



October 22, 2015

Chair Mary Jo White
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Serious market structure-related civil and criminal illegal conduct by a number of firms represented on the SEC's Equity Market Structure Advisory Committee must be addressed promptly.

Dear Chair White:

I am writing to highlight major flaws in the creation and composition of the SEC's Equity Market Structure Advisory Committee and to urge the SEC to take immediate action to address those problems, including but not limited to immediately removing International Technology Group (ITG) and Convergex from the Committee.

At least three firms represented on the Committee have either committed or been implicated in serious violations of law, including misconduct that was in some cases willful, board-approved, or even criminal. Those three firms are ITG, Convergex and Barclay's PLC. ITG and Barclays have each been the subject of enforcement actions or lawsuits relating to dark pool and high-frequency trading violations, and Convergex has been criminally charged and sanctioned for other serious trading violations.

For example, as described in greater detail below, the trading violations committed by ITG were not only "egregious" according to the SEC, but also **approved** by the Board of Directors. And yet, the SEC chose the very person who was the Chairman of the Board at ITG while the illegal conduct was underway—Dr. Maureen O'Hara—to serve as a member of the Committee. In the case of Convergex, the violations included criminal misconduct designed to "fleece" investors. Those investors—charitable organizations among them—suffered tens of millions of dollars in damages. And yet again, the SEC somehow determined that a firm guilty of flagrant investor abuses should be represented on the Committee.

As a separate matter, the Committee is also flawed because, since its inception, its membership has been grossly imbalanced in favor of industry's perspective. Over half of the seventeen members represent financial market participants. While they may provide valuable expertise and propose solutions on some aspects of market structure reform, the fact remains that the Committee is not balanced with a commensurate number of people and organizations solely committed to ensuring that the public interest is served. With this imbalance, the Committee

cannot be expected to provide the type of guidance that the SEC will need to fix our capital markets in a way that truly serves the interests of investors, our markets, and the public.

The composition of the Committee is a matter of great importance, as defects in our market structure are among the most pressing issues facing the SEC today. Those defects create profound unfairness; threaten major “flash crash” disruptions; and ultimately undermine investor confidence—without which our equity markets cannot function. Establishing an advisory committee to assist the SEC in addressing these problems is appropriate, but only if the Committee is properly constituted with members who have the requisite combination of expertise, respect for law, and commitment to investor protection.

It is imperative that the SEC act promptly to remedy this grossly unacceptable situation. The SEC must take the following steps without delay:

1. **Overhaul:** Remove the representatives of ITG and Convergenx from the Committee immediately; carefully re-assess whether Barclays should be permitted to continue serving on the Committee in light of the legal actions described later in this letter; and reconstitute the Committee with a majority of members who are focused solely on the public interest in fair, transparent, and competitive markets that will have the confidence of the public, investors, and market participants.
2. **Prevent:** Publicly disclose the criteria and specific processes that govern appointments to EMSAC; ensure that firms with significant disciplinary actions are barred from serving in the first place or removed if they are subject to such actions after appointment; and ensure that the composition of the Committee aligns with the SEC’s primary goal of protecting investors.
3. **Explain:** Publicly explain in detail how and why the SEC determined that representatives of ITG and Convergenx were suitable candidates for participation on the Committee, including specifically the consideration of the apparently ongoing SEC enforcement investigations and actions against them; and, disclose all remedial actions taken in response to this letter.

I. Recent revelations of misconduct by three firms represented on the Committee highlight the urgent need for remedial action.

The EMSAC includes at least **three** representatives from **three** different firms that have recently committed or been substantially implicated in dark pool and high-frequency trading violations, as well as other serious misconduct: ITG, Convergenx, and Barclays PLC.¹

¹ ITG is represented on the Committee by Maureen O’Hara, Chairman of the Board of the ITG; Convergenx is represented by Eric Noll, the CEO of Convergenx Group; and Barclays is represented by Joe Mecane, managing director of Barclays PLC.

