February 17, 2022

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. 34-94223 (SR-NYSE-2022-07)

Dear Ms. Countryman:

MEMX LLC ("MEMX") appreciates the opportunity to provide comments to the Securities and Exchange Commission ("Commission") on the above-referenced proposed fee change filed by the New York Stock Exchange LLC ("NYSE"). Notably, the proposed fee change would: (1) increase the fees that NYSE charges for Market on Close ("MOC") orders executed in its closing auction; and (2) introduce new incremental "discounts" to those higher MOC fees based on a member's contribution to consolidated average daily volume ("CADV") added on NYSE during intraday continuous trading or volume executed during the trading day by an affiliated floor broker. These proposed fees are anticompetitive and should therefore be suspended and, ultimately, disapproved by the Commission pursuant to Section 19(b)(3)(C) of the Exchange Act.[1]

MEMX was founded by leading market participants with the common goal of improving U.S. equity markets for investors through, among other things, fostering increased competition

[1] 15 U.S. Code § 78s(b)(3)(C).

among national securities exchanges. Such competition among exchanges is vital for a healthy national market system as it drives technological and operational efficiencies, reduces costs, and supports continued innovation. For this reason, Congressional policy enshrined in the Exchange Act and the Commission's own equity market structure efforts have also often focused on how to facilitate competition among venues transacting in NMS stocks. By tying fees for on-close volume, over which NYSE operates a virtual monopoly, to intraday volume traded in the continuous market, the proposed fees threaten the robust competition that MEMX was founded to promote and that Congress and the Commission have sought over the years to facilitate.

Background

The MOC fees that NYSE seeks to increase were introduced in January 2018, the same month that the Staff of the Division of Trading and Markets ("Staff") initially approved the Cboe Market Close, an on-exchange facility for executing MOC orders at the official closing price.[2] At that time, and presumably in anticipation of *potential* competition, NYSE reduced its MOC fees, which had long been criticized by the industry as being unreasonably high, and those reduced MOC fees have been in place until the current proposal became effective on February 1, 2022.

However, following a lengthy review by the Commission, which resulted in the Commission eventually affirming the Staff's decision to approve the Cboe Market Close,[3] this

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2 See Securities Exchange Act Release Nos. 82563 (January 22, 2018), 83 FR 3799 (January 26, 2018) (SR-NYSE-2018-03) (2018 NYSE Fee Filing); 82522 (January 17, 2018), 83 FR 3205 (January 23, 2018) (SR-BatsBZX-2017-34) (Staff Approval of Cboe Market Close). Cboe Market Close was initially referred to as the "Bats Market Close," but the name was changed following Cboe Holdings acquisition of Bats Global Markets, Inc. For brevity, we refer to this product as Cboe Market Close throughout this letter.

3 See Securities Exchange Act Release No. 88008 (January 21, 2020), 85 FR 4726 (January 27, 2020) (SR-BatsBZX-2017-34) (Commission Approval).

facility has failed to divert volume from listing exchange closing auctions. In fact, while NYSE makes an unsubstantiated assertion in its filing that the "availability of the Cboe Market Close" along with "broker-dealer internalization of MOC orders" has "increased competition for MOC orders in NYSE-listed securities," our data on closing activity shows that Cboe BZX Exchange, Inc. ("BZX") accounts for less than 0.01% of total closing activity in NYSE-listed securities.[4]

At the same time, while various off-exchange venues do offer closing facilities to their customers, off-exchange trading in NYSE-listed securities at the official closing price accounts for only 22.6% of total closing activity. Now that the dust has settled on the Cboe Market Close, and in the face of still limited off-exchange execution opportunities to trade at the official closing price, NYSE seeks to raise its prices back to the levels that existed prior to January 2018. In addition, NYSE seeks to use the opportunity produced by these higher fees to incentivize members to transact more volume on NYSE during intraday continuous trading to lower these higher fees to more reasonable levels, thereby subverting generally fierce intraday competition for order flow.

I. THE PROPOSED FEES IMPOSE AN UNDUE BURDEN ON COMPETITION THAT IS INCONSISTENT WITH SECTION 6(B)(8) OF THE EXCHANGE ACT

NYSE's closing auction, which sets the official reference price for various mutual funds, exchange traded products ("ETPs"), and derivatives, "represent[s] about 7% of daily volume in NYSE-listed securities" and "can account for over 20% of daily volume" on "major option expiration and index rebalance days."[5] Notwithstanding unsubstantiated assertions to the contrary contained in NYSE's filing, NYSE enjoys a virtual monopoly over this closing activity. As

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4 All market share numbers discussed in this comment letter are calculated as discussed in the Appendix for the period from January 3, 2022 to February 14, 2022.

