

**UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION**

In the Matter of:

Market Data Infrastructure

File No. S7-03-20

Release No. 34-90610 (Dec. 9, 2020)

**MOTION FOR STAY OF MARKET DATA INFRASTRUCTURE RULE BY THE
NASDAQ STOCK MARKET LLC, NASDAQ BX, INC., NASDAQ PHLX LLC, NEW
YORK STOCK EXCHANGE LLC, NYSE AMERICAN LLC, NYSE ARCA, INC., NYSE
CHICAGO, INC., NYSE NATIONAL, INC., CBOE BYX EXCHANGE, INC., CBOE BZX
EXCHANGE, INC., CBOE EDGA EXCHANGE, INC., CBOE EDGX EXCHANGE, INC.,
AND CBOE EXCHANGE, INC.**

The Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc. and Cboe Exchange, Inc. (“Petitioners”) hereby request that the Securities and Exchange Commission (the “Commission”) stay its Market Data Infrastructure Final Rule, Release No. 90610 (Dec. 9, 2020) (the “Market Data Infrastructure Rule”). Petitioners request this stay pending approval of the new consolidated data plan (the “CT Plan”) and final resolution of their petitions for review challenging the Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827, 85 Fed. Reg. 28,702 (May 13, 2020) (“NMS Governance Order”), which Petitioners filed in the D.C. Circuit on June 1, 2020, June 8, 2020, and June 30, 2020.

Dated: February 5, 2021

Respectfully submitted,



Paul S. Mishkin
Matthew A. Kelly
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
paul.mishkin@davispolk.com
matthew.kelly@davispolk.com

Amir C. Tayrani
Joshua M. Wesneski
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atayrani@gibsondunn.com
jwesneski@gibsondunn.com

*Counsel for New York Stock Exchange LLC,
NYSE American LLC, NYSE Arca, Inc., NYSE
Chicago, Inc., and NYSE National, Inc.*

Jeffrey S. Davis
John Yetter
NASDAQ, INC.
805 King Farm Blvd.
Rockville, MD 20850

Paul E. Greenwalt, III
Michael K. Molzberger
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 7100
Chicago, IL 60302
(312)258-5702
pgreenwalt@schiffhardin.com
mmolzberger@schiffhardin.com

*Counsel for The Nasdaq Stock Market LLC,
Nasdaq BX, Inc., and Nasdaq PHLX LLC*

*Counsel for Cboe BYX Exchange, Inc.,
Cboe BZX Exchange, Inc., Cboe EDGA
Exchange, Inc., Cboe EDGX Exchange,
Inc., and Cboe Exchange, Inc.*

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INFRASTRUCTURE RULE BY THE NASDAQ STOCK MARKET LLC,
NASDAQ BX, INC., NASDAQ PHLX LLC, NEW YORK STOCK EXCHANGE LLC,
NYSE AMERICAN LLC, NYSE ARCA, INC., NYSE CHICAGO, INC., NYSE
NATIONAL, INC., CBOE BYX EXCHANGE, INC., CBOE BZX EXCHANGE, INC.,
CBOE EDGA EXCHANGE, INC., CBOE EDGX EXCHANGE, INC., AND CBOE
EXCHANGE, INC.**

Paul S. Mishkin
Matthew A. Kelly
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
paul.mishkin@davispolk.com
matthew.kelly@davispolk.com

*Counsel for New York Stock Exchange LLC,
NYSE American LLC, NYSE Arca, Inc., NYSE
Chicago, Inc., and NYSE National, Inc.*

Paul E. Greenwalt, III
Michael K. Molzberger
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 7100
Chicago, IL 60302
(312)258-5702
pgreenwalt@schiffhardin.com
mmolzberger@schiffhardin.com

Counsel for Cboe BYX Exchange, Inc.,

Amir C. Tayrani
Joshua M. Wesneski
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atayrani@gibsondunn.com
jwesneski@gibsondunn.com

Jeffrey S. Davis
John Yetter
NASDAQ, INC.
805 King Farm Blvd.
Rockville, MD 20850