Egregious, Board-Approved Violations by ITG

In August of this year, ITG, an agency broker, agreed to pay a record \$20.3 million for operating a proprietary trading desk that used knowledge of customer requests to trade for its own benefit, leveraging data that other users of the dark pool did not have.² **“The conduct here was egregious,”** said Andrew Ceresney, director of the SEC’s enforcement division,³ who also said that “The abuse of confidential information is significant.”⁴ The fine was the largest ever for misconduct in private trading venues.⁵ ITG admitted wrongdoing as part of the settlement, also a first for a dark-pool-related case.⁶ And perhaps most incredibly, ITG’s board approved of this illegal, secret conduct, which occurred from 2010-2011.⁷

In light of this disciplinary history—the largest fine ever imposed for misconduct in alternative trading venues, a first-of-its-kind admission of wrongdoing, and an acknowledgment that illegal conduct (of the type that the EMSAC is expressly designed to combat) was **approved by their board**—ITG is unfit to serve on the Committee. These extraordinary circumstances warrant the immediate expulsion of the ITG board member that sits on the EMSAC.

These facts also raise serious questions about the process that the SEC followed in selecting members of the Committee. After many months of deliberation, the SEC announced the EMSAC membership publicly on January 13, 2015.⁸ At that time, the SEC’s investigation of ITG must have been ongoing for a significant period of time, given that it resulted in a \$20 million settlement and admission of wrongdoing less than seven months later. And presumably, you, in your capacity as Chair of the SEC, had been briefed on the SEC’s ongoing enforcement activity during the deliberations that preceded the announcement of the EMSAC. In light of this timeline, the SEC owes the public, at a bare minimum, a detailed explanation of the decision process that resulted in ITG’s being chosen for the EMSAC while the SEC was simultaneously investigating the firm for illegal conduct of such magnitude.

A similar explanation is due with respect to the selection of Dr. O’Hara to serve as ITG’s representative. She has been Chairman of ITG’s Board of Directors since 2007, well before the

² U.S. Securities and Exchange Commission Press Release, *SEC Charges ITG With Operating Secret Trading Desk and Misusing Dark Pool Subscriber Trading Information* (Aug. 12, 2015), <http://www.sec.gov/news/pressrelease/2015-164.html>.

³ John McCrank and Lisa Lambert, *ITG To Pay Record Fine For 'Dark Pool' Violations*, Reuters (Aug. 12, 2015, 1:37 PM), <http://www.reuters.com/article/2015/08/12/securities-regulation-itg-idUSL1N10N10Q20150812>.

⁴ Matt Robinson and Sam Mamudi, *ITG Pays Record Dark Pool Fine for Secret Trading Desk*, Bloomberg (Aug. 12, 2015, 9:51 AM), <http://www.bloomberg.com/news/articles/2015-08-12/itg-pays-record-dark-pool-fine-for-running-secret-trading-desk>

⁵ Bradley Hope, *Hedge Fund AQR Fires Trading Head Linked to ITG Probe*, Wall St. J. (Aug. 12, 2015, 5:54 PM), <http://www.wsj.com/articles/itg-confirms-plan-to-pay-20-million-to-settle-sec-dark-pool-charges-1439388899>.

⁶ *Id.*

⁷ Order Instituting Administrative Cease-And-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-And-Desist Order at 22, U.S. Securities and Exchange Commission, Aug. 12, 2015, *available at* <http://www.sec.gov/litigation/admin/2015/33-9887.pdf>

⁸ U.S. Securities and Exchange Commission Press Release, *SEC Announces Members of New Equity Market Structure Advisory Committee* (Jan. 13, 2015), <http://www.sec.gov/news/pressrelease/2015-5.html>.

board-sanctioned, illegal conduct began. This raises serious questions not only about why an ITG board member remains on the EMSAC, but also why Dr. O'Hara in particular was thought to be an appropriate candidate for the EMSAC in the first place.

