

November 12, 2020

Ms. Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (File No. 4-757)

Dear Ms. Countryman:

BMO Capital Markets<sup>1</sup> is writing to provide its views on the SROs' proposed new single national market system ("NMS") plan governing the public dissemination of real-time consolidated equity market data for NMS stocks ("CT Plan").

As we discussed in our comment letter on the Commission's order directing the SROs to act jointly in developing and filing the Plan,<sup>2</sup> BMO Capital Markets believes that of all of the market structure and trading issues being examined and debated, concerns relating to the provision of market data, including the current governance model of the NMS plans, are of utmost importance.<sup>3</sup> We therefore support the provisions of the proposed CT Plan overall.

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<sup>1</sup> BMO Capital Markets is a trade name used by BMO Financial Group for the wholesale banking businesses of Bank of Montreal, BMO Harris Bank N.A. (member FDIC), Bank of Montreal Europe p.l.c, and Bank of Montreal (China) Co. Ltd, the institutional broker dealer business of BMO Capital Markets Corp. (Member FINRA and SIPC) and the agency broker dealer business of Clearpool Execution Services, LLC (Member FINRA and SIPC) in the U.S., and the institutional broker dealer businesses of BMO Nesbitt Burns Inc. (Member Investment Industry Regulatory Organization of Canada and Member Canadian Investor Protection Fund) in Canada and Asia, Bank of Montreal Europe p.l.c. (authorized and regulated by the Central Bank of Ireland) in Europe and BMO Capital Markets Limited (authorized and regulated by the Financial Conduct Authority) in the UK and Australia. "Nesbitt Burns" is a registered trademark of BMO Nesbitt Burns Inc., used under license. "BMO Capital Markets" is a trademark of Bank of Montreal, used under license. "BMO (M-Bar roundel symbol)" is a registered trademark of Bank of Montreal, used under license. ® Registered trademark of Bank of Montreal in the United States, Canada and elsewhere. ™ Trademark of Bank of Montreal in the United States and Canada. © 2020 BMO Financial Group

<sup>2</sup> References to prior comments, comment letters, and submissions on trading and market structure issues cited in this letter were filed under the "Clearpool Group" name. Clearpool Group was acquired by BMO Financial Group in April 2020.

<sup>3</sup> See Letter from Joe Wald, Chief Executive Officer, and Ray Ross, Chief Technology Officer, Clearpool to Vanessa Countryman, Secretary, Securities and Exchange Commission (File No. 4-757), dated February 28, 2020 (Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data). See also, Letter from Joe Wald, Co-Head of Electronic Trading, BMO Capital Markets Group and Ray Ross, Co-Head of Electronic Trading, BMO Capital Markets Group to Vanessa Countryman, Secretary, Securities and Exchange Commission (File No. S7-03-20), dated May 26, 2020 (Market

While the Commission's request for comment covers a number of issues relating to the proposed CT Plan, many of which were addressed in our previous comments on the Commission's order, our letter focus on two areas of interest to BMO Capital Markets - ensuring the timely implementation of the Plan and addressing real and potential conflicts of interest around the Plan. Our specific comments and recommendations follow.

## **I. Need to Ensure Timely Implementation of the CT Plan**

BMO Capital Markets supports continuing efforts to address issues relating to market data, including the current governance model of the NMS plans. With that said, the industry has waited a significant amount of time for the reform of the governance structure of the current NMS market data plans, and has put much effort towards seeing that such reform occurs. We therefore believe it is critical that the CT Plan be implemented on a timely basis.

Unfortunately, while the proposed CT Plan specifies the steps to be undertaken before the Plan becomes effective<sup>4</sup> and operational,<sup>5</sup> it does not include specified time periods in which these actions must be commenced or completed. BMO Capital Markets is concerned that the lack of any definitive deadlines relating to the Effective Date and Operative Date will unduly delay the Plan's implementation.

