AMERICAN CONSUMER & INVESTOR INSTITUTE

November 4, 2024

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

RE: ***New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Section 802.01C of the NYSE Listed Company Manual (Price Criteria for Capital or Common Stock) To Limit the Use of Reverse Stock Splits To Regain Compliance With the Price Criteria in Certain Circumstances*** **(Release No. 34-101306; File No. SR-NYSE-2024-48)**

Dear Ms. Countryman:

The American Consumer and Investor Institute ("ACII") respectfully submits this comment letter to the U.S. Securities and Exchange Commission (the "Commission" or "SEC") in response to the above proposal by New York Stock Exchange LLC ("NYSE") regarding its delisting process and the use of reverse stock splits.[1] NYSE's proposal begins to address similar risks to those targeted by The Nasdaq Stock Market LLC's ("Nasdaq") recent rule to update its delisting process for low-priced securities, many of which take advantage of reverse stock splits to remain listed. ACII submitted a comment letter addressing Nasdaq's rule on September 13, 2024.[2]

NYSE proposes to amend Section 802.01C (''Price Criteria for Capital or Common Stock'') of the NYSE Listed Company Manual to modify the implications of a reverse stock split for an issuer that falls below compliance with the NYSE price criteria. Currently, Section 802.01C provides that a company will be out of compliance with listing standards if the average closing price of a security is below $1.00 over a consecutive 30 trading-day period (the "Price Criteria").[3] If a company fails to meet the Price Criteria, it must bring its share price and average share price above $1.00 within six months. If, after six months, both a $1.00 closing share price on the last trading day of the cure period and a $1.00 average closing share price over the 30 trading-day period ending on the last trading day of the cure period are not attained, the Exchange will commence suspension and delisting procedures. An issuer may then request review of the delisting, which generally stays the suspension of the security during the review.

NYSE states that the action a company generally takes to cure non-compliance with the Price Criteria is a reverse stock split. NYSE notes that some companies engage in repeated reverse stock splits, which is often indicative of deep financial or operational distress, "rendering them inappropriate for trading on the Exchange for investor protection reasons." NYSE believes that restricting the

[1] Exchange Act Rel. No. 101306, 89 FR 83738 (Oct. 10, 2024).
[2] *See* https://www.sec.gov/comments/sr-nasdaq-2024-045/srnasdaq2024045-520477-1494622.pdf.
[3] The amendment would specifically define the $1.00 requirement as "Price Criteria," which is currently used as a defined term in the Listed Company Manual but not actually defined.

excessive use of reverse stock splits will protect investors by delisting companies that cannot maintain price compliance, which is indicative of financial instability and unsuitability for continued listing. Accordingly, it seeks to amend Section 802.01C to provide that if a company fails to meet the Price Criteria and the company has effected (i) a reverse stock split over the prior one-year period or (ii) one or more reverse stock splits over the prior two-year period with a cumulative ratio of 200 shares or more to one, then NYSE will immediately commence suspension and delisting procedures, without any compliance period. Additionally, the amendment would prevent a listed company from effecting a reverse stock split if it would result in the company becoming non-compliant with a different NYSE continued listing requirement. If a company executed such a reverse stock split, NYSE would promptly commence suspension and delisting procedures.

This follows increasing concern about exchange-listed penny stocks[4] and recent proposals from Nasdaq to update the delisting process for companies failing to meet Nasdaq's $1.00 bid price requirement and to restrict certain uses of reverse stock splits to regain compliance with the bid price requirement.[5] As with Nasdaq[6], we support NYSE's efforts that begin to address concerns about exchange-listed penny stocks and reverse stock splits.[7] ACII urges the Commission to approve NYSE's proposals as another incremental step towards protecting retail investors from the risks associated with such penny stocks and reverse splits.

