

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 93051 / September 17, 2021

File No. 4-757

In the Matter of

Joint Industry Plan; Order Approving, as
Modified, a National Market System Plan
Regarding Consolidated Equity Market
Data

ORDER DENYING STAY

On August 6, 2021, the Commission issued *Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data*, Release, No. 34-92586 (the “CT Plan Order”). It was published five days later in the Federal Register. *See* 86 Fed. Reg. 44,142 (Aug. 11, 2021). Later that month, The Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe Exchange, Inc. (the “exchanges”) filed with the Commission a motion to stay the effect of the CT Plan Order pending final resolution of their petitions for review filed in the U.S. Court of Appeals for the D.C. Circuit that challenge the CT Plan Order and the 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. 88827, 85 Fed. Reg. 28,702 (May 13, 2020) (the “NMS Governance Order”).¹

Pursuant to Section 25(c)(2) of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 705 of the Administrative Procedure Act, the Commission has discretion to stay the CT Plan Order. *See* 15 U.S.C. § 78y(c)(2); 5 U.S.C. § 705. As discussed below, however, the exchanges have not met their burden to demonstrate that a stay of the CT Plan Order is appropriate. Accordingly, the exchanges’ stay motion is denied.

1. Staying a final agency action pending review is an “extraordinary remedy.” 85 Fed. Reg. 36,921, 36,921 (June 18, 2020) (Commission order denying stay

¹ Petitioners filed a stay motion with the Commission dated August 19, 2021. Due to an administrative oversight, Commission staff did not learn of the filing and bring it to the Commissioners’ attention until three weeks later. The Commission has issued this order expeditiously after becoming aware of the filing and, in any event, well within “a reasonable period” under Section 25(c)(2).

of NMS Governance Order). The Commission has discretion to grant a stay of its rules pending judicial review if it finds that “justice so requires.” 15 U.S.C. § 78y(c)(2); 5 U.S.C. § 705. Traditionally, the Commission uses “the familiar four-factor framework” when considering whether a stay during litigation is appropriate:

whether there is a strong likelihood that a party will succeed on the merits in a proceeding challenging the particular Commission action (or, if the other factors strongly favor a stay, that there is a substantial case on the merits);

whether the issuance of a stay would likely serve the public interest;

whether there would be substantial harm to any person if the stay were granted;
and

whether, without a stay, a party will suffer imminent, irreparable injury.

In re Am. Petroleum Inst., Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012); *see Nken v. Holder*, 556 U.S. 418, 434-35 (2009) (noting that the harm-to-others factor and the public-interest factor “merge when the Government is the opposing party”).

2. The exchanges have not met their burden to demonstrate a likelihood of success on the merits. The Commission has previously addressed the three arguments the exchanges make, not only in the CT Order itself, but also in denying a stay of the NMS Governance Order and in the prior litigation challenging that order. None has merit.

First, the exchanges state that the CT Plan Order “unlawfully vests representatives of [non-self-regulatory organizations, or non-SROs] with voting power on the plan’s operating committee,” Mot. 5, because, in their view, SROs—and only SROs—may have voting power on a national market system operating committee. This argument misunderstands the statutory scheme and the Commission’s authority. Section 11A(a)(2) directs the Commission to use its authority under the Exchange Act to facilitate the establishment of the national market system in accordance with and in furtherance of Congress’s specific findings and objectives. One of Congress’s express objectives in Section 11A(a)(1) is to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. *See* 15 U.S.C. 78k-1(a)(1)(C). And Congress expressly authorized the Commission in Section 11A(c)(1)(B) to prescribe rules “to assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in” NMS securities. *Id.* § 78k-1(c)(1)(B). Section 11A(a)(3) grants the Commission additional authority, including “to authorize or require self-regulatory organizations to act jointly” with respect to “matters as to which they share authority under this chapter in planning, developing, operating, or regulating a national market system.” *Id.* § 78k-1(a)(3)(B); *see also* 17 C.F.R. § 242.608(a). Pursuant to its authority under Section 11A, as the CT Plan Order explained, the Commission may permit or require the operating committee to include voting rights for non-SROs. *See* 86 Fed. Reg. at 44,156-58.

