SECURITIES AND EXCHANGE COMMISSION
TRANSACTION FEE PILOT FOR NMS STOCKS; FINAL RULE
Release No. 34-84875; File No. S7-05-18
RIN 3235-0761
84 Fed. Reg. 5202 (February 20, 2019)

CBOE'S MOTION FOR STAY OF
TRANSACTION FEE PILOT FOR NMS STOCKS

Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc. (collectively, "Cboe") hereby request that the Securities and Exchange Commission stay its newly adopted final rule, which amended Regulation NMS to adopt new Rule 610T, 17 C.F.R. § 242.610T, known as the "Transaction Fee Pilot for NMS Stocks" (the "Rule"), and that the stay apply to the Rule's April 22, 2019 effective date. (Transaction Fee Pilot for NMS Stocks, 84 Fed. Reg. 5202 (Feb. 20, 2019).) Cboe requests a stay of the Rule in its entirety pending final resolution of its Petition for Review challenging the Rule filed on February 15, 2019, in *Cboe BZX Exchange, Inc. v. SEC*, No. 19-1046 (D.C. Cir. Feb. 15, 2019).[1] If a stay is granted, Cboe would join the Commission in seeking expedited review from the United States Court of Appeals for the District of Columbia Circuit.

On March 1, 2019, New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (collectively, "NYSE") filed a motion requesting that the Commission stay the Rule during the pendency of NYSE's Petition for Review. Cboe agrees with the arguments made by NYSE, but Cboe is filing a separate motion to emphasize that a stay should be granted because the Commission failed to make the findings and conduct the

[1] Cboe filed a second Petition for Review on February 25, 2019, *Cboe BZX Exchange, Inc. v. SEC*, No. 19-1053 (D.C. Cir. Feb. 25, 2019). Cboe filed the second Petition for Review as a precaution in the event that the D.C. Circuit determined that Cboe's first Petition for Review was premature because that Petition was filed before the Rule was published in the Federal Register. *See* 15 U.S.C. § 78y(b)(1).

analysis required by the Securities Exchange Act of 1934 when it approved the Rule and that Cboe, other exchanges, and other market participants will suffer irreparable harm if the Rule becomes effective before the resolution of the pending appeals.

Dated: March 22, 2019

Respectfully submitted,

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SECURITIES AND EXCHANGE COMMISSION
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Release No. 34-84875; File No. S7-05-18
RIN 3235-0761
84 Fed. Reg. 5202 (February 20, 2019)

CBOE'S BRIEF IN SUPPORT OF ITS MOTION <u>FOR STAY OF TRANSACTION FEE PILOT FOR NMS STOCKS</u>

Dated: March 22, 2019

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PRELIMINARY STATEMENT

Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc. (collectively, "Cboe") respectfully request that the Securities and Exchange Commission stay the effective date of Rule 610T of Regulation NMS, the "Transaction Fee Pilot for NMS Stocks" (the "Rule") during the pendency of the Petition for Review filed by Cboe on February 15, 2019 with the United States Court of Appeals for the District of Columbia Circuit. On March 1, 2019, New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (collectively, "NYSE") filed a motion requesting that the Commission stay the Rule during the pendency of NYSE's Petition for Review. Cboe agrees with the arguments made by NYSE, but Cboe moves separately to emphasize that a stay should be granted because the Commission failed to make the findings and conduct the analysis required by the Securities Exchange Act of 1934 when it approved the Rule and because Cboe, other exchanges, and other market participants will suffer irreparable harm if the Rule becomes effective before the resolution of the pending appeals.

DISCUSSION

A. <u>A Stay Should Be Entered Because Justice So Requires.</u>

The Commission may stay a rule "pending judicial review if it finds that justice so requires." 15 U.S.C. § 78y(c)(2); *see also* 5 U.S.C. § 705 (agency may postpone the effective date of an action pending judicial review when "justice so requires"). Although the Commission may find it instructive to consider the four factors that courts examine when evaluating requests for a stay, the Commission is not limited to considering those factors in deciding whether "justice so requires" a stay pending judicial review. For example, the Commission applied a broader approach when granting a stay pending judicial review of its final rules regarding proxy access for shareholder director nominations. *Bus. Roundtable*, Exchange Act Release No. 63,031, 2010 WL

