Elizabeth K. King

Chief Regulatory Officer, ICE
General Counsel and Corporate Secretary, NYSE

11 Wall Street
New York, NY 10005
T+202.661.8948
F+212.656.8101
Elizabeth.King@theice.com

June 1, 2020

Via Email

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

Re: Proposed Rule on Market Data Infrastructure (File No. S7-03-20)

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE") respectfully submits this comment letter on behalf of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (together, the "NYSE Exchanges") in response to the February 14, 2020 proposed rulemaking (the "Proposal") from the Securities and Exchange Commission ("SEC" or the "Commission") on Market Data Infrastructure.[1]

Executive Summary

In its comment letter[2] on the Commission's January 8, 2020 proposed order,[3] NYSE supported the Commission's efforts to modernize securities information processors ("SIPs") and set out a blueprint for practical, easily implementable solutions to the main difficulties that market participants have identified with the current consolidated market data disseminated by exclusive SIPs. The blueprint proposed, in pertinent part: first, to expand SIP content, by creating varied consolidated market data products designed for the different needs of market participants; second, to modernize SIP delivery, by permitting the existing SIPs to address latency concerns by consolidating market data in each major data center; and third, to make minor changes to SIP governance, such as replacing the unanimity requirement.

---

1 See Securities Exchange Act Release No. 88216 (Feb. 14, 2020); Market Data Infrastructure, 85 Fed. Reg. 16726 (Mar. 24, 2020) (to be codified at 17 CFR §§ 240, 242, 249) (the "Proposal").

2 See Letter from Elizabeth King, General Counsel, NYSE, to Vanessa Countryman, Secretary, SEC, at 3-4 (Feb. 5, 2020), https://www.sec.gov/comments/4-757/4757-6779249-208168.pdf.

3 See Securities Exchange Act Release No. 87906 (Jan. 8, 2020); Order Directing the Exchanges and Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, 85 Fed. Reg. 2164 (Jan. 14, 2020).

The Commission's current Proposal takes a radically different approach. Instead of making reasoned, incremental improvements, the Proposal upends nearly every aspect of existing market data infrastructure, requires industry-wide technology changes, and fractures well-established order protection principles. At nearly 600 pages, and with more than 300 questions posed, the Proposal envisions nothing short of "Regulation NMS 2.0."

Despite the gravity of the changes contemplated and the risks posed by poorly reasoned rulemaking, the Commission has offered market participants almost no time to evaluate, analyze, and comment on the changes proposed. This stands in stark contrast to the process surrounding the adoption of Regulation NMS itself, which, after being initially proposed in February 2004, was subject to a hearing in April 2004, a comment period extension through June 2004, and re-proposal in December 2004, before the adopting release was issued in June 2005.[4] Instead of following that model of careful deliberation in consultation with interested parties and industry stakeholders, the Commission appears to be moving at breakneck speed to force the Proposal's monumental changes on the markets after only a scant 60-day comment period.

The Commission's pace is all the more reckless given the demands and challenges of the ongoing COVID-19 pandemic. Since late February, the U.S. financial markets have experienced unprecedented volumes and volatility, as well as four market-wide circuit breaker halts.[5] Market participants have weathered these storms, all while transitioning to working remotely and adapting to the closure of trading floors such as NYSE's. To provide meaningful commentary in just 60 days in response to the Proposal's hundreds of requests would have been impossible under even normal market conditions. There is no credible suggestion that interested parties and market participants have been able to give the Proposal an adequate level of attention and analysis under current conditions.

The Commission's apparent decision to press its Proposal forward at this relentless pace suggests a troubling conclusion: that this "comment period" is illusory and that, despite repeatedly professing its own ignorance of the information needed to anticipate the likely effects of the proposed rulemaking, the Commission aims to deprive market participants of a full and fair opportunity to comment on the Proposal or to participate in the rulemaking process.

---

[4] See Securities Exchange Act Release No. 49325 (February 26, 2004); Regulation NMS Proposal, 69 Fed. Reg. 11126 (March 9, 2004); Securities Exchange Act Release No. 49749 (May 20, 2004); Regulation NMS: Supplemental Request for Comment 69 Fed. Reg. 30142 (May 26, 2004); Securities Exchange Act Release No. 50870 (December 16, 2004); Regulation NMS, 69 Fed. Reg. 77424 (Dec. 27, 2004); Securities Exchange Act Release No. 51808 (June 9, 2005); Regulation NMS, 70 Fed. Reg. 37496 (June 29, 2005) ("Regulation NMS Adopting Release").

[5] The U.S. equities markets experienced market-wide circuit breaker Level 1 halts on March 9, 12, 16, and 18, 2020. See Minami Funakoshi & Travis Hartman, March Madness, Reuters (March 18, 2020) www.graphics.reuters.com/USA-MARKETS/0100BHL44C/index.html.

Without suggesting the comments contained below are exhaustive of those that NYSE would provide if given sufficient opportunity, NYSE believes that the Proposal is severely flawed, overly speculative, and will result in significant, unintended consequences for the entire market system. As discussed below in Part I, the substantial changes to market data content are needlessly complex and are not reasonably designed to meet the differentiated needs of market participants. Next, as discussed in Part II, the success of the Proposal's consolidation model rests entirely on unfounded assumptions regarding the appearance of a market for competing consolidators and baseless speculation regarding fees for new consolidated market data, rendering the Proposal arbitrary and capricious.[6] Finally, as discussed in Part III, the Commission's effort to retain NMS Plans while removing their primary function—to collect, consolidate, and disseminate market data through a single plan processor—is nonsensical and demonstrates the irrational outcomes that would stem from adopting the Proposal.

I. The Proposal's Changes to "Consolidated Market Data" Are Overly Broad and Unnecessarily Complex

As discussed in depth in its February 5, 2020 comment letter, NYSE supports the Commission's efforts to expand SIP content, but the complete overhaul proposed to consolidated market data is not appropriately tailored to the needs of the market. Under the APA, an agency must explain the basis for its decision, and explain the reason for rejecting responsible alternatives to its proposed action.[7] Here, the Commission failed to consider meaningfully alternatives that would better suit market participants, such as the proposal by NYSE to create levels of market data content tailored to the needs of different investors. Instead, the Commission proposes an unnecessarily complex definition of "core data" that lacks a reasoned basis.

A. The Commission Fails to Tailor Proposed "Core Data" to the Actual Needs of Market Participants

While NYSE supports "core data" being formally defined in Commission regulations, the Commission's proposed definition and its impact on the application of Regulation NMS rules are poorly designed because they only consider the requirements of those market participants that need, and are able to consume, a richer data set.

The Proposal would substantially expand the scope of "core data" but assumes without a reasoned basis that market participants who do not need and cannot consume the richer data set would be able to receive only the portions of "core data" and "consolidated market data" they need. Instead of considering the varying needs of market participants, the Commission's proposed definition of "core data" piles more data elements onto a single consolidated data product, which would require non-professional investors who do

---

6 5 U.S.C. § 706(2)(A); See Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (2016); Animal Legal Defense Fund, Inc. v. Perdue, 872 F.3d 602, 619 (D.C. Cir. 2017).

7 Physicians for Social Responsibility v. Wheeler, 956 F.3d 634, 644 (D.C. Cir. 2020).

not need such rich data to purchase and consume even more unnecessary data elements (e.g., depth of book data) than the current SIP product provides.

At the same time, the Commission failed to consider reasonable alternatives that would allow "core data" to be more tailored to the varying needs of market participants. For example, NYSE suggested an approach that recognizes that the data market participants consider "core" varies greatly, depending on their use of the data and the makeup of their customer base.[8] Instead, the Commission offers only, by way of example, that the operating committee of an effective national market system ("NMS") plan could develop differential *pricing* for a top of book product that includes only certain SRO data content.[9] But the Commission cannot assume that the operating committee of an NMS plan would create such a product, or whether the costs of such a product would meet the needs of market participants who do not want or cannot consume the full consolidated market data. If an NMS plan's operating committee did not propose such products, and if competing consolidators did not choose to create such a differentiated product, market participants would not have access to products less comprehensive and more tailored to their particular needs. As proposed by the Commission, non-professional investors and other market participants who do not need the full scope of the expanded core data would have no other alternatives. The failure to consider more tailored approaches to address the problems identified, or to provide "a reasoned explanation for its rejection of such alternatives" renders the Proposal arbitrary and capricious.[10]

---

[8] See supra note 2, at 3-4. NYSE suggested three levels of SIP products, each with different content designed to serve the needs of specific types of investors:

- *SIP Essential* would be designed for non-professional, retail investors and would be available for displayed use only, at a significant discount from the other SIP products. It would provide a calculated NBBO, all exchange and TRF trades, and limited regulatory messages, but it would exclude market identifiers required by broker-dealers seeking to facilitate high-speed trading.