5 See NYSE Auctions *available at* https://www.nyse.com/auctions.

discussed, no meaningful volume is transacted in on-exchange MOC facilities that offer executions at the official closing price outside of NYSE's closing auction. And, while various broker-dealers do offer facilities that allow their customers to seek to obtain executions at the official closing price, these facilities are somewhat fragmented and do not offer a true substitute for market participants trading in the closing auction on the primary listing exchange. As a result, NYSE continues to maintain a market share of 76.5% of total closing activity in its listed securities.[6]

It is in this environment of limited competition that NYSE seeks to use its market power to increase MOC fees while offering "discounts" to those higher fees to members that direct significant intraday volume to NYSE. The result is that smaller broker-dealers that do not qualify for the proposed incentives would have to pay more to execute MOC orders in NYSE's closing auctions, while larger broker-dealers are offered what amounts to a Hobson's choice: pay the monopoly prices that NYSE proposes to charge for MOC orders executed in the closing auction, or divert intraday order flow to NYSE to avoid paying those monopoly prices. The Exchange Act does not permit a national securities exchange to use its fees to restrict competition in this manner.

Section 6(b)(8) of the Exchange Act provides that the rules of a national securities exchange registered with the Commission must not "impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act.[7] This requirement reflects Congress's understanding of the significant role that national securities exchanges play in our capital markets and the benefits that investors receive from robust competition. As a market

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6 In addition to volume executed off-exchange at the official closing price and the insignificant volume executed in the Cboe Market Close, competing exchange auctions offered by The Nasdaq Stock Market LLC ("Nasdaq") and NYSE Arca, Inc. ("Arca") account for the remaining 0.9% of total closing activity in NYSE-listed securities.

7 15 U.S. Code § 78f(b)(8).

operator that was founded with the goal of increasing competition among exchanges, we urge the Commission to reject NYSE's attempt to use its market power in the market for executions at the close to inhibit competition in other segments of the national market system.

As the D.C. Circuit has stated, "[n]o one disputes that competition for order flow is 'fierce.'"[8] This is not mere happenstance and we must not take it for granted. Competition is fierce because of the steps taken by Congress and the Commission to facilitate that competition and the works of firms like MEMX that bring competition to the market. Put another way, competition is something that must be cultivated and not an immutable characteristic of financial markets. Allowing an exchange to leverage its ability to set monopoly prices in one aspect of the market to limit competition in another is a surefire way to unravel the carefully crafted tapestry of competition that Congress, the Commission, and market participants have nurtured over the years.

Indeed, the Commission has previously acknowledged the potential that a self-regulatory organization ("SRO") could attempt to improperly leverage its market power to set anticompetitive fees that are inconsistent with Section 6(b)(8). For example, the 2019 Staff Guidance on SRO Rule Filings Relating to Fees discusses the possibility that an SRO could leverage its "significant market share" in a manner that imposes an undue burden on competition from other smaller SROs:

> "[T]o the extent that a proposed fee structure creates significant incentives for certain market participants to realize significant pricing benefits by maintaining minimum volume levels with an SRO having significant market share, the SRO should address whether that

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8 See NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSE-2006-21)).

structure permits the SRO to leverage its market share in a manner that would impose an undue burden on competition on smaller SROs attempting to gain market share."[9]

It is patently clear that NYSE, which is responsible for about 76.5% of total closing activity in its listed securities has "significant market share" in that market. Although it no longer executes 79% of overall consolidated volume in its listed securities as it did in 2005 before the introduction of Regulation NMS and an explosion of competition from other trading venues,[10] NYSE continues to maintain a virtual monopoly in trading in its listed securities at the close. There can also be little doubt that the proposed fee structure "creates significant incentives" for NYSE members to "realize significant pricing benefits by maintaining minimum volume levels." Indeed, the highest incremental discount that NYSE proposes in its filing requires that the member add liquidity on NYSE that accounts for at least 1% of CADV,[11] an amount that is greater than the market share of seven of sixteen U.S. equities exchanges, including three NYSE affiliates.

The only question then is whether the significant burden on competition imposed by NYSE's proposed fee structure is "undue." We submit that any attempt by an exchange to leverage market power in a monopoly business to gain a competitive advantage in another business must be considered an undue burden. Anticompetitive "tying" of products in a more competitive market with products over which a monopolist has market power has long been held to violate the antitrust laws. Similarly, tying fees charged for the execution of orders in an exchange's closing auction, which is a virtual monopoly, to volume transacted on that exchange in what is an otherwise

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9 See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) *available at* https://www.sec.gov/tm/staff-guidancesro-rule-filings-fees (Staff Fee Guidance).

