March 9, 2023

Via Electronic Comment Submission

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

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 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] The proposals purported to become immediately effective upon filing with the U.S. Securities and Exchange Commission ("SEC" or "Commission").[3] The Exchanges also requested that the Commission waive the 30-day operative delay so that the proposed rule changes may become effective and operative upon filing. 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. Furthermore, the Commission's authority to waive the 30-day operative delay is, as we understand it, discretionary and limited to circumstances in which doing so is consistent with the protection of investors and the public interest.

We respectfully submit that the Commission should not grant a waiver of the 30-day operative delay and should suspend the proposals and institute disapproval proceedings.

---

[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] The Exchanges filed the proposed rule changes pursuant to Section 19(b)(3)(A) of the Exchange Act and Rule 19b-4(f)(6) thereunder, 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; and (C) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

HPR commented on the original iterations of the Exchanges' proposals, during which we offered several substantive and procedural arguments for suspension and disapproval of the proposed pre-trade risk controls.[4] The Exchanges responded by withdrawing their original filings and then refiling them, as referenced above. We continue to believe that suspension and disapproval proceedings are necessary and in the public interest, for the protection of investors, and in furtherance of the purposes of the Exchange Act.

Many of the arguments we made in our original letter continue to apply to the Exchanges' refiled proposals. When the Commission considers the full record, including our original comment letter, we think it will be abundantly clear that the refiled proposals do little to meaningfully address the real and substantial concerns and deficiencies we previously identified. In many ways, the refiled proposals actually support HPR's concerns by showcasing the Exchanges' confused and contradictory attempts to justify their assertions. *We therefore seek to have our original comment letter made part of the comment file for the Exchanges' refiled proposals*.

The Exchanges seem to hope to have the Commission (and the industry) believe that these proposals are just a handful of inconsequential copycat filings the Exchanges drafted based on what their competitors have already moved through the Commission's rule filing process. This could not be further from reality, particularly when it comes to the very real anti-competitive effects that will surely result from these proposals. This is especially true given that the Exchanges' proposals seek to introduce technologically complex pre-trade risk mechanisms that would affect industry obligations under and compliance with Exchange Act Rule 15c3-5 (the "MAR").[5] It is possible that the Exchanges' proposed controls will not significantly and positively affect the protection of investors or the public interest. They may even impede the protection of investors. This is a decision for the *Commission and its staff* – not the Exchanges. Unfortunately, the Exchanges have not provided sufficient information for the Commission and its staff to make this determination. We think this can only occur through "regular" rule filings that are published for public notice and comment. The Commission's own statements support the importance of thoughtful and deliberate consideration in this area.[6]

---

[4] 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. See also Exchange Act Release Nos. 96403 (Nov. 29, 2022), 87 FR 74459 (Dec. 5, 2022) (SR-NYSEAMER-2022-53); 96499 (Dec. 14, 2022), 87 FR 77907 (Dec. 20, 2022) (SR-NYSEARCA-2022-80); 96504 (Dec. 15, 2022), 87 FR 78166 (Dec. 21, 2022) (SR-NYSEARCA-2022-82); 96488 (Dec. 13, 2022), 87 FR 77651 (Dec. 19, 2022) (SR-NYSECHX-2022-30); and 96487 (Dec. 13, 2022), 87 FR 77662 (Dec. 19, 2022) (SR-NYSENAT-2022-26).

[5] Each Exchange notes a version of the following: "The proposed rule change would not significantly affect the protection of investors or the public interest because the proposed additional Pre-Trade Risk Controls are a form of impact mitigation that will aid Entering Firms in minimizing their risk exposure and reduce the potential for disruptive, market-wide events. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system."