- *SIP Classic* would be designed for active traders, market professionals, and certain automated trading systems. SIP Classic would include the same data as the current SIP product: trades executed, each exchange's best bid and offer quotes, a calculated NBBO, and the full scope of regulatory messages.

- *SIP Premium* would include SIP Classic data plus three levels of depth-of-book data for each exchange. This product would be geared toward institutional and active traders not needing order-level data, and would provide them an alternative to buying proprietary data from each of the exchanges.

[9] Proposal 16792, n.616. The Commission states that the NMS plan could develop different pricing for different products along the lines of the NYSE's proposed levels of content.

[10] See, e.g., Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 242 (D.C. Cir. 2008) ("An agency is required to consider responsible alternatives to its chosen policy and

B. The Proposal Adds Unreasonable Complexity to "Core Data" in its Definition

The Commission's proposed "core data" definition adds needless complexity without adequately examining the costs and benefits of the proposed changes. Under the APA, an agency must "examine the relevant data and articulate a satisfactory explanation for its action."[11] Here, the Commission has not sufficiently explained the need for the myriad changes to the proposed definition of "core data." The shortcomings of the proposed definition include, but are not limited to, the following:

- **Unreasonable addition of more than five levels of depth to consolidated market data:** The Commission's Proposal would add not only five levels of depth of book data to the definition of "core data," but also all "aggregated orders at each price between the best bid and best offer and the protected bid and protected offer (if different) . . . ."[12] The Commission proposes that the manner by which the best bid and offer would be determined would be materially different from how a protected bid and protected offer would be determined, because the former would be based on the Commission's proposed new round-lot value tied to the price of the security, whereas the latter would always need to be a minimum of 100 shares, regardless of the price of the security. At any moment, the number of price levels between these two calculations for a security could be more than five levels, and the total number of price levels could rapidly fluctuate intra-day as quotes update. The spread between these two calculations would be more pronounced in higher-priced securities. This proposed aggregation means that many more than five levels of depth would be included in the "core data." The Commission also does not consider the impact on market data subscribers that would need to consume a continuously indeterminate number of prices from each exchange, and on exchanges that would need to provide this increased data for consolidation.

- **Proposed definition of "round lots":** As stated in our February 5, 2020 letter, NYSE believes the best way to address the lack of odd lot quotation information on the SIP would be to include the best-priced odd lot quotation from each exchange in the definition of "core data." Absent that, NYSE agrees that a market-wide graduated "round lot" definition based on each security's share price could be a low-effort technical solution to ensure investors can access liquidity currently inside the SIP's NBBO—provided the relationship between round lot and protected quote status is preserved. While the Proposal includes such a graduated definition, it eliminates the long-standing market convention of

---

to give a reasoned explanation for its rejection of such alternatives.") (internal quotation marks omitted); Wheeler, 956 F.3d at 644.

[11] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm, 463 U.S. 29, 43 (1983); see also Wheeler, 956 F.3d at 644 ("It is axiomatic that the APA requires an agency to explain its basis for a decision.").

[12] Proposal at 16752-53.

protecting each market's best round lot quote. In addition, the Proposal fails to properly analyze the impact of this change on other Regulation NMS rules:

- **Order Protection Rule:** The Commission proposes that, notwithstanding the proposed changes to the definition of "round lot," the Order Protection Rule in Rule 611 "would not be extended to protected quotations of less than 100 shares."[13] The Commission claims that this position is justified by its belief that "a single test for the application of the protected quotation definition, without special exceptions for certain stocks, would be simpler, would facilitate compliance with Rule 611, and would set consistent expectations among market participants."[14] But nowhere does the Commission attempt to justify—or even acknowledge—the confusion across the market that may result among investors from a needlessly complex system that uses graduated round lot sizes for BBO and NBBO purposes, but only protects quotations of 100 shares or more. Nor does the Commission analyze the effects of removing Rule 611 protections from the round-lot-sized quotations that are currently protected in the twelve NYSE listings with round-lot sizes of less than 100 shares. The Proposal fails to sufficiently analyze the implications to investor protection and market integrity of publicly disseminated odd-lot quotations consistently being traded through.

  The Commission also does not consider the complexity that the new round-lot definition would introduce for stocks priced above $50.00, which would have a round-lot size under 100 shares for purposes of determining the best bid or offer of each exchange, and a quote size of 100 shares for purposes of determining the protected quotation in that security. Both SROs and broker-dealers would need to design, test, and implement new systems capable of monitoring the diverging best bid or offer and protected quotation for each security priced over $50.00. The Commission has not considered the costs associated with these changes needed to comply with the Order Protection Rule, or whether they would outweigh any benefits of keeping the protected quotation size at 100 shares for all securities.

- **Vendor Display Rule:** The Commission also does not consider how the Proposal's substantial expansion of "core data" would impact the ability of market participants to comply with the Vendor Display Rule.[15] The proposed changes to the "round lot" definition would result in the NBBO reflecting smaller-sized orders. While the Commission notes this change,[16] it does not consider in any way the indirect impact this will have

---

13 Id. at 16737.

14 Id. at 16749.

15 Rule 603(c) of Regulation NMS, 17 CFR § 242.603(c).

16 Proposal at 16742.

on the Vendor Display Rule.[17] The Vendor Display Rule requires, in any context in which a trading or order routing decision can be implemented, SIPs and broker-dealers to provide a consolidated display of an NMS stock if the SIP or broker-dealer displays any information with respect to quotations for or transactions in the NMS stock.[18] The Proposal fails to acknowledge, let alone analyze, the impact on investors of changing the definition of "round lot" to the "consolidated display" and the information required to be provided under the Vendor Display Rule. The Commission also fails to consider whether the costs associated with retaining the Vendor Display Rule outweigh its benefits if the Commission adopts its proposed changes to the definition of "round lot."

- **Rule 610:** The Commission acknowledges that its proposed definition of "round lot" would affect Rule 610(c),[19] among other rules,[20] because "these fee limitations would apply to quotes in the smaller round lot sizes."[21] The Commission states that it preliminarily believes that Rule 610(c) should apply to quotes in the new proposed round lot size because "applying the fee limitations . . . to orders of meaningful size, as reflected in the proposed definition of round lot, would further that rule's objectives of ensuring the accuracy of displayed quotations."[22] But the Commission does not consider the harm that an expanded fee limitation would have on competition, or the burdens it would place on market participants, including trading centers that display quotes. This is in stark contrast to the Commission's analysis when it adopted Rule 610.[23] There, the SEC supported its adoption of the fee limitation, among other things, as a way

---

17 The Commission notes only that retail investors would be among those who could see the new quotes, reported as NBBO in the new core data, "as a result of the Vendor Display Rule." Id. at 16823 n.913.

18 Rule 600(b)(14) currently defines "consolidated display" to mean "(i) the prices, sizes, and market identifications of the national best bid and national best offer for a security; and (ii) consolidated last sale information for a security." Rule 600(b)(14) of Regulation NMS, 17 CFR § 242.600(b)(14).

19 Proposal at 16745.

20 See id. at 16743.

21 Id. at 16745.

22 Id. Notwithstanding the language in the proposing release to apply the new round lot definition to the access fee limitations of Rule 610(c), the Commission did not propose text changes to Rule 610(c), which currently refers to access to "protected quotations." Because the Commission is proposing to change the definition of "protected quotation" to be a quotation of at least 100 shares, the text of Rule 610(c) is inconsistent with the Commission's description of its proposal.

23 See Regulation NMS Adopting Release, supra note 4, at 27-29, 183-204.

to preclude individual trading centers from raising their fees substantially in an attempt to take improper advantage of strengthened protection against trade-throughs. Even though the Proposal would not extend trade-through protection to smaller-sized quotes reflected in the definition of "round lot," these smaller-sized quotes would be subject to the fee limitation. The Commission fails to discuss why one of the bases for the fee limitation—the Order Protection Rule—is no longer valid.