Against this backdrop, the exchanges insist that Section 11A(a)(3)(B) forecloses the Commission from extending voting power to representatives of non-SROs. But nothing in the text of that provision constrains the manner in which the Commission can regulate the operating committee. Section 11A(a)(3)(B) authorizes the Commission to require the SROs to act “jointly” in furtherance of Section 11A’s goals—which the CT Plan Order does. It does not provide that the Commission can only include the SROs in its regulation of the national market system or indicate that acting “jointly” means acting “jointly and exclusively.” CT Plan Order, 86 Fed. Reg. at 44,157.

Indeed, here the Commission is requiring joint action with respect to the planning, development, and operation of a national market system plan governing dissemination of consolidated equity market data to further the goals of Section 11A(c). That provision tasks the Commission with prescribing rules to ensure “the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in securities and the fairness and usefulness of the form and content of such information,” and expressly contemplates the involvement of non-SROs in that process. *See* 15 U.S.C. § 78k-1(c)(1). Moreover, as the CT Plan Order stated, “an operating committee that takes into account views from non-SRO members that are charged with carrying out the objectives of the CT Plan will have an overall improved governance structure that better supports those goals, because it will reflect a more diverse set of perspectives from a range of market participants, including significant subscribers of SIP core data products.” 86 Fed. Reg. at 44,157.

Relying on the *expressio unius* canon, the exchanges claim that Section 11A’s reference to the Commission’s ability to order SROs to “act jointly” categorically precludes the Commission from allowing any non-SRO entity to participate in plan governance. Mot. 6-7. But, given the express contemplation of the involvement of non-SROs in the dissemination of national market system data elsewhere in Section 11A, *see* 15 U.S.C. § 78k-1(c)(1), this reference to joint SRO action does not preclude their inclusion. Section 11A’s text, structure, and history demonstrate Congress’s intent to provide the Commission with flexibility in carrying out the enumerated statutory goals. And granting non-SROs voting power is consistent with Section 11A for the reasons discussed above.

Nor is the Commission expanding its authority to regulate entities over which it does not otherwise have authority. Instead, the CT Plan Order requires the plan operating committee to include non-SROs. Any specific non-SRO selected to be on an operating committee can choose to participate or not.

The exchanges likewise err in arguing that “Section 11A’s reference to ‘self-regulatory organizations’ would be entirely superfluous if . . . the statute does not in fact limit the Commission’s ‘act jointly’ authority to SROs *alone*.” Mot. 8. As the CT Plan Order explained, in granting the Commission broad powers, Congress was cognizant of how doing so could raise antitrust concerns. The provision allowing or requiring SROs to “act jointly” enables the Commission to require joint activity that otherwise might raise antitrust concerns. 86 Fed. Reg. at 44,157-58 & n.242; *see* Brief for NYSE Group, Inc. as Amicus Curiae, 2007 WL 173673, at *8, in *Credit Suisse Sec. (USA) LLC v.*

Billing, 551 U.S. 264 (2007) (NYSE previously acknowledging that the Exchange Act “enables the Commission to require joint activity that otherwise might be asserted to have an impact on competition, where the activity serves the public interest and the interests of investors”). And even if Section 11A’s grant of authority to permit or require SROs to act jointly could be read as superfluous or redundant of other Commission authority to oversee SROs, Congress’s decision to remove any doubt that the Commission may authorize joint action by SROs cannot fairly be read as a conscious choice to limit the Commission’s ability to require non-SRO participation.

