



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. 57-24-89; Release No. 34-87910
Joint Industry Plan; Notice of Filing of the Forty-Seventh 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 Plan² to adopt a confidentiality policy to provide guidelines for the Operating Committee and the Advisory Committee of the Plan, and all subcommittees thereof, regarding confidentiality of any data or information generated, accessed, or transmitted to the Operating Committee, as well as discussions occurring at a meeting of the Operating Committee or any subcommittee.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 confidentiality 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 understanding that they are viewed in conjunction with any such

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 7000 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 *Joint Industry Plan; Notice of Filing of the Forty-Seventh 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. 34-87910 (Jan. 8, 2020), 85 FR 2212 (Jan. 14, 2020) (“*the Proposal*”).

³ Comments filed are substantially similar to those filed by TD Ameritrade under File No. File No. SR-CTA/CQ-2019-04; Release 34-87909.

comments we may release with respect to both Release No. 34-87908 and Release No. 34-87906, collectively the "January 2020 UTP Market Data Releases." The first would address the conflicts of interest under current Plan governance. The second would revise the current structure of the Plans, 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(s) 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.

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

- 1. Do commenters believe that Participants involved in the operation or governance of each Plan have, by consequence of their position, access to information of substantial commercial and competitive value? If so, do commenters believe that certain of that information, including customer-specific financial information, customer-specific audit information, personally identifiable information, and information concerning the intellectual property of Participants or customers, is highly sensitive to such a degree that its possession and use should be more tightly controlled? Please explain. For example, should the Amendment require logs and written attestations when a Covered Person shares Highly Confidential Information with other employees or agents of the Participant or its affiliates? Do commenters believe the Amendment should specifically address commercial use of information that is of substantial competitive value?***

TD Ameritrade believes that all Covered Persons (including Participants) by nature of their work with the Plan likely have access to information of substantial commercial and competitive value, as outlined in the Proposal, and agrees that certain information should be more tightly controlled.⁴

Specifically, control procedures for restricted, highly sensitive or confidential information should be sufficient to prevent the information's disclosure to:

- individuals with a conflict of interest with respect to receiving such information, or to
- individuals without specific reason to receive such information to address their responsibilities according to the Plan's requirements.

However, the policy should be flexible to allow the sharing of confidential information when appropriate with relevant parties, such as the SEC, non-SRO Members of any Operating or Advisory Committee, and the Public. This provides the transparency which allows these stakeholders to

⁴ See *The Proposal* defining "Covered Persons" at 2214 as: "[...] all representatives of the Participants, Pending Participants, the UTP Administrator and Processor, and the Advisory Committee[...] agents of the Operating Committee, including, but not limited to, attorneys, advisors, accountants, contractors or subcontractors ("Agents"), as well as any third parties invited to attend meetings of the Operating Committee or Plan subcommittees."

make conclusions on the effectiveness of the Plan to meet its established goals.⁵ For example, non-SRO members may provide valuable feedback on contract negotiations with a Processor given such members background working with Processors.

These procedures should be explicitly defined within the policy where required and should include, but not be limited to, the following:

- required attestation from all Covered Persons which positively affirms their understanding of the Confidentiality Policy of the Plan(s) and their agreement to abide accordingly, regardless of the level of confidential information which they may receive;
- standardized procedures for the redaction/aggregation/anonymization of information where feasible;
- required logging of the sharing of Restricted and Highly Confidential Information;
- requirements to prevent the sharing of information with a competitive value to those individuals who have direct responsibility for the management, sale or development of proprietary data products offered separately;
- recusal of an individual in certain circumstances when the information presented may lead to potential conflict of interest (*e.g.*, during Executive Sessions or Operating Committee meetings)⁶; and
- required use of common logical security controls on documents shared electronically to ensure confidentiality of such information is maintained (*e.g.*, encryption/password protection).

Specifically, with respect to Restricted and Highly Confidential Information, the policy should not allow for the automatic sharing of this information between the Administrator and the Processor or the Participant and its employees or agents unless specifically required for performance of responsibilities as required by the Plan(s). For example, customer audit information identified by an Administrator is not required to be shared with a Processor, even though both Administrators and Processors have access to Restricted Information. Additionally, should the Administrator choose to share the identity of a customer that is the subject of Restricted Information in Executive Session and not redact such information, the Administrator should also ensure no parties with a conflict of interest are present in such session or, if so, should develop procedures to require that individual's recusal to ensure they do not receive information of significant competitive value.