In addition, the Commission does not propose changes to Rule 610(d), which requires SROs to establish, maintain, and enforce written rules that require members reasonably to avoid displaying quotations that lock or cross "protected quotations" reconcile locked or crossed quotations, and from engaging in a pattern or practice of displaying quotations that lock or cross any "protected quotation." The Commission's proposed change to the definition of "protected quotation" to be a quotation that is at least 100 shares,[24] would mean that the Rule 610(d) would continue to apply as it does currently. The Commission does not justify why it is proposing to expand the fee limitation applicable to SROs' best bids and offers under Rule 610(c), but not proposing to expand the limits in Rule 610(d) on SRO members locking and crossing protected quotations.

- **Rule 201 of Regulation SHO:** The Commission states that it "preliminarily believes that the objectives of Rule 201 of restricting destabilizing short sale orders in rapidly declining markets would be furthered by applying the proposed definition of round lot such that bids of meaningful size would be included within this restriction," but fails to include any analysis of the issue.[25] In reality, the changes to the "round lot" definition would substantially change how the national best offer would be calculated for a security, and therefore would impact Rule 201. In the one paragraph it devotes to this issue, the Commission fails to examine whether additional short sales would be prevented, fails to analyze the impact of this change on price discovery, and fails to consider whether any textual changes to Rule 201 are appropriate.

II. The Proposed Decentralized Consolidation Model Is Inconsistent with the Administrative Procedure Act

The Commission's Proposal would abandon a well-functioning centralized consolidation model in favor of a decentralized consolidation model with ambiguous features, speculative benefits, and clear shortcomings.[26] If adopted as proposed, NYSE believes

---

[24] See Proposal at 16749. The Commission states that because Rule 610(d) is based on the term "protected quotation," as amended, the prohibition on locking or crossing markets will refer to displayed, automated quotations that are the best bids or offers of at least 100 shares of a national securities exchange or association.

[25] Id. at 16746.

[26] In its February 5, 2020 letter, NYSE suggested that the Commission modernize SIP delivery by (a) requiring consolidation in each major data center to address

the Proposal would be inconsistent with the Commission's obligations under the APA for the following reasons:

- **The Proposal is not based on existing market conditions.** The Commission unreasonably relies on stale data and information to justify its proposed transition to a decentralized model that is dependent on unknown players willing to function as competing consolidators, disregarding recent changes that undercut the Commission's rationale for action.

- **The Proposal relies on the appearance of a robust market for competing consolidators that the Commission acknowledges may never materialize.** The success of the Proposal's model hinges on the eventual existence of a sufficient number of competing consolidators to reduce costs, encourage technological advancement, and satisfy the diverse data demands of investors. The Commission's assertion that this market for competing consolidators will likely appear is, at best, speculative and, in fact, contrary to the evidence.

- **The Proposal contains no reasoned analysis of expected costs and fees for market data under the decentralized consolidation model.** The Proposal rests on the assumption that the transition to a model dependent on unknown players stepping up to operate as competing consolidators, and the effects of competition between competing consolidators, will ultimately reduce the overall cost of market data in a way that benefits the majority of market participants. But the Commission provides no reasoned economic analysis to support these assumptions, which are—in fact—contrary to the record.

- **The Proposal would not be a reasonable response to the problem it ostensibly seeks to address.** The Commission justifies its proposed transition to its new model based on considerations of reliability, promptness, and fundamental fairness between market participants. But, on its own terms, the Proposal fails to meaningfully address these concerns. Instead, it would perpetuate a two-tiered market structure by reconfiguring—but not removing—existing latencies, vulnerabilities, and informational asymmetries, and would do so at substantial costs that the Commission has failed to consider.

- **The Commission failed to meaningfully consider viable alternatives to the Proposal.** The Commission did not give meaningful consideration to viable and less drastic alternatives to its proposed model. The decision to forgo such measures in favor of the Proposal lacks any reasoned justification.

---

geographic latency ("Distributed SIP"), and (b) allowing these Distributed SIPs to be "competing consolidators of SIP data." See supra note 2, at 2. While the NYSE's proposal is targeted to address identified concerns regarding geographic latency and would allow for limited competition among SIPs, it would continue to require the NMS Plans to be responsible for and monitor the SIPs. In this way, it is fundamentally different than the Commission's Proposal.

For these reasons, among others, adopting the Commission's proposed decentralized consolidation model would be arbitrary and capricious in violation of the APA, as explained further below.

A. The Commission's Proposed Rulemaking Would Be Arbitrary and Capricious Because It Is Not Based on Actual Evidence Regarding Current Market Conditions

The Commission's proposed decentralized consolidation model is inconsistent with APA requirements because it is not based on concrete evidence regarding current market conditions. Instead, the Commission rationalizes its proposed competitive model with outdated information, ignoring the impact of significant changes to the SIP infrastructure already implemented by the SROs and to the governance of the national market system that the Commission recently imposed, while overlooking the impressive performance of the existing system in a time of extreme market volatility. The Proposal's reliance on stale evidence renders the Commission's proposed action arbitrary and capricious.

Under the APA, an agency must "examine the relevant data and articulate a satisfactory explanation for its action."[27] Any inferences drawn must be based on reason and evidence.[28] An agency's action is arbitrary and capricious where it "offer[s] an explanation for its decision that runs counter to the evidence before the agency."[29]

Here, if the Commission were to adopt the Proposal, it would fail to meet the APA's standard because the Commission does not examine relevant evidence, citing only stale data to support its conclusion that a decentralized consolidation model will satisfy the goals of the Exchange Act. Most glaringly, throughout the Proposal, the Commission relies heavily on outdated discussions and panelist comments from a series of industry roundtables held in 2018 (the "Market Data Roundtable"). Since then, multiple changes to the infrastructure and governance of the existing market data system have narrowed the latency differential between market users—a fact that the Commission acknowledges in passing, but fails to consider meaningfully.

For example, while the Commission recognizes that the Nasdaq UTP SIP has reduced its average latency for Tape C securities to an average of 16.9 microseconds for quotes and 17.5 microseconds for trades, it relies on stale information for CTA data.[30] In 2019, the SIP Operating Committee authorized two improvements to the CTA SIP, which will be funded fully by NYSE and are in the process of being implemented. First, NYSE has invested $4 million to build a new, dedicated network for consolidated tape data that will

---

27 State Farm, 463 U.S. at 43; see also Wheeler, 956 F.3d at 644.

28 See Time Warner Entertainment Co. v. FCC, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (noting that the APA requires the agency to "draw 'reasonable inferences based on substantial evidence'" to support its conclusions (quoting Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994))).

29 State Farm, 463 U.S. at 43.

30 See Proposal at 16766.

allow exchanges and subscribers to access CTA SIP data more quickly.[31] This first change will reduce what the Commission refers to as CTA SIP data "transmission" latency, i.e., the time interval between when data is sent and when it is received, by over 140 microseconds. Second, NYSE has funded a technology overhaul to move the consolidator function of the CTA SIP to NYSE's low-latency Pillar technology platform, a process that will be completed by mid-July 2020.[32] This second improvement will reduce the median aggregation latency for both CT and CQ SIP data to under 20 microseconds. These improvements belie the Commission's premise that the SIP Operating Committees have failed to make investments to address latency, and the Proposal gives no meaningful consideration to these improvements. The Commission also fails to analyze the extent to which further incremental reductions in transmission latency—the most that the decentralized model would purportedly offer[33]—will actually benefit market participants, let alone whether any such benefits are worth the immense costs of the Proposal.

The benefits of the improvements made by the SROs have been on full display during recent market conditions caused by reactions to the COVID-19 pandemic. Despite multiple trading halts, extreme price swings, and unprecedented day-over-day trading volume and volatility, the existing market data infrastructure has performed as designed and as required. As Commissioner Jay Clayton explained himself on May 14, 2020:

> Despite these extraordinary volumes and volatility, the "pipes and plumbing" of the securities markets—*i.e.*, the clearing agencies, exchanges, ATSs and securities information processors, among other things—functioned largely as designed, and importantly, as market participants would expect. In other words, we can report that during this

---

31 The Commission approved this network on May 7, 2020 and the NYSE Exchanges expect that data recipients will begin using this dedicated network on June 1, 2020. See Securities Exchange Act Release No. 88837 (May 7, 2020); Order Granting Approval of a Proposed Rule Change, As Modified by Amendment No. 1, To Amend the Exchanges' Co-Location Services to Offer Co-Location Users Access to the NMS Network, 85 Fed. Reg. 28671 (May 13, 2020).