3862548 (Oct. 4, 2010). In that decision, the Commission expressly did not "address[] the merits of petitioners' challenges to the rules," and instead exercised its discretion to grant a stay because "justice so require[d]." *Id.* at *1. The Commission found that a stay was "consistent with what justice require[d]" because, among other reasons, "a stay avoid[ed] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity." *Id.*

A stay is warranted here for similar reasons. A stay would have no adverse effects and would avoid significant and unnecessary costs, regulatory uncertainty, disruption, and risks to the equities markets, market participants, and the public while the Rule is under appellate review. As demonstrated in Section B, the Commission has acknowledged that it is unable to predict the Rule's impact on the market and that the Rule could negatively impact efficiency, competition, and capital formation. In light of the uncertainty concerning the effects of the Rule on the markets and market participants, the Commission should stay the Rule pending judicial review.

Issuance of a stay is consistent with what justice requires, the Commission's past practice, and the Commission's statutory mandate to protect investors and the markets. Indeed, entry of a stay would demonstrate that the Commission is acting as a sound overseer of the financial markets and that it is taking a thoughtful, measured approach to implementation of the Rule. Simply put, there is much to gain and nothing to lose by staying the Rule pending judicial review. [2]

B. <u>The Traditional Four Factors Weigh In Favor Of A Stay.</u>

As noted, the Commission need not utilize the four-factor approach. The Commission has recognized, however, that the four-factor approach can be a useful framework to guide the

[2] If a stay is granted, Cboe would join the Commission in seeking expedited review from the United States Court of Appeals for the District of Columbia Circuit.

consideration of a stay request so the Commission often considers whether (1) petitioners have a strong likelihood of success on the merits or have presented a substantial case on the merits, (2) absent a stay there would be irreparable injury; (3) a stay would cause substantial harm to any person; and (4) a stay would serve the public interest. *See Am. Petroleum Inst.*, Exchange Act Release No. 68,197, 2012 WL 5462858, at *2, n.1 (Nov. 8, 2012). "If the arguments for one factor are particularly strong, a stay may be appropriate even if the arguments on the other factors are less convincing." *Id.* at *2; *see also Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("A stay may be granted with either a high likelihood of success and some injury, or vice versa."). Here, the four factors favor entry of a stay.

1. **<u>The Exchanges Have A Strong Likelihood Of Success On The Merits In Their Appeals.</u>**

Cboe is likely to prevail on the merits because the Commission has failed to meet the Exchange Act's requirements in adopting the Rule. To find a strong likelihood of success, it "will ordinarily be enough that the [movant] has raised serious legal questions going to the merits[.]" *Akiachak Native Cmty. v. Jewell*, 995 F. Supp. 2d 7, 13 (D.D.C. 2014) (quoting *Population Inst. v. McPherson,* 797 F.2d 1062, 1078 (D.C. Cir. 1986)). For the reasons set forth in NYSE's Motion for Stay, there are, at a minimum, serious legal questions going to the merits of whether the Commission acted arbitrarily and capriciously in adopting the Rule.[3] There also are serious legal questions going to the merits because the Commission has admitted that it did not and cannot make the findings or conduct the analysis that were required under the Exchange Act before the Rule could be adopted.

[3] As NYSE established, the exchanges have a strong likelihood of success on the merits for several reasons: the Commission failed to identify a sufficient basis to justify its exploratory rule, the Commission failed to conduct a proper cost-benefit analysis, and the Rule fundamentally undermines competition. (*See* NYSE's Br. in Supp. of Mot. for Stay, at 9-23.)

The Exchange Act expressly prohibits the Commission from adopting any rule that "would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the" Exchange Act. 15 U.S.C. § 78w(a)(2). When adopting the Rule, the Commission was also required to consider whether the Rule was "necessary or appropriate in the public interest[.]" 15 U.S.C. § 78c(f); 15 U.S.C. § 78k-1(a)(2), (c)(1); 15 U.S.C. § 78q(a); *Transaction Fee Pilot for NMS Stocks*, 84 Fed. Reg. 5202, 5245, 5280 (Feb. 20, 2019) (the "Adopting Release"). Because it must consider whether the Rule is in the public interest, the Commission has a statutory obligation to consider whether the Rule "will promote efficiency, competition, and capital formation." 15 U.S.C. § 78c(f); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (the Commission has a "statutory obligation" to determine the economic implications of a rule). The Commission acts arbitrarily and capriciously when it fails "adequately to assess the economic effects of a new rule" upon efficiency, competition, or capital formation. *Bus. Roundtable*, 647 F.3d at 1148.