*Counsel for The Nasdaq Stock Market LLC,
Nasdaq BX, Inc., and Nasdaq PHLX LLC*

*Cboe BZX Exchange, Inc., Cboe EDGA
Exchange, Inc., Cboe EDGX Exchange,
Inc., and Cboe Exchange, Inc.*

Date: February 5, 2021

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INTRODUCTION

The Commission should exercise its authority under the Administrative Procedure Act (the “APA”), 5 U.S.C. § 705, and Section 25(c)(2) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78y(c)(2), to stay the effectiveness of the Market Data Infrastructure Rule pending approval of the CT Plan and the resolution of petitioners’ petitions for review challenging the NMS Governance Order.

The Market Data Infrastructure Rule is part of a larger effort by the Commission to restructure the framework for collecting and disseminating equity market data. It follows on the heels of the NMS Governance Order, which directed petitioners and other self-regulatory organizations (“SROs”) to propose a new NMS plan governing the consolidation and distribution of equity market data. The NMS Governance Order required the SROs to file a single consolidated NMS plan, the CT Plan, that would, if approved, eventually displace the three existing NMS plans that currently govern the consolidation and distribution of equity market data—the Consolidated Tape Association Plan, the Consolidated Quotation System Plan, and the Unlisted Trading Privileges Plan (“equity data plans”). As required by the NMS Governance Order, the CT Plan would, for the first time, give representatives of non-SROs voting power on the operating committee of an NMS plan.

The SROs have complied with the Commission’s directive in the NMS Governance Order and have submitted a proposed CT Plan for Commission review and approval. The Commission, however, has not yet approved the proposed plan and instead recently initiated proceedings to determine whether to approve or disapprove the proposal. And even if the proposed plan were approved, for a period after that approval, the CT Plan would need to undertake several steps before it could become operational and replace the equity data plans, including identifying the members of its operating committee, selecting an administrator, and filing plan amendments

establishing fees. During that period, the equity data plans would continue to govern the consolidation and distribution of equity market data. Meanwhile, the NMS Governance Order remains subject to an ongoing legal challenge by petitioners in the D.C. Circuit, which, if successful, would prevent the CT Plan from taking effect and preserve the equity data plans' governing role over the consolidation and distribution of equity market data.

The Commission's pending consideration of the proposed CT Plan, petitioners' pending challenge to the NMS Governance Order, and the equity data plans' ongoing responsibilities create substantial uncertainty regarding the implementation of the Market Data Infrastructure Rule, which would expand the consolidated data provided to market participants and restructure the way in which that data is transmitted to market participants. As the Commission acknowledges, the "first key milestone" in the implementation of those changes is the approval of plan amendments, including an entirely new fee schedule for the provision of consolidated market data to the entities authorized to receive that data from the exchanges; under the Rule, those plan amendments must currently be submitted for Commission approval within 150 days of the effectiveness Rule 614 (210 days after the Rule's publication in the Federal Register). Market Data Infrastructure Rule at 414-15. In light of the pending administrative and judicial proceedings, however, it is unclear whether the operating committee of the new CT Plan or the operating committees of the equity data plans (or both) will be responsible for formulating and submitting the fee schedule and other proposed amendments.

Accordingly, moving forward with implementation of the Market Data Infrastructure Rule while those pending proceedings remain unresolved would inject serious and unnecessary uncertainty into the market. It is not clear, for example, what would happen to the equity data plans' fee proposal if the Commission approved the CT Plan after the existing plans had already

submitted a proposal. Nor is it clear what would happen if the CT Plan filed a fee proposal, secured Commission approval of the proposal, but was then declared unlawful by the D.C. Circuit. The inevitable result for market participants would be confusion, disruption, and wasted resources. And the significance of those repercussions would be compounded by the fact that the Market Data Infrastructure Rule effectuates, by far, the most substantial restructuring of the securities market since Regulation NMS in 2005. There is no good reason to rush ahead with implementation of the Market Data Infrastructure Rule until this cloud of uncertainty has been lifted.