[6] In adopting the MAR, the Commission itself noted that Rule 15c3-5 is designed to "reduce the risks faced by broker-dealers, as well as the markets and the financial system as a whole, as a result of various market access arrangements, by requiring effective financial and regulatory risk management controls reasonably designed to limit financial exposure and ensure compliance with applicable regulatory requirements to be implemented on a market-

Based on the record to date, we think it is clear that the obvious goal of the Exchanges here is to use their SRO status to create an unfair advantage to eliminate competition and to ensure a meaningful revenue stream in the future once the competitive market is eliminated. The filings as resubmitted are flawed and contradictory and, in large part, incoherent. In this letter, we will reiterate and expand on the following main arguments:

1. The Exchanges' proposals fail to recognize the realities of the commercial market that has grown up around the Market Access Rule over the past decade, and also fail to address the fact that the Exchanges' risk checks are demonstrably inferior to, and riskier than other solutions, including HPR's.

2. The Exchanges' proposals offer contradictory views on the meaningfulness of the latency at issue and utterly fail to square these views.

3. The Exchanges are attempting to misuse the rule-making process, and unfairly lever their special status as SROs, not to compete fairly in an established market, but rather to unfairly drive out competition in services of a slower, less tested and inferior product.

1. **The Exchanges' proposals fail to recognize the realities of the commercial market that has grown up around the Market Access Rule over the past decade, and also fail to address the fact the Exchanges' risk checks are demonstrably inferior to and riskier than other solutions, including HPRs.**

Pre-trade risk checks have been a requirement since MAR compliance was mandated in November 2011. The Exchanges seek to enter an existing competitive market more than a decade later, with new tools that remain largely untested, and will ultimately and inevitably introduce new risks to the markets and market participants. The Exchanges' pre-trade risk checks are less understood, less comprehensive, and less tested than other marketplace offerings, such as HPR's.

Over the past several years, the Exchanges and their competitors have slowly crept into this space to compete with firms like HPR.[7] Competition has been fierce – and we welcome more of it – but only when it is on fair terms. We believe that if the Commission does not halt the Exchanges' current misguided efforts, the Exchanges' offerings will not supplement, but rather replace, the faster, more robust solutions currently available to brokers, and therefore competition in this space will not only be burdened, but may be extinguished. When that happens, brokers subject to the MAR will either need to develop their own internal pre-trade controls or be forced

---

wide basis." The Commission further noted that Rule 15c3-5 is "designed to ensure that broker-dealers appropriately control the risks associated with market access, so as not to jeopardize their own financial condition, that of other market participants, the integrity of trading on the securities markets, and the stability of the financial system."

[7] The Commission, in adopting the MAR, addressed the issue of brokers receiving their required pre-trade controls from exchanges, noting that they could be "useful risk management tools." The Commission went on to offer its views "that market centers may independently implement pre-trade risk management controls to ***supplement*** those applied by broker-dealers," (emphasis added) but that "broker-dealers with market access should be responsible in the first instance for establishing and maintaining appropriate risk management controls."

to primarily rely on suboptimal offerings. We think that, as a practical reality, many brokers would come to rely primarily on the offerings provided by the Exchanges and other markets. We strongly believe that a virtual monopoly of inferior products and services will lead to increased risk of harm to investors. This, of course, is completely contrary to the Commission's mission and goals. The Commission has the opportunity to, and should, prevent this.

As one example of the risk to investors, consider that the Exchanges want to be able to claim, among other things, that their risk offerings add minimal or "de minimis" latency. (Latency is further discussed in detail below). This desire results in problematic competing incentives and leads to choices that render many of the proposed controls inadequate and unreliable for 15c3-5 purposes. The need for minimal latency competes directly with the quality of the risk controls. Unlike the Exchanges, HPR has not made these same trade-offs, instead investing considerable time and resources innovating to ensure robust checks at minimal latency.

In the case of the Exchanges' risk checks, this has led to troubling feature contraction that is tantamount to an automaker throwing airbag technology out the window to optimize gas mileage. An example of one such check is the duplicate order test. In service to 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. Remarkably, if two different symbols (e.g., buy GOOG and buy MSFT) send repeat orders at the same time, then the test will fail, resulting in the member's quotes and orders continuing to stream into the Exchanges' systems, likely surpassing the member's risk thresholds and tolerances.

