*February 4, 2020*

***Via Electronic Mail (rule-comments@sec.gov)***

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

***RE: File No. S7-24-89; Release No. 34-87908***
***Joint Industry Plan; Notice of Filing of the Forty-Fourth Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis***

Dear Ms. Countryman:

TD Ameritrade, Inc.[1] ("TD Ameritrade" or "the Firm") appreciates the opportunity to provide comments concerning the Unlisted Trading Privileges Plan ("UTP Plan") proposal to amend the Nasdaq/UTP Plan[2] to make mandatory a conflicts of interest disclosure regime that currently has not been required.[3]

TD Ameritrade provides a unique perspective as an advocate for our more than 12 million client accounts. TD Ameritrade supports the need for a conflicts of interest policy overall. Prior to elaborating on our comments with respect to the U.S. Securities and Exchange Commission's ("SEC" or the "Commission") specific questions, we would like to clarify that TD Ameritrade is providing these comments with the request that they are viewed in conjunction with any such comments we may make available related to the SEC's Proposed Order under Release No. 34-87906 and the Plan's proposal under Release No. 34-87910, collectively the "January 2020 SEC and UTP Market Data

---

1 TD Ameritrade, Inc. is a wholly owned broker subsidiary of TD Ameritrade Holding Corporation (Nasdaq: AMTD). AMTD has a 44-year history of providing financial services to self-directed investors. TD Ameritrade provides investing services and education to over 12 million client accounts, totaling approximately $1.4 trillion in assets, and custodial services for more than 7,000 independent registered investment advisors. As a leader in U.S. retail trading, TD Ameritrade executes an average of approximately 1 million trades per day for our clients.

2 *See Joint Industry Plan; Notice of Filing of the Forty-Fourth Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis,* Release No. 34-87908 (Jan. 8, 2020), 85 FR 2202 (Jan. 14, 2020) ("*The Proposal*").

3 Comments filed are substantially similar to those filed by TD Ameritrade under File No. SR-CTA/CQ-2019-01; Release 34-87907.

Releases." The first would revise the current structure of the Plan, presently including both an Operating Committee and an Advisory Committee, to effectively retain only one such 'Committee' and giving non-SRO Members a vote with respect to Plan activities, and to require that any Plan Administrator not be owned or controlled by a corporate entity that offers for sale its own proprietary market data product either directly or via another subsidiary. The second contains the Plan's current proposal for a confidentiality policy.

TD Ameritrade appreciates the opportunity to respond to the Commission's requests for comments as follows:

1. ***The text of the Amendment, set forth above, states that: "With Exchanges permitted to offer both proprietary market data products and also acting as Participants in running the public market data stream, potential conflicts of interest are inherent in the structure developed under Regulation NMS." The Amendment further notes that "[t]here may be instances in which representatives from the Participants and Advisory Committee members have responsibilities with respect to both proprietary data and [SIP] data" and that "such overlapping responsibilities may give rise to potential conflicts of interest." Do commenters believe the proposed Amendment adequately addresses those potential conflicts? Please provide sufficient detail to support your views, including, to the extent available, actual or possible examples.***

   TD Ameritrade does not believe the proposed amendment completely addresses the potential conflicts as outlined by the Plan[4] and recognized by the SEC.[5] As stated in the SEC's proposal, and for the reasons incorporated therein, TD Ameritrade agrees that market developments have heightened the potential for and perception of conflicts of interest between the exchanges' commercial interests and their regulatory obligations under the Act and the Equity Data Plans to produce and provide core data.[6] As discussed in a letter the Firm recently submitted[7], the lower

---

4 *See The Proposal* at 2203, noting that, ""With Exchanges permitted to offer both proprietary market data products and also acting as Participants in running the public market data stream, potential conflicts of interest are inherent in the structure developed under Regulation NMS." *The Proposal* further notes that "[t]here may be instances in which representatives from the Participants and Advisory Committee members have responsibilities with respect to both proprietary data and [SIP] data" and that "such overlapping responsibilities may give rise to potential conflicts of interest."