32 See Consolidated Quotation System and Consolidated Tape System: Migration to Pillar SIP Platform TCP Input FAQs, Securities Industry Automation Corporation ("SIAC"), (Jan. 15, 2020), https://www.ctaplan.com/publicdocs/ctaplan/Pillar_SIP_Input_FAQ.pdf.

33 As discussed further below, the Commission itself acknowledges that the decentralized model will only reduce—but cannot eliminate—the continued existence of a latency gap in the two-tiered system that would be preserved under the Proposal's decentralized model. See infra Section II.D (discussing how a latency differential will continue to exist between customers of competing consolidators and self-aggregators).

> time of unprecedented stress, we have observed no systemically adverse operational issues with respect to our key infrastructure.[34]

Further, the Commission does not adequately consider how current market conditions will be impacted by changes that the Commission itself already ordered with the governance modifications mandated by the Commission's May 6, 2020 Governance Order (the "Governance Order").[35] Despite the Commission's insistence to the contrary,[36] the Governance Order and the Proposal are directly related, both imposing substantial costs on market participants in service of the same putative goals: addressing performance and pricing differentials that "currently exist" between SIP and proprietary data due to alleged conflicts of interest.[37] The two actions also directly contradict each other: the Governance Order was adopted to change NMS plan governance based on the justification that the exclusive SIPs are currently "monopolistic providers of certain market information."[38] The Proposal, if adopted, would eliminate this monopoly altogether, mooting one of the core motivations for the Governance Order.[39] The Commission has chosen—over the objection of NYSE and other market participants—to proceed with adoption of its Governance Order. It must now account for the changes that will flow from the Governance Order when considering related

---

34 Jay Clayton, Chairman, SEC, Remarks to the Financial Stability Oversight Committee (May 14, 2020), http://business.cch.com/srd/clayton-remarks-financial-stability-oversight-council-051420.pdf.

35 See Securities Exchange Act Release No. 88827 (May 6, 2020); Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, 85 Fed. Reg. 28702 (May 13, 2020) (the "Governance Order").

36 Id. at 28707-08.

37 See id. at 28705 (noting that "disparities between SIP data and proprietary DOB data feeds with respect to both speed and content continue to affect the ability of many market participants to use core data to be competitive in today's market and thereby call into question whether the SIPs continue to adequately serve their regulatory purpose); id. at 28707 ("the Commission believes that changes to the governance structure of the SIPs are appropriate to create a governance structure that will reduce obstacles to ongoing improvement of the consolidated market data feeds in ways that the current governance structure of the Equity Data Plans has not"); Proposal at 16,765.

38 See Securities Exchange Act Release No. 34-87906 (Jan. 8, 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, 85 Fed. Reg. 2164, 2168 (Jan. 14, 2020).

39 The Governance Order also calls for the new Consolidated Data Plan operating committee to "select plan processors and an independent plan administrator," id. at 2185, but the Proposal would eliminate the role of plan processors altogether, Proposal at 16750.

rulemaking. At present, the Commission not only fails to explain why the changes it has already adopted would be insufficient, but it also does not explain how it can evaluate the sufficiency of the Governance Order's impact before the required governance changes are even implemented. These shortcomings are critical failures of reasoned rulemaking required under the APA.[40]

In sum, the Proposal is not properly tailored to evaluate the current state of the market data system, which already reflects substantial investments in infrastructure and technology by SROs and non-SROs, alike. The proposed abandonment of the centralized consolidation model—which will undermine these investments and will jeopardize the stability and performance of the national market system—requires more than conclusory justifications based on outdated information.[41]

B. The Commission's Assumptions Regarding Competition Are Not Reasonably Supported

The Commission proposes drastic changes to market data infrastructure based on its unfounded assumption that a robust competitive market of competing consolidators will materialize to improve the quality and availability of market data. If that assumption proves incorrect—a possibility that the Commission acknowledges[42]—the Proposal necessarily fails.

The Commission professes its faith in this critical assumption, but does not support it with reasoned analysis. In particular, the Commission does not meaningfully rebut the numerous reasons to believe these competing consolidators would *not* appear—let alone in sufficient numbers and with sufficient qualifications and duration to produce the desired competitive model. Nor does the Commission seriously consider how, if at all, it would attempt to address a situation where the Proposal's initial implementation phase does not appear to be yielding sufficient competition. Instead, the Commission simply promises not to implement the Proposal's decentralized model until the end of an

---

[40] See Animal Legal Defense Fund, Inc., 872 F.3d at 619 (holding agency action was arbitrary and capricious where the agency's "explanation r[an] counter to the evidence allegedly before it"); cf. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) ("[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by [a] prior policy.").

[41] See Encino Motorcars, 136 S. Ct. at 2127 (holding that conclusory statements were insufficient to justify agency action where there were "serious reliance interests at stake").

[42] See Proposal at 16838 (recognizing a risk that "few competing consolidators" would enter the market). The Commission also does not address the possibility that a competing consolidator could begin operations, the Commission could dismantle the existing exclusive SIPs, and then the competing consolidator subsequently could go out of business and cease operations. See id. at 16777 & n.525 (noting under proposed Rule 614(a)(3), all that a competing consolidator must do to cease operations is "to publish notice of its cessation of operations on Form CC at least 30 business days prior to the date it ceases to operate as a competing consolidator").

indefinite "transition period," during which time the Commission says it will monitor the "operational readiness" of the market for competing consolidators. This reliance on an almost entirely undefined "transition period"—with respect to which interested parties will have no ability to comment or voice concerns—cannot cure the Proposal's failings and underscores the Commission's reliance on speculation. Accordingly, the Commission has not "engaged in the reasoned decision-making essential to informed and evenhanded implementation of public policy."[43]

1. The Commission Did Not Meaningfully Consider that the Costs of Becoming a Competing Consolidator May Substantially Outweigh the Benefits.

Contrary to the Commission's conclusory assertion, the economic case for ***anyone*** to become a competing consolidator is extremely weak. The stability and viability of any potential competing consolidator's revenues are entirely dependent on outside conditions, including the yet-to-be determined fees set by NMS plans, the prices charged by other competing consolidators, the response of market participants that choose to become self-aggregators, and (as discussed further below) the uncertain end to the Commission's "transition period."[44] The Commission assumes that any issues will be addressed by competitive forces and the ability of competing consolidators to "differentiate" themselves sufficiently to carve out a place in the now non-existent market.[45] These conclusory, speculative statements, made without reference to any underlying data, fall far short of the reasoned analysis required by the APA.[46]

Potential competing consolidators also face onerous registration and regulation requirements as a barrier to entry. Under the proposed model, competing consolidators must register with the Commission under the proposed Rule 614, comply with recordkeeping requirements, and disclose "information about their organization,

---

[43] Ariz. Pub. Serv. Co. v. United States, 742 F.2d 644, 649 (D.C. Cir. 1984) (citing Cross-Sound Ferry Servs., Inc. v. ICC, 738 F.2d 481, 483 (D.C. Cir. 1984)); see also Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177 (D.C. Cir. 2010) (finding the rule arbitrary and capricious as the Commission "d[id] not disclose a reasoned basis for its conclusion that [the rule change] would increase competition"); Time Warner Entertainment Co., 240 F.3d at 1133 (D.C. Cir. 2001) (noting that the APA requires the agency to "draw 'reasonable inferences based on substantial evidence'" to support its conclusions (quoting Turner Broadcasting Sys., Inc., 512 U.S. at 666)).

[44] See Proposal at 16836 ("The ability of competing consolidators to attract different investor types would depend on fees set by the national market system plan(s) and the competing consolidators' ability to differentiate among themselves."); id. at 16837 ("Because [fees for consolidated market data content] depend on future action by the effective national market system plan(s), the Commission cannot be certain of the level of those fees.").

[45] Id. at 16836.

