



February 25, 2020

VIA ELECTRONIC DELIVERY

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

RE: Proposed 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. 34-87906; File No. 4-757)

Dear Ms. Countryman:

Virtu Financial, Inc. (“Virtu”) respectfully submits this letter in response to the above-referenced proposed order issued by the Securities and Exchange Commission (the “SEC” or “Commission”) on January 8, 2020 (the “Proposed Order”)¹ directing the national securities exchanges (the “Exchanges”) and the Financial Industry Regulatory Authority (“FINRA”) to submit a new National Market System Plan (“NMS Plan”) regarding consolidated equity market data. Virtu applauds and supports the Commission’s thoughtful attention to a number of important topics related to U.S. equity market structure, including potential amendments to the regulatory framework governing market data and market access. We believe that the Commission’s Proposed Order represents an important step forward in enhancing the transparency and efficiency of the NMS Plan structure, and in eliminating potential conflicts of interest associated with the dissemination of consolidated equity market data.

As the Commission’s Proposed Order explains in great detail, under the existing NMS Plan governance structure, there are significant limitations on the ability of NMS Plan advisory committees to participate in and influence deliberations and decisions of NMS Plan operating committees. Exchanges exercise complete control over key aspects of NMS Plan governance, including setting fees for the consolidated data feeds distributed by securities information processors (“SIPs”). This governance structure exacerbates already existing conflicts of interest and allows exchanges to promulgate rules unilaterally to the detriment of broker-dealers and buy-side representatives. There is also a complete lack of transparency under the existing NMS Plan structure concerning the allocation of hundreds of millions of dollars collected by exchanges for the dissemination of data through SIPs—even though exchanges have complete control over setting the SIPs’ fees with no input from other market participants—nor are exchanges required to

¹ SEC Rel. No. 34-87906; File No. 4-757 (Jan. 8, 2020), available at <https://www.sec.gov/rules/sro/nms/2020/34-87906.pdf>.

disclose *any* information about their costs related to the collection and dissemination of market data.

The Commission's Proposed Order would implement a number of very significant enhancements to the existing framework, and Virtu in particular applauds the following proposed changes to the existing plans:

- Limiting each unaffiliated SRO and exchange group to one vote on the operating committee;
- Ensuring diverse representation for non-SRO voting members, comprising one-third of the membership of the NMS Plan operating committee;
- Eliminating unanimous voting requirements and imposing an "augmented majority vote" for most actions;
- Consolidating the existing three plans into one New Consolidated Data Plan to promote the application of consistent policies, procedures, terms, fees, and conditions that would be more transparent and easily understood;
- Severely limiting the circumstances allowing for Executive Session meetings excluding non-SRO members;
- Implementing significant governance reforms and mandating new policies and procedures to ensure transparency and accountability for actions taken by the operating committee.

Virtu believes that these changes are reflective of the Commission's efforts to modernize the SEC's rule set in a number of areas, including the rules governing U.S. equity market structure. Among other steps the agency has taken in this area, we commend (i) the Commission's October 2018 decision to set aside certain NYSE Arca, Inc. and Nasdaq Stock Market LLC market data fee filings that were the subject of long running litigation and to remand over 400 challenged fee filings to the exchanges for additional review,² (ii) the robust dialogue made possible by the two-day Market Data Roundtable hosted by the SEC in late October 2019,³ (iii) the informative commentary on and analysis of a number of market structure issues offered by SEC Chairman Clayton and Director of the Division of Trading and Markets Redfearn in April 2019,⁴ (iv) the *Staff Guidance on SRO Rule Filings Relating to Fees* issued in May 2019,⁵ (v) the Commission's approval of proposed amendments to Rule 608 rescinding the "effective upon filing" procedure

² Walter J. Clayton, III, Chairman, U.S. Securities and Exchange Commission, *Statement on Market Data Fees and Market Structure* (Oct. 16, 2018), available at <https://www.sec.gov/news/public-statement/statement-chairman-clayton-2018-10-16>.

³ Comments on Roundtable on Market Data and Market Access (File No. 4-729), available at www.sec.gov/comments/4-729/4-729.htm.