- 2. Do commenters believe that Participants' representatives should be subject to restrictions and/or information barriers as part of the confidentiality policy to address their direct or indirect involvement in the development or sale of proprietary data products to SIP customers? For example, do commenters believe that Participants' access to a list of the Processor's customers as well as information on those customers' data usage and fees paid to the Plan has competitive**

⁵ See *Regulation NMS*, Release No. 34-51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) ("*Regulation NMS Release*"), specifying one of the Commission's most important responsibilities is to "preserve the integrity and affordability of the consolidated data stream." *Id.* at 37650.

⁶ See TD Ameritrade Inc. Comment Letter to *File No. S7-24-89; Release No. 34-87908*, submitted by Joseph Kinahan on February 4, 2020.

implications? Do commenters believe that the Plan should require recusal in certain circumstances (e.g., during Executive Sessions or Operating Committee meetings) because the potential for misuse of competitively sensitive confidential information is too great? If so, what should those circumstances be? Do commenters believe that any Participant or Advisory Committee member that is directly involved in the management, sale, or development of similar proprietary market data products that may be sold to customers of the SIPs should have access to any customer information from the SIPs? Do commenters believe that Operating Committee members, as well as the Administrator, Processor, and auditor should be prohibited, unless otherwise required by law, from sharing confidential information with individuals that are not involved with the operation of the Plan and individuals employed by or affiliated with the same entity if such individuals are involved in the management, sale, or development of proprietary data products that are offered separately to a substantially similar customer base, i.e., customers or potential customer of the SIPs? Would these concerns also be present for the sale of related data products that are supplemental to SIP data?

Please see response to Question 1.

- 3. Do commenters believe that the Plan should require all Participants and other Covered Persons to establish, maintain, and enforce policies and procedures to safeguard confidential and proprietary information received via their participation in the Plan and to prevent its misuse by such Participants or entities controlling, controlled by, or under common control with such Participants? If so, do commenters believe the proposed Amendment sufficiently achieves that goal?***

The Plan(s) should explicitly define the required policies and procedures to safeguard confidential and proprietary information for all Covered Persons to follow, which should then be attested to by such Covered Persons. If such policies and procedures are not explicitly defined in the Plan(s), the Plan(s) should explicitly designate responsibility for the creation of such policies and procedures to one individual/body, to ensure the policies and procedures are standardized in approach, and should then communicate the policies and procedures to promote consistent implementation across all Administrators, Processors, Participants, Advisory Committee Members, and service providers. This communication may occur through the receipt and attestations required by all Covered Persons.

- 4. Do commenters believe the proposed guidelines and procedures for identifying and categorizing types of confidential information, including for providing increasing degrees of protection for more sensitive types of confidential information, provide sufficient detail and a sufficiently comprehensive process and procedures to identify, classify, and subsequently protect confidential information? Or do commenters believe that further efforts are necessary to identify, categorize, and protect confidential information and/or information of substantial competitive or commercial value? Do commenters believe that a need may arise for information or data that are not initially categorized as confidential to be categorized as such at a later point in time and, if so, what should the process be for doing so? For example, should the Operating Committee be able to classify or de-classify material as appropriate based on a majority vote?***

While the proposed guidelines and procedures for identifying and categorizing types of confidential information, including for providing increasing degrees of protection for more sensitive types of confidential information, provide some detail and a process to identify, classify, and subsequently protect confidential information, TD Ameritrade believes there are some modifications to the Proposal that should be considered.

In the current Proposal, broad categories of information types are included, but not fully defined. For example, 'Personal Identifiable Information' is classified as Restricted Information, but the Proposal does not include what specific data points relative to the Plan(s) are considered to be Personal Identifiable Information, such as whether this policy intends to include the following pieces of commonly identified Personal Identifiable Information:

- Name (of customers, customer client's, Participants, Advisory Committee Members, etc.);
- Home Address;
- Telephone Number;
- E-mail address;
- Notes / Comments about clients or other individuals; and
- HR Information.

TD Ameritrade notes that "minutes of the Operating Committee or any subcommittee" are classified as Confidential information, which as a result may not be disclosed publicly until authorized by a majority vote of the Operating Committee or subcommittee.⁷ No procedures have been established around the time or place for such vote, meaning such minutes may be withheld from the public until the following meeting of such Committee or later, regardless of whether such minutes are from discussion during an open session of the meeting or whether they contain information that would be of benefit and value to outside members in a more timely fashion. Therefore with respect to minutes, it would be more appropriate that these either be re-classified as public information unless pertaining to "information shared in an Executive Session or that would otherwise qualify for confidential treatment pursuant to the Plans' Executive Session Policy,"⁸ or that the procedures established include a requirement for making minutes available in draft form to be available for public disclosure within a specified number of days of the meeting (preferably three) until such time that they are voted on and made public by any such Committee.

