April 4, 2023

Via Electronic Comment Submission

U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549
Attention: Vanessa Countryman, Secretary

ADDITIONAL COMMENT LETTER AND PETITION FOR SUSPENSION AND DISAPPROVAL

Re: Exchange Act File Nos. SR-NYSEAMER-2023-12; SR-NYSEARCA-2023-13; SR-NYSECHX-2023-08; SR-NYSENAT-2023-07

Dear Secretary Countryman:

Hyannis Port Research, Inc. ("HPR")[1] appreciates the opportunity to comment further on the above-captioned notices, pursuant to which NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the "Exchanges") proposed amendments to their rules to make additional pre-trade risk controls available to certain members and, indirectly, non-members of the Exchanges (the "proposals").[2]

At any time within 60 days of the filing of such a proposed rule change, the Commission summarily may temporarily suspend such proposals 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 the Exchange Act. **We respectfully resubmit our request that the Commission should suspend the proposals and institute disapproval proceedings**.

HPR commented on the original iterations of the Exchanges' proposals, at which time we offered several substantive and procedural arguments for suspension and disapproval of the proposed pre-trade risk controls.[3] The Exchanges responded by withdrawing their original filings and then refiling them, as referenced above. HPR commented further in a letter dated March 8, 2023[4]. We continue to believe that suspension and disapproval proceedings are necessary and in

[1] HPR is a leader in capital markets infrastructure products. HPR brought its first pre-trade risk product, Riskbot®, to market in 2011, shortly after the adoption of the Rule 15c3-5 under the Securities Exchange Act of 1934 ("Exchange Act"). Today, more than 1 billion shares of daily U.S. stock trading volume flows through HPR's pre-trade risk and market access products. HPR supports over 85 global markets and its clients include some of the world's largest banks and most elite proprietary trading firms.

[2] See Exchange Act Release Nos. 96922 (Feb. 14, 2023), 88 FR 10580 (Feb. 21, 2023) (SR-NYSEAMER-2023-12); 96921 (Feb. 14, 2023), 88 FR 10597 (Feb. 21, 2023) (SR-NYSEARCA-2023-13); 96920 (Feb. 14, 2023), 88 FR 10592 (Feb. 21, 2023) (SR-NYSECHX-2023-08); and 96919 (Feb. 14, 2023), 88 FR 10569 (Feb. 21, 2023) (SR-NYSENAT-2023-07).

[3] See Letter from Gerard P. O'Connor, Vice President and General Counsel, HPR, to Vanessa Countryman, Secretary, Commission, dated January 19, 2023, available at https://www.sec.gov/comments/sr-bx-2022-022/srbx2022022-20155250-323599.pdf.

[4] Letter from Gerard P. O'Connor, Vice President and General Counsel, HPR, to Vanessa Countryman, Secretary, Commission, dated March 8, 2023, available at https://www.sec.gov/comments/sr-nyseamer-2023-12/srnyseamer202312-20158980-327200.pdf

the public interest, for the protection of investors, and in furtherance of the purposes of the Exchange Act. The points below augment and emphasize arguments we made in our original letter and our March 8, 2023 letter.

In this letter, we therefore seek to emphasize the following two points:

1. The Exchanges have offered no evidence to support their claims of "de minimis latency" and we believe that the latencies will be both "measurable" and not "sub-microsecond."

2. The Exchanges' claims that providing customers an opt-out ability would be costly and impractical are (a) not adequately supported in the filings; and (b) if true, caused solely by an explicit business choice that is unnecessary, falls short of industry best practice and is designed to ensure an unfair competitive advantage for their offering.

Each of these matters is addressed in turn below.

1. The Exchanges offered no evidence to support their claims of "de minimis latency" and we believe that the related latency is both "measurable" and not "sub-microsecond."

The Exchanges' initial filings were notably silent on the specific amount of additional, unnecessary latency that would be imposed upon members who choose not to use the Exchanges' proposed pre-trade controls.

In the refiled proposals, following our initial comment letter, the Exchanges stated that they expect that the latency added by the combination of their existing risk checks plus the proposed additional pre-trade risk controls would be "significantly less than one microsecond."