There are alternative algorithms that can track each symbol independently that will not fail under such scenarios. However, these checks create multiple-microsecond latency, and apparently fail to meet the minimal latency targets of the Exchanges. Any test that requires tracking multiple datasets must be implemented in a hardware or similar real-time subsystem unless the trading entity can accept delays in the tens of microseconds.

HPR, because of its superior proprietary technology, is an example of a vendor that can offer a safe and reliable duplicate order check that does track each symbol independently, and that will not fail under the above condition. It would be a grave mistake to place barriers against the market's use of a safer, faster solution by imposing punitive latency – just to make the Exchanges' inferior and riskier solution more appealing.

2. **The Exchanges' proposals offer contradictory views on the importance of the latency at issue, and utterly fail to square these views.**

Exchange Act Section 6(b)(8) prohibits any national securities exchange rule from imposing any burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. We believe that the Exchanges' treatment of the question of latency, both in their proposals and in the structure of their proposed offerings, violates this section of the statute.

Technically speaking, firms are not required to *utilize* the Exchanges' proposed pre-trade checks. However, even if they do not, the Exchanges have designed their offering so that market

participants that opt out are still *subject to* the same latency costs as those that opt in. In a marketplace where nanoseconds determine winners and losers, the "option" to take on added latency with or without the risk checks is a Hobson's choice, i.e., no choice at all! Therefore, we urge the Commission to examine the role of latency and the manner in which the Exchanges are exploiting their ability to impose latency costs to make up for their offerings' shortcomings.

For many market participants, latency is a critical factor in making and implementing decisions about trading strategy as well as in selecting tools and resources for addressing the markets. The critical importance of this factor was seen in the Exchanges' October 2020 efforts to obtain Commission approval of new rules to establish wireless connectivity services ("Wireless Connections"). 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 data centers in Carteret, NJ, Secaucus, NJ, and Markham, Canada ("Third Party Data Centers").[8] After encountering industry criticism, the Exchanges ultimately modified this service to eliminate the unfair latency advantage that would have resulted from the initial design of their "Data Center Pole." These modifications addressed the advantage of their Wireless Connections due to the location of the Data Center Pole within the exchange facility to level the playing field for competitors offering similar wireless connectivity services between the Mahwah Data Center and Secaucus and Carteret Third Party Data Centers. In their revised rule filings, and in response to commenters' concerns, the Exchanges represented that they are "committed to the principle of having *no measurable latency differential* due to [their] use of a Data Center Pole," (emphasis added) and made several changes to the measures they previously proposed. The Commission noted in its approval that it considered potential burdens on competition in this context, including by citing Exchange Act Section 6(b)(8) and its prohibition on national securities exchanges' imposing any burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. In particular, the Commission noted that, in making its findings, "the Commission has also taken into consideration certain representations made by the Exchanges" and that, "[c]onsistent with their representations, the Commission expects the Exchanges to adhere to the principle of having no *measurable* latency differential due to their use of the Data Center Pole." The Commission went on to note that it "expects the Exchanges, as well as the Commission staff, to monitor the Wireless Connections, particularly as market conditions and technology evolve, to assess whether conditions continue to permit competitors to offer substantially similar substitutes for the Wireless Connections."[9]

The regulatory process around the Mahwah Data Center clarified an important rubric: the Exchanges cannot play favorites with latency. Applying that rubric to the current scenario, it should stand to reason that, just as the Exchanges could not unfairly provide a measurable latency benefit to a participant using an Exchange-provided resource, they should not be allowed to impose an unfair measurable latency cost upon a participant choosing not to use an Exchange-provided

---

[8] 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).