Here, the Commission abdicated its statutory obligations by failing to make the findings required under the Exchange Act, thereby rendering promulgation of the Rule arbitrary and capricious. Rather than making the required findings, the Commission's Adopting Release provides competing hypotheses about the Rule's potential effects and then concedes that it cannot determine *ex ante* the Rule's effects. (*See* Adopting Release, 84 Fed. Reg. at 5280-5291.) The Commission's admissions raise serious questions as to the propriety of the Rule, which Cboe and other commentators have warned has the potential to negatively impact the competitive position of a number of market participants, widen spreads, and increase execution costs for the millions of investors that the Commission is charged with protecting.

The Commission failed to fulfill its statutory obligation to adequately consider and make findings regarding the Rule's effect on competition. Although no rule may be adopted absent a finding that it will not unnecessarily burden competition, 15 U.S.C. § 78w(a)(2), the Commission never made a finding as to whether the Rule would ultimately promote or harm competition. (*Cf.* Adopting Release, 84 Fed. Reg. at 5282 ("Because the Commission is unable to determine *ex ante* the Pilot's effects on liquidity, the Commission is unable to quantify many of the effects of the Pilot on competition.").) Indeed, the Commission recognized that the Rule could have adverse effects on the "competitive dynamics between exchanges, exchanges and off-exchange trading venues, broker-dealers, and issuers, particularly ETPs." (*Id.*; *see also id.* at 5288 ("[S]ince the Commission does not know *ex ante* how the Pilot will impact the liquidity of ETPs, it is unable to quantify the effects that the Pilot will have on competition between ETPs.").)

With respect to competition between exchanges and off-exchange venues, which the Commission excluded from the Rule, the Commission acknowledged that the Rule could harm the competitive position of the exchanges compared to off-exchange trading venues. (*Id.* at 5282 ("the Commission acknowledges that the Pilot may potentially place exchanges at a competitive disadvantage relative to off-exchange trading venues"); 5282 ("the Commission is unable to quantify or determine the overall effects that the Pilot will have on competition between exchanges and off-exchange trading venues"); 5283 ("the Commission is unable to predict the overall effect that changes in liquidity caused by the Pilot will have on the competition for marketable order flow between exchanges and off-exchange trading venues.").) Similarly, the Commission acknowledged that the Rule could harm the competitive position of the various exchanges and that the Commission was unsure of the scope of those competitive effects. (*Id.* at 5286 ("[T]he Commission acknowledges significant uncertainty with respect to the effect of the Pilot on exchange competition,").) Furthermore, after opining that some of the Rule's effects on competition *might* be only temporary, the Commission admitted that the Rule could "potentially have competitive effects for smaller exchanges that last beyond the Pilot." (*Id.* at 5282.) Based on its own admissions, the Commission failed to make the statutorily required finding that the Rule would not unduly burden competition.

The Commission also failed to fulfill its statutory obligation to adequately consider whether the Rule was in the public interest. The Adopting Release begins by noting that the Commission "currently lacks the data necessary to meaningfully analyze the impact that exchange transaction fee-and-rebate pricing models have on order routing behavior, market and execution quality, and our market structure generally." (*Id.* at 5203.) The Commission then leaps to the conclusion that, because it lacks sufficient data, it should engage in a costly experiment because that exercise *might* provide "additional information [that] would assist the Commission in making future regulatory decisions." (*Id.* at 5244; *see also id.* at 5259 (the Commission "cannot predict at this time whether [the Rule] will suggest any particular policy direction[.]").) In other words, the Rule is a significant and costly experiment, which may (or may not) produce information that could potentially justify some other unspecified Commission action in the future. Therefore, based on its own admissions, the Commission failed to ensure that the Rule itself would be in the public interest.