Petitioners therefore respectfully request that the Commission issue a stay of the Market Data Infrastructure Rule pending the Commission's approval of the proposed CT Plan and resolution of petitioners' petitions for review of the NMS Governance Order.¹

STANDARD OF REVIEW

The Commission has discretion under the APA to stay implementation of agency action when it "finds that justice so requires." 5 U.S.C. § 705. It likewise has authority to stay agency action under the Exchange Act "pending judicial review if it finds that justice so requires." 15 U.S.C. § 78y(c)(2).

Although the Commission often employs a four-factor analysis borrowed from general equitable principles when evaluating an application for a stay, *see, e.g., In re Am. Petroleum Inst.*, Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012), on other occasions, the Commission has dispensed with that analysis, issuing a stay "[w]ithout addressing the merits of petitioners' challenges to the Rule," *In re Rule 610T of Regulation NMS*, Release No. 85447, 2019 WL 1424351, at *1 (Mar. 28, 2019); *see also In re Grossman*, Release No. 4563, 2016 WL 6441565,

¹ The Commission will lose jurisdiction to grant a stay once it has filed the rulemaking record with the D.C. Circuit. *See* 15 U.S.C. § 78y(b)(2). Petitioners therefore respectfully request a ruling on this motion before that date.

at *4 (Nov. 1, 2016) (granting stay “without reference to the applicant’s likelihood of success on the merits or the other components of the four-factor test”); *In re Malouf*, Release No. 4516, 2016 WL 4537671, at *3 (Aug. 31, 2016) (same). In those circumstances, the Commission has explained that a stay may be warranted to “avoid[] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rule[] were to become effective during the pendency of a challenge to [its] validity.” *In re Motion of Business Roundtable and the Chamber of Commerce of the United States of America for Stay of Effect of Commission’s Facilitating Shareholder Director Nominations Rules*, Release No. 9149, 2010 WL 3862548, at *1 (Oct. 4, 2010).

DISCUSSION

Petitioners have filed petitions for review of the Market Data Infrastructure Rule. *See* Petition for Review, *The Nasdaq Stock Market LLC v. SEC*, No. 21- ____ (D.C. Cir. Feb. 5, 2021), *New York Stock Exchange LLC v. SEC*, No. 21- ____ (D.C. Cir. Feb. 5, 2021); *Cboe BYX Exchange, Inc. v. SEC*, No. 21- ____ (D.C. Cir. Feb. 5, 2021). Although petitioners are confident in their likelihood of prevailing in that proceeding, a stay of the Market Data Infrastructure Rule is warranted without regard to petitioners’ likelihood of success and the other elements of the traditional four-factor analysis because a stay would obviate “potentially unnecessary costs, regulatory uncertainty, and disruption that could occur” if the Rule were to take effect before the Commission has approved the CT Plan and the D.C. Circuit has decided the validity of the NMS Governance Order. *In re Motion of Business Roundtable*, 2010 WL 3862548, at *1.

The Market Data Infrastructure Rule works a sea change in the distribution of data regarding quotations and transactions in equity securities. The Rule has two main features: changes to the content of consolidated data and changes to the mechanism through which that data is consolidated and disseminated. Most significantly, rather than continue to require the exchanges

to submit the components of consolidated data to centralized securities information processors for dissemination to market participants, under the Market Data Infrastructure Rule, “the relevant exchange will provide quotes and trades in the NMS stocks they trade directly to competing consolidators and self-aggregators.” Market Data Infrastructure Rule at 171. Competing consolidators will consolidate the data from all the exchanges and resell it to market participants, while self-aggregators will consolidate the data only for their own internal use. *Id.* at 172. The price paid to exchanges for the data transmitted to the competing consolidators and self-aggregators will be set by a Commission-approved fee schedule. According to the Rule, “[t]he effective national market system plan(s) will propose and file with the Commission, pursuant to Rule 608, the fees for the data content underlying consolidated market data.” *Id.* at 353-54.