The exchanges are on no firmer ground in arguing that, “even if the Exchange Act did not foreclose the Commission’s effort to grant voting power to representatives of non-SROs, Rule 608 “plainly” does. Mot. 9. Rule 608 implements Section 11A(a)(3)(B), authorizing joint action in the creation, operation, and implementation of national market system plans. Specifically, it provides that “[a]ny two or more self-regulatory organizations, acting jointly, may file a national market system plan” and that “[s]elf-regulatory organizations are authorized to act jointly in” “[p]lanning, developing, and operating any national market subsystem or facility contemplated by a national market system plan,” “[p]reparing and filing a national market system plan,” and “[i]mplementing or administering an effective national market system plan.” 17 C.F.R. § 242.608(a). Nothing in the rule, which authorizes the SROs to act jointly, limits the Commission’s ability to extend voting right to non-SROs under the Commission’s Section 11A authority. To “act jointly” means to act together or cooperatively. There is no indication that in using the same phrase as in Section 11A the Commission intended to attribute a different meaning to that phrase or to constrain its own discretion in achieving Section 11A’s goals.

Nor does the exchanges’ reference (Mot. 6) to a remark at oral argument in the prior litigation regarding the NMS Governance Order satisfy their burden to show that they now have a likelihood of success on the merits. *See In re Adelpia Commc’ns Corp.*, 336 B.R. 610, 636 n.44 (Bankr. S.D.N.Y. 2006) (“Thoughts voiced by judges in oral argument do not always find their way into final decisions, often intentionally and for good reason.”), *aff’d*, 342 B.R. 122 (S.D.N.Y. 2006); *Bd. of Trade of City of Chicago v. SEC*, 883 F.2d 525, 530 (7th Cir. 1989) (“Comments by Commissioners during a meeting are no more the ‘decision’ of the Commission than comments by judges of this court during oral argument are our opinion or judgment.”).

Second, the exchanges contend that “the CT Plan Order impermissibly allocates operating committee votes to ‘exchange groups’—rather than to each individual affiliated exchange—with each group limited to a maximum of two votes, no matter the number of exchanges in the group,” which under the exchanges’ view gives too much power to non-SROs and also disadvantages affiliated SROs. Mot. 10. The Commission in the CT Plan Order, just as it did in the NMS Governance Order, thoroughly considered and rejected that argument. *E.g.*, CT Plan Order, 86 Fed. Reg. at 44,163-65. The “proposed allocation of votes to Non-SRO Voting Representatives will provide the Non-SRO Voting Representatives a meaningful presence and opportunity to vote on Operating Committee matters, while assuring that their voting power does not equal or exceed that of the SRO Voting Representatives.” *Id.* at 44,165. Under this structure, SROs will

control two-thirds of the votes on the new plan operating committee and can collectively govern the plan without a single vote from a voting member that is not a self-regulatory organization.

The exchanges assert that it is improper to take into account corporate affiliations of the exchanges when deciding how votes should be allocated on the operating committee. Mot. 11. But as the Commission explained in the CT Plan Order, that argument fails for several reasons. “Sometimes, the Commission treats affiliated entities independently,” while “[o]ther times, the Commission takes into account corporate relationships when deciding how to regulate.” 86 Fed. Reg. at 44,164 (citing examples). Here, “[b]ecause of the concentrated power affiliated SROs exert in the governance structure of consolidated equity market data, as demonstrated by the indisputable fact that affiliated SROs vote as blocs, the Commission has determined that affiliated exchanges under common management and control should be treated as one SRO Group limited to one vote, or at most two votes, in the context of NMS plan governance.” *Id.*