10 See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3593, 3595 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

11 The 1% of CADV added excludes any volume from a NYSE Designated Market Maker.

competitive market for continuous trading must be found to violate Section 6(b)(8).[12] Such a finding is needed not only to allow other exchanges like MEMX a fair opportunity to compete but also to ensure that broker-dealers and the investors they represent continue to be able to freely direct their order flow to the best market without incurring a penalty for doing so.

II. THE COMMISSION SHOULD APPLY HEIGHTENED SCRUTINY WHEN EVALUATING WHETHER MONOPOLISTIC AUCTION FEES ARE "REASONABLE" UNDER SECTION 6(B)(4) OF THE EXCHANGE ACT

Competition for order flow has brought down prices in the market for intraday trading, with exchanges largely retaining modest capture for providing these services. However, due to the virtual monopoly that the listing exchanges have over their closing auctions, prices in these auctions have remained high, with significant fees generally charged to both buyers and sellers. While the threat of potential competition seems to have initially resulted in a reduction in NYSE's prices, NYSE has decided to raise its prices again, secure in the knowledge that such competition has not actually materialized. Its filing to do so should be subject to heightened scrutiny.

Section 6(b)(4) of the Exchange Act requires that the rules of an exchange "provide for the equitable allocation of reasonable dues, fees, and other charges."[13] Generally, the Commission applies a "market-based approach" when evaluating whether fees proposed by an exchange are "reasonable" as required under Section 6(b)(4).[14] Pursuant to this market-based approach, the

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12 NYSE briefly discusses in its filing similar fees charged by Nasdaq for trades in Nasdaq-listed securities. However, the fact that another exchange has similar fees is not evidence that those fees are consistent with the Exchange Act. The Nasdaq fees cited by NYSE in its proposal raise the same issues discussed in this comment letter.

13 15 U.S. Code § 78f(b)(4).

14 See Staff Fee Guidance, supra note 9. The guidance cites several Commission actions for this principle. See e.g. Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR at 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (ArcaBook Order)

Commission first "examines whether the exchange making the proposal is subject to significant competitive forces in setting the terms of its proposal, including the level of any fee."[15] If the proposed fees are subject to significant competitive forces, then the Commission will generally approve the proposed fees except where there is "substantial countervailing basis"[16] not to do so. However, in the absence of persuasive evidence that the proposed fees are constrained by significant competitive forces, an exchange must provide a substantial basis other than competitive forces that demonstrates that the proposed fees are consistent with the Exchange Act.[17]

As discussed, the reasonableness analysis contained in NYSE's filing relies on unsubstantiated assertions about the competitiveness of the market for the execution of orders in its listed securities at the close. However, far from being a competitive market as NYSE asserts, the evidence actually shows that NYSE, which maintains a market share of 76.5% of total closing activity, actually maintains a virtual monopoly over this market. The "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder… is on the self-regulatory organization that proposed the rule change."[18] NYSE has certainly not met its burden. Given the lack of competition in the market for executions in its listed securities at the close, NYSE must present additional analysis to enable the Commission to fulfill its own statutory role in evaluating the reasonableness of the proposed MOC fees.[19] Such

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15 Id.

16 Id.

17 Id.

18 See Commission Rules of Practice, Rule 700 (b)(3) (17 CFR 201.700(b)(3)).

19 See Susquehanna Int'l Grp., LLC v. SEC, 866 F.3d 442 (D.C. Cir. 2017).

heightened scrutiny is required under the Exchange Act in the absence of meaningful competition that would otherwise constrain an exchange's ability to charge supra-competitive fees.

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MEMX was founded by leading market participants who believe in the benefits of robust competition. Our capital markets work best when exchanges compete vigorously to offer high-quality services at reasonable prices. Today, competition for intraday volume is fierce and this competition has benefited investors through innovation and reduced costs. Nevertheless, now is not the time for complacency. NYSE's proposed fees violate Section 6(b)(8) and threaten the competitive environment that has been fostered through years of work by Congress, the Commission, and firms like MEMX. In addition, in the absence of a competitive market to constrain fees charged for executions in NYSE's closing auction, the proposed filing raises significant issues with regard to whether the proposed fees are "reasonable" under Section 6(b)(4).