The first action item required before any changes contemplated by the Market Data Infrastructure Rule can be implemented is for the “effective national market system plan(s)” to file its/their proposed plan amendments required by new Rule 614(e), including a proposed fee schedule, within 150 days of the effectiveness of the Rule. Market Data Infrastructure Rule at 414-15.

The Market Data Infrastructure Rule’s ambiguous phrasing referring to one or more plans reflects the regulatory uncertainty as to whether a single NMS plan—the CT Plan currently under consideration by the Commission—or the three existing equity data plans will be responsible for submitting the proposed plan amendments, including the proposed fee schedule for the data underlying the new expanded content of consolidated data, to the Commission. The three equity data plans are governed by operating committees that comprise the exchanges that process equities trades and the Financial Industry Regulatory Authority; each SRO currently has one vote on the

operating committee of each equity data plan. *See* NMS Governance Order, 85 Fed. Reg. at 28,712.

In the NMS Governance Order, however, the Commission dramatically altered that governance structure. It directed the SROs to propose a “New Consolidated Data Plan” that would replace the existing NMS plans that govern the dissemination of consolidated market data. The Commission has instructed the SROs that the proposed plan must include two key features: (1) the operating committee of the plan must include not only SROs but also individuals that represent broker-dealers, investors, issuers, and other interested parties, and (2) exchanges that share a corporate affiliation will collectively receive only one or two votes on the operating committee, depending on their combined market share, instead of one vote each as currently provided. *See* NMS Governance Order, 85 Fed. Reg. at 28,729-30. Thus, once implemented, the operating committee of the new NMS plan will have both different membership and a different voting structure from the operating committees of the equity data plans.

Since the Commission promulgated the NMS Governance Order, however, two intervening events have called into question whether and when the new NMS plan will take effect.

First, in accordance with the NMS Governance Order, the SROs submitted the proposed CT Plan for Commission approval on October 6, 2020. *See* Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Release No. 90096, 85 Fed. Reg. 64,565 (Oct. 13, 2020). The Commission has not yet approved the proposed CT Plan. Instead, it has instituted proceedings “to determine whether to disapprove the CT Plan or to approve the plan with any changes or subject to any conditions the Commission deems necessary or appropriate.” Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated

Equity Market Data, Release No. 90885, 86 Fed. Reg. 4,142, 4,142 (Jan. 15, 2021). In so doing, the Commission has sought public comment on a number of broad topics, including “[w]hether the proposed CT Plan is consistent with the Governance Order” and whether “the proposed CT Plan is necessary or appropriate in the public interest.” *Id.* at 4,143. Comments are due by February 5, 2021, and the Commission has up to 300 days from the October 13, 2020 publication date of the proposed plan to issue an order approving or disapproving the plan. *See* 17 C.F.R. § 242.608(b)(2).

Second, petitioners filed petitions for review of the NMS Governance Order in the D.C. Circuit. *See* Petition for Review, *The Nasdaq Stock Market LLC v. SEC*, No. 20-1181 (D.C. Cir. June 1, 2020); Petition for Review, *New York Stock Exchange LLC v. SEC*, No. 20-1192 (D.C. Cir. June 8, 2020); Petition for Review, *Cboe BYX Exchange, Inc. v. SEC*, No. 20-1231 (D.C. Cir. June 30, 2020). In that ongoing proceeding, petitioners are challenging several fundamental components of the NMS Governance Order, including on the grounds that the Exchange Act does not authorize the Commission to give representatives of non-SROs voting power on the operating committee of an NMS plan and that the Commission’s reallocation of voting power based on so-called “exchange groups” violates the Exchange Act and is arbitrary and capricious. Briefing in the case remains ongoing, and oral argument has not yet been scheduled.