Criminal and Civil Violations by Convergenx

In December of 2013, Convergenx, a brokerage firm, agreed to pay more than \$151 million to settle **criminal and civil charges** related to routing trades through an offshore affiliate to generate secret commissions. To hide the fact that traders were taking markups, traders fabricated details about execution orders and sent false transaction reports to clients. Unwitting investors—including charities, religious organizations, retirement plans, governments, and universities—ultimately paid tens of millions of dollars in unwarranted fees in what prosecutors called an **"astonishingly brazen" fraud**.⁹

As a result, Convergenx agreed to pay criminal penalties totaling more than \$43 million under a deferred prosecution agreement.¹⁰ Acting Assistant Attorney General Mythili Raman said that Convergenx had engaged in a "coordinated bilking" and a "concerted . . . effort to fleece its clients."¹¹ Further, three Convergenx brokerage units admitted to wrongdoing as part of a more-than \$107 million settlement of a parallel civil case filed by the Securities and Exchange Commission.¹² "Convergenx brokerages sent customer trades on an unnecessary journey through its offshore affiliate so they could take extra fees behind customers' backs," said Stephen Cohen, Associate Director of the SEC's Enforcement Division. "Brokers who seek to enhance their bottom lines through deception about their compensation are violating the law and the trust of their customers."¹³

“[T]he theft of money from Convergenx’s clients was large in scale,” said Acting Assistant Attorney General Mythili Raman, less than two years ago.¹⁴ **“Convergenx and its traders, plain and simple, lied to their clients to hide that they were stealing their money.”**

A representative of a firm that has recently been subject to \$150 million in civil and criminal penalties for market structure-related violations should not be permitted to serve on the Committee. As in the case of ITG, it is essential that the SEC remove Convergenx's representative

⁹ Jean Eaglesham and Bradley Hope, *Convergenx Settles Fraud Charges for \$151 Million*, Wall St. J. (Dec. 18, 2013, 7:52 PM), <http://www.wsj.com/articles/SB10001424052702303773704579266573383329550>.

¹⁰ U.S. Department of Justice Office of Public Affairs, *Remarks as Prepared for Delivery by Acting Assistant Attorney General Mythili Raman for the Convergenx Resolution Press Call*, (Dec. 18, 2013), <http://www.justice.gov/opa/pr/remarks-prepared-delivery-acting-assistant-attorney-general-mythili-raman-convergenx>.

¹¹ *Id.*

¹² U.S. Securities and Exchange Commission Press Release, *SEC Charges Convergenx Subsidiaries With Fraud for Deceiving Customers About Commissions*, (Dec. 18, 2013), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540521484>.

¹³ *Id.*

¹⁴ U.S. Department of Justice Office of Public Affairs, *Remarks as Prepared for Delivery by Acting Assistant Attorney General Mythili Raman for the Convergenx Resolution Press Call*, (Dec. 18, 2013), <http://www.justice.gov/opa/pr/remarks-prepared-delivery-acting-assistant-attorney-general-mythili-raman-convergenx>.

from the EMSAC without delay. And, as with ITG, the SEC owes the public an explanation of why they saw fit to appoint a representative from Convergenx to the EMSAC in the first place and specifically what criteria were used, what due diligence was done, and who at the SEC was involved in the review and appointment process.

Civil Suits and Investigations Involving Barclays PLC

While ITG and Convergenx have engaged in the most flagrant market structure-related misconduct, the activities of at least one of the other firms on the Committee in this area also raise serious concerns.