5 *See 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*, Release No. 34-87906 (Jan. 8, 2020). 85 FR 2164 (Jan. 14, 2020) ("*NMS Plan*"). *NMS Plan* at 2174, where the SEC explained that, "the Commission believes that the exchanges' commercial interests in their proprietary data businesses, as well as the exchange administrators' access to confidential subscriber information, have created conflicts of interest that could influence decisions as to the Equity Data Plans' operation and thereby impede their ability to ensure the 'prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information'." *Id.*

6 *Id.* at 2168.

7 *See* Letter from Matthew J. Billings, Managing Director, Market Data Strategy, TD Ameritrade (Oct. 24, 2018), at 5–9, *available at* https://www.sec.gov/comments/4-729/4729-4560068-176205.pdf ("TD Ameritrade Letter").

cost of exchange top of book products, coupled with costs associated with processes imposed by the Plans, including associated audit burdens, favors retail broker-dealer use of exchange proprietary top of book products, which puts the interests of the exchanges in producing such products above that of the Securities Information Processors ("SIP") and may create direct conflict with their roles as Administrators.

2. ***If commenters do not believe that the proposed Amendment adequately addresses the potential conflicts of interest arising from the Plan's current governance structure, is that because commenters believe the Amendment is inadequate in any particular way? Or is it because commenters believe that the potential conflicts of interest have not been characterized accurately? If so, in what ways do commenters believe the Amendment fails to describe the current environment and potential conflicts of interest?***

TD Ameritrade does not believe the proposed Amendment completely addresses an individual's conflicts of interest because it does not address the root cause of the conflicts or their perception, and, therefore, the Firm does not believe the Amendment will mitigate these conflicts. Disclosure of potential conflicts in and of itself does not necessarily mitigate any such conflict or the perception of such conflict, but rather simply creates transparency.

Effectively addressing an individual's conflict of interest, whether perceived or in fact, includes mitigating and/or removing such conflict. In a situation where the conflict cannot be fully removed, mitigating processes should be established.[8] The SEC's proposal for a new Regulation NMS Plan is a first step at removing potential conflicts that are present today, by precluding entities who directly or through an affiliate offer for sale a proprietary data product from acting as a Plan Administrator.[9] As highlighted throughout this letter, TD Ameritrade has additional recommendations to address potential conflicts of interest for an individual associated with the Plan.

3. ***In their filing, the Participants state that the proposed questions in the disclosure document are tailored to elicit information relevant to assess the extent of an individual's potential conflict of interests with the Plan. Do commenters believe that the questions for Participants, Processors, Administrators, and members of the Advisory Committee are sufficient to elicit information to provide insight into all potential conflicts? Will public availability of the responses increase transparency and confidence in the governance of the Plan? Do commenters believe the proposed disclosures are sufficient or should enhanced disclosures be required? If so, what additional items of disclosure should be required and why? Do commenters believe that additional disclosures should be required for the representatives and alternative representatives of a Participant, Processor, Administrator, or member of the Advisory Committee?***

---

8 *See* American Institute of Certified Public Accountant's *Code of Conduct*, Section 1.110 Conflicts of Interest, stating: "If the member concludes that the threat is not at an acceptable level, the member should apply safeguards to eliminate the threat or reduce it to an acceptable level." *Available at* https://www.aicpa.org/research/standards/codeofconduct.html

9 *See NMS Plan* at 2187.

The questions for Participants, Processors, Administrators and members of the Advisory Committee are not completely sufficient to elicit the necessary information to provide insight into all potential conflicts for an individual. While the current questions may highlight areas of a potential conflict at a high level, the follow-up questions collecting supporting information need to be enhanced with additional direction and example responses. In all cases, disclosures should explicitly state the circumstances causing the potential conflict of interest between the individual's role with the Plan(s) and that of their separate and other affiliations. This would ensure sufficient, transparent information is available for the public to effectively analyze the potential conflicts being disclosed.

Each disclosure should be enhanced to elicit responses that provide detailed information about the nature of the conflict, including not only the general role of an individual, but also specific information about that individual's contractual requirements, compensation structures, resource allocations, and information access that may cause a perceived conflict.

Requiring the questions to provide detailed and specific information regarding a potential conflict of an individual (and not specifically their employer) will ensure the review of potential conflicts focuses on that individual, and preserves the understanding that appointees are serving in their roles to further the goals of the Plan(s) for their relative positions/industry sectors.

