to the subpenny prohibitions stating, "[i]f a security always trades with a penny spread and there is tremendous liquidity available on both sides of the market this is a strong indication that the minimum increment [one penny] is too wide."[3]

In April 2010, BATS along with NYSE and NASDAQ (the "exchanges") submitted a petition for an exemption to the Subpenny Rule, which was based on a more nuanced and data driven analysis than that provided by NYSE in its Petition. While posted on the SEC's website (http://www.sec.gov/spotlight/regnms.htm), no action has ever been taken on this request. In this earlier petition, the exchanges argued that "the imposition of a [minimum price variation or] MPV of $0.01 has resulted in a publicly displayed quote that is artificially wide for certain lower priced, liquid securities, and has caused a detrimental impact to the public price discovery process, resulting in worse executions prices for investors." The exchanges included detailed data demonstrating the impact of this artificially wide MPV on certain lower priced securities, and requested that the Commission utilize its authority under Regulation NMS to approve an exemption to the Subpenny Rule, on a pilot basis, that would allow the exchanges to accept, rank, and display particular securities identified by the exchanges at an MPV of $0.005, or one half of a cent.

In contrast to the nuanced, data-driven analysis contained in the prior petition from the exchanges, NYSE is now seeking a blanket exemption for all NYSE-listed and AMEX-listed securities to allow NYSE to accept and rank subpenny orders at an MPV of one-tenth of a penny, without providing any support for why such an exemption would satisfy the Commission's concerns regarding stepping ahead of a displayed limit order – which itself could be a Retail Order – for an insignificant amount of price improvement. BATS submits that the reason the

3 Id.

Petition is devoid of such analysis is because NYSE cannot defend what it is proposing against the concerns previously articulated by the Commission. BATS does not believe that an MPV of one-tenth of a penny would be an economically significant amount of price improvement for most securities, and BATS questions whether it would be an economically significant amount of price improvement for any security.

There are legitimate issues related to internalization, price discovery, and best execution that NYSE is seeking to address in its Proposal and Petition; however, as noted above, BATS does not believe NYSE's Proposal and Petition address these issues in a balanced manner. Rather, BATS urges the Commission to revisit the previous petition submitted by the exchanges, evaluate the data presented, and consider initiating a more nuanced discussion focusing on a security's trading characteristics, with the goal of defining the minimum amounts of price improvement necessary to be considered significant or material, and then enforcing those minimum standards consistently to the ranking and execution of orders on exchanges and over-the-counter destinations alike. Further, BATS requests that the Commission take thoughtful action on the pending proposal on Regulation of Non-Public Interest.

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BATS appreciates the opportunity to comment on the Proposal and Petition. Please feel free to contact me if you have any questions in connection with matter.

Sincerely,

Eric J. Swanson
Secretary

cc. Chairman Mary L. Schapiro
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
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