⁴ Walter J. Clayton, III, Chairman, and Brett Redfearn, Director of Division of Trading and Markets, U.S. Securities and Exchange Commission, *Equity Market Structure 2019: Looking Back & Moving Forward* (Mar. 8, 2019), available at <https://www.sec.gov/news/speech/clayton-redfearn-equity-market-structure-2019>.

⁵ U.S. Securities and Exchange Commission, Division of Trading and Markets, *Staff Guidance on SRO Rule Filings Relating to Fees* (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

for NMS Plan fee amendments;⁶ and (vi) the Commission’s actions to suspend a number of fee proposals deemed not to be fair, reasonable and not unreasonably discriminatory.⁷

Taken together, these actions have established a solid foundation for needed reforms and modernization of the regulatory framework governing market data and market access, and in aligning the Commission’s rule set with the electronic marketplace of 2020. However, we respectfully submit that more work remains to be done.

In particular, we encourage the Commission to focus its future efforts on curbing the oligopoly enjoyed by the exchanges with respect to fees for proprietary market data feeds, as well as fees charged by the exchanges for physical connectivity and logical access to their systems. As several of the Commissioners acknowledged in their statements accompanying the Proposal, the existing two-tier regulatory structure governing market data and market access has resulted in a worrisome gap between the depth and quality of data available through the SIPs versus data included in proprietary feeds:

Chairman Clayton: “Institutional investors and the brokers who serve our Main Street investors, among others, have raised concerns about the gap between the consolidated market data distributed through the Equity Data Plans and proprietary data products. One such concern is whether the gap adversely affects those who do not access proprietary data products or who may not have the processing capacity to trade competitively.”⁸

Commissioner Jackson: “Importantly, today’s proposal does nothing to address the fact that exchanges enjoy a local monopoly on their private feeds. Investors who want to know the best price on a particular exchange can only buy that information from one source, so it’s no surprise that investors complain about consistently rising prices for market data.”⁹

⁶ Press Release, *SEC Proposes to Require Proposed NMS Plan Fee Amendments to Follow Public Notice, Comment, and Approval Procedure* (Oct. 1, 2019), available at <https://www.sec.gov/news/press-release/2019-204>.

⁷ See, e.g., Exchange Act Release No. 88109, File No. SR-NYSENAT-2019-31 (Jan. 31, 2020) (SEC order suspending NYSE Integrated Feed fee filing, leading to subsequent withdrawal of the proposal by NYSE); Exchange Act Release No. 85184, 84 FR 6842 (Feb. 28, 2019) (SEC order disapproving BOX Exchange proposal to establish certain connectivity fees and classify its high speed vendor feed connection as a port fee); Exchange Act Release No. 84357, 83 FR 50976 (Aug. 13, 2018) (SEC order suspending MIAX Exchange proposal to establish certain connectivity fees, leading to subsequent withdrawal of the proposal by MIAX).

⁸ Walter J. Clayton, III, Chairman, U.S. Securities and Exchange Commission, *Statement on Proposed Order to Modernize the Governance Structure of National Market System Plans for Equity Market Data* (Jan. 8, 2020), available at <https://www.sec.gov/news/public-statement/statement-clayton-open-meeting-2020-01-08>.

⁹ Robert Jackson, Commissioner, U.S. Securities and Exchange Commission, *Statement on Reforming Stock Exchange Governance* (Jan. 8, 2020), available at <https://www.sec.gov/news/public-statement/statement-jackson-open-meeting-2020-01-08>.

Commissioner Roisman: “We have heard from some that advances in technology, richer content, and other developments (such as co-location and fiber and wireless connectivity) have entrenched these proprietary feeds as the preferred—and some would even say, essential—means of receiving market data, in comparison to the SIPs.”¹⁰

This gap has created an environment in which the exchanges can extract exorbitant rents from market participants who have no choice but to pay for access to exchange systems and for proprietary market data in order to remain commercially competitive or even to meet their obligations under the securities laws. As we explained in a comment letter submitted in advance of the October 2018 Market Data Roundtable¹¹—and as echoed by a chorus of other market participants in a variety of fora—under the existing regulatory construct, exchanges have been free to increase fees exponentially for access to their systems and for proprietary market data feeds in the face of stagnating or declining revenue streams in other areas.