[9] Exchange Act Release No. 34-90209, 85 FR 67044, at 67054.

service. The Commission should look at the present latency considerations through the same scrutinous lens as described above, applying the same standards that it required of the Exchanges then: that there be *no measurable latency* cost placed on a member that chooses not to use the proposed checks.[10]

The Exchanges' original filings were silent on the specific amount of additional latency that would be experienced by members who choose not to use the proposed pre-trade controls. In the refiled proposals, the Exchanges note only 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." In an environment where firms are spending millions of dollars to compete in nanoseconds and given the "no measurable latency" standard used in the Mahwah Data Center rule-making, this vague statement is objectively insufficient.[11]

The Exchanges obfuscate this issue further by providing arguments that are contradictory as to whether the latency from their proposed checks is relevant to competition. As stated in the proposals, the Exchanges try to argue that the same amount of latency involved is (i) highly relevant for the Exchanges' customers, but at the same time, somehow (ii) de minimis for HPR customers. Specifically, the Exchanges argue that it is necessary to implement their pre-trade risk controls "symmetrically" (adding the same latencies for non-users, e.g., HPR customers) so that non-users do not gain a competitive advantage over users. However, when addressing HPR's concerns, they then call the very same latencies "de minimis" and claim that they would not have "a material impact on the order flow of Participants that choose to employ non-exchange providers."

The rule the Exchanges want effectively amounts to: you have to take this, and the latency cost that comes with it, whether you want it or not, and whether you have any need for it or not. The word for this is not "symmetrical," but rather, "compulsory." Obviously, a market participant that uses HPR risk check solutions and also experiences Exchange-imposed latency would be at a latency disadvantage relative to a participant who uses only Exchange-provided risk checks. The Exchanges attempt to deny this obvious competitive disadvantage on the basis that the latencies are "de minimis" and would not have "a material impact on the order flow of Participants that choose to employ non-exchange providers."[12]

---

[10] For example, as one commenter noted related to the Exchanges' Pole proposals, "[n]othing is more critical in trading than timely access to exchange systems to submit orders and receive market data, and the Wireless Connections . . . being faster even if only by a microsecond can make a competitive difference." Letter from Matt Haraburda, President, XR Securities LLC to Vanessa Countryman, Secretary, Commission, dated March 18, 2020.

[11] 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."

[12] 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."

The Exchanges try to bolster their argument by claiming that their proposed latency cost is "the recognized best practice in this area," citing to a paper by Citadel Securities, a market participant well known for its ability to access markets at high speed and its proficiency in latency arbitrage strategies. The Exchanges, purporting to adopt Citadel's reasoning, suggest that if exchanges segmented orders into "those that would pass through [Exchange-provided] risk check vs. those that would not," such segmentation of orders would "produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage." This argument is wholly unfounded. Under the MAR, no firm can trade without pre-trade controls. The irresponsible and unfounded contention that any rational market participant will simply forego all risk checks should not be taken seriously. We think it is obvious that the exact reverse of this will occur, i.e., a market participant that is forced to pay the Exchanges' latency cost regardless of whether they use this service will be incentivized to rely solely on the Exchanges' controls – on the theory that it achieves regulatory compliance at the lowest possible latency. This is the likely outcome even if the Exchanges warn that firms should not rely solely on their proposed controls.

The Exchanges also try to bolster their argument on latency by stating that their approach is "the functionality that clients have specifically requested." We are aware of no client, ever, asking for extra latency for a product that it doesn't use. And regarding client requests, the Exchanges note in Item 5 of their Forms 19b-4 that "[t]he Exchanges ha[ve] neither solicited nor received written comments on the proposed rule change." Are the Exchanges saying that the client requests the Exchanges received were all verbal? This is contradictory and inconsistent with the requirements of Form 19b-4.

The Exchanges' arguments regarding latency are not only contradictory, but also disingenuous. Latency is a cost that broker-dealers and others inevitably incur to access markets responsibly. The importance of latency – and reducing it – is so great that market participants collectively spend hundreds of millions of dollars every year to reduce it as much as possible. The Exchanges themselves offer a multitude of connectivity options that generate significant revenue from their latency-sensitive clients. For example, in the market data space, the Exchanges have created a landscape where the value of their own proprietary data products is significantly higher than the value of that provided by securities information processors (SIPs) largely because faster data is essential to competitive trading strategies. If the Exchanges are so concerned about "latency neutrality," why would they sell faster ports and superior (and more expensive) connectivity services to their most latency-sensitive customers? Why would they sell faster market data at a high premium to latency-sensitive customers and so vehemently resist eliminating "geographic" latency at SIPs, which the Commission is otherwise addressing through its Market Data Infrastructure ("MDI") rules?[13] The importance of latency is reflected in the vast amount of revenue generated by the Exchanges in their own offerings. In fact, it is so relevant that one is left to infer that, at some point in the future, one would expect fees for gaining the benefit of such latency advantage in their pre-trade risk checks.