Barclays PLC, the multinational banking and financial services firm, has recently been embroiled in multiple controversies and lawsuits related to manipulating markets to benefit high-frequency traders. In a nationwide class-action suit, a number of pension funds and other investors accused Barclays and seven exchanges, including BATS Global Markets,¹⁵ of giving high-frequency traders favored treatment, costing less-favored investors billions of dollars.¹⁶

In dismissing the lawsuit, U.S. District Judge Jesse Furman held that the plaintiffs failed to show that Barclays perpetrated a fraudulent scheme to exploit investors in its dark pool, and that the exchanges were "absolutely immune" from the plaintiffs' key claims because of their status as self-regulatory organizations.¹⁷ The Court nevertheless acknowledged the potentially serious nature of the misconduct alleged: "[Michael] Lewis and the critics of HFT may be right in arguing that it serves no productive purpose and merely allows certain traders to exploit technological inefficiencies in the markets at the expense of other traders," he wrote.¹⁸ "They may also be right that there is a need for regulatory or other action from the SEC or entities such as the exchanges and Barclays. Those, however, are debates and tasks for others."¹⁹

New York Attorney General Eric Schneiderman has also sued Barclays, alleging that they duped investors in marketing materials about the level of protection from high-frequency traders they would receive in Barclays's dark pool.²⁰ Barclays moved to have that case dismissed, but the court denied the motion in February.²¹ The lawsuit cites specific emails (reproduced below) in which employees acknowledge and even discuss apparent inaccuracies and deceptions in Barclays

¹⁵ BATS Global Markets is also represented on the EMSAC, by Jamil Nazarali, a member of the BATS Global Markets board of directors.

¹⁶ William Alden, *Pension Funds Join Lawsuit on High-Frequency Trading*, N.Y. Times (Sep. 8, 2014, 4:16 PM), http://dealbook.nytimes.com/2014/09/08/pension-funds-join-lawsuit-on-high-frequency-trading/?_r=0.

¹⁷ *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, No. 14-MD-2589 JMF, 2015 WL 5052538, at *12 (S.D.N.Y. Aug. 26, 2015).

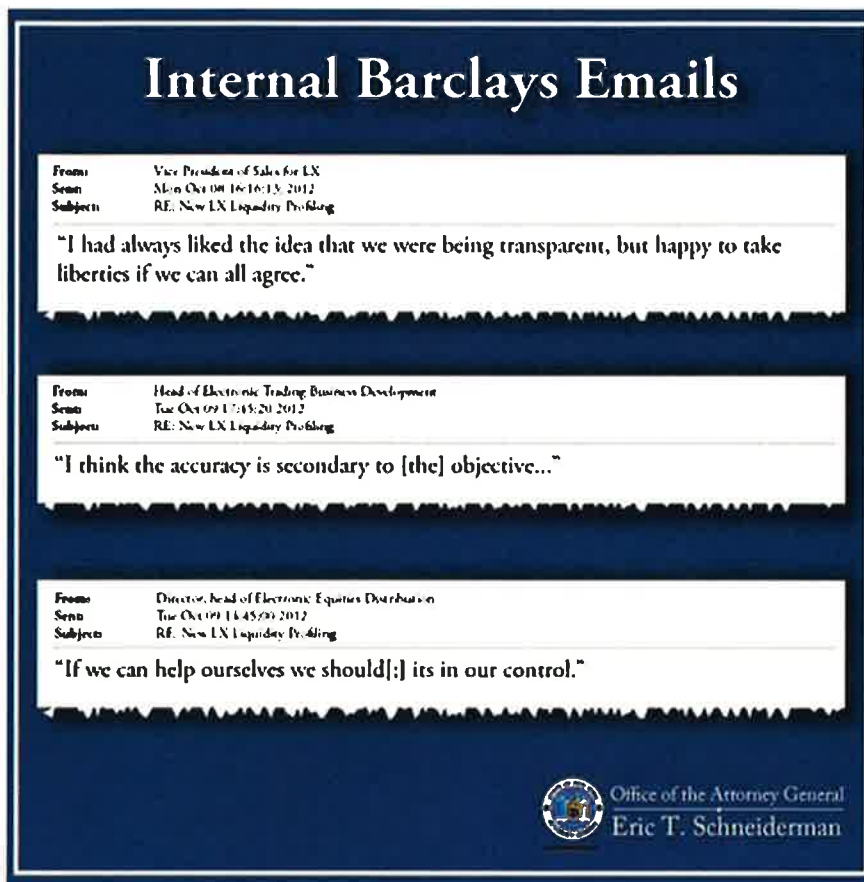
¹⁸ *In re Barclays Liquidity Cross & High Frequency Trading Litig.*, No. 14-MD-2589 JMF, 2015 WL 5052538, at *27 (S.D.N.Y. Aug. 26, 2015)