[46] See State Farm, 463 U.S. at 43.

operations, and products."[47] Competing consolidators also are required under the proposed model to calculate, generate, and sell a strictly defined consolidated market data product under proposed Rule 614(d)(2), irrespective of demand. And, as sources of consolidated market data, they must also comply with rigorous Regulation SCI requirements, which the Commission acknowledges would impose significant costs on potential competing consolidators, as well as various costs on other market participants.[48]

In addition, the substantial infrastructure investments necessary to become a competing consolidator would deter market entry, particularly where these firms have no way of knowing in advance whether they will be able to successfully attract customers for their services, what their cost for market data would be, or what they could charge. As the Commission acknowledges, any potential competing consolidator would incur the costs of the "creation or modification of technical systems to receive, consolidate, and disseminate the proposed consolidated market data."[49] These systems would have to be developed and built to process and disseminate types of data that have yet to be distributed in market data feeds, including the newly proposed types of regulatory data outlined in the Proposal.[50] The significant costs required to develop, test, and support these technologies—costs that even existing data processors would incur—would serve as a barrier to entry for the competing consolidator market.

A competing consolidator would also face unknown liability for any performance failures, even if due to conditions outside its control. Customers would depend on the promise of prompt, accurate, reliable, and fair access to market data; as a result, competing consolidators could face costly civil suits for any delivery failures. Further, competing consolidators would also be liable for any compliance issues, including under Regulation SCI or any other, yet-to-be determined regulatory requirements.[51] Entities who might consider becoming a competing consolidator have no way of estimating these risks, and the Proposal does not acknowledge that these liability concerns are a significant barrier to entry.

2. The Uncertain "Transition Period" Underscores the Lack of Reasoned Analysis Regarding Competition.

In an apparent effort to control for the significant risk of failure, the Proposal calls for an undefined and indefinite "transition period" during which the Commission would "consider the operational readiness of competing consolidators and self-aggregators," before actually requiring an NMS plan amendment to implement the decentralized

---

47 Proposal at 16774.

48 Id. at 16786-89.

49 Id. at 16836.

50 Id. at 16836-37.

51 Only individuals are not liable under Regulation SCI. See Rule 1001(b)(4) of Regulation SCI, 17 CFR § 242.1001(b)(4).

model.[52] The Commission fails to make clear how it will determine the degree of "operational readiness" needed to end the transition period and leaves no room for reconsideration of the Proposal if the market for competing consolidators simply fails to appear, or is not as robust as the Commission unilaterally deems necessary to adequately replace the proven existing structure. This feature of the Proposal is problematic and further indicative of an APA violation for several reasons.

First, the Commission's failure to place any specific parameters around the "transition period" demonstrates that it is merely taking a wait-and-see approach with respect to the potential emergence of competing consolidators. Lacking any well-grounded views about when or if the required competitive landscape will emerge, the Commission proposes that potential entrants and market participants should incur substantial costs and expenses—including investments in infrastructure and regulatory compliance—while the Commission tests whether its assumption about the appearance of a market for competing consolidators will prove correct.

Second, by failing to specify how the Commission will determine the success or failure of the transition period or to specify even the criteria it will attempt to evaluate in connection with that assessment, the Commission has reserved for itself unchecked decision-making authority outside the rulemaking process. Market participants will be deprived of an opportunity to comment on the Commission's ultimate evaluation of whether the competitive model is ready to be deployed. In essence, the Commission has proposed to decide later when (or potentially if) the competitive model is viable, but it will do so based on future developments and conditions that are currently unknown, and to make this monumental determination without input from or participation by market participants.

Third, while presenting the transition period as a control against the risk of failure, the Commission fails to consider how it in fact makes failure more likely. Potential entrants would have to make extensive investments to become competing consolidators or self-aggregators during the transition period, but would have no ability to earn any returns on those investments—or estimate when or if such returns would be realized—until after the Commission has elected to transition to the decentralized model—if it indeed ultimately chooses to do so.[53] This uncertainty would undermine the likelihood that any market participant would undertake the significant investments required to become a competing consolidator in the first place.

3. The Commission's Assumption that Existing Market Participants Would Choose to Become Competing Consolidators Is Unsupported.

---

[52] Proposal at 16794. At the same time, the Commission expects other market users to incur substantial costs in preparing to implement a system that will not be approved until the Commission determines that competing consolidators achieve "sufficient operational readiness." See id. at 16794-95.

[53] SROs that "wish to act as competing consolidators," id. at 16776, also would incur substantial costs during the "transition period" in preparing to assume new responsibilities for whenever the Commission would determine the period to end.

To the extent that the Commission has attempted to allay any of the above concerns, it has done so based on inadequate speculation. The Commission relies principally on assertions regarding entities who "may wish" to enter the market.[54] For instance, the Commission speculates that some large broker-dealers may seek to become competing consolidators but fails to support this conclusion with any reasoned analysis. Nor could it: many (if not most) potential entrants to the competing consolidators market would choose to become or continue being a self-aggregator. The Commission is correct that the heaviest users of market data—who are also the most latency and content-sensitive—are large broker-dealers that currently self-aggregate proprietary data from exchanges. These broker-dealers will likely choose to continue acting as self-aggregators under the Proposal because becoming competing consolidators would require the increased operational costs and regulatory scrutiny previously discussed, as well as entry into a business that is entirely different from the one in which they currently engage.[55] In addition, by becoming a self-aggregator, these technologically savvy market participants would no longer need to subscribe to consolidated market data from a competing consolidator, thereby reducing the potential pool of customers for competing consolidators. Rather than support the development of a market for competing consolidators, the likely transition of larger broker-dealers into self-aggregators will leave the potential customer base for competing consolidators less latency sensitive and less interested in content depth. The result will be a more limited pool of customers who would have little interest in, and derive little benefit from, competition between potential competing consolidators.

In a similar manner, the Commission speculates that existing SROs would seek to become competing consolidators, but again fails to provide any reasoned analysis to support its conclusion. Despite having certain existing data-processing systems, SROs would still face substantial infrastructure costs as well as additional regulatory requirements should they elect to become competing consolidators. The Proposal suggests that SROs may want to establish competing consolidators as affiliated entities rather than facilities, but the Commission provides no analysis as to how those competing consolidators could avoid being facilities subject to the more rigorous exchange regulatory regime.[56] In addition, succeeding in the proposed competitive model requires constant investment and innovation, and with uncertain return on those investments. The Commission provides no reasoned analysis or evidence as to why SROs would seek to overcome these hurdles and become competing consolidators.

Nor does the Commission provide any reasoned analysis or evidence of why SROs that currently operate the exclusive SIPs would want to continue operating as a competing consolidator under this structure. A competing consolidator that is not affiliated with an exchange would be able to change its services (e.g., wireless transmission versus fiber) and associated fees simply by notifying the Commission, and thus could adjust its

---

54 Id.

55 Smaller broker-dealers who do not self-aggregate for cost reasons and who currently buy consolidated market data from the SIPs also may decide to self-aggregate in the future because they can get this data as part of "core data" at a lower cost.

56 Id. at 16779 n.537.

services and fees in response to competitive forces without waiting for the Commission to review and approve those changes. By contrast, an SRO operating a competing consolidator would need to seek permission to make such changes by filing proposed rule changes under Section 19(b) of the Act. The Commission also does not explain why it proposes that SROs may not continue to consolidate data directly obtained from other SROs, as it proposes broker-dealers may continue to do as self-aggregators. This differentiated regulatory structure for the same services, and differentiated treatment between broker-dealers and SROs, would put SROs at a competitive disadvantage, as they would not be able to participate on a level playing field with any competing consolidators that are not SROs.[57]

The Commission's unsupported assumption that current market data vendors would choose to become competitive consolidators is similarly flawed. Under the Proposal, data vendors who wish to continue to receive consolidated market data directly from an SRO would have to register as a competing consolidator and assume the same investment and regulatory burdens described above.[58] Vendors who do not become competing consolidators would then have to contract with a competing consolidator to purchase consolidated market data—data that is currently purchased from exchanges' direct proprietary feeds. As the Commission acknowledges, the price for this data could potentially increase under the Proposal, which would "cause [vendors'] customer base to shrink."[59] The Commission does nothing to analyze whether these added costs would outweigh any potential benefits to vendors, only conceding the immense uncertainty within the Proposal and that "data vendors could exit the market" if data prices are too high, thereby reducing competition.[60] Thus, there is a complete lack of evidence to support the Commission's conclusory assumptions that data vendors would remain in the market as competing consolidators, and the impact of infrastructure and regulatory costs evidences the opposite conclusion: that data vendors would exit the market.