The Commission recently addresses the question of latency, in its approval of NYSE rules to establish wireless connectivity services at its Mahwah Data Center.[5] The standard adopted by the Commission for wireless connectivity services in the Mahwah Data Center filing is "no measurable latency."[6] The idea that any latency measured at one microsecond or below is "de minimis" is not stated in a precedent to be drawn upon here, and flouts the reality of current market realities and latency standards. As a relevant data point, HPR's measured latency for its initial

[5] The Exchanges sought to enable market participants purchasing the services to establish low-latency connectivity with an unfair latency advantage between their equipment in the Mahwah Data Center (which they own and operate and where the Exchanges house their electronic trading and execution systems and co-location facility), and non-exchange data centers in Carteret, NJ, Secaucus, NJ, and Markham, Canada ("Third Party Data Centers"). See Exchange Act Release No. 34-90209 (Oct. 15, 2020), 85 FR 67044 (October 21, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SRNYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SRNYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, SR-NYSENAT-2020- 08).
[6] Each Exchange notes a version of the following: "The Exchange argues that it has designed its pre-trade risk offering "symmetrically" such that "all orders on the Exchange would pass through these risk checks" so that "an Entering firm that does not choose to set limits pursuant to the new proposed pre-trade risk controls would not achieve any latency advantage with respect to its trading activity on the Exchange."

Riskbot® products is 340 nanoseconds – below the expected latency that the Exchanges are currently claiming is "de minimis."

More to the point, though, the Exchanges' filings to date contain no evidence at all that they can offer the pre-trade risk checks anywhere near the microsecond or sub-microsecond range claimed. As a leading provider of ultra-low latency capital markets infrastructure, HPR is well aware of the engineering challenges required to achieve sub-microsecond latency while providing dependable and compliant risk solutions. HPR has invested substantial amounts of money and time and has leveraged leading technological and engineering resources to develop intellectual property that enables it to achieve latency that is significantly sub-microsecond. The Exchanges, simple stated, have made no case that they possess any such ability.

Simply accepting the Exchanges' unsubstantiated assertions that they are able to achieve sub-microsecond latency, with no supporting evidence, is precisely the kind of "unquestioning reliance" that the Susquehanna ruling proscribes[7]. If the Commission is to follow the appropriate legal standard under Susquehanna, then it should require the Exchanges to (a) explain the methodologies that they are using to measure latency; and (b) share the specific data they have from their testing to substantiate these claims. It is imperative that latency is measured relative to what a non-user would experience if accessing the marketplace using all other available top-of-the-line ultra-low latency connectivity, *not* what a non-user would experience when subject to the new configuration. Further, as stated in our prior letters, the competitive issues at stake here are real and material and therefore, the proper approach is to require the Exchanges to submit their proposal through a normal rule-making process so that these claims can be properly assessed and evaluated with an opportunity for public comment. The Commission's mission to act as the investors' advocate demands this approach.

The Exchanges seek to force additional latency on market participants that choose to use pre-trade risk checks from a non-exchange competing provider of risk services. This forces upon them a latency penalty that puts them at a competitive disadvantage relative to those who use the services of the Exchanges, regardless of the investment, technology or quality of service provided by the Exchanges (i.e., any latency, no matter how low, from a competing provider is an added latency penalty; whereas any latency from the exchange is neutralized within the facility of the exchange). In a marketplace where competition is driven by speed, this will force certain participants to utilize these services, even if they are less tested, less robust[8] and introduce added complexities. We believe that, in addition to being anti-competitive, the net effect of this will include greater risk of errant orders and market disruptions.

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[7] Susquehanna Int'l Group LLP, et al., v. SEC; 866 F.3d 442 (D.C. Cir. 2017).

[8] As we have previously pointed out, to attempt to compete with leading latency solutions, new providers may be tempted to cut corners elsewhere. One example of this is the duplicate order test as proposed to be offered by the Exchanges. In order to reduce latency, the Exchanges have stripped the test down to merely detect a concurrent stream of buy or sell orders that exceeds a set limit over a specified time interval. Under this protocol, though, if two different symbols (e.g., buy GOOG and buy MSFT) send repeat orders at the same time, then the test will fail completely, resulting in the member's quotes and orders continuing to stream into the Exchanges' systems, likely surpassing the member's risk thresholds and tolerances

The whole point of Rule 15c3-5 was to eliminate as fully as practicable the risk of errant orders causing market disruption. Solution providers such as HPR have answered that call, offering a mature, reliable, fast set of leading risk checks, not only in the U.S., but globally. It defies logic that the Commission would permit the Exchanges to take the U.S. markets backwards to slower, less dependable solutions, while also threatening the very existence of the competitive offerings that have served our markets so well during the preceding years during which exchanges have not offered such services.

2. <u>The Exchanges' claims that providing customers an opt-out ability would be costly and impractical are (a) not adequately supported in the filings; and (b) if true, caused solely by an explicit business choice that is unnecessary, falls short of industry best practice and is designed to ensure an unfair competitive advantage for their offering</u>.