We therefore request that the proposed fee change be suspended pursuant to authority granted to the Commission under Section 19(b)(3)(C), which allows the Commission to temporarily suspend an immediately effective proposed fee change "if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of"[20] the Exchange Act. If the Commission chooses to temporarily suspend the proposed fee change, Section 19(b)(3)(C) further provides that the Commission shall institute proceedings to determine whether the proposal should be approved or disapproved. We further request that the proposed fee change be disproved following such proceedings. Suspension and, ultimately, disapproval of the proposal is warranted given the

[20] 15 U.S. Code § 78s(b)(3)(C).

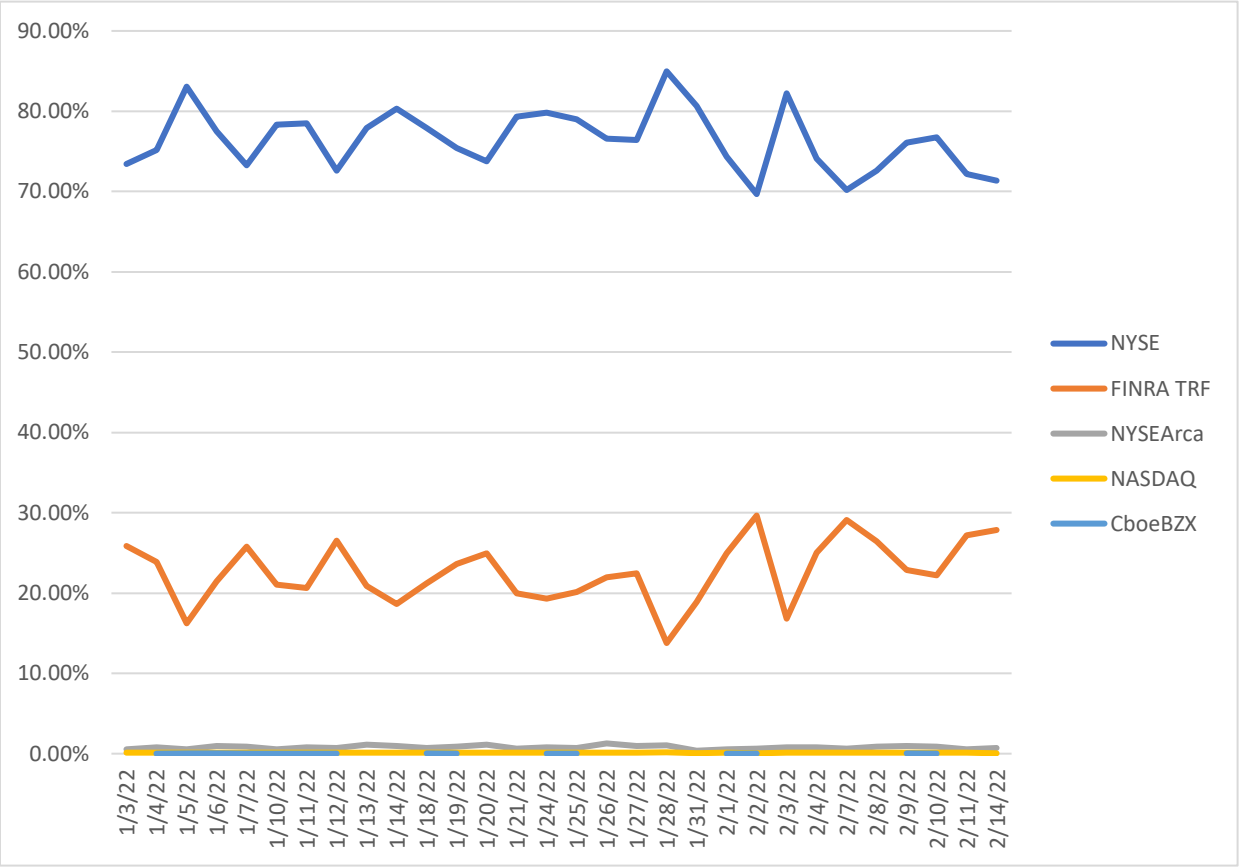
anticompetitive nature of the proposed fees and the insufficient justification provided for them in light of the virtual monopoly that NYSE has in closing activity in its listed securities.

Sincerely,

/s/ Adrian Griffiths

Adrian Griffiths
Head of Market Structure

APPENDIX: CLOSING MARKET SHARE IN NYSE-LISTED SECURITIES



* Market share includes executions in NYSE's closing auction and competing exchange closing facilities, *i.e.*, both price forming auctions and MOC facilities offered by other exchanges, as well as off-exchange executions at the official closing price between 4:00 p.m. to 4:15 p.m.