As a result of these administrative and judicial proceedings, it is uncertain whether the new CT Plan or the existing equity data plans will be the “effective national market system plan(s)” responsible for proposing the fee schedule and other amendments that, when approved by the Commission, will constitute the “first key milestone” in the implementation of the Market Data Infrastructure Rule. Market Data Infrastructure Rule at 414. Indeed, even if the CT Plan were approved before the date that the first NMS plan amendments must be submitted to the

Commission, the equity data plans would continue to govern the consolidation and distribution of equity market data for what is likely to be a significant period of time before the CT Plan could become operational. Given their ongoing obligation to govern the consolidation and distribution of equity market data, the operating committees of the equity data plans must immediately begin evaluating the requirements of Rule 614(e), including the fees for the data underlying the newly expanded content of consolidated data, and then file proposed amendments and supporting documentation with the Commission within 150 days of the effective date of the Market Data Infrastructure Rule.

That deadline creates the risk of substantial regulatory confusion and uncertainty. It is possible that sometime prior to the existing plans' submission of their proposed fee schedule, the Commission will approve (or approve with modifications) the proposed CT Plan, which would call into question whether the fee-setting work done by the operating committees of the three existing plans would be used by the operating committee of the new CT Plan or whether that new operating committee would be required to start over from scratch—a task that the new committee would not even be able to begin until the non-SRO representatives have been selected and the new committee formally constituted. Or, the Commission might approve the proposed CT Plan *after* the equity data plans have submitted their proposed fee schedule, but *before* those proposed fees have been approved, creating the question whether the operating committee of the CT Plan must submit new proposed fees or whether the existing fee proposal would remain operative. Or, the Commission might approve the CT Plan after the fees proposed by the equity data plans have been approved, again creating the question whether the operating committee of the CT Plan must submit new proposed fees to replace those already approved by the Commission.

The potential for regulatory uncertainty and unnecessary duplication of effort is compounded by the pending petitions for review of the NMS Governance Order. If the D.C. Circuit vacates the NMS Governance Order after the Commission has approved both the CT Plan and a proposed fee schedule submitted by the CT Plan, the validity of that fee schedule would be called into question and the operating committees of the equity data plans would likely need to submit a new fee schedule for the Commission's review. All of these disruptive effects and wasted efforts could be eliminated by a stay.

In contrast, there is no good reason to rush ahead with proposing a fee schedule for the newly expanded version of consolidated data until the NMS plan(s) that will propose those fees and other necessary amendments has been definitively determined. In fact, staying implementation of the Market Data Infrastructure Rule until the conclusion of the ongoing administrative and judicial proceedings would further the Commission's own regulatory objectives and its view of the public interest embodied in the NMS Governance Order and Market Data Infrastructure Rule. If the Commission is correct that those regulatory measures are consistent with the Exchange Act and APA, then a stay would ensure that the fees for the expanded version of consolidated data are established by a new operating committee that, in the Commission's view, is more representative and less conflicted than the operating committees of the equity data plans. That outcome is more consonant with the Commission's policy objectives than leaving the fee-setting responsibilities to the equity data plans' operating committees that, according to the Commission, are tainted by exchanges' supposed conflicts of interest.

A stay also would be consistent with the Commission's past practice of issuing stays to prevent regulatory confusion and the wasteful expenditure of resources. In 2019, for example, the Commission promulgated a rule that would have implemented a "Transaction Fee Pilot" to test the

effect of new limits on transaction fees and rebates across hundreds of securities. *See* Transaction Fee Pilot for NMS Stocks, Release No. 84875, 84 Fed. Reg. 5,202 (Feb. 20, 2019). Upon application by several exchanges, the Commission stayed the critical portion of the rule pending judicial review, finding that such a stay “appropriately balance[d] the Commission’s statutory duty to ensure the economically efficient execution of securities transactions, the public interest, and the harms petitioners assert they would suffer should the Pilot proceed during the pendency of litigation.” *In re Rule 610T of Regulation NMS*, 2019 WL 1424351, at *1. The Commission expressly declined to “address[] the merits of petitioners’ challenges to the Rule or the Pilot program,” focusing instead on the potential harms that would arise were the pilot vacated by the D.C. Circuit after it had become operative. *Id.*