TD Ameritrade is concerned about the inclusion of the individual views and statements of Covered Persons during a meeting of the Operating Committee as Confidential Information. The intent of the Operating Committee is to direct the equity data plans in a manner that furthers the Commission's responsibilities to preserve the integrity and affordability of the consolidated data stream.⁹ Without transparency into the views attributable to individual Covered Persons responsible for directing Plan operations through their role on the Operating Committee, members of the public, as consumers of plan data, would be unable to determine whether those Covered

⁷ See *The Proposal* at 2214.

⁸ *Id.*

⁹ See *Regulation NMS Release* at 37650.

Persons were acting in the best interest of the Plan(s) and were effective in their roles. At a minimum, a summary of directions/votes made by Covered Persons should be included in Committee Minutes, which would become public information.

TD Ameritrade also has concerns regarding the classification of all contracts between the Operating Committee and its agents as Confidential Information. Agents should be retained to further Plan goals, and thus anyone with an interest in the Plan(s) should have sufficient transparency into the agents utilized by the Plan(s) to be able to contextualize and understand whether or not a conflict of interest may exist between the Operating Committee and contracted agents. Furthermore, given the potential for an interested party to simultaneously engage those same agents unknowingly, lack of transparency may create an un-waivable conflict scenario. This may be a situation in which the Plan(s) allow for the flexibility to redact sensitive information from certain documents (*e.g.*, pricing terms and conditions) and allow the classification of such information to remain public.

Lastly, TD Ameritrade recognizes that a need may arise for information or data that are not initially categorized as confidential to be categorized as such at a later point in time. As a result, TD Ameritrade would anticipate the Plan Administrator may classify such document as Confidential subject to the next meeting of the Operating Committee, where they should be granted authority to review and re-classify or de-classify material as appropriate based on a majority vote.

5. ***Do commenters believe that the Administrator and Processor should be solely responsible for classifying material according to the proposed standards? Or do commenters believe the decisions of the Administrator and Processor should be subject to review, for example upon the request of a member of the Operating Committee? Do commenters believe that potential conflicts of interest should preclude the Administrator and Processor from solely and independently making classification determinations in those circumstances when entities with which they are directly or indirectly affiliated separately offer proprietary data products to a substantially similar customer base, i.e., customers or potential customers of the SIPs?***

The Administrator and Processor should not be solely responsible for classifying material according to the proposed standards, even if the Plan(s) provides that such determination may be altered by majority vote of the Operating Committee. For all determinations made, the Operating and Advisory Committees should review the decisions of the Administrator and Processor to ensure documentation is appropriately classified on an ongoing basis.

6. ***Do commenters believe that certain information or data generated, accessed, transmitted to, or discussed by the Operating Committee, such as information regarding contract negotiations with a potential new Processor, Administrator, auditor, or other third party service provider, should be designated as confidential and, if so, what level of confidentiality should such information be afforded?***

Certain information or data generated, accessed, transmitted to, or discussed by the Operating Committee may present a conflict of interest. This would require minimum designation as Confidential and further consideration for control procedures, such as information barriers to conflicting parties and/or consideration for a more restrictive classification. As suggested in our

response to Question 1, procedures for appropriate information barriers and/or recusal of individuals with a conflict of interest should be implemented where appropriate.

It is important to note, TD Ameritrade believes that some information which may be considered to present a conflict of interest to certain parties may also be relevant to parties not presently defined in the Operating Committee or in what may be defined as those privy to Operating Committee Executive Sessions. Non-SRO members may provide valuable feedback and insight into decisions made with respect to an Administrator, Processor, auditor, or third party service provider. The Plan(s) would in such a case benefit from disclosure of certain information beyond the requirements currently established in the Proposal. TD Ameritrade recognizes that the SEC has a Proposed Order filed for comment to include those parties in the Operating Committee, however notes that at present no proposal seeks to give non-SRO members information available in executive session.¹⁰ Any information classified as Highly Confidential or Restricted is only permissible to be shared in executive session only, in which non-SRO members are not included, and therefore TD Ameritrade does not believe a heightened classification beyond Confidential is automatically necessary at this time.