The connectivity fees charged by exchanges, of course, are the fruit of Rule 611 of Regulation NMS, which imposes a legal obligation on broker-dealers like Virtu to connect to exchange systems. “Access fees” were established and capped so that the exchanges could not charge usurious prices to facilitate compliance with Rule 611. In response, the exchanges began charging more and more for physical connections—a requirement for access—and such fees have become tantamount to “synthetic” access fees.

Like proprietary data fees, many of these synthetic access fees are completely untethered to any cost-based standard and fail to meet the statutory requirement that such fees be “fair and reasonable” and “not unreasonably discriminatory.” And what’s more, the exchanges currently have no obligation to disclose their revenues and costs associated with access to their systems or the dissemination of proprietary market data, making it impossible for market participants, let alone the Commission, to assess whether the fees are justified under the securities laws.

While we strongly support the efforts of the agency to make enhancements to the NMS Plans governing SIP data, we urge the Commission to take even bolder steps to introduce needed reforms in the regulatory construct governing market data and market access. In this regard, Virtu welcomes and applauds the Commission’s February 14, 2020 proposal to modernize the infrastructure for collecting, consolidating and disseminating market data (the “Proposal”).¹² While we are still reviewing the Proposal, we believe that enhancing the nature and scope of information disseminated through the SIPs represents an important step in leveling the two-tiered playing field that currently exists in the marketplace as a result of Regulation NMS. We also

¹⁰ Elad Roisman, Commissioner, U.S. Securities and Exchange Commission, *Statement at the Open Meeting Considering a Proposed Commission Order Addressing Equity Market Data Plans* (Jan. 8, 2020), available at <https://www.sec.gov/news/public-statement/statement-roisman-open-meeting-2020-01-08>.

¹¹ Letter from Doug Cifu to Brent Fields, Secretary, U.S. Securities and Exchange Commission (Oct. 23, 2018), available at <https://www.virtu.com/uploads/2019/02/2018.10.23-Virtu's-Comment-Letter-Roundtable-on-Market-Data-and-Market-Access.pdf>.

¹² U.S. Securities and Exchange Commission, Proposed Rule, *Market Data Infrastructure*, Release No. 34-88216; File No. S7-03-20 (Feb. 14, 2020), available at <https://www.sec.gov/rules/proposed/2020/34-88216.pdf>.

applaud the concept of introducing competition (in the form of “competing consolidators”) in this area that has for far too long been dominated by the exchanges.

We urge the Commission to move quickly not only to adopt these changes, but also to pursue additional reforms, particularly in the area of disclosure. For example, as we proposed in our letter submitted in advance of the Market Data Roundtable, the Commission should require that SIP Plan Processors and the Exchanges publicly disclose on quarterly basis: (a) the revenues earned in aggregate and individually for each form of market data that is distributed for sale, including all revenues generated from physical connectivity and logical access charges; and (b) the direct costs associated with compiling and distributing the data, including connectivity costs, in a transparent and itemized fashion. These modest reforms would be consistent with the Commission’s disclosure-based regulatory mandate and would foster a fairer and more transparent marketplace for investors.

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Virtu appreciates the opportunity to submit this response to the SEC’s Proposed Order governing NMS Plans. While the Commission has in other settings made a distinction between “core” and “non-core” products, in reality all market data and exchange connectivity is “core” as many market participants cannot function or meet their regulatory responsibilities or customer expectations without access to such data. We appreciate that the Proposed Order is a needed step to enhance the governance around the provision of “core” data, but respectfully submit that the NMS Plans and SIP data are just a small component of the universe of “core” data that needs to be modernized.

Respectfully submitted,

Thomas M. Merritt
Deputy General Counsel

cc: Walter J. Clayton, III, Chairman
Allison H. Lee, Commissioner
Hester M. Peirce, Commissioner
Elad L. Roisman, Commissioner
Brett W. Redfearn, Director, Division of Trading and Markets