Furthermore, the Commission failed to properly analyze the economic impact of the Rule on efficiency, competition, and capital formation. 15 U.S.C. § 78c(f); *Bus. Roundtable v. SEC*, 647 F.3d at 1148; *Chamber of Commerce of U.S. v. Sec. & Exch. Comm'n*, 412 F.3d 133, 144 (D.C. Cir. 2005) (the Commission has a statutory obligation to consider a rule's effects on efficiency, competition, and capital formation, which requires it to "apprise itself . . . of the economic consequences of a proposed regulation"). A necessary starting point for a cost-benefit analysis is identification of the predicted benefits that will be achieved by the Rule. Here, the Commission has failed to identify any benefit of the Rule. Instead, as noted, the Commission has stated that the Rule *might* provide "additional information [that] would assist the Commission in making future regulatory decisions." (Adopting Release, 84 Fed. Reg. at 5244; *see also id.* at 5259 (the Commission "cannot predict at this time whether [the Rule] will suggest any particular policy direction[.]").) The Commission has therefore admitted that it has not identified any direct benefit of the Rule and that the Rule is instead just a potentially costly, real-world experiment that at most might provide information that would be relevant to potential *future* rulemaking. The Commission cannot "justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of any rule." *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177-78 (D.C. Cir. 2010). Absent identifying any concrete benefit, the Commission failed properly to assess or quantify the claimed economic benefit relative to the Rule's potential costs.

The Commission's examination of the costs that the Rule will impose with respect to efficiency, competition, and capital formation is similarly flawed. The Commission failed to adequately quantify the costs with respect to any of these statutory factors. Instead, the Commission simply enumerated various potential outcomes and found that the economic costs were too uncertain to quantify. That is insufficient. *See, e.g.*, *Bus. Roundtable*, 647 F.3d at 1152 (the Commission acts arbitrarily when it "duck[s] serious evaluation of the costs" that a rule would impose); *Pub. Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004) (an agency is required to "exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct, even if . . . the estimate will be imprecise.").

The Commission failed to quantify the Rule's economic effect on competition, instead admitting that it does not know whether the Rule will promote or harm competition and that the Rule actually might have anti-competitive effects that will continue after the Rule's pilot program ends. As noted above, the Commission discussed various possibilities, but made no effort to actually quantify the likely competitive costs, while admitting that the Rule could harm competition. That is inadequate. Uncertainty "does not excuse the Commission from its statutory obligation to determine as best it can the economic implications of the rule it has proposed." *Chamber of Commerce*, 412 F.3d at 143 (citing *Pub. Citizen*, 374 F.3d at 1221).

The Commission's analysis of the Rule's impact on efficiency was similarly flawed. The Commission admitted that it did not know whether the Rule would promote efficiency. The Commission found that it was "unable to determine *ex ante* the overall effects the Pilot will have on the efficiency of capital allocation, price efficiency, or the efficiency of fees and rebates." (Adopting Release, 84 Fed. Reg. at 5280.) In addition to acknowledging that it could not affirmatively find that the Rule would improve efficiency, the Commission acknowledged that the Rule might instead *harm* efficiency in a number of ways. The Commission recognized that the "efficiency of capital allocation could be reduced," that there could be a reduction in "customers' willingness to trade," and that the Rule "could lead to a lower injection of capital into the markets[.]" (*Id.*) The Commission further found that the Rule could "impair price efficiency and the price discovery process," negatively impact price efficiency of Exchange Traded Products, and result in inefficient optimization of exchange pricing structures. (*Id.* at 5281.) Finally, the Commission "acknowledge[d] that the Pilot's restrictions on rebates and fees could potentially harm efficiency[.]" (*Id.* at 5282.) At most the Commission was able to find only that some unknown future rule *might* later improve efficiency based on the data generated by the Rule's pilot—not that the Rule itself would actually promote efficiency. (*Id.* at 5280.) The Commission therefore failed to adequately consider the economic implications of the Rule relative to efficiency.

The Commission also failed to adequately consider the Rule's effect on capital formation. The Commission admitted that it does not know whether the Rule will promote capital formation: "it is unclear to what degree the Pilot will temporarily promote or harm capital formation[.]" (*Id.* at 5289.) The Commission acknowledged that the Rule could lead "to worse execution prices and subsequently reducing liquidity for the duration of the Pilot," thereby harming capital formation. (*Id.*) The Commission further acknowledged that some issuers might face increased costs of capital and that some issuers might be delayed in raising additional capital during the Rule. (*Id.*). Rather than determining the economic impact of the Rule on capital formation, the Commission could only opine that it does not *believe* issuers will "experience significant increases in the cost of capital as a result of the Pilot," without providing any factual basis for that belief. (*Id.* at 5291.) The Commission therefore failed to adequately consider the economic implications of the Rule relative to capital formation.