Similarly, in 2010, after the Commission promulgated rules intended to facilitate the exercise of shareholders’ rights to nominate and elect directors, *see* Facilitating Shareholder Director Nominations, Release No. 62764, 75 Fed. Reg. 56,668 (Sept. 16, 2010), the Commission granted a stay of the rules pending judicial review, *see In re Motion of Business Roundtable*, 2010 WL 3862548. Again “[w]ithout addressing the merits of petitioners’ challenge to the rules,” the Commission found that a stay would “avoid[] 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.* at *1. Even though the petitioners had sought a stay only with respect to one of the rules, the Commission also stayed the effectiveness of a second rule because the two rules were “intertwined, and there [was] potential for confusion if the amendment to [the unchallenged rule] were to become effective while [the challenged rule] [was] stayed.” *Id.*

These factors supporting a stay apply here with even greater force. Through the Market Data Infrastructure Rule and the NMS Governance Order, the Commission is instituting the most

far-reaching modifications to the securities market since Regulation NMS in 2005. *See* Regulation NMS, Release No. 51808, 70 Fed. Reg. 37,496 (June 29, 2005). The NMS Governance Order and Market Data Infrastructure Rule purportedly work in tandem to effectuate fundamental changes to the way in which market data is consolidated and disseminated to market participants. Moving forward with the Market Data Infrastructure Rule while the implementation and validity of the closely related provisions of the NMS Governance Order are the subject of ongoing administrative and judicial proceedings would expose market participants to needless uncertainty, disruption, and expense. In contrast, a stay of the Market Data Infrastructure Rule pending the outcome of those proceedings would protect the public interest and promote predictability and stability.²

² Petitioners also note that the securities markets and their regulators continue to face challenges posed by the ongoing pandemic and its effect on market volatility, as well as novel challenges presented by unprecedented volatility in certain individual stocks. Accordingly, the Commission should be cautious about forcing through significant market structure changes at this time.

CONCLUSION

The Commission should stay the Market Data Infrastructure Rule pending approval of the CT Plan and resolution of petitioners' petitions for review of the NMS Governance Order in the D.C. Circuit.

Respectfully submitted,



Paul S. Mishkin
Matthew A. Kelly
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
paul.mishkin@davispolk.com
matthew.kelly@davispolk.com

*Counsel for New York Stock Exchange LLC,
NYSE American LLC, NYSE Arca, Inc., NYSE
Chicago, Inc., and NYSE National, Inc.*

Paul E. Greenwalt, III
Michael K. Molzberger
SCHIFF HARDIN LLP
233 South Wacker Drive
Suite 7100
Chicago, IL 60302
(312)258-5702
pgreenwalt@schiffhardin.com
mmolzberger@schiffhardin.com

*Counsel for Cboe BYX Exchange, Inc.,
Cboe BZX Exchange, Inc., Cboe EDGA
Exchange, Inc., Cboe EDGX Exchange,
Inc., and Cboe Exchange, Inc.*

Amir C. Tayrani
Joshua M. Wesneski
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atayrani@gibsondunn.com
jwesneski@gibsondunn.com

Jeffrey S. Davis
John Yetter
NASDAQ, INC.
805 King Farm Blvd.
Rockville, MD 20850

*Counsel for The Nasdaq Stock Market LLC,
Nasdaq BX, Inc., and Nasdaq PHLX LLC*

Date: February 5, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 201.154(c) of the Securities and Exchange Commission's Rules of Practice, petitioners certify that the foregoing Motion for Stay and Brief in Support of Motion for Stay is 3,372 words in length, exclusive of the Table of Contents and Table of Authorities.

Dated: February 5, 2021



Amir C. Tayrani

CERTIFICATE OF SERVICE

I, Amir C. Tayrani, counsel for The Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC, hereby certify that on February 5, 2021, I served copies of the foregoing Motion for Stay and Brief in Support of Motion for Stay as indicated below:

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
apfilings@sec.gov
(via hand delivery and email)



Amir C. Tayrani