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Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. S7-02-22; Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"

Dear Ms. Countryman:

Investor Choice Advocates Network ("ICAN")[1] is pleased to submit this response to the Securities and Exchange Commission ("Commission" or "SEC") request for further comment on its proposal to amend Exchange Act Rule 3b-16, modifying the definition of "Exchange" ("the Proposal"). After thorough review of the many comments submitted in response to the two open comment periods, we believe we can offer additional, valuable perspective for the Commission's consideration.

As a primary concern, the Proposal fails to adequately consider harm to the very investors the SEC strives to protect as part of its longstanding mission. We believe the increased regulatory burdens this Proposal establishes will drive participants from the markets, stifle innovation, and increase consolidation, all of which ultimately will limit the choices investors may have for venues, platforms, and even technologies available to engage in transactions. And while all investors will be impacted, the result would be most acutely felt by retail investors, who indisputably have less access to the markets than larger players from the outset. This Proposal is harmful to all, but disproportionately so to the retail investment community.

[1] Investor Choice Advocates Network (ICAN) is a nonprofit public interest litigation organization dedicated to breaking down barriers to entry to capital markets and pushing back against regulatory overreach, serving as a legal advocate and voice for investors and entrepreneurs whose efforts help fuel vibrant local and national economies driven by innovation and entrepreneurship.

In addition, ICAN is increasingly concerned with the SEC's continued attempts at constitutionally problematic overreach, and this Proposal follows that worrying trend. Administrative agencies such as the SEC derive their authority from Congress. While the SEC may be granted wide berth in rulemaking that furthers the statutory aim to protect investors, this authority is not limitless. As the Commission is well aware, intent does not always justify action: The SEC may intend to protect the public in promulgating this rule, but it is neither necessary nor appropriate as proposed, it lacks proper statutory authority, and poses a risk of significant harm.

ICAN urges the SEC to withdraw this Proposal. As currently drafted, certain elements of the Proposal signal helpful and overdue changes to the markets, such as eliminating the exemption of government securities from Regulation ATS. However, those elements alone are not enough to overcome the fulsome, harm this Proposal would inflict on the markets by limiting investor choice.[2] The SEC can, and should, consider beneficial elements apart from this Proposal, perhaps addressing them under an alternative framework following thorough consideration of the numerous, well-informed opinions of commenters.

The Expansive Nature of This Proposal Fosters Harm, not Harmonization, Within Our Markets

In this Proposal, the SEC suggests several language changes that would vastly expand the definition of an "Exchange" by capturing – intentionally or not - a broad array of venues, platforms, and technologies used in the scope of engaging in transactions that would not otherwise be considered as "Exchanges". Specifically, the Proposal would add "Communication Protocol Systems" ("CPS") to the definition of an "Exchange". A CPS is not defined in the Proposal but is intended to broadly include messaging systems, without any accompanying justification for doing so and risking significant market disruption. At best, this vague and problematic addition to Exchange criteria will lead to confusion; at worst, it will cause market participants to curtail operations rather than being miscast as an Exchange and subject to those burdensome and unwarranted rules and regulation.

The addition of CPS to the Exchange definition is not the only textual change of great concern. The Proposal also would replace the longstanding terminology of bringing together "the orders for securities of multiple buyers and sellers" with bringing together "buyers and sellers of securities using trading interest" when defining the activity of an Exchange. By swapping out the word "orders" for "trading interest", the definition then expands to include non-firm trading interest that

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[2] To be sure, a handful of commenters observed in passing the Proposal's adverse impact on investor choice we highlight herein, but that adverse impact merits greater emphasis and the Commission's direct attention. *See, e.g.*, April 12, 2022, comment letter from Securities Traders Association (noting "We believe the uncertainty around the application of the Communication Protocol Systems will stifle innovation by creating unreasonable barriers to entry due to lack of regulatory clarity, negatively impact investor protection, as well as limit investor choice due to the inevitable confusion in the implementation of the Proposal") and April 18, 2022, comment letter from Bloomberg L.P. and Bloomberg Tradebook (noting "Interoperability of systems democratizes best of breed rather than limiting it to the big players that can afford to develop their own proprietary systems. Interoperability empowers investor choice and produces real benefits by increasing transparency and liquidity.")

does not meet the definition of "order." Specifically, the definition would now include "any non-firm indication of a willingness to buy or sell a security that identifies at least the security and either quantity, direction (buy or sell), or price". This is an extraordinary expansion with grave consequences.

Exchanges have long been defined as marketplaces that bring together orders of buyers and sellers, operating under established and nondiscretionary rules for order execution. They are not messaging platforms or software that may be used by investors in expressing their trading interests, yet this Proposal would deem those as such. Certainly, innovation has occurred and will continue to occur, and regulation must be adjusted to account for it. However, updates to regulation require precision and full consideration of unintended consequences. We do not believe that has occurred here, as we cannot envision it was the SEC's intent to harm investors by stifling innovation. Nonetheless, this Proposal casts such a wide regulatory net that it would ensnare many tools and market participants with no purpose or intent of being an Exchange.