¹⁹ *Id.*

²⁰ Andrew Trotman, *Barclays Facing New Dark Pool Allegations*, The Telegraph (Jan. 21, 2015, 10:13 PM), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11361612/Barclays-facing-new-dark-pool-fraud-allegations.html>.

²¹ Jonathan Stempel, *Barclays Fails to Win Dismissal of NY 'Dark Pool' Lawsuit*, Reuters (Feb. 13, 2015, 5:15 PM), <http://www.reuters.com/article/2015/02/13/us-barclays-newyork-darkpool-lawsuit-idUSKBN0LH2B220150213>.

marketing materials.²² According to these emails, Barclays removed references about their dark pool's then-largest participant, an HFT firm that Barclays knew engaged in predatory behavior, from a marketing document intended for institutional investors.²³



The suit further takes aim at Barclays's role as a broker, claiming that Barclays told clients that it routed their orders to trading venues that offered the best terms, when it actually sent their orders to its own dark pool first.²⁴ The Attorney General's lawsuit is pending in court, and Barclays has not yet been subject to any enforcement-related penalties. Nonetheless, these are very serious allegations (backed by apparently credible evidence) of specific violations of the exact laws that the EMSAC is charged with upholding and improving.

When there are ample and well-substantiated reasons to think that a firm is involved in illegal activity, at the very least, the SEC is duty-bound to reassess that firm's fitness to be represented on the EMSAC. This principle applies with the utmost force where the firm's

²² Andrew Trotman, *Barclays Facing New Dark Pool Allegations*, The Telegraph (Jan. 21, 2015, 10:13 PM), <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11361612/Barclays-facing-new-dark-pool-fraud-allegations.html>.

²³ *Id.*

²⁴ William Alden, *Barclays Faces New York Lawsuit Over Dark Pool and High-Frequency Trading*, (Jun. 25, 2014, 3:28 PM), <http://dealbook.nytimes.com/2014/06/25/n-y-attorney-general-to-accuse-barclays-of-fraud-over-dark-pools/>.

misconduct relates to the very market structure issues that the Committee was established to address.

II. Additionally, the Committee has been grossly imbalanced since its inception.

When the EMSAC was announced, you observed that “secondary markets exist for investors and public companies, and their interests must be paramount.”²⁵ Unfortunately, the composition of the Committee reflects something closer to the opposite: a paramount interest in safeguarding incumbent industry interests.²⁶

In fact, a majority of the members of the Committee are electronic market makers, Wall Street brokers, and other market participants. The remaining members include one dedicated public interest advocate, Nancy Smith,²⁷ a few academics, and a couple of investors. Thus, only a minority of the members of the Committee offer a purely or mostly pro-investor perspective.

You have said that the EMSAC represents “a diversity of backgrounds and viewpoints”²⁸ and indeed, the EMSAC Charter specifies that one of the Committee’s primary objectives is to provide the SEC with “diverse perspectives on the structure and operations of the U.S. equities markets.”²⁹ Yet it is impossible to ignore that the diversity on display in the EMSAC is drawn primarily from *within* the industry. The sheer dominance of industry perspectives on the EMSAC not only runs counter to the dictates of the Committee’s charter, but is an independent reason to doubt the committee’s most basic ability to fulfill its core mission.

An excessive concentration of industry representatives will limit the Committee’s ability to objectively diagnose the problems in our markets and recommend valuable solutions. The Committee’s analysis of problems facing investors will be blinkered, tainted, and incomplete; proposed solutions to those problems will be ineffectual, inadequate, and designed to preserve market structures that create profit-making opportunities at the expense of investors. In short, if not properly constituted with fair representation of members who seek to protect the public interest, the Committee threatens to do more harm than good, in addition to failing in its stated mission.