7. Do commenters believe that information shared in Executive Sessions should be classified as Highly Confidential simply by virtue of it having been shared in an Executive Session, or should such information be classified based solely on its content and competitive sensitivity?

TD Ameritrade believes information shared in Executive Sessions should be classified based solely on its content and competitive sensitivity, and not simply due to the fact that such information was shared during Executive Session. By nature of the current executive session policy, there are still topics included which may have information that would not need to be classified as Highly Confidential. For example, the performance of a processor should be available for discussion by any Operating or Advisory Committee to ensure the processor continues to meet the expectations of the plan and the needs of the consumers. Allowing information to be classified based on its content provides for a flexible policy that will mature without the need for amendment as markets evolve.

8. Do commenters believe that information that is not classified at some level of confidentiality should be considered public and may be shared freely outside of the Operating Committee? What specific information do commenters believe should be considered public and shared outside of the Operating Committee?

Information that is not classified at some level of confidentiality should be considered public and may be shared freely outside of the Operating Committee. Specific information TD Ameritrade believes should be considered public and shared outside of the Operating Committee may include shared Plan revenue information, industry subscriber and quote metrics, Processor transmission metrics and Operating Committee minutes. This information provides transparency into the operation of the Plan(s), valuable for making determinations on the efficacy of Plan operations.

¹⁰ 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") at 2187.

9. ***Do commenters believe that the proposed guidelines and procedures setting forth the circumstances in which disclosure of confidential information may be authorized are sufficiently clear and comprehensive? Do commenters believe that the proposed provisions allowing Participants to disclose confidential and highly confidential information to other employees or agents of the Participant or its affiliates as needed as they reasonably determine is appropriate? Or do commenters believe that, if a Participant is either employed by or affiliated with an entity that offers proprietary data products that are offered for sale to a substantially similar customer base (i.e., customer or potential customers of the SIPs), that Participant should be required to develop policies and procedures that govern the sharing of confidential information? Do commenters believe such policies and procedures should be reviewed by the Operating Committee and Advisors and made publicly available via the Plan's website? Do commenters believe that the potential conflicts of interest involved and the difficulty of mitigating the potential harm and potential burdens on competition are so great that Participants should be explicitly prohibited from disclosing restricted and confidential information at all or only if authorized to do so on a case-by-case basis from the Operating Committee, unless such disclosure is otherwise required by law? If disclosure is required by law, should the Covered Person be required to first notify the Operating Committee (e.g., to provide the Operating Committee with an opportunity to redact information if permitted by applicable law or to dispute the requirement to provide in its entirety)?***

Please see response to Questions 1 and 3.

In addition, TD Ameritrade believes such policies and procedures should be reviewed by the Operating and Advisory Committees and should be made publicly available via the Plan(s) website(s).

The potential conflicts of interest involved and the difficulty of mitigating the potential harm and associated burdens on competition are so great that Participants should be explicitly prohibited from disclosing restricted, highly confidential and confidential information to other employees or agents of the Participant or its affiliates unless authorized to do so on a case-by-case basis from the Operating Committee, and only if required to do so for such individual to perform his or her function on behalf of the Plan, unless such disclosure is otherwise required by law.

If disclosure is required by law, the Covered Person should be required to first notify the Operating Committee (e.g., to provide the Operating Committee with an opportunity to redact information if permitted by applicable law or to dispute the requirement to provide in its entirety).

10. ***Do commenters believe that certain confidential information may become less sensitive if it is anonymized and aggregated? If so, do commenters believe that certain types of restricted or highly confidential information could be anonymized and aggregated to the point where it could be classified as public? What methodology for anonymizing confidential information would commenters suggest, and should the methodology be standardized such that the Administrator, Processor, and auditor all follow a consistent practice for anonymizing such information? Do commenters believe that certain information is so sensitive, whether anonymized or not, that it should never be shared outside of the Operating Committee or outside of the Administrator?***

Certain confidential information may become less sensitive if it is anonymized and aggregated. Certain types of restricted or highly confidential information could be anonymized and aggregated to the point where it could be classified as confidential or public. Please see our response to Questions 1 and 3.

The methodology for redacting/aggregating/anonymizing confidential information should be standardized such that the Administrator, Processor, auditor, and all other relevant parties follow a consistent practice. The methodology should include requirements for what information should always be redacted/aggregated/anonymized (e.g., customer names, size/demographic information that could reasonably be used to determine the name of the customer, etc.). If any information that is anonymized, aggregated or redacted could still reasonably be used, whether independently or with current information available in the industry, to identify less than or equal to two firms/Participants, then such information may not be re-classified to public.