Third, the exchanges assert that the CT Plan Order “arbitrarily and capriciously requires that the administrator of the CT Plan be ‘independent.’” Mot. 11. But the Commission acted reasonably in finding that the new plan’s administrator should not at the same time offer for sale its own proprietary data products because such an entity would have access to confidential information as administrator that would benefit its proprietary data business. The exchanges claim that the Commission did not adequately demonstrate that current administrators have “misused customer audit data or that the combination of existing safeguards and the new confidentiality measures imposed by the CT Plan Order will be insufficient to eliminate that purported risk.” *Id.* at 12. But the exchanges do not dispute the existence of this conflict of interest, or that such information is sensitive and commercially valuable. Further, as explained in the CT Plan Order, the Commission has “provided evidence of problems in the current Administrator framework for the existing Equity Data Plans.” CT Plan Order, 86 Fed. Reg. at 44,195. Moreover, “the conflicts of interest faced by a non-independent Administrator are so great that these conflicts cannot be sufficiently mitigated by policies and procedures alone.” *Id.* And the exchanges’ concerns about costs were similarly addressed and rejected in the CT Plan Order. *Id.* at 44,196-97.

3. The CT Plan Order serves a strong public interest. The governance model for the Equity Data Plans was established in 1970s. Since then, critical developments in the equities markets—including the heightening of an inherent conflict of interest between the for-profit and regulatory roles of the exchanges and the concentration of voting power in the Equity Data Plans among a few large exchange groups—have demonstrated the need for an updated governance model. *See* CT Plan Order, 86 Fed. Reg. at 44,142. The public interest will be served by the enhanced decisionmaking and potential for innovation in the provision of equity market data that will result from the governance changes compelled by the CT Plan Order. And the governance of the consolidated data feeds can be improved by consolidating the three existing, separate Equity Data Plans into a single New Consolidated Data Plan that will reduce existing redundancies, inefficiencies, and inconsistencies between and among the Equity Data Plans. *See id.*; *see also* NMS Governance Order, 85 Fed. Reg. at 28,711. Moreover,

“[a]ddressing the issues with the current governance structure of the Equity Data Plans discussed in [the CT Plan Order] is a key step in responding to broader concerns about the consolidated data feeds.” 86 Fed. Reg. at 44,142. Any further delay in establishing a new governance structure will impede the achievement of these benefits, including the Commission’s efforts to mitigate the clear, inherent conflict between the exchanges’ commercial interests in selling proprietary data products and their regulatory obligations to produce and disseminate consolidated market data. Indeed, the exchanges nowhere contest that this intractable conflict exists.

The exchanges state that “the CT Plan Order will not yield any immediate benefits for market participants” because the Commission set forth an implementation schedule. Mot. 15. That argument could be made every time any agency adopts any rule or order that does not take effect immediately, yet a stay in those circumstances remains an extraordinary remedy. The exchanges also claim that any benefit from the CT Plan is “purely speculative,” *id.* at 16, but the Commission determined that the exchanges’ inherent conflict affects their incentives to meaningfully enhance the provision of consolidated data and concluded that the current governance structure of the Equity Data Plans is inadequate to respond to these changes or to the evolving needs of investors and other market participants.

The exchanges also claim that the operating committee of the CT Plan may set the fees for core data at the same level or a higher level than they are now. Mot. 16. That argument, however, is speculative and the exchanges offer no reason why that unsubstantiated concern warrants a stay. And that argument is particularly misplaced because the exchanges themselves will play a major role in setting those fees. In any event, the CT Plan Order is reasonably designed to improve the governance of the national market system by, among other things, addressing the conflict of interest between the exchanges’ for-profit and regulatory roles.

The exchanges speculate that, if the D.C. Circuit vacates the CT Plan, there will be market uncertainty regarding the distribution of core data. Mot. 16-17. But that speculation is insufficient to justify the extraordinary remedy of a stay, particularly when weighed against the harms from the delay of efforts to mitigate the undisputed conflicts of interest faced by the exchanges through their for-profit and regulatory roles. The Court could act before the CT Plan becomes operative in August 2022 and, in doing so, confirm the validity of the plan. And even if the Court were to decide in favor of the exchanges, the decision may not affect the entirety of the CT Plan. Moreover, the three Equity Data Plans will not simply cease to exist in August 2022 or automatically lose their ability to fulfill their functions if the CT Plan Order were vacated.