Despite the above, because an increase in transparency to a potential conflict does not in fact mitigate the conflict, it will not increase public confidence in the governance of the Plan(s). As the Plan(s) noted already in their Proposal[10], Participants disclose their responses to the proposed questions publicly at the time of this letter. Regardless, the changes necessary to streamline the operation of the SIP feeds and address the issues previously raised by the industry[11] have not been proposed or implemented by the Plans under the current regime. While a disclosure based regime may be a logical step forward, the Plan(s) should seek to further alleviate conflicts of interest by implementing a formal procedure for evaluating disclosures and making an explicit determination regarding whether the potential conflicts disclosed will, in perception or fact, impede that individual's ability to fulfill their role for the Plan(s). TD Ameritrade would expect, in times of perceived or actual conflict, that any such individual would recuse themselves as appropriate. However, similar to standard procedure for most Boards, TD Ameritrade suggests the policy require review of disclosures by a Committee composed of both SRO and non-SRO members, guidance from Plan legal counsel, and vote by a Committee for ultimate determination on any required recusals in these circumstances. While an individual under review may provide further feedback as requested by the Committee, such individual should not be present for any discussion regarding their disclosures, and should not be permitted to vote on any determination regarding their own potential conflict.

Individuals may be required to recuse themselves for certain topics or for the tenure of their term depending on the severity of the conflict. The results of each determination should be transparent to the Committee, the disclosing individual and the public, and should be re-evaluated each year

---

10 *See The Proposal* at 2203.

11 *See NMS Plan*, outlining some of the changes deemed necessary for the Plans at this time.

that an individual serves in such a role. The Committee, or their designee, should maintain procedures to track any required recusals and ensure they are implemented as intended throughout all Plan and Committee business.

As standard procedure for most Boards, a potential conflict with an individual, employer or any alternate thereof should be clearly disclosed and addressed per a conflicts of interest policy. Therefore, TD Ameritrade believes the same disclosures should be required for any representatives and alternative representatives of a Participant, Processor, Administrator, Committee member, or service provider as such individuals should be held to the same standard for the roles which they fill.

4. ***In their filing, the Participants state that a disclosure-based regime is a pragmatic step to address potential conflicts of interests. Do commenters agree or disagree with that statement? Do commenters believe that a disclosure-based regime is sufficient to address the potential conflicts that Participants, Processors, Administrators, and members of the Advisory Committee may face in their roles within the Plan?***

Please see response to Question 3.

5. ***Do commenters think any other types of persons should be required to provide disclosures, such as services providers to the Administrator that provide audit, accounting, or other professional services? As an example, if auditing services are outsourced to a Participant's employer or an affiliate that also is offering proprietary data products to SIP customers and/or conducting audits for those products, should that entity also be required to disclose its conflicts and otherwise be subject to the terms of the conflicts of interest policy, even if it is neither the Administrator nor Processor?***

As stated in response to Question 1, TD Ameritrade believes service providers (*e.g.*, audit, accounting, legal, and other professional providers) should be required to provide disclosures to ensure such individuals remain independent of conflicts in both appearance and fact. These disclosures should be submitted for all firms and individuals providing services for the Plan, regardless of whether such providers are affiliated with or engaged by the Administrator(s), Processor(s), or a third party contracted by the Plan directly. Such service providers are operating for the benefit of the Plan(s), and must be sufficiently independent of other functions to ensure they provide qualified, accurate and unbiased services.

Information by service providers which should be disclosed may include: the nature of any relationships held with Participants, Administrators, Processors, and Advisory Committee Members, any dependencies noted within compensation structures which may lead to a conflict of interest, and use of any additional affiliated parties so that the Committee may request appropriate conflicts of interest disclosures from those third parties (*e.g.*, use of an audit firm with a commission-based system dependent on the number of findings). Should such relationships exist, the Plan(s) must provide for review of the nature of the relationship and whether the provider may:

- Remain independent to ensure the providers perform their duties for the Plan(s)

- Be subject to certain information barriers to ensure confidential information is not shared (1) with conflicted parties and/or (2) beyond need for a role