We believe it is nonsensical to rely on the SROs, many of whom have no incentive to change the current governance structure, to take actions on a timely basis to ensure the implementation of the Plan. We therefore recommend that definitive timelines and deadlines be delineated in conjunction with the specified actions that need to occur relating to the Effective Date and Operative Date. For example, there should be a reasonable date certain associated with the Operative Date of the Plan, *e.g.*, one-year from Commission approval of the CT Plan. Other aspects of the Plan also should include reasonable deadlines, such as requiring that the Operating Committee be constituted within

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Data Infrastructure); Letter from Joe Wald, Chief Executive Officer, Clearpool, to Brent J. Fields, Secretary, SEC (File No. 4-729), dated October 23, 2018 (SEC Roundtable on Market Data and Market Access); and Clearpool Group Viewpoints Papers at <http://bit.ly/2ISs8cR> and <http://bit.ly/2YFpN4H>.

<sup>4</sup> The proposed CT Plan provides that the Plan will not become effective ("Effective Date") until the later of two things occurs: (1) the proposed Agreement has been approved by the Commission, and (2) the CT Plan Members have formed the CT Plan by filing a certificate of formation with the Delaware Secretary of State.

<sup>5</sup> The proposed CT Plan provides that, following the Effective Date, the Plan will not become operative as an NMS Plan ("Operative Date") until the first day of the month that is at least 90 days after the last of five specified actions has occurred. The specified actions include: (a) the SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee have been determined; (b) fees for market data disseminated pursuant to the Plan have been established by the Operating Committee, are effective as an amendment to the Plan pursuant to Rule 608 of Regulation NMS, and are ready to be implemented on the Operative Date; (c) the Company has entered into an agreement with the necessary Processor(s); (d) the Company has entered into an agreement with an Administrator and such Administrator has completed the transition from prior Administrators under the CQ Plan, CTA Plan, and UTP Plan such that it is able to provide services under the Administrative Services Agreement; and (e) the Operating Committee and, if applicable, the Commission has approved all policies and procedures that are necessary or appropriate for the operation of the Company.

a set time, and requiring the Operating Committee within set times to establish fees and to enter into contracts with an Administrator and Processor(s).

As transparency into the implementation process will be key for market participants to understand the progress surrounding the CT Plan, we also believe it will be important for the Plan to require that the Operating Committee provide periodic updates as to the status of implementation of the specified actions in the proposed Plan, and to make such updates public in nature.

Finally, while not the subject of the proposed CT Plan, we should not forget other efforts related to market data reform, particularly the Commission's proposed rule to make changes to the current market data infrastructure. The timely implementation of the CT Plan would undoubtedly facilitate the success of any new market data infrastructure regime and, at the very least, will be important to ensure that, upon Commission approval, the implementation of any such regime is not impeded.

## **II. Need to Address Conflicts of Interest**

The conflicts of interest that currently exist relating to the provision of market data goes to the heart of the issues that market participants are facing in this area. Market data plans are governed by SROs that have conflicts of interest in the provision of market data; conflicts of interest that create significant concerns regarding whether the consolidated feeds meet the need to ensure the prompt, accurate, reliable, and fair dissemination of market data. BMO Capital Markets supports expanding voting representation under the CT Plan to non-SROs and having them participate as full voting members of the Operating Committee as we believe this will allow non-SROs to have a role in the CT Plan's decision-making process and therefore help address conflicts of interest.

Nevertheless, central to addressing any conflicts in the CT Plan will be the existence of a robust and effective policy designed to address the conflicts of interest of both SRO members and non-SRO members. As we stated in our previous letter, an effective policy cannot be based merely on disclosure. The conflicts that SROs face when it comes to market data already has been well documented and are well known.

We believe a conflicts of interest policy must therefore be vigorous enough to ensure that SROs take actionable steps to mitigate such conflicts. We are concerned that the system designed to address many of the issues that involve conflicts of interest in the proposed CT Plan relies too heavily on a disclosure regime to rectify any conflicts. As discussed below, we therefore believe that additional steps, such as recusal and explicit prohibition of certain actions and/or certain persons, also will be necessary.