The Exchange Act "does not ask for an analysis of whether *any* rule would have an effect on competition. Rather, it asks for an analysis of whether the *specific rule* will promote efficiency, competition, and capital formation." *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 178. The Commission's repeated acknowledgements that it has not, and cannot, determine whether the Rule will actually benefit the public interest, protect investors, or promote efficiency, competition, and capital formation, coupled with its admissions that the Rule may actually harm these interests, raise serious questions as to whether the Rule will survive judicial review.

The Rule cannot be saved merely because it is called a pilot, rather than a permanent rule. The Rule is, in fact, a large-scale experiment in market structure that the Commission admits has the potential to negatively impact a large number of issuers, investors, securities exchanges, and other equities market participants. Importantly, when the Commission enacts *any* rule, it must comply with the requirements of the Exchange Act and be able to make the requisite findings and conduct the required analysis. In imposing requirements about the findings and analysis that are required before the Commission may adopt a rule, the Exchange Act does not differentiate between pilots and permanent rules. Here, as demonstrated above, the Commission has not made and apparently cannot make the requisite findings that the Rule satisfies the statutory criteria. Allowing the Rule to become effective without a showing that the statutory criteria have been met would permit the Commission to avoid the "unique obligation" Congress imposed on the Commission to make a specific finding that the Rule will not unduly burden competition, to consider whether the Rule is in the public interest, and to quantify the economic effects of a new rule on efficiency, competition, and capital formation. *Bus. Roundtable*, 647 F.3d at 1148 (quoting *Chamber of Commerce,* 412 F.3d at 144); *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 176. The Commission's unsupported hope that the Rule might yield useful information that might lead to some unspecified future regulatory action that might somehow benefit the public and investors does not satisfy the requirements of the Exchange Act.

2. **Absent A Stay Pending Judicial Review, Cboe Will Experience Irreparable Injury.**

Cboe and the other exchanges face at least two forms of irreparable injury absent a stay pending judicial review. First, the Rule imposes substantial compliance costs on the exchanges that cannot be recovered in the event that the D.C. Circuit finds the Rule to have been improvidently enacted. It is well-established that financial injury constitutes irreparable harm when the damages are substantial and unrecoverable. *See, e.g.*, *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 317 F. Supp. 3d 555, 563 (D.D.C. 2018) (finding that financial harm, in the form of millions of dollars in compliance costs, constituted irreparable harm); *Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 65 (D.D.C. 2004) ("[C]ourts have recognized that economic loss may constitute 'irreparable harm' where a plaintiff's alleged damages are unrecoverable.").

Here, the Commission estimates that the exchanges would have to spend over $2 million to implement the Rule. (Adopting Release, 84 Fed. Reg. at 5267.) The Commission further estimates the exchanges' total compliance costs to be roughly $6.5 million over the life of the Rule. (*Id.*) Cboe and the other exchanges will be unable to recover those costs in the event that the Rule is invalidated on appeal. *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 59 (2d Cir. 1996). Absent a stay, Cboe and the other exchanges will be forced to continue expending resources to prepare for the "Pre-Pilot Period" and the Rule itself. Compliance costs will be incurred even before the Rule's effective date, and those costs will increase during the time that the Rule is under judicial review. Absent a stay, Cboe and the other exchanges will experience substantial irreparable harm in the form of those unrecoverable costs.

Second, there is evidence that Cboe and the other exchanges will temporarily, and possibly permanently, lose revenues and customers as a result of the Rule. Such a loss of customers may constitute irreparable harm, particularly when there is no mechanism for Cboe to recover those costs if the Rule is overturned. *See, e.g.*, *Bloomberg L.P.*, Exchange Act Release No. 83,755, 2018 WL 3640780 (July 31, 2018) (finding that likely loss of customers constitutes irreparable harm); *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 790 (8th Cir. 2010) (affirming finding of irreparable harm in part because movant would suffer lost customers); *Stuhlbarg Int'l*

Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm.").