III. Establishing a new advisory committee can be part of a meaningful solution to the problems in the equity markets, but only if the public interest is fully and fairly represented.

The SEC’s decision to establish a market structure advisory committee was necessary and appropriate, as flaws in the structure of our equity markets are growing in importance, creating

²⁵ *Id.*

²⁶ See the addendum to this letter for a complete list of the members of the EMSAC.

²⁷ For example, Ms. Smith’s background reflects a demonstrable commitment to investor protection and education, as she was Director of the SEC’s Office of Investor Education and Assistance, and also served as a state securities regulator. <http://www.aarp.org/about-aarp/executive-team/info-2010/nancy-smith.html>.

²⁸ *Id.*

²⁹ U.S. Securities and Exchange Commission Equity Market Structure Advisory Committee Charter, February 9, 2015, at Section 3, available at <https://www.sec.gov/spotlight/emsac/equity-market-structure-advisory-committee-charter.pdf>. The EMSAC Charter further stipulates that the Committee’s membership must be “balanced fairly in terms of points of view represented.” *Id.* at Section 11.

unfairness for investors and even threatening the stability of our financial markets. As stock trading continues to migrate from established exchanges to dark venues with restricted access and limited reporting requirements, doubts about the transparency, fairness, efficiency, and basic integrity of the equity markets are rising.

Indeed, many sophisticated industry observers and market participants share these doubts. Duncan Neiderauer, a former CEO of the New York Stock Exchange, has observed that **“nobody rational would look at this [market] and say it isn’t broken.”**³⁰ A recent survey found that a “majority of financial industry participants” believe that the equity markets are not “fair for all participants.”³¹

Increasingly decentralized markets and technology-based trading practices have produced an uneven playing field that unfairly advantages certain market participants over others. Highly fragmented markets complicate attempts to subject market actors to consistent regulation. Incentives like payment for order flow arrangements create damaging conflicts of interest that are not readily apparent to investors. The large and growing proportion of trading that takes place in dark pools has reduced displayed liquidity and inhibited price discovery. Preferential data access confers unfair advantages on a select number of market participants at the expense of others. High frequency trading practices exploit other market participants, create the illusion of market liquidity, and contribute at times to extreme volatility that harms investors and undermines confidence in our markets. These are all serious problems that the SEC must address.

Establishing a formal body to relay advice and recommendations on market structure issues to the SEC could still be a positive step toward ensuring that the equity markets operate more openly, fairly, and efficiently, and for the benefit of all investors. Your own aspirations for the EMSAC reflect this very point. When the EMSAC was announced, you observed that the EMSAC will be “invaluable . . . in ensuring . . . that our markets continue to operate openly, fairly and efficiently to benefit investors and promote capital formation.”³²

However, to achieve these goals, the composition of the Committee must reflect the SEC’s overarching priorities of protecting investors and ensuring the integrity of the equity markets. Representatives from industry can bring valuable expertise and insight to such a committee, but they must be appropriately counterbalanced with a majority of members who can be relied upon to represent investors and the public interest. And when law violators such as ITG and Convergenx are added to the mix, the public has every reason to doubt that a body so deeply flawed in its composition can or will truly work to improve the integrity of the markets and advance the public good.

³⁰ David Benoit, *NYSE CEO: Knight Capital Another Reason for Reform*, Wall St. Journal Deal Journal Blog (Aug. 3, 2012, 9:19 AM), <http://blogs.wsj.com/deals/2012/08/03/nyse-ceo-knight-capital-another-reason-for-reform/>.

³¹ Eric Noll, *U.S. Equity Market Structure “Flashback” Survey Results*, Convergenx (Mar. 26, 2015, 11:49 AM), <http://convergenx.tumblr.com/post/114674985559/us-equity-market-structure-flashback-survey>.

