

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88824; File No. S7-24-89)

May 6, 2020

Joint Industry Plan; Order Approving 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, as Modified by the Commission, Concerning Conflicts of Interest

I. Introduction

On July 5, 2019,¹ 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 (“Nasdaq/UTP Plan” or “Plan”)² participants (“Participants”)³ filed with the Securities and Exchange Commission (“SEC” or “Commission”) pursuant to Section 11A of the Securities Exchange Act of 1934

¹ See Letter from Robert Books, Chair, Nasdaq/UTP Plan Operating Committee to Vanessa Countryman, Secretary, Commission, dated July 3, 2019 (“Transmittal Letter”).

² The Plan governs the collection, processing, and dissemination on a consolidated basis of quotation information and transaction reports in Eligible Securities for its Participants. This consolidated information informs investors of the current quotation and recent trade prices of Nasdaq securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Eligible Securities. See Securities Exchange Act Release No. 55647 (April 19, 2007), 72 FR 20891 (April 26, 2007).

³ The Participants are the national securities association and national securities exchanges that submit trades and quotes to the Plan and include: Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., NYSE Chicago, Inc., Financial Industry Regulatory Authority, Inc., The Investors' Exchange LLC, Long-Term Stock Exchange, Inc., Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, Inc., The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE National, Inc. (each a “Participant” and collectively, the “Participants”). Participants are also members of the Plan’s Operating Committee.

(“Act”),⁴ and Rule 608 of Regulation National Market System (“NMS”) thereunder,⁵ a proposal to amend the Nasdaq/UTP Plan. The amendment represents the 44th amendment to the Nasdaq/UTP Plan (“Amendment”). As described in the Amendment, the Participants proposed to make mandatory a conflicts of interest disclosure regime that currently is voluntary. The Amendment was published for comment in the Federal Register on January 14, 2020.⁶ This order approves the Amendment to the Plan, as modified by the Commission. The Commission concludes that the Amendment, as modified, is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act.⁷ A copy of the Amendment, as modified by the Commission, is attached as Exhibit A hereto.

⁴ 15 U.S.C. 78k-1.

⁵ 17 CFR 242.608.

⁶ See Securities Exchange Act Release No. 87908 (January 8, 2020), 85 FR 2202 (January 14, 2020) (“Notice”). Comments received in response to the Notice are available at <https://www.sec.gov/comments/s7-24-89/s72489.shtml>.

⁷ 17 CFR 242.608(b)(2).

II. Description of the Proposal

Under the current practice, which the Amendment proposed to make mandatory, the Participants,⁸ the Processor,⁹ the Administrator,¹⁰ and the members of the Advisory Committee¹¹ (collectively, the “Disclosing Parties”)¹² voluntarily respond to a set of questions designed to provide transparency regarding potential conflicts of interest of such parties. Each of the Disclosing Parties’ responses is made publicly available on the Plan’s website and is updated at least annually.¹³ The Amendment would make this practice mandatory. The Participants stated that they believe that publicly providing these responses increases transparency and confidence in the governance of the Plan.¹⁴

According to the Participants, 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.¹⁵ There may be instances in which representatives from the Participants and Advisory Committee members have responsibilities with respect to both

⁸ See supra note 3 (listing the Participants).

⁹ The “Processor” is charged with collecting, processing and preparing for distribution or publication all Plan information. The Processor for the Nasdaq/UTP Plan is Nasdaq Stock Market LLC (“Nasdaq”).

¹⁰ The “Administrator” is charged with administering the Plan to include data feed approval, customer communications, contract management, and related functions. The Administrator of the Plan is Nasdaq.

¹¹ The “Advisory Committee members” are natural persons who represent particular types of financial services firms or actors in the securities market, and who were selected by Plan participants to be on the Advisory Committee.

¹² A list of the Processor, Administrator, and Advisory Committee members, along with their conflict of interest disclosures, is available at <https://www.utpplan.com/governance>.

¹³ See id.

¹⁴ See Notice, supra note 6, 85 FR at 2203.

¹⁵ See id.

proprietary data and Securities Information Processor (“SIP”) data.¹⁶ Drawing on the expertise of persons with such overlapping responsibilities may give rise to potential conflicts of interest, and to address such potential conflicts of interest, the Participants adopted a voluntary conflicts disclosure regime with questions that are tailored to elicit responses that disclose potential conflicts of interest.