Here, the Commission admitted that the Rule could cause Cboe and the other exchanges to lose customers while the Rule is in effect, and that those losses may become permanent after the Rule expires. The Commission chose not to include off-exchange venues in the Rule. (Adopting Release, 84 Fed. Reg. at 5205-07.) While Exchanges will be restricted in their ability to offer incentives to generate order flow, off-exchange venues will face no such restrictions. (*Id.* at 5282.) The Rule therefore could result in off-exchange venues attracting significant order flow away from Cboe and the other exchanges because the off-exchange venues will be permitted to offer uncapped order flow incentives.[4] (*Id.*) The Commission admitted that the Rule's resulting impact "on exchange revenues . . . could be significant" and that those revenue losses could be permanent. (*Id.* at 5273 ("The Pilot could also impact exchanges' fee revenue after the conclusion of the Pilot if as a result of the Pilot broker-dealers permanently alter their order routing decisions after the Pilot is completed. . . . [T]he Commission acknowledges that the Pilot may lead to lower trading volume/market share for exchanges, which would impose a cost in terms of lost transaction fee revenue, but is unable to quantify the expected magnitude of this potential cost[.]").)

The conclusion that the exchanges may suffer substantial, permanent, irreparable revenue and customer losses is bolstered by the only two substantive studies in the rulemaking record, the Battalio Equity Market Study and the Nasdaq/Swan study. (*Id.* at 5248–49 (recognizing that the Battalio study found that broker-dealers route orders to capture liquidity rebates); *id.* at 5249-50

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[4] That the Rule will drive order flow from transparent, regulated exchange markets to non-transparent, lightly regulated venues further illustrates that the Rule is not in the public interest and would not protect investors.

(discussing the Nasdaq/Swan study, which found that Nasdaq lost market share in stocks when it experimented with lower fees and rebates).) Although the Commission was unable to quantify the scope of competitive harm to the exchanges and instead merely noted that such losses are "difficult to determine in advance," (*id.* at 5272), the inability to measure the losses that the exchanges would suffer underscores the irreparable injury Cboe and the other exchanges face absent a stay.[5] *See, e.g., Metalcraft of Mayville, Inc. v. The Toro Co.*, 848 F.3d 1358, 1368 (Fed. Cir. 2017) (discussing loss of customers as potential irreparable harm and noting that "[w]here the injury cannot be quantified, no amount of money damages is calculable, and therefore the harm cannot be adequately compensated and is irreparable.").

Because there is evidence that Cboe and the other exchanges will suffer substantial monetary losses that are unrecoverable and permanent and because the exchanges will incur significant compliance costs in connection with the Rule, a stay is justified so that the exchanges do not suffer irreparable harm while the Rule is under judicial review.

3. A Stay Would Not Cause Substantial Harm To Any Person And Would Serve The Public Interest.

As illustrated in NYSE's Brief, a stay would not cause substantial harm to any person and would serve the public interest. (*See* NYSE's Br. in Supp. of Mot. for Stay, at 25-26 (demonstrating that a stay is in the public interest because wider spreads under the Rule could harm investors and issuers and because a stay avoids unnecessary costs, regulatory uncertainty, and disruption if the Rule were to become effective and subsequently vacated).) By the Commission's own description, the Rule is an experimental program designed to gather data over

[5] The Commission briefly addressed the estimates that a 10% decrease in order flow would cost the exchanges $150 million in lost revenue during the Rule, but ultimately stated that it was unreasonable to expect a 10% decrease, without providing an alternative measure or explaining why the 10% figure was purportedly too high. (*See* Adopting Release, 84 Fed. Reg. at 5274.)

an extended period of time for potential use in the development of an unspecified future rule. There is no need for the Commission's experiment to begin immediately, and hence there is no substantial harm to any person by entering a stay pending judicial review.

To the contrary, the Commission has acknowledged that the Rule may actually harm investors and issuers. (*See supra* at 4-10.) As a result, the public interest supports entry of a stay.

CONCLUSION

For the foregoing reasons, Cboe respectfully requests that the Commission stay the Rule pending final resolution of its Petition for Review.

Dated: March 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2019, I caused a copy of the foregoing **Cboe's Motion For Stay Of Transaction Fee Pilot For NMS Stocks and Cboe's Brief In Support Of Its Motion For Stay Of Transaction Fee Pilot For NMS Stocks** to be served on the parties listed below via commercial courier.

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Dated: March 22, 2019

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