³² U.S. Securities and Exchange Commission Press Release, *SEC Announces Members of New Equity Market Structure Advisory Committee* (Jan. 13, 2015), <http://www.sec.gov/news/pressrelease/2015-5.html>

IV. The SEC must reconstitute the membership of EMSAC in accordance with the ultimate goal of serving the investing public.

The composition of the Committee is simply unacceptable. Industry perspectives are overwhelmingly dominant on the Committee, while investor interests are under-represented. And nearly 20% of the Committee's current membership is comprised of representatives of firms that have committed or been implicated in serious violations of the very laws the Committee was created to analyze and improve. As a result, an immediate wholesale review of the Committee membership, as well as the appointment process, is warranted and necessary, and it must be completed without delay.

For the public to have faith that the EMSAC will serve its interests, the SEC must take the following steps:

1. **Overhaul:** Remove the representatives of ITG and Convergenx from the Committee immediately; carefully re-assess whether Barclays should be permitted to continue serving on the Committee in light of the legal actions referenced above; and reconstitute the Committee with a majority of members who are focused solely on the public interest in fair, transparent, and competitive markets that will have the confidence of the public, investors, and market participants.
2. **Prevent:** Publicly disclose the criteria and specific processes that govern appointments to EMSAC; ensure that firms with significant disciplinary actions are barred from serving in the first place or removed if they are subject to such actions after appointment; and ensure that the composition of the Committee aligns with the SEC's primary goal of protecting investors.
3. **Explain:** Publicly explain in detail how and why the SEC determined that representatives of ITG and Convergenx were suitable candidates for participation on the Committee, including specifically the consideration of the apparently ongoing SEC enforcement investigations and actions against them; and, disclose all remedial actions taken in response to this letter.

Conclusion

We appreciate your consideration of the issues raised in this letter. We urge you to take prompt and transparent action to address them, so that the Committee can serve as a meaningful source of guidance and expertise on what are widely regarded as critically necessary market structure reforms.

Sincerely,



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cc: SEC Commissioners
Members of the Equity Market Structure Advisory Committee

Addendum: Equity Market Structure Advisory Committee Members

Members of the Equity Market Structure Advisory Committee include:

1. Matthew Andresen, Co-Chief Executive Officer, Headlands Technologies LLC
2. Reginald Browne, Senior Managing Director & Global Co-Head, ETF Group, Cantor Fitzgerald & Co.
3. Kevin Cronin, Global Head of Trading, Invesco Ltd.
4. Brad Katsuyama, President and CEO, IEX Group Inc.
5. Ted Kaufman, Professor, Duke University Law School and former U.S. Senator from Delaware
6. Richard Ketchum, Chairman and CEO, FINRA
7. Manisha Kimmel, Managing Director, Financial Information Forum
8. Mehmet Kinak, Vice President and Head of Global Equity Market Structure and Electronic Trading, T.Rowe Price Group
9. Andrew Lo, Charles E. and Susan T. Harris Professor of Finance and Director, Laboratory for Financial Engineering, MIT Sloan School of Management and Chairman and Chief Investment Strategist, AlphaSimplex Group
10. Joseph Mecane, Managing Director, Barclays PLC
11. Jamil Nazarali, Senior Managing Director & Head of Execution Services, Citadel Securities
12. Eric Noll, President & CEO, Convergenx Group
13. Maureen O'Hara, Robert W. Purcell Professor of Finance, Johnson Graduate School of Management, Cornell University and Chairman of the Board, Investment Technology Group Inc.
14. Joe Ratterman, CEO, BATS Global Markets Inc.
15. Nancy Smith, Corporate Secretary & Chief Integration Officer, AARP
16. Chester Spatt, Kenneth B. and Pamela R. Dunn Professor of Finance, Tepper School of Business, Carnegie Mellon University and Director of its Center for Financial Markets
17. Gary Stone, Chief Strategy Officer, Bloomberg Tradebook LLC