The Commission points to the fact that there were competing bids to become the exclusive SIP plan processors as evidence that there would be significant economic

---

57 For example, the Commission took the full 240-day period permitted under Section 19(b)(2) of the Exchange Act (15 U.S.C. § 78s(b)(2)(B)) to approve the new, low-latency dedicated network to access the CTA SIP. See Securities Exchange Act Release No. 88837 (May 7, 2020); Order Granting Approval of a Proposed Rule Change, As Modified by Amendment No. 1, To Amend the Exchanges' Co-Location Services to Offer Co-Location Users Access to the NMS Network, 85 Fed. Reg. 28671 (May 13, 2020). Because of the length of time it took for such service to be improved, NYSE had to delay implementation of this improvement by six months. A competing consolidator not affiliated with an exchange would not have been subject to the same regulatory delay in innovating its services.

58 Proposal at 16770 n.434.

59 Id. at 16856.

60 Id. at 16856.

interest in the role of competing consolidator.[61] But the Commission's conclusion is not supported by its premise. The Commission cites only a handful of entities who sought to become data processors in the context of a *guaranteed monopoly*. There is no reason to believe that a substantially larger group of participants—a group large enough to foster a robust market with competition on multiple dimensions—would be interested in becoming data processors without any guarantee of economic viability. Plainly, the Commission cannot point to any precedent for such a market appearing in comparable contexts.

In sum, the Commission has failed to "articulate a satisfactory explanation for its action," which in turn has deprived the public of an opportunity to comment meaningfully.[62] Because its conclusions on an essential aspect of the Proposal are entirely unsupported by reasoned analysis and run counter to the current factual record, the Commission's proposed action would be arbitrary and capricious.[63]

C. The Proposal Fails to Provide Any Reasonable Analysis of Likely Fees for and Costs of Market Data under the Decentralized Consolidation Model

The Proposal's viability also rests on the Commission's assertion that changes to fees for consolidated market data will serve the goals of the Commission's mandate under the Exchange Act, but the Proposal contains no guidance or meaningful analysis with respect to those fees, leaving to speculation how fees for market data will be determined, how "reasonableness" will be defined or achieved, and how costs to market participants will actually be controlled under the proposed decentralized consolidation model. The Commission instead attempts to defer decision on these issues, by noting that they will be addressed in connection with fee filings at some future date. But without reliable information about projected costs borne by market participants, neither the Commission nor any interested parties can meaningfully predict whether the Proposal will ultimately do more harm than good—a fundamental APA deficiency.[64] The absence of information regarding both market data fees charged by the NMS Plans and the fees that would be charged by competing consolidators also forces market participants to resort to speculation regarding the full economic impacts of the Commission's proposed

---

61 Id. at 16776.

62 Fox Television Stations, Inc., 556 U.S. at 513 (internal quotation marks omitted).

63 See State Farm, 463 U.S. at 43 (determining agency action will not be upheld where an agency "entirely fail[s] to consider an important aspect of the problem"); Animal Legal Defense Fund, Inc., 872 F.3d at 619 (holding agency action was arbitrary and capricious because the agency's "explanation r[an] counter to the evidence allegedly before it").

64 Pub. Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1221 (D.C. Cir. 2004) ("The agency's job is to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct, even if . . . the estimate will be imprecise."); see also Md. People's Counsel v. FERC, 761 F.2d 768, 779 (D.C. Cir. 1985) (holding that regulations must do "more good than harm" under the APA).

action, depriving them of a full and fair opportunity to participate meaningfully in the rulemaking process as required by the APA.[65]

The Commission assumes that market data fees will likely decrease for market participants who currently receive both proprietary market data products from the SROs and SIP data and already aggregate proprietary market data for purposes of operating transaction services that compete with the transaction services that the exchanges offer. More specifically, the Commission notes that fees that the NMS plans could charge for the market data content for the proposed consolidated market data are "unlikely to increase."[66] This benefit would thus largely inure to firms capable of becoming a self-aggregator, which are also firms that are competitors of the exchanges.[67] At the same time, the Commission concedes that market data fees may increase for market participants who are otherwise satisfied with the SIP product, and likely are not consumers of proprietary market data products.[68] That is, the Commission acknowledges that the Proposal would see countless market participants (including nearly all retail investors) that only require existing SIP data subsidizing the data consumption of the most active and profitable investment firms. The Commission argues repeatedly, however, that it lacks sufficient data to analyze or estimate reliably the fees that market participants will ultimately pay under the Proposal, making it impossible for interested parties to estimate or evaluate the likelihood and extent of this forced subsidization.[69]

The Commission also overlooks the impact of additional costs to NMS plan participants for new regulatory and oversight responsibilities. For example, exchanges are charged under the Proposal with creating "assessments of competing consolidator performance" as well as the preparation and provision of an "annual report of such assessment to the

---

65 See Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007) (noting that the APA aims to provide commenters with "fair notice"); Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible.").

66 Proposal at 16839-40. The Commission's assumption here signals that it would not support a fee proposal for the consolidated market data content from the NMS plans that would charge fees higher than the current fees charged for consolidated data—even though the scope of the data would materially increase with the inclusion of depth-of-book data and auction information.

67 Id. at 16840.

68 Id. at 16840-41.

69 See, e.g., id. at 16837 ("Regarding the fees for the proposed consolidated market data content, the Commission recognizes uncertainty in these fees."); id. at 16841 (Commission concedes uncertainty about fees, stating that new "data fees paid for equivalent data *could be higher* than current SIP data fees or *could be lower* than current SIP data fees." (emphasis added)).

Commission."[70] The Proposal also places on exchanges the costs of calculating and disseminating certain regulatory data (such as LULD bands) to competing consolidators and self-aggregators.[71] The Commission has not considered how a primary listing exchange responsible for calculating and disseminating this data would obtain from the other exchanges the information needed to perform these calculations. To the extent the Commission assumes each primary listing exchange would obtain the necessary data from a competing consolidator, the Commission fails to consider the added financial and systemic costs of this circuitous design, including the latency impact on the creation of regulatory data.

In addition, as discussed below, NMS plan participants are required to create and implement plans that will ensure "the application of timestamps to all consolidated market data," even though participants no longer consolidate and distribute the data.[72] The Commission's attempt to write off these added costs as "minimal" [73] with no further analysis misrepresents the breadth of these additional responsibilities that SROs would face under the Proposal—the costs of which would in turn increase reasonable market data fees.

The Proposal also requires SROs to "make available" to every competing consolidator and self-aggregator "all data necessary to generate consolidated market data"—but does not make clear ***how*** SROs would be compensated for the cost of delivering such market data information.[74] The Proposal further specifies that "the same access options available to proprietary feeds . . . would be required to be made available for proposed consolidated market data feeds," and that "[a]ccess fees would be set forth in each individual SRO's fee schedules."[75] But there is no mention in the Proposal of whether exchanges would have discretion to set the prices that competing consolidators and self-aggregators must pay to receive exchange market data information in these various formats, or whether (and how) the Commission would seek to constrain or otherwise influence the fees that the exchanges would set.

---

70 Id. at 16798.

71 See id. at 16761-62; Proposed Rule 600(b)(77). The Commission also failed to consider the competitive implications of requiring some SROs to incur the costs to calculate and disseminate this regulatory data and not others. Nor does the Proposal adequately consider whether shifting this responsibility to the primary listing exchanges would delay transmission of these messages to investors, thereby thwarting one of the Commission's goals to reduce latency in transmission of consolidated market data.

72 Proposal at 16775.

73 Id. at 16848.

74 Id. at 16770; Proposed Rule 603(b).

75 Proposal at 16769 nn.428, 440.

The Commission's inability to adequately explain and assess the costs and benefits of its Proposal to market participants is an especially glaring oversight when the Commission has historically considered the significant costs SROs face to develop, maintain, and provide market data.[76] The Proposal does not recognize that these ongoing costs will continue and simultaneously be met with a reduction in funding from proprietary feeds. As previously stated by the Commission, before imposing "a significant and sudden reduction in SRO funding," the Commission must carefully consider the consequences this reduction might have on the "integrity of the U.S. equity markets."[77] There has been no careful consideration here; by neglecting to present any concrete evidence supporting the data pricing model that is integral to the Proposal's success, the Commission's assumption that the Proposal will lead to more equitable data delivery amounts to conjecture. In short, the Commission's failure to provide any reliable, consistent analysis of how changes to market data fees will risk underfunding of SRO ongoing costs renders the economic impacts of the Proposal unreasonably speculative in violation of the APA.