However, like other market participants, we believe the Commission should promptly take its own action to address the clear risks posed by low-priced securities. The Commission adopted penny stock rules to protect investors from risks associated with penny stocks, including sales practice abuses and market manipulation. Securities that are listed on a national securities exchange are specifically exempted from the penny stock rules if they meet exchange listing standards.[8] The exchange listing standards are meant, among other things, "as a proxy for investors to distinguish between exchange-listed companies and companies that trade over-the-counter ("OTC") based on how well capitalized they are."[9]

Unfortunately, because exchanges continue to list companies for long periods of time while non-compliant with the listing standards, investors are exposed to "classic penny stock companies that are often tied to pump-and-dump trading activity and other forms of market manipulation,"[10] while viewing them "as relatively safer, more liquid investments."[11] These risks are exacerbated because the number of stocks listed on exchanges that trade below the $1.00 share price threshold has

---

[4] *See, e.g.*, Letter from Thomas H. Merritt, Virtu Financial to SEC (July 15, 2024) (https://www.sec.gov/files/rules/petitions/2024/petn4-830.pdf) ("Virtu Petition"); https://www.wsj.com/finance/stocks/hundreds-of-stocks-have-fallen-below-1-theyre-still-listed-on-nasdaq-c8e36abf; https://www.wsj.com/finance/stocks/nasdaq-penny-stock-proposed-rule-change-74677b00. The term "penny stock" generally refers to a security issued by a very small company that trades at less than $5 per share.

[5] Exchange Act Rel. No. 100767, 89 FR 68228 (Aug. 23, 2024) (Notice of Filing of Proposed Rule Change to Modify the Application of the Minimum Bid Price Compliance Periods and the Delisting Appeals Process for Bid Price Non-Compliance in Listing Rules 5810 and 5815 Under Certain Circumstances); Exchange Act Rel. No. 100461, 89 FR 56457 (July 3, 2024) (Notice of Filing of Proposed Rule Change To Modify the Application of Bid Price Compliance Periods).

[6] Letter from The American Consumer & Investor Institute to SEC (Sept. 13, 2024), (https://www.sec.gov/comments/sr-nasdaq-2024-045/srnasdaq2024045-520477-1494622.pdf).

[7] *See, e.g.*, https://www.wsj.com/finance/stocks/nasdaq-penny-stock-proposed-rule-change-74677b00.

[8] The major stock exchanges have rules requiring companies to maintain a $1.00 share price, rather than the $5.00 threshold of the penny stock rules.

[9] Letter from Ellen Greene, Managing Director and Joseph Corcoran, Managing Director, Securities Industry and Financial Markets Association to SEC (Oct. 8, 2024). (https://www.sec.gov/comments/sr-nasdaq-2024-045/srnasdaq2024045-527615-1515662.pdf) ("SIFMA Letter").

[10] Virtu Petition.

[11] SIFMA Letter.

increased dramatically, from less than twelve in early 2021 to over 550 in 2023.[12]

As NYSE and Nasdaq both noted, many companies attempt to cure non-compliance with minimum price requirements by effectuating one or more reverse stock splits. A reverse stock split swaps multiple shares for one share and artificially boosts the share price.[13] "This mathematical trick allows companies to quickly regain compliance with bid price requirements without regard for their overall market value."[14] Like the number of exchange-listed penny stocks, the increase in reverse stock splits is pronounced. The 495 reverse splits of exchange-listed stocks in 2023 were the most in any recorded year and significantly more than the 288 reverse splits in 2022.[15]

Reverse stock splits signal "that a company is experiencing difficulties, leading [investors] to anticipate declines in its stock price, which typically results in a continued decline in the company's overall market value."[16] For example, Virgin Galactic received notice from NYSE in May that it was non-compliant with the Price Criteria. Pursuant to NYSE rules, the company had six months to regain compliance. In June, that Virgin Galactic announced a 1-for-20 reverse stock split to ensure NYSE minimum share price compliance.[17] In the month after the announcement of the reverse stock split, the share price, adjusted for the split, fell over 50%.