We suspect that the Exchanges are intent on selling the Commission on "latency neutrality" as an egregious euphemism for "latency advantage" simply because they have not, to date,

---

[13] See Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596 (April 9, 2021) (File No. S7-03-20).

invested in the latency reducing technologies required to compete on a fair and level playing field with firms like HPR.

Please refer to the more substantial discussion of these concerns in our original comment letter.

3. The Exchanges are attempting to misuse the rule-making process, and unfairly lever their special status as SROs, not to compete fairly in an established market, but rather to unfairly drive out competition in services of a slower, less tested and inferior product.

A number of features of the Exchanges' proposals have clear anti-competitive effects or unfair advantages stemming from the Exchanges' special status as SROs. These include:

- anti-competitive aspects of the offerings,
- the inaccurate claim that the offerings are "optional,"
- the inaccurate and irrelevant claim that the risk offerings are "substantially identical" to those currently offered by other markets,
- inaccurately characterize the offerings as mere "functional enhancements,"
- ignoring the Exchanges' limits on liability and conflicting roles,
- unaddressed elements required for fee filings, and
- requesting to waive the 30-day operative delay without merit.

Anti-Competition

As noted above, a significant segment of the market relies on latency measured in nanoseconds as a critical competitive factor. HPR's offerings excel at offering low latency pre-trade risk checks. This is one of the most important components of its competitive offering.

We previously commented that the proposals will make it commercially impracticable for firms to use third party offerings like HPR's, due to anti-competitive latency features, predatory pricing, and related considerations. The Exchanges' responded by noting that their proposals will not impose an undue burden on competition, because HPR's offering is different and more substantial, and because the Exchanges' proposed pre-trade checks are not designed to be solely relied on for MAR compliance or otherwise, unlike HPR's, which are.[14]

This response entirely fails to address our prior points and is a weak attempt by the Exchanges at convincing the Commission that the proposals satisfy the necessary standards under

[14] Each Exchange notes a version of the following: "Nor would [the proposals] impose an unnecessary burden on competitors like HPR for all orders – even orders of ETP Holders that choose not to use the proposed Pre-Trade Risk Controls – to pass through the Exchange's risk checks, because the Exchange's proposed risk checks would not and could not replace the far broader third-party risk solutions like HPR's. Unlike HPR's risk solutions, the Exchange's proposed Pre-Trade Risk Controls would not permit clients to track aggregated risk across all markets, provide consolidated risk management capabilities, or offer a complete Rule 15c3-5 solution. The Exchange's risk controls are not designed to be the sole means of risk management that any firm uses."

the Exchange Act. Are the Exchanges acknowledging that there *is* a burden on competition, but that it is not "undue"? If so, then they need to explain that. Or are the Exchanges saying that *no* burden on competition will exist whatsoever? If so, then they need to explain that.

The Exchanges are using their unique positioning and SRO status to collectively eliminate competitive offerings and to help their offering compete against better technology by slowing down all other market participants. While HPR offerings also include other components, that is irrelevant to this essential and highly competitive aspect of the pre-trade risk market.

Notably, the proposals also inadequately and confusingly attempt to address anti-competitive concerns across the markets generally in the aggregate, and even suggest positive effect on competition. Each Exchange notes a version of the following:

> "The Exchange[s] do[] not believe that the proposed rule change[s] will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange[s] believe[] that the proposal[s] will have a positive effect on competition because, by providing Entering Firms additional means to monitor and control risk, the proposed rule[s] will increase confidence in the proper functioning of the markets. The Exchange[s] believe[] the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. As a result, the level of competition should increase as public confidence in the markets is solidified."