D. The Decentralized Consolidation Model Is Arbitrary and Capricious Because It Will Not Solve the Problem It Was Designed to Address

The Proposal further violates the APA because even if the proposed decentralized consolidation model could be achieved, it bears no "rational connection" to the stated goal of assuring a market data delivery system that is prompt, accurate, reliable, and fair. It is well-settled that an agency must "offer a rational connection between the facts found and" its chosen action.[78] Here, the Commission proposes to amend Regulation NMS based on its preliminary belief that both an expanded consolidated market data definition and a decentralized consolidation model will improve the fairness and reliability of data delivery as compared to the present centralized model.[79] The Commission fails, however, to show why the proposed competitive model would actually achieve these goals. Indeed, the evidence demonstrates the opposite: a two-tiered market data system would continue to exist under the decentralized model and would simply

---

[76] See Securities Exchange Act Release No. 34-42208 (Dec. 9, 1999) ("[T]he information that the SROs provide to the [exclusive SIPs] would not be considered as cost-free. . . . [T]he SROs must establish, monitor, and enforce trading rules, as well as otherwise regulate their markets to prevent fraudulent and manipulative acts or practices. The SROs incur substantial costs in performing these functions, and they contribute substantially to the value of the information."); cf. Wheeler, 956 F.3d at 644 (noting the "foundational precept" that an agency explain its decision is "especially important where . . .an agency changes course").

[77] See Securities Exchange Act Release No. 34-50870 (Dec. 16, 2004).

[78] State Farm, 463 U.S. at 42, 57 (concluding agency failed to supply the requisite "reasoned analysis").

[79] Although the Proposal also references considerations related to promptness and accuracy, the Commission does not and could not credibly argue that—under the current market system—the centralized model fails to deliver data either promptly or accurately, within the meaning of the Exchange Act.

perpetuate the same or similar inequities and risks of failure that exist in the current system.

The Proposal's concession that the competing consolidator model will—at most—reduce, but not eliminate, informational asymmetries in the market undermines its assumption that the Proposal would enhance the fairness of the delivery of market data.[80] The Commission acknowledges that geographic latency is the largest contributing source of existing latency differentials between the exclusive SIPs and the proprietary data feeds. But, as discussed above, the Commission fails to acknowledge, let alone adequately consider, the significant recent improvements to latency in discussing latency gaps.[81] Further, even if the competitive model were implemented, geographic latency would still exist—which the Commission concedes. Specifically, the Commission states that "[s]elf-aggregators may have a minor latency advantage over market participants that decide to utilize a competing consolidator" because self-aggregators "eliminate a potential latency cost that comes with an extra hop within a given data center."[82] The Commission's conclusory assumption that competitive forces should "minimize . . . inherent latencies" and "materially reduce information asymmetries" is therefore unfounded.[83] While the Commission is purporting to address the "two-tiered market data environment, where those participants that can reasonably afford and choose to pay for the proprietary feeds receive other content rich data faster than those who do not," contrary to the Commission's assertion, the Proposal would clearly not "address the latency differentials and reduce the asymmetries that exist within this two-tiered environment."[84] Rather, in order to avoid being "unnecessarily disruptive to the current market data infrastructure landscape,"[85] the Proposal would continue this two-tiered structure—with participants that can afford to act as self-aggregators able to obtain and use that data faster than those relying on competing consolidators.

Notably, the Proposal offers no analysis of the degree of latency advantages that self-aggregators will continue to enjoy. The Commission does not explain its conclusion that reduction of the latency differential would be of sufficient benefit to justify the costs of dismantling the current model and creating a new decentralized consolidation model—particularly when doing so would not achieve the stated goal of eliminating the two-tiered

---

80 The Commission asserts that the decentralized model will address latency differentials between current SIP data and proprietary data because (the Commission assumes) consolidators will compete for business based on latency, among other metrics. However, as explained in Section II.B, the Commission's plan for a robust market among competing consolidators is, at best, speculative, and, at worst, contrary to reason.

81 See supra Section II.A.

82 Proposal at 16791.

83 Id. at 16769, 16791.

84 Id. at 16768.

85 Id. at 16790.

market data system. Indeed, the Commission's framing elides the fundamental fact that—even if the latency advantage enjoyed by some market participants would be reduced somewhat—*every* customer of *every* competing consolidator would still receive market data slower than all self-aggregators privileged by the Proposal. That is, the Proposal merely redistributes the same inequities that are part of the current system, proposing a new system that is just as likely to be less fair, not more.

Nor does the Commission provide evidence to support its conclusion that transitioning to the proposed model would enhance the stability of the current market data system from the perspective of individual data consumers. First, the current system is stable and performed admirably during the unprecedented volatility recently experienced.[86] Second, any customer of a single competing consolidator would still be exposed to a single-point-of-failure risk under the decentralized consolidation model. If a competing consolidator were to experience an unexpected performance failure, its customers would lose access to consolidated market data. Compared to the current system, the decentralized model increases the likelihood of failure by diversifying the number of providers, and introduces inequity that does not currently exist.[87] Whereas all market participants would be equally disadvantaged if the SIPs fail in the current system, only the customers of the individual failing consolidator would be at risk in the decentralized model. In response, market participants would either have to face unequal risk of failure or subscribe to at least two or more competing consolidators, which would increase the cost to those market participants. The Commission fails to consider either of these added costs to market participants, and fails to address the extremely inequitable outcome of the selective-single-point-of-failure risk created by the Proposal.

At the same time, the proposed decentralized model will undermine existing frameworks that support informed decision-making by market participants through uniform comparisons of broker-dealer execution quality. The Commission's conclusion that "Rule 605 reports should still provide uniform comparisons of execution quality" is purely conclusory.[88] As it stands, each competing consolidator and self-aggregator would be separately responsible for calculating the NBBO, which will result in multiple NBBOs available at any given time. Under the proposed model, market centers preparing Rule 605 reports would no longer be providing uniform comparisons because the baseline NBBO that each market center will use will be different. The Proposal fails to sufficiently analyze the impact that multiple BBOs would have on the reliability of Rule 605 reports.

---

86 See supra note 34 and accompanying text.

87 Because, in the Commission's view, competing consolidators do not pose a single point of failure risk, they also need not all comply with the enhanced regulatory requirements of "critical SCI systems" under Regulation SCI that apply to the existing exclusive SIPs. See Proposal at 16786-87, 16847. The Commission noted a "systems issue could occur at a competing consolidator," but instead of conducting any analysis, requests comment on whether all of Regulation SCI should apply to competing consolidators. Id. at 16786.

88 Id. at 16745, n.225.

E. The Proposal is Further Rendered Arbitrary and Capricious by the Commission's Failure to Consider Viable Alternatives

In proposing to overhaul completely the national market system, the Commission unreasonably ignores or inadequately rejects several alternatives to its Proposal in violation of the APA. While the Commission need not consider every conceivable alternative, "[t]he failure of an agency to consider obvious alternatives has led uniformly to reversal."[89] This is an especially glaring omission given that, as discussed above, the Proposal "suffers from noteworthy flaws."[90]

First, the Commission has failed to consider whether any of the multiple changes to market data infrastructure proposed by the Commission in just the last five months—including changes addressed in the now-adopted Governance Order and discrete changes in the Proposal itself—would be sufficient to address the stated goals of the Commission's proposed actions. For instance, the Commission never considered whether either of the two main changes in its Proposal—the forced expansion of "core market data" that would be provided by the SIP or the creation of a decentralized consolidation model—would be sufficient to achieve the Commission's stated goals, or whether one would be more likely to achieve those goals as compared to the other. Further, as discussed above, the Commission did not consider or discuss whether the now-adopted changes in the Governance Order are sufficient to address the alleged shortcomings that provide the justification for the Commission's Proposal.[91] The Commission not only fails to explain why these contemplated governance changes—justified by the same performance and pricing differentials identified in the Proposal—would be insufficient, creating the need for the present Proposal, but also does not explain how it can reach such a conclusion before the governance changes in the Governance Order are actually implemented. The failure to consider these apparent and less drastic alternatives are contrary to the Commission's obligation to consider reasonable alternatives to its proposed policy.[92]

---

89 Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986); see also Brookings Mun. Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (finding the agency's rule arbitrary and capricious because the agency failed to consider or discuss an alternative discussed in detail in two comment letters). The Commission identified three alternatives in its Proposal, but only discussed two of them. See Proposal at 16795-97 (listing as suggested alternative approaches a distributed SIP plan, a single SIP alternative for all exchange-listed securities, and a low-latency dedicated connection to existing exclusive SIP feeds, but failing to consider or analyze the third alternative). Moreover, the Commission did not conduct any data analysis in concluding to reject the two alternatives it even considered.