The Financial Industry Regulatory Authority ("FINRA") has told retail investors to "proceed with caution" if a reverse split occurs and that it "does nothing to change the value of the company," even though it can result in a much different post-split share price.[18] The SEC, in approving a recent Nasdaq amendment, stated that "[m]eaningful listing standards also are important given investor expectations regarding the nature of securities that have achieved an exchange listing" and that "adequate standards are especially important given the expectations of investors regarding exchange trading and the imprimatur of listing on a particular market."[19]

Yet the Commission under Chair Gensler's leadership has consistently failed to protect investors and prevent securities from remaining listed for long periods of time when not satisfying exchange standards, including share price requirements. Even if NYSE's amendment is adopted, a company may trade on the exchange for 180 days while being non-compliant with the Price Criteria. If the company does not regain compliance during those 180 days, it may then seek review of the delisting determination and remain listed during the review. The company can then execute a reverse stock split to gain compliance with the Price Criteria. At each stage, although exposing investors to the risks of classic penny stock companies, the security is exempt from the penny stock rules and has the "imprimatur of listing" described by the Commission.

In July, Virtu Financial, Inc. petitioned the Commission to initiate rulemaking that would require exchanges to, among other things:

---

[12] *See* https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b; https://www.wsj.com/finance/stocks/hundreds-of-stocks-have-fallen-below-1-theyre-still-listed-on-nasdaq-c8e36abf.

[13] *See* https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b.

[14] Letter from Daniel Zinn, General Counsel, and Flavia Vehbiu, Deputy General Counsel, OTC Markets Group Inc. to SEC (Sept. 17, 2024) (https://www.sec.gov/comments/sr-nasdaq-2024-045/srnasdaq2024045-521515-1498242.pdf) ("OTC Letter").

[15] https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b.

[16] OTC Letter.

[17] https://investors.virgingalactic.com/news/news-details/2024/Virgin-Galactic-to-Effect-a-Reverse-Stock-Split/default.aspx.

[18] FINRA, Stock Splits, https://www.finra.org/investors/investing/investment-products/stocks/stock-splits.

[19] Exchange Act Rel. No 101271, 89 FR 82652 (Oct. 11, 2024) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Modify the Application of Bid Price Compliance Periods) ("Order").

- strengthen listing standards for stocks trading below $1.00 and reduce the timeline thresholds that result in a violation of the minimum share price requirement and delisting;
- adopt rules limiting excessive reverse stock splits and target reverse stock splits used to avoid delisting due to share price violations; and
- monitor for potentially misleading and manipulative promotional activity.[20]

More recently, SIFMA made suggestions to the Commission regarding listing standards and the penny stock rules, including:

- Updating and enhancing the standards in the penny stock rules;
- Considering whether the dollar amounts in the penny stock rules should be updated to account for inflation;
- Undertaking a fundamental review of the effectiveness of the penny stock rules, including whether exchange-listed status continues to operate as a reasonable proxy for an issuer's financial stability.[21]

SIFMA specifically pointed to the recent interest on this topic as an opportunity for the Commission to work with exchanges to update the Commission's penny stock rules and exchange listing standards. While the Commission has recognized that the delisting process allows companies experiencing temporary financial and/or business issues to regain compliance with listing standards, there must be a balance with the need to prevent companies from remaining listed while failing to comply with listing standards for long periods of time, which is contrary to the goal of protecting investors and the public interest.[22] We again recommend that the Commission engage with the industry, including a review of the suggestions that have already been made, and update the penny stock rules and exchange listing standards. This would better prevent companies from remaining listed while non-compliant with listing standards and protect investors.

ACII appreciates the opportunity to comment on this issue and we look forward to continuing to work with the Commission on improvements to U.S. capital markets that promote retail investor access, opportunity, and protection.

Sincerely,

The American Consumer and Investor Institute

[20] Virtu Petition.
[21] SIFMA Letter.
[22] Order, 89 FR at 82654.