This entire paragraph simply makes no sense at all. How and why "should" the level of competition increase? Are the Exchanges suggesting that this would result from "public confidence" in the "markets" being "solidified"? Are the Exchanges suggesting that without their pre-trade checks, public confidence in the markets is not solid? Just on the Exchanges' markets? What do the Exchanges mean by "solidified"? Clearly the Exchanges thought they needed to say something positive-sounding about competition in support of their proposals, or else they would not have included it. They should be required to fully explain and substantiate their assertions, not only generally, but especially where they form the basis for filing proposals for immediate effectiveness.

Please also refer to the more substantial discussion of these concerns in our original comment letter.

The proposed pre-trade checks are not "optional" as claimed

We discuss latency concerns in detail above. The Exchanges suggest that their risk checks are optional, and that "[i]f market participants find that the latency cost of such enhancements is not justified by the additional functionality they offer; such market participants will vote with their feet and send their order flow elsewhere." This is simply not true. Such behavior could violate Exchange Act Rule 611, the Order Protection Rule. Market participants have no choice but to

access the best-displayed protected bids and offers across all markets. Any added latency in clearing the national best bid or offer impedes the performance of latency-sensitive trading strategies. Firms cannot "opt out" of accessing the best displayed prices at the Exchanges and, therefore, there is no meaningful way to "walk with their feet."

The Exchanges also argue that "providing customers an opt-out ability would require the Exchange[s] 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." First, this statement acknowledges that there is actually no ability to opt out of the Exchanges' offering. Moreover, in the current regulatory and commercial environment, the Exchanges' customers are not required to purchase new ports to avoid added latency. The Exchanges are inventing this new reality and forcing it on participants, because they made a conflicted and flawed design choice for their new service. The alternatives being presented are disturbing: either (a) pay the additional latency cost for not using the new checks, or (b) pay additional port fees for not using the new checks (if available). This suggests a troubling deviation from a desire to do what is in the best interests of customers and market participants generally. Moreover, no competitive business that needed to market and sell a new solution to customers on merit would ever come up with such a solution. Only a protected SRO could even attempt such a flawed business model.

Finally, the Exchanges also note that "functionality on the Exchange[s'] trading systems is *often* applied uniformly to all orders, regardless of whether a particular client has opted to use that functionality for a particular order" (emphasis added). By the Exchanges' own admissions, not all of the Exchanges' functionality is applied uniformly to all orders.[15] The Exchanges fail to sufficiently explain why added latency, added complexity, and intentional access delays they propose are consistent with the Exchange Act. Worse, the Exchanges are attempting to substitute their thin rationalizations for the thoughtful and careful risk assessments that market participants must, and should be entitled, to make for themselves. HPR provides, among its offerings, pre-trade risk services that we believe are more complete, faster and more reliable than the proposed Exchange offerings. A broker may decide that it can best carry out its trading strategy, and meet its regulatory obligations and responsibilities as a market participant, by selecting a non-exchange pre-trade risk check and forgoing new and comparatively unproven exchange-provided services and the accompanying latency cost. The Exchanges have offered no reason why they should be empowered to alter the behavior of the market by unilaterally prohibiting this choice.

<u>The Exchanges fail to corroborate their claim that their risk offerings are "substantially identical" to those offered by other markets</u>

The Exchanges assert that the proposed risk checks are not novel, claiming that they are "modeled on," "substantially identical," and "substantively identical" to risk settings available on other equities exchanges, and that market participants are already familiar with the protections the

[15] Note that this does not state "always" applied uniformly. Taken in context it would appear that the word "functionality" could be replaced by latency, by that is not fully clear. It would be helpful to better understand in which cases the Exchanges have decided to apply latency uniformly and in which cases they have not (and how such choices affect their involvement in other commercial markets).

proposed risk controls afford. However, the Exchanges make no real effort to corroborate what they mean by "substantively identical" or to compare or contrast their substantive checks with those on the other top exchanges, i.e., NASDAQ and CBOE.