The Exchanges have not provided an opt-out option. The Exchanges attempt to justify this choice thusly:

> While the Exchange strongly believes that symmetrical application of all pre-trade risk controls is the appropriate approach (as explained above), providing customers an opt-out ability would require the Exchange to provide new order entry ports that would bypass the evaluation of such pre-trade risk protections. Providing such new ports would burden customers with additional costs to purchase such ports and to migrate their order flow to such ports. The Exchange does not believe that the added expense of creating such new ports (on the part of the Exchange) or of purchasing and migrating to them (on the part of customers) is justified in light of the *de minimis* latency imposed by the pre-trade risk controls at issue.

These claims make no sense. The only reason that a user would need a special port to opt out of the Exchanges' risk checks and the corresponding latency, is because the Exchanges have intentionally removed the existing port optionality in place today, seemingly to ensure a competitive advantage for their own offerings. From an engineering perspective, this approach is unnecessary and not industry best practice today.

For example, HPR's risk solutions are engineered to operate independently of order entry ports. A user that wants to use HPR's risk checks simply adds them, and a user that does not want them (or their latency) does not. It is that simple. If indeed HPR wanted to engineer its solution into the exchange port, it would not be able to do so as it is not the SRO and exchange operator. This inability illustrates exactly the kind of approach that an exchange should never be able to take when competing in a commercial marketplace, i.e., that is explicitly using its position as SRO and exchange operator to ensure a competitive advantage over other market participants.

Furthermore, there is no compelling reason given by the Exchanges why they cannot simply provide access to existing ports that do not incur this additional latency or cannot engineer a solution that provides the optionality for a "risk check" path (with added latency) vs. a "no risk check" path (with no added latency). The materiality of the competitive advantage they

are trying to achieve should compel the Exchanges to articulate the cost, complexity and consideration given to viable alternatives that are not anti-competitive.

Again, the fact that the Exchanges control the order entry ports does not mean that it makes sense to embed the risk checks there. In fact, we assert that it makes no sense at all. This is not how the market has addressed pre-trade risk in the 12 years since 15c3-5 was promulgated. The Exchanges should not be permitted to use their special role as SRO and exchange operator to artificially engineer a solution in a manner seemingly conceived solely to inflict their own latency on users of competitive solutions to ensure an anti-competitive latency advantage. Stated differently, it is not physically possible to engineer pre-trade risk checks without measurable latency and the fact that the Exchanges have engineered something that mitigates this reality, but only for their offerings, is an abuse of their SRO status and position as regulated exchange operator.

In sum, the decision to engineer risk checks at the port level is not necessary, not in the best interests of all of its customers, not reflective of industry best practice, and is violative of the Exchange Act.

Again, in light of the competitive advantages that are being embedded into the exchanges offering, the potential disruption to a commercial marketplace, and the associated added risk of increased market disruptions, these filings should not be filed pursuant to Section 19(b)(3)(A) which requires that the proposed rule change effects a change that (A) does not significantly affect the protection of investors or the public interest; (B) does not impose any significant burden on competition.

A customary rule-making procedure and comment period will provide the Exchanges with an excellent opportunity to further validate their unsubstantiated assertions, and will enable the public and the Commission to address several other concerns raised with this offering. It would be contrary to the Commissions obligations under the Act and to the Susquehanna decision to proceed with “unquestioning reliance” on the Exchanges’ representations in the proposals related to the latencies at issue and their representations as to the necessity to embed such risks checks into all ports used to access the Exchanges, without consideration of reasonable alternatives that are not inherently anti-competitive.

As HPR has stated, we welcome additional competition in the highly competitive marketplace of capital market infrastructure and risk management solutions. The Exchanges, and others similarly situated, are free to offer products and services that might add value for market participants, and to compete fairly with HPR, broker-dealers and market participants generally. However, for reasons that we have stated in our previous comments, two of which we will re-emphasize and further evidence in this letter, we believe that when the Commission considers the full record, including our previous letters, it is clear that the Exchange’s filings are deficient in material respects, and that to allow the Exchanges to proceed as proposed will inappropriately burden competition and risks erosion of fair and orderly markets.

We urge the Commission to give this matter the critical attention it deserves through a full rule-making process, and **we respectfully request that the Commission suspend and disapprove the proposals**.

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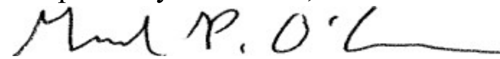
If you have any questions or you would like to discuss these matters further, please contact me at [redacted].

Respectfully submitted,



Gerard P. O'Connor
Vice President and General Counsel
Hyannis Port Research, Inc.

cc: Gary Gensler, U.S. Securities and Exchange Commission, Chairman
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