Vastly expanding the definition of an Exchange to include ancillary services and technology is all but certain to drive providers of those supportive services out of the marketplace, either consolidating with others to be able to withstand the regulatory burden of Exchange registration or ceasing to operate, at least in a manner accessible to all. Larger industry players may have the resources to replicate what they need to fill this void, but smaller platforms may not be able to bear the costs of registration and compliance. Again, all investors would be harmed by lack of choices, but that harm will be disproportionately meted out to those least able to avoid it. As SIFMA has noted about a different SEC registration requirement, one way or the other, either by increased costs or innovations left by the wayside, investors ultimately suffer.[3]

A key element of a healthy, resilient financial market is choice, and that choice must include the ability to select from numerous instruments, services, and providers in making investment decisions, which are inherently personal. A regulator cannot know the individual wants and needs of each and every investor and should not assume it does have such knowledge when framing regulation. Having investors' best interests in mind cannot supplant the investors' right to make discretionary decisions, yet this Proposal would do exactly that by increasing regulatory burdens that would reduce options available in the marketplace.

Several years ago in a different context, Commissioner Pierce addressed this regulatory conundrum quite succinctly as follows: "*Investor protection means enforcing antifraud and disclosure rules, but it also means protecting an investor's right to make investment decisions for herself, to take risks and to use the latest technology to trade and invest. As in other areas of life, people want to be able to make choices about their finances, even if others might question those choices or choose differently for themselves*." Equally important, she added that "*regulators have a role to play, but*

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[3] Securities Industry Association, *The Costs of Compliance in the U.S. Securities Industry* (Feb. 2006) at 12 ("Perhaps the most significant costs are . . . the opportunity costs borne by firms and their impact on investors, who may end up paying either higher prices or who may perceive a reduction in the choices available to them.") available at https://www.sifma.org/wp-content/uploads/2017/06/costofcompliancesurveyreport1.pdf.

that role should always be carried out with humility and a realization that investors have a right to make their own decisions." [4]

Innovation in Financial Markets Does Not Create Regulatory Authority

Like many of the other commentors to this Proposal, ICAN shares the view that the SEC does not have the statutory authority to vastly expand the definition of an "Exchange" in U.S. financial markets. Effecting a change of this magnitude requires the will and authority of Congress, neither of which exists.

This Commission has, of late, made several such attempts to exceed its regulatory mandate, proposing to redefine a number of long-held industry definitions, standards, and operating practices. At present, there are several pending rule proposals that would redefine who is a securities "Dealer" and what is an "Exchange", that attempt to prescriptively rewrite the terms of business for private fund advisers, that would mandate climate-focused investment practices, that would prescribe terms for outsourcing, and would require cybersecurity policies and actions that would clash with recommendations and pending requirements of CISA – the recognized federal agency expert in cybersecurity. This is not an exhaustive list.

Aside from the much-deserved public outcry, legislators have taken notice. Among the numerous public statements, members of Congress have explicitly called upon the SEC to specify its source of Congressional authority for each new rule it proposes so that they can "monitor the SEC to ensure it does not operate outside its statutory directives."[5]

The sheer volume of rulemaking activity over the past two years is in and of itself worrisome, particularly when considering the accompanying brief comment periods that appear to ignore a particular proposal's complexity and impact. However, many of these proposals and corresponding statements by members of the Commission indicate a fundamental change in the SEC's approach to its remit. The SEC's longstanding three-part mission is to protect investors, maintain fair, orderly and efficient markets, and to facilitate capital formation. This mission is in jeopardy from the SEC's own actions when they harm investors by limiting their choice in participation, products, and services, injecting the markets with uncertainty, and by driving business and liquidity out of the U.S.[6]

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[4] SEC Commissioner: Investors Have the Right to Make Their Own Decisions Without Regulators Standing in the Way, https://www.cnn.com/2021/10/11/perspectives/sec-commissioner-investors-regulators/index.html

[5] Letter from Reps. McHenry, Comer, and Granger to the Honorable Gary Gensler (Sept. 20, 2022), https://financialservices.house.gov/uploadedfiles/2022-09-20_final_mchenry_granger_comer_letter_to_sec_re_west_virginia_v._epa.pdf

[6] *See Chamber of Commerce of the U.S. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) (loss of opportunity to purchase mutual fund shares constituted a legally cognizable injury).

In light of the foregoing concerns, ICAN urges the Commission withdraw this Proposal and do as Commissioner Pierce suggests: Act with humility when carrying out your responsibilities as an administrative regulator. That humility should include recognizing the boundaries of statutory authority. We would welcome the opportunity to elaborate further on the points raised in this letter. For further information, please contact me by email.

Sincerely,

Nick Morgan
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cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
Dr. Haoxiang Zhu, Director, Division of Trading and Markets
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