The exchanges’ contention that vacatur would complicate the implementation of the Market Data Infrastructure rule, *see* 86 Fed. Reg. 18,596 (Apr. 9, 2021), is likewise off base. As the Commission has already made clear, its initiatives to improve the governance and infrastructure of the national market system are mutually reinforcing but “[n]either initiative depends on the other initiative being implemented before it may take effect.” Order Denying Stay, Market Data Infrastructure Rule 5, Release No. 34-91397, (Mar. 24, 2021). Finally, the exchanges argue that “a decision invalidating the CT Plan

Order would raise a host of legally complicated and practically fraught questions about the validity of actions already taken by the CT Plan and the prospective implications of those actions.” Mot. 17. That speculative concern is routinely present any time an agency rule or order is subject to legal challenge and in this case does not warrant a stay.

4. The exchanges’ stay request also mischaracterizes the harm that will result from their compliance with the CT Plan Order. The exchanges assert that they will incur “out-of-pocket expenditures” and devote “substantial time and effort” as they work toward implementing the CT Plan. Mot. 14. But “ordinary compliance costs are typically insufficient to constitute irreparable harm,” *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005), and “it proves too much to suggest that ‘irreparable’ injury exists, as a matter of course, whenever a regulated party seeks preliminarily to enjoin the implementation of a new regulatory burden,” *California Ass’n of Private Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, 170 (D.D.C. 2018). Otherwise, a regulated party would always suffer cognizable irreparable harm whenever it faces compliance costs from agency action while its legal challenge proceeds. The costs of complying with a new regulatory burden do not qualify as irreparable harm except in extraordinary circumstances. *See Nat’l Lifeline Ass’n v. FCC*, No. 18-1026, 2018 WL 4154794, at *1 (D.C. Cir. Aug. 10, 2018) (stay justified where implementation of order “will result in substantial, unrecoverable losses . . . that may indeed threaten the future existence of [petitioners’] businesses” and “is likely to result in a major reduction, or outright elimination, of critical telecommunications services for many tribal residents, which are vital for day-to-day medical, educational, family care, and other functions”). Here, the exchanges have made no attempt to offer even an estimate of their compliance costs or explain the extent to which those costs may affect their businesses.

5. Finally, a stay is not warranted under the statutory provision granting the Commission authority to issue a stay where “justice so requires.” 15 U.S.C. § 78y(c)(2). As the Commission has explained, the traditional four-factor analysis provides “a useful framework to guide our consideration” under the justice-so-requires standard. *In re Am. Petroleum Inst.*, 2012 WL 5462858, at *2 n.1. As already discussed, the exchanges have failed to carry their burden to meet the traditional requirements for a stay. Although the exchanges cite two cases in which the Commission granted stays under this standard, Mot. 18-19, neither case involved the Commission’s determination that a stay was justified despite the petitioner’s failure to satisfy the traditional four-factor stay analysis. *See In re Rule 610T of Regulation NMS*, Release No. 85447, 2019 WL 1424351 (Mar. 28, 2019); *In re Motion of Business Roundtable and the Chamber of Commerce of the United States of America for Stay of Effect of Commission’s Facilitating Shareholder Director Nominations Rules*, Release No. 9149, 2010 WL 3862548 (Oct. 4, 2010). And in this matter, the exchanges cannot meet *any* of the factors. The exchanges have not demonstrated that the Commission should grant a stay even though they cannot meet their burden to show a strong likelihood of success on the merits, they have not shown that the issuance of a stay would serve the public interest, and they offer no evidence of legally cognizable irreparable harm.

Accordingly, it is ORDERED, pursuant to Exchange Act Section 25(c)(2) and Section 705 of the Administrative Procedure Act that the motion for a stay be denied.

By the Commission.

J. Matthew DeLesDernier
Assistant Secretary