Related to this, though, we think it is imperative that the Commission evaluate whether other markets are also baking in an unfair competitive advantage to their commercial offerings via "latency neutralization." If the Commission were to determine that this is the case, then those other markets should be required to modify their offerings and submit new rule filings. In the new filings, those other markets should explain their pre-trade checks in greater detail, particularly related to latency, any tradeoffs or shortcuts made to achieve lower latency, competitive effects, and those markets' limits on liability and conflicted roles as SRO and commercial provider of necessary MAR controls.

The Exchanges also argue that "there is nothing unique about the [symmetrical implementation] approach" and compare their pre-trade risk checks to "limit order price protection," stating "orders with limit prices are not processed more slowly than those without." This statement is irrelevant, and the argument wholly unavailing. There is no competitive commercial market for exchange limit orders, which exist within an exchange's own matching engine and are not provided by (or required to be provided by) broker-dealers. In contrast, since the adoption of MAR and imposition on brokers of responsibility for pre-trade risk, risk controls have evolved into a competitive set of vendor-provided market services that depend on significant proprietary technologies in which significant sums have been invested. This investment and innovation by companies like HPR have paid off -- market participants that deploy better, faster pre-trade risk solutions are better able to fulfill their business objectives. This is precisely how an open and fair competitive market is supposed to work. The Exchanges, a decade late to the party, now want to institute a heavy-handed, top-down approach that effectively forces market participants to use their new, untested offerings while simultaneously undermining an existing competitive market including vendors and brokers that have been providing fast, reliable pre-trade risk checks and enabling MAR compliance for years.

<u>The exchanges inaccurately characterize the offerings as mere "functional enhancements"</u>

The Exchanges note that, "[w]ith one exception, the additional risk checks proposed here would be a functional enhancement to the Exchange's Pillar gateway and the risk checks would be applied to all orders on the Exchange." The Exchanges indicate that "[t]he one exception is the proposed pre-trade risk control…which would permit an Entering Firm to set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31E(a)(2)(B) regarding Limit Order Price Protection. This risk check, like the Exchange's Limit Order Price Protection, is implemented in the matching engine."

This exception, which may be only the first, means that the set of risk checks cannot be regarded as a mere "functional enhancement." It is interesting that the Exchanges mention this "exception" only in a footnote and fail to fully explain whether there are any important differences between checks that live in the Pillar gateway versus in the matching engine. We think this is an important distinction that the Exchanges must fully explain. This also raises questions about

whether and how often the Exchanges deploy other "functional enhancements" that have not been subject to rule filings.

The Proposals Continue to Ignore the Exchanges' Limits on Liability and Conflicting Roles in the Context of the Proposals and the Market Access Rule

The proposals continue to fail to discuss the Exchanges' limits on liability and conflicting roles as both regulator and commercial provider. This is a key and critical consideration that must be addressed in the context of the proposed pre-trade checks. The Exchanges' proposals implicate the need for careful and deep consideration in these areas, which we think can only be accomplished through the course of a "regular" rule filing that is published for full notice and comment and in a way that requires the Exchanges themselves to proffer their related views. We strongly believe that it is critical for the protection of the markets and to ensure competition between market participants that the Exchanges and the Commission address how and to what extent the proposed risk controls would be viewed with respect to the Exchanges' liability-limiting rules or regulatory immunity under the Exchange Act.

Please refer to the more substantial discussion of these concerns in our original comment letter.

The proposals do not address elements required for fee filings or related commission staff guidance.

As we noted in our original comment letter, we respectfully believe that the Commission should consider a pricing-for-services determination that results in a zero fee in the same light as it considers any non-zero fee for a set of services, especially for services that are already offered in the marketplace as fee-based services. We appreciate that this likely is a matter of Commission interpretation and policy, perhaps one that the Commission and its staff have not previously contemplated. Nevertheless, legacy staff guidance clearly does contemplate filings submitted other than pursuant to Rule 19b-4(f)(2) that include "a fee component" and that the staff guidance "will apply to the fee component."[16] That same legacy staff guidance also clearly indicates that the term "fees" refers "broadly to all pricing determinations set forth on an SRO's fee schedule, including charges assessed, waivers thereof or discounts thereto, and rebates or credits offered." In today's market, competitive risk solutions cost time, money and talent to develop, and choosing to just offer them "for free" is a bizarre decision that deserves more, not less, scrutiny. If the Commission were to agree with our view, we think it is objectively clear that the proposals do not address at all (or insufficiently address) whether the proposed risk controls are (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition. In this circumstance, we believe that the zero fee *does* cause a significant and undue burden on competition, especially in light of the significant costs associated with building, marketing, testing, and deploying products of this nature.