Under their current approach to disclosure, each self-regulatory organization (“SRO”) discloses details about its ownership; whether it offers and charges for proprietary market data; the names of all representatives authorized to vote; and a narrative description of the representatives’ role within the organization, including any direct responsibilities related to the development, dissemination, sale, or marketing of the exchange’s proprietary market data and the nature of those responsibilities. The Administrator and Processor disclose any employment or affiliation with an SRO and a narrative description of functions performed; whether it provides any services to, or has any responsibilities for the profitability of that SROs’ proprietary market data products; and any policies and procedures in place to safeguard confidential Plan information. Finally, non-SRO Advisory Committee members disclose a description of their role at the firm with which they are associated, including whether they have responsibilities related to the use or procurement of market data or the firm’s trading or brokerage services, whether they use the SIP or exchange proprietary data, whether they hold ownership in an SRO, and whether they are actively participating in any litigation against the Plan. The disclosures are made annually, updated in response to material changes, and are publicly posted on the Plan’s website.

¹⁶ See id.

III. Discussion and Modifications by the Commission

Pursuant to Rule 608, the Commission shall approve the amendment, “with such changes or subject to such conditions as the Commission may deem necessary or appropriate,” if it finds that they are “necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.”¹⁷

The Commission agrees with the Participants that potential conflicts of interest are inherent in the current market data governance structure where exchanges can offer proprietary market data products while they also act as Participants in running the public market data stream. Indeed, as we recognized in the Notice, the Commission has separately raised broader concerns about the impact of these conflicts on the governance of the Plan.¹⁸ And the Commission solicited comment as to “whether the Amendment to the current Plan addresses the concerns outlined in the Governance Notice or whether it should be further enhanced regarding conflicts of interest in national market system plan governance.”

After carefully considering the comments received on the Notice, the Commission is modifying the Amendment pursuant to Section 11A of the Act¹⁹ and Rule 608 thereunder,²⁰ as discussed in detail below. The Commission agrees that the current voluntary conflicts of interest disclosure regime should be made mandatory, but believes that the modifications set forth below,

¹⁷ 17 CFR 608(b)(2).

¹⁸ See Notice, supra note 6, 85 FR at 2203. See also Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (File No. 4-757) (“Governance Notice”).

¹⁹ 15 U.S.C. 78k-1.

²⁰ 17 CFR 608.

including enhanced disclosure requirements and a requirement that an SRO be recused from voting when it or an affiliate is competing for a contract with the Plan, are appropriate in order to provide fuller transparency and further address conflicts of interest. Specifically, the Commission believes that the Plan should require additional public disclosures of any personal, business, or financial interests, and any employment relationships that would affect the ability of a party to the Plan, or its representative, to be impartial regarding the objectives and actions of the Plan. Further, the Commission believes that the Plan should impose additional disclosure requirements on Participants and their representatives, the Processor, the Administrator, Advisory Committee members, and service providers and subcontractors to the Plan.

The Commission believes that full disclosure of all material facts necessary for market participants and the public to understand the potential conflicts of interest inherent in the current market data structure is an important approach to dealing with those potential conflicts. Detailed, clear, and meaningful disclosures that provide insight into otherwise non-transparent structures and operations can raise awareness by bringing these important issues into the light. In turn, increased access to information can facilitate public confidence in Plan operations as well as promote self-awareness on the part of Disclosing Parties that can support their efforts to identify and address those potential conflicts. The Commission believes that by requiring full disclosure of all material facts necessary to identify the nature of a potential conflict of interest and the effect it may have on Plan action, all parties, including the Commission and the public, will be better positioned to evaluate competing interests among any of the parties involved in governing, operating, and overseeing the Plan, as those competing interests could materially affect their ability to carry out the purposes of the Plan.

Specifically, the Commission is modifying the Amendment as described below:

A. Enhanced Disclosures

1. Service Providers and Subcontractors

In the Notice, the Commission solicited comment on whether enhanced conflicts disclosures should be required. Among other questions, the Commission asked whether commenters “think any other types of persons should be required to provide disclosures, such as service providers to the Administrator that provide audit, accounting, or other professional services.”²¹ Further, the Commission asked whether disclosures and conflicts policies should be applicable to subcontractors, for example where “the Administrator enlists assistance from an auditor or any other professional services subcontractor for any of the Plan(s)” including most prominently when “the subcontractor is affiliated with an entity that is involved in the development, pricing, or sale of proprietary data products offered to SIP customers, or is subject to any other conflict.”²²

In response to the Notice, the Advisory Committee recommended that the Amendment “should apply to service providers engaged in audit or other professional service functions.”²³ Another commenter stated that “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” and asserted that “[s]uch service

²¹ Notice, supra note 6, 85 FR at 2205.

²² Id. at 2206.

²³ Letter from CTA/UTP Advisory Committee to Vanessa Countryman, Secretary, Commission, dated January 24, 2020 (“Advisory Committee Letter”), at 2. The Advisory Committee further recommended that the audit function be managed directly by the Plan and performed by an entity different from the entity engaged to audit the exchange’s proprietary data products. See id. The Commission is not incorporating that suggestion at this time but believes it warrants further consideration.