### Meetings of the Operating Committee and "Member Observers"

The types of persons that will have access to information regarding the inner workings of the CT Plan is of interest to BMO Capital Markets as this can exacerbate concerns relating to real and

potential conflicts of interest. To that end, the proposed CT Plan would permit “Member Observers” to attend Executive Sessions of the Operating Committee.<sup>6</sup>

We believe that further guidance is needed regarding the types of persons who would be considered Member Observers and the information to which they would be privy. At the very least, we believe the circumstances under which Member Observers could attend Executive Session, Operating Committee and subcommittee meetings should be very limited and persons who hold certain positions within an SRO should be prohibited from serving as Member Observers, particularly those who have direct responsibility for the management, marketing, sale, or development of proprietary equity data products offered separately by the SRO.

Protecting confidential and proprietary information from misuse also is important to effectively address conflicts of interest. We therefore believe that the Confidentiality Policy under the CT Plan should apply to Member Observers, and Member Observers also should be required to demonstrate a legitimate or particularized need for specific “Restricted or Highly Confidential Information” before being granted access to such information.

#### Certain Transactions and Company Opportunities

The proposal permits the SROs to engage in business activities outside of the business activities of the CT Plan, including through investments or business relationships with other persons engaged in market data services or through strategic relationships with businesses that are or may be competitive with the CT Plan. Similarly, the proposal provides that the CT Plan is not prohibited from employing or dealing with persons in which an SRO or any of its affiliates has a connection or a direct or indirect interest.

While the disclosure requirements under the proposal may, to an extent, elicit relevant information to mitigate conflicts of interest that may result from such business activities, we believe other steps may be necessary to address such conflicts. For example, we believe that if the CT Plan and SRO members are permitted to engage in the activities above, the relevant SROs should be required to maintain information barriers between themselves and the affiliates or persons that have employment relationships or business dealings with the CT Plan. In addition, any necessary recusals should be required before the CT Plan employs or deals with persons in which an SRO or any of its affiliates has a direct or indirect interest or a connection.

### **III. Executive Sessions and Exclusion of Non-SRO Representatives**

As we stated in our previous letter, BMO Capital Markets supports the inclusion of an Executive Session policy in the Plan that would limit circumstances in which non-SRO members could be excluded from Executive Sessions. The proposed CT Plan lists a number of items for discussion within an Executive Session where Non-SRO Voting Representatives may be excluded. While we recognize that there will be certain items that will be discussed where it is appropriate to exclude

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<sup>6</sup> The CT Plan defines “Member Observer” to mean any individual, other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member’s compliance with its obligations under Rule 608(c) of Regulation NMS to attend Executive Session, Operating Committee and subcommittee meetings.

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Non-SRO Voting Representatives, these items should be few and far between in number. The proposed CT Plan, however, is unclear on this issue and contains a “catch all” provision that provides that the delineated items are “not dispositive of all matters that may by their nature require discussion in an Executive Session.”

BMO Capital Markets believes that the list of permissible topics for Executive Session discussion should be listed more specifically in the CT Plan. The “catch all” provision above is too broad, and runs the risk of providing the SROs with excessive discretion to limit or prevent the participation of Non-SRO Voting Representatives in certain CT Plan matters.

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BMO Capital Markets offers its assistance to the Commission as it examines the proposed CT Plan. If you have any questions on our comment letter, please feel free to contact Joe Wald at

[REDACTED] or at [REDACTED], or Ray Ross at [REDACTED] or at [REDACTED].

Sincerely,



Joe Wald  
Managing Director, Co-Head of  
Electronic Trading  
BMO Capital Markets Group



Ray Ross  
Managing Director, Co-Head of  
Electronic Trading  
BMO Capital Markets Group

cc: The Honorable Jay Clayton, Chair  
The Honorable Hester M. Peirce, Commissioner  
The Honorable Elad L. Roisman, Commissioner  
The Honorable Allison Herren Lee, Commissioner  
The Honorable Caroline A. Crenshaw, Commissioner  
Brett Redfearn, Director, Division of Trading and Markets