- 11. Do commenters believe that the scope of the proposed Amendment is sufficiently comprehensive to cover all parties that might have access to confidential information, or should the scope be broadened to apply to additional classes of persons? For example, should outsourced service providers (including, but not limited to, firms and persons that provide audit services, accounting services, or legal services to the Plan, the Administrator, or the Processor) be subject to additional restrictions, particularly if they are directly or indirectly affiliated with a Participant, the Administrator, the Processor, or any entity that offers separately proprietary data products to a substantially similar customer base, i.e., customers or potential customers of the SIPs? If so, should the Plan explicitly preclude itself from engaging with an Administrator, Processor, auditor, or any agents or third parties thereof, unless the entity establishes, maintains, and enforces policies and procedures to safeguard confidential and proprietary information and to prevent its direct or indirect misuse? If so, should the Operating Committee review those policies and procedures and/or should they be made public (i.e., provided on the Plan's website)? For example, if the Administrator oversees a Plan's audit function (directly or through an agent or third party) but also is affiliated with an entity that sells proprietary data products to SIP customers, do commenters believe that potential conflicts of interest should preclude the Administrator from independently determining its own confidential information policies as they apply to the audit function? Or, should such policies be subject to review and approval by the Operating Committee, and be posted publicly, to help ensure their adequacy and completeness?**

Outsourced service providers (including, but not limited to, firms and persons that provide audit, accounting, or legal services to the Plan(s), the Administrator, or the Processor) should be subject to additional restrictions, particularly if they are directly or indirectly affiliated with a Participant, Administrator, Processor, or any entity that offers separately proprietary data products to a substantially similar customer base. The Plan(s) should explicitly preclude themselves from engaging with an Administrator, Processor, auditor, or any agents or third parties thereof, unless the entity attests and adheres to the confidentiality policies and procedures established by the Plan, as suggested in Question 3, and provides conflict of interest disclosures as suggested by TD

Ameritrade.¹¹ An alternative to an attestation may include incorporation of such requirements in any contracts established with third parties.

12. Do commenters believe that Advisory Committee members need access to sensitive information of substantial commercial and competitive value in order to perform their duties? Do commenters believe that the Advisory Committee members need access to underlying information relied on by the Participants when making decisions on funding of and improvements for the SIPs?

Advisory Committee members need access to sensitive information of substantial commercial and competitive value in order to perform their duties. Advisory Committee members need access to underlying information relied on by the Participants when making decisions on funding of and improvements for the SIPs.

13. Do commenters believe the proposed remedy in the event that a Covered Person discloses “Highly Confidential Information” in a manner inconsistent with the proposed policy is sufficient, or should any other consequences of such disclosure be provided?

The proposed remedies in the event that a Covered Person discloses any confidential information in a manner inconsistent with the proposed policy are not sufficient. Remedies for unauthorized disclosure of any confidential information, regardless of classification, should be the same irrespective of the nature of the Covered Person. Any breaches by a Covered Person should be disclosed to the Operating Committee, recorded, and reviewed by the Operating Committee for determination upon majority vote of an appropriate remedy, which should include remedies up to and including:

- required recusal on future discussion of related confidential topics, or
- removal from any Operating or Advisory Committee or removal from a role with respect to Plan Activities.¹²

Any reviews of or votes regarding a breach should require recusal of such Covered Person who caused the breach.

14. Similarly, do commenters believe the Amendment would sufficiently deter unauthorized disclosure of “Confidential Information” by a Covered Person without authorization by the Operating Committee? Do commenters believe appropriate remedies for Participants and Advisors should differ, or should potential remedies for Participants that disclose confidential

¹¹ See TD Ameritrade Inc. Comment Letter to File No. S7-24-89; Release No. 34-87908, submitted by Joseph Kinahan on February 4, 2020.

¹² This Proposal is contingent upon passage of the SEC’s proposal to include non-SRO votes on the Operating Committee, to ensure transparency of this process to non-SRO Members. Should this proposal not be implemented, if the Covered Person under review is a non-SRO member, the review should include first a recommendation from the Advisory Committee. See generally, NMS Plan.

information also include the possibility of removal of that Participant from the Operating Committee?

Please see response to Question 13.

* * * *

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 confidentiality policy. TD Ameritrade believes that the Commission could significantly improve the operations of the Plan(s) by ensuring information associated with the Plan(s) remains confidential and properly safeguarded, while also allowing for the flexibility of information sharing where appropriate for transparent oversight and public consideration.

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