6. ***Do commenters believe that an alternative approach could better identify and address conflicts of interests among Participants, Processors, Administrators, and the Advisory Committee, as well as auditors? For example, should a disclosure regime be supplemented with certain prohibited conduct or procedural requirements, such as a prohibition on a Participant voting when that Participant has direct business responsibilities related to producing, selling, or managing competing data products? If you believe an alternative approach is appropriate, please provide details on any such alternative approach. Do commenters regard the Plan's ability to identify and protect the confidentiality of competitive information as an important component to the Plan's ability to manage conflicts of interest? If so, how do commenters regard the interaction between this proposed Amendment and the separate proposed Plan amendment to govern treatment of confidential information noted above?***

   TD Ameritrade believes that the ability to manage conflicts of interest and the ability to govern confidential information are intertwined. For example, if an individual with a conflict of interest is making a determination on whether to disclose information to the Committee or the public which may be viewed in a negative manner, they may have intrinsic motivation to ensure such information is kept confidential from outside parties and may seek to improperly designate such information as Highly Confidential.

7. ***Do commenters believe that the proposed disclosure questions for each party are sufficient to identify the specific relationships that may give rise to a conflict under the Plan and related information? Separately, do commenters believe that the proposed questions effectively require all material facts necessary to not only identify the nature of the conflict, but also the effect it may have on the Plan? Should the Amendment require more disclosure of such potential effects or greater details with respect to the disclosures that are made?***

   Please see response to Question 3.

8. ***Do commenters believe that the Plan should require additional public disclosures of any personal, business, or financial interests, and any employment or other commercial relationships that could materially affect the ability of a party to be impartial regarding actions of the Plan?***

   The Plan(s) should require that all individuals providing disclosures include any additional relationships, whether personal, employment, or commercially related, which may present a perceived or actual conflict of interest with their assigned role(s) for the Plan(s). This may in part be accomplished by a question substantially similar to "Do you or a family member have any potential conflicts of interest not previously disclosed in this form? If so, please specify with whom the relationship exists, the nature of the relationship and the nature of the potential conflict presented by such relationship."

9. ***The Participants propose to continue to post the conflicts of interest disclosures for each party on the Plan's website. Do commenters believe that doing so provides sufficient public notice of potential conflicts? If not, in what other manner should the disclosures be made public? For***

***example, should Participants be required to acknowledge potential conflicts when discussing specific matters at Operating Committee meetings or subcommittee meetings that present a conflict? Should a complete set of the disclosures be included in the materials for each Plan meeting? Is the timing clear with respect to the requirement that a Disclosing Party "promptly" update its disclosures, or should the Amendment be more specific? What do commenters consider sufficiently prompt? Within one week? Within 30 days? Some other timeframe?***

Providing disclosures on public websites provides sufficient public notice of potential conflicts of interest.

TD Ameritrade suggests the proposal should provide for a specific deadline for disclosing any changes to conflicts of interest to ensure consistency among all parties (*e.g.*, within 15 business days unless the potential conflict is identified within 15 days of an upcoming Committee meeting, at which time it should be submitted prior to any votes of that individual on a Committee). Such a practice would be in keeping with the SEC's own administrative practices.

10. ***As proposed, the Amendment states that disclosures will be made and updated annually or upon any material change. Do commenters believe that these intervals are sufficient, or should updates be required more frequently such as in advance of scheduled Plan meetings? What constitutes a "material" change that should require the filing of an amended disclosure? Please explain.***

TD Ameritrade supports an update annually or upon material change. TD Ameritrade agrees that a definition of material change should be incorporated into the policy. In the Firm's opinion, a material change occurs when the nature of the disclosure is fundamentally different from the original statement.

We believe the above responses address the requirements for Participants, Processors, Administrators, and Advisory Committee members sufficiently. At this time, TD Ameritrade has no further comment on burdens to competition.

* * * *

**Conclusion**

TD Ameritrade appreciates the opportunity to comment on the January 2020 SEC and UTP Market Data Releases. The Firm strongly supports the reformation of market data structure, including the need for creation and implementation of a conflicts of interest policy. TD Ameritrade believes that the Commission could significantly improve the structure and operations of the Plan(s) by requiring those affiliated with the Plan(s) to explicitly disclose any actual and perceived conflicts of interest, and requiring the Plan(s) to properly review and address such conflicts.

TD Ameritrade greatly appreciates the Commission's consideration of the above comments and concerns. Please feel free to contact me, at (866) 839-1100, with any questions regarding our comments.

Respectfully Submitted,

Joseph Kinahan
Managing Director, Client Advocacy and Market Structure