90 Brookings, 822 F.2d at 1169 (citing Farmers Union Cent. Exchange, Inc. v. FERC, 734 F.2d 1486, 1511 (D.C. Cir. 1984)).

91 See supra notes 37–39 and accompanying text.

92 See, e.g., Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 242 (D.C. Cir. 2008) ("An agency is required to consider responsible alternatives to its chosen policy and

Second, the Commission failed to engage with other viable proposals set forth by commenters in response to the Governance Order and provided no reasoned explanation for their rejection, as required by the APA. For instance, as discussed above, the NYSE proposed creating three different levels of SIP products to match demands from different types of customers.[93] While the Commission acknowledges the recommendation in the Proposal, it makes no effort to explain why it rejected the viable alternative. Instead, the Commission proposed an expanded definition of core data that does not take into account the varied needs across market participants. To comply with its obligations under the APA, the Commission should have adequately considered a reasonable alternative like the one NYSE proposed and then explained its rejection.[94]

Third, as discussed above, the Commission only considered other alternatives, such as the distributed SIP model, using the context as of the time of the 2018 Market Data Roundtable.[95] Since that time, NYSE and other market participants have implemented significant changes that render the Commission's consideration of alternatives outdated. The Proposal's discussion of any alternatives therefore is not properly tailored to evaluate the current state of market data infrastructure.

III. The Commission Does Not Meaningfully Consider the Implications of Retaining NMS Plans While Eliminating the Exclusive SIP Model

The Commission has not adequately considered why the Proposal would continue to require that SROs jointly act pursuant to an NMS plan when the Proposal would simultaneously eliminate the exclusive processor model. Such an illogical outcome suggests that the Commission has not fully appreciated, nor reasonably explained its rationale for, the systemic overhaul posed by the Proposal's adoption.

Today, Commission rules require the SROs to act jointly pursuant to an NMS plan to disseminate (through a single plan processor) a consolidated NBBO, along with last sale data, for each NMS stock.[96] As the Commission described in its Governance Order, the purpose of these particular NMS plans is to "facilitate the required collection and dissemination of core data so that the public has ready access to a 'comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock

---

to give a reasoned explanation for its rejection of such alternatives." (internal quotation marks and citation omitted)).

93 See supra note 8 and accompanying text.

94 See Am. Radio Relay League, Inc., 524 F.3d at 242; Edison Elec. Inst. v. EPA, 2 F.3d 438, 448 (D.C. Cir. 1993) (concluding the agency did not act in an arbitrary and capricious manner by failing to adopt a suggested alternative because it "adequately considered and rejected" the alternative).

95 See Proposal at 16795-97; supra Section II.A.

96 See Rules 601-603 of Regulation NMS, 17 CFR § 242.601-603; Proposal at 16728, 16730.

at any time during the day.'"[97] The SRO Participants of such NMS plans have the responsibility to "ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information."[98] Currently, this responsibility is effectuated by the Operating Committees of these NMS plans entering into agreements with the exclusive processors, overseeing the operation of such exclusive processors, establishing fees for the consolidated data disseminated by the exclusive processors, and overseeing the functions of the Administrators, which manage the subscriber agreements, collect fees, and distribute revenue to SROs.

The Proposal would change the requirement for SROs to act jointly pursuant to NMS plans to collect, consolidate, and disseminate consolidated market data through a single plan processor, and instead require them to act jointly merely to disseminate consolidated market data. Under the Proposal, competing consolidators would collect and consolidate this market data.[99] The Commission does not explain why an NMS plan is necessary to disseminate data that the NMS plan would no longer be responsible for collecting and consolidating.

The Commission does not mention that the reason that the NMS plans currently establish fees for the consolidated data disseminated by the exclusive processors will no longer exist if the Proposal is adopted. Under the Proposal, the NMS plans would establish the fees charged by the exchanges to competing consolidators and self-aggregators for consolidated market data -- even though they would have no role in the collection, consolidation, or dissemination of market data.[100] The Commission should consider whether, rather than through an NMS plan, SROs should individually charge data fees directly to competing consolidators or to such competing consolidators' clients pursuant to Section 19(b) of the Exchange Act.[101] Such an approach would be more efficient and eliminate the need for the NMS plan to determine what fees are appropriate

---

97 Governance Order at 28702 (quoting Securities Exchange Act Release No. 61358 (Jan. 14, 2010); Concept Release on Equity Market Structure, 75 Fed. Reg. 3593, 3600 (Jan. 21, 2020)).

98 Id. at 28730.

99 See Rule 614(a)(1)(i) of Regulation NMS, 17 CFR § 242.614(a)(1)(i); see also Proposal at 16782 (noting "the main obligations of competing consolidators, which are to collect, calculate, and disseminate consolidated market data").

100 See Proposal at 16792 ("[T]he participants of the [NMS Plans] would develop and file with the Commission the fees for SRO data content . . . including fees for SRO market data products. . . as well as the fees for market data products"); id. ("In the decentralized consolidation model, the effective national market system plan(s) for NMS stocks would no longer be responsible for collecting, consolidating, and disseminating consolidated market data and would no longer operate an exclusive SIP.").

101 15 U.S.C. § 78s(b).

to charge for a competitor's data. This alternative model would eliminate the need for a centralized Administrator, given that each competing consolidator could be responsible for onboarding its own customers, who could be charged the market data content fees established by the SROs.[102]

The Proposal also would require the SROs to continue to incur costs associated with managing an NMS plan while overseeing and reporting on competing consolidators—when the NMS plan participants do not regulate competing consolidators, and may themselves be operating competing consolidators. For example, Rule 614(e) would require NMS plan participants to create and implement plans that will ensure "the application of timestamps to all consolidated market data" even though participants no longer consolidate and distribute the data.[103] In addition, the NMS plan would be required to assess competing consolidators, and provide an annual report of such assessment to the Commission.[104] The NMS plans have no role in selecting or monitoring such competing consolidators, yet the Commission proposes that the SROs that operate the NMS plans would incur the cost associated with such assessments.

* * *

NYSE continues to commend the Commission's desire to improve the SIPs and market data infrastructure. But reform to such an integral part of the financial markets cannot be done in haste without reasoned analysis or clear guidance to parties necessary to the success of the proposed reforms. Throughout the near 600-page Proposal, the Commission failed to engage in reasoned analysis because the core features of its proposal rest on guesswork, speculation, and inherent contradictions. At a time of global crisis and extreme market volatility, the Commission should not make speculative wholesale changes to the system that—as observed by Chairman Jay Clayton—has "functioned largely as designed, and importantly, as market participants would

---

[102] Similarly, the Proposal would require that changes to any "exchange-specific program data" would require an NMS Plan amendment to become effective. See Proposal at 16764. Exchanges are currently free to propose such programs through the SRO rulemaking process provided in Section 19(b) of the Exchange Act, 15 U.S.C. § 78s(b), and the Section 19(b) process would still be required for future exchange-specific programs. Requiring such changes to be duplicatively filed by the NMS Plans as proposed plan amendments would serve no policy or regulatory purpose, and would improperly give competing exchanges (as members of the NMS Plans' Operating Committee) a vote in whether or not an exchange may change its programs in a manner the Commission has already found consistent with the Exchange Act.

[103] Proposal at 16775. There would seem to be no additional benefits to requiring this timestamp requirement to be approved by the Commission as an NMS plan amendment, rather than as a rule adopted by the Commission.

[104] Id. at 16793. The Commission also proposes that the NMS plan maintain a list that identifies the primary listing exchange for each NMS stock, an administrative task that could be performed by the Commission itself, and does not justify the costs associated with maintaining the operations of an NMS plan.

expect."[105] The Commission should reform the SIPs by adopting specific policy recommendations, including expanding the content of the SIPs and modernizing delivery as NYSE previously proposed. We look forward to continuing dialogue with the Commission, broker-dealers, investors, and other stakeholders.

Respectfully submitted,

Elizabeth K. King

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

[105] Jay Clayton, Chairman, SEC, Remarks to the Financial Stability Oversight Committee (May 14, 2020), http://business.cch.com/srd/clayton-remarks-financial-stability-oversight-council-051420.pdf.