Please refer to the more substantial discussion of these concerns in our original comment letter.

---

[16] *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, (May 21, 2019), *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

<u>There is no basis for the exchanges' request to waive the 30-day operative delay</u>

We understand that the Commission's authority to waive the 30-day operative delay is discretionary and limited to circumstances in which doing so is consistent with the protection of investors and the public interest. The Exchanges do not attempt to argue *why* a waiver would be consistent with the protection of investors and the public interest. That seems like a minimum threshold they would need to satisfy to provide the Commission with the necessary basis on which to even consider granting the waiver. All the Exchanges say is that they want the "waiver of the operative delay in order to promptly meet market competition." They are at least a decade too late for that. Before permitting the Exchanges to potentially harm or even eliminate an established, open and competitive market, the Commission should require a full rule-making process and address all of the points we have raised that implicate serious questions related to investor protection. While it may be in the *Exchanges'* interest to have the operative delay waived, we think doing so is contrary to the public's interest.

<u>Conclusion</u>

We appreciate the continued opportunity to comment on the proposals and share our belief that they remain deficient. We remain very concerned about the anti-competitive nature of these offerings. As stated above, we believe exchanges should be able to offer pre-trade risk controls like those described in the proposals. It is critical, though, that any new solutions offered by exchanges should compete in the technological and commercial marketplace that has developed since the adoption of the MAR. Importantly, exchange-offered pre-trade risk controls should not embed unfair latency advantages nor benefit from rule-based limitations on liability and regulatory immunity, of which non-exchanges cannot avail themselves. We also remain deeply concerned that these exchange-offered risk controls exacerbate an inherent conflict within exchanges in their function as competitive, commercial providers of tools used to meet regulatory obligations and as market regulators, and that this conflict could undermine – not promote – market confidence.

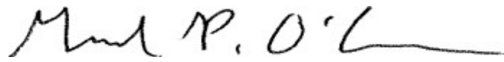
Ultimately, our desired outcome is that HPR has an opportunity to compete on a fair and level playing field with any competitors, including the Exchanges. The only way this can happen is if the Exchanges are not permitted to inflict an anti-competitive latency penalty on non-users of their proposed controls or lever their SRO status or other conflicted aspects of their relationship with their members to the detriment of HPR and other competitors in the space.

The Exchange Act and the rule filing process generally require that the Exchanges substantiate their views and assertions. The proposals objectively fail to do so. The Exchanges appear to be misleading or at least obfuscating their members, their competitors, the general public, and the Commission out of the important and necessary ability to sufficiently analyze the effects of the proposed risk controls and, therefore, **we respectfully request that the Commission suspend and institute proceedings to determine whether to approve or disapprove these proposals and should not waive the operative delay**.

*   *   *

If you have any questions or you would like to discuss these matters further, please contact me at [REDACTED] or [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
Hester M. Peirce, U.S. Securities and Exchange Commission, Commissioner
Caroline A. Crenshaw, U.S. Securities and Exchange Commission, Commissioner
Jaime Lizárraga, U.S. Securities and Exchange Commission, Commissioner
Mark T. Uyeda, U.S. Securities and Exchange Commission, Commissioner
Haoxiang Zhu, U.S. Securities and Exchange Commission, Director, Division of Trading and Markets
David S. Shillman, U.S. Securities and Exchange Commission, Associate Director, Division of Trading and Markets
Eric Juzenas, U.S. Securities and Exchange Commission, Associate Director, Division of Trading and Markets