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.”²⁴

The Commission is modifying the Amendment to require the Participants, Administrator, Processor, or Operating Committee to only use service providers and subcontractors that make the required disclosures in certain circumstances.²⁵ Specifically, the Commission is adding the words “and each service provider or subcontractor engaged in Plan business (including the audit of subscribers’ data usage) that has access to Restricted or Highly Confidential Plan information” and defining those, together with the existing parties, within the term “Disclosing Parties” as used in Section F.1 of the Plan. Further, the Commission is specifying that “The Operating Committee, a Participant, Processor, or Administrator may not use a service provider or subcontractor on Plan business unless that service provider or subcontractor has agreed in writing to provide the disclosures required by this section and has submitted completed disclosures to the Administrator prior to starting work.” As is the case for all other Disclosing Parties, disclosures provided by service providers and subcontractors would be made public.

The Commission believes that the proposed disclosures contained in the Amendment are insufficient in that they do not apply at all to service providers to the Plan. For example, service providers can be affiliated with a Participant or the Administrator. In that case, the potential conflicts of interest that apply to the Participant or Administrator could equally apply to the service provider. These conflicts, as discussed above, exist because some exchange Participants

²⁴ Letter from Joseph Kinahan, Managing Director, Client Advocacy and Market Structure, TD Ameritrade to Vanessa A. Countryman, Secretary, Commission, dated February 4, 2020 (“TD Ameritrade Letter”), at 5.

²⁵ The Commission is using the term “service providers and subcontractors” to capture any natural person or entity engaged in Plan business, including those that may be affiliated with a Disclosing Party.

have a dual role as both an SRO responsible for the operation of the SIP, on one hand, and, on the other hand, as part of a publicly held company that offers proprietary data products and connectivity services.²⁶ The exchanges generate revenue from these proprietary data products in addition to the revenue the exchanges receive from the Plan. Given service providers' and subcontractors' access to competitively sensitive and commercially valuable Plan-related information, and the potential for competitive harm if they share such information with the Participants or their affiliates, the Commission believes that conflicts of interest can also arise with respect to service providers and subcontractors that may be under the direction of, or affiliated with, an exchange Participant, Administrator, or Processor, or those that may be under the direction of the Operating Committee. The Commission believes it is appropriate to include within the scope of the Amendments non-affiliates, including legal counsel, because they would be under the direction of one or more Participants, engaged in Plan business, and have access to Restricted or Highly Confidential Information. Accordingly, the inherent conflicts of interest faced by Participants, discussed above, could be perceived by a reasonable objective observer to also affect the ability of such non-affiliated persons to be impartial. Obtaining disclosures from such service providers and subcontractors would therefore serve the purposes of the Amendments to the same extent they do for any other Disclosing Party.

²⁶ For example, Participants may offer proprietary data products with content in excess of the core data offered by the SIPs, as well as other top-of-book proprietary data products with less content that can be marketed as a cheaper alternative to the SIP. Examples of such proprietary top-of-book products are NASDAQ Basic (<https://business.nasdaq.com/intel/GIS/nasdaq-basic.html>), Cboe One Feed (https://markets.cboe.com/us/equities/market_data_services/cboe_one/), and NYSE BBO (<https://www.nyse.com/market-data/real-time/bbo>).

The Commission therefore believes it is appropriate to include service providers and subcontractors within the scope of the conflicts of interest disclosures by prohibiting the Operating Committee, a Participant, the Processor, or the Administrator from using a service provider or subcontractor on Plan business unless that service provider or subcontractor has agreed to submit and keep current the required disclosures.²⁷

To implement the expansion of the required disclosures to service providers and subcontractors engaged in Plan business that have access to any level of confidential information, the Commission believes it is appropriate to add the following new section under Required Disclosures to apply to service providers and subcontractors:

Pursuant to Section IV.F.1. of the Plan, each service provider or subcontractor that has agreed in writing to provide required disclosures and be treated as a Disclosing Party pursuant to Section IV.F. of the Plan shall respond to the following questions and instructions:

- Is the service provider or subcontractor affiliated with a Participant, Processor, Administrator, or member of the Advisory Committee? If yes, disclose with whom the person is affiliated and describe the nature of the affiliation.
- If the service provider's or subcontractor's compensation is on a commission basis or is tied to specific metrics, provide a detailed narrative summary of how compensation is determined for performing work on behalf of the Plan.
- Is the service provider or subcontractor subject to policies and procedures (including information barriers) concerning the protection of confidential information that includes affiliates? If so, describe. If not, explain their absence.
- Does the service provider or subcontractor, or its representative, have any other relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with its

²⁷ To the extent the Operating Committee, a Participant, the Processor, or the Administrator seeks to use the services of a service provider or subcontractor for Plan business, it would first need to secure a written commitment from the service provider or subcontractor to agree to submit a required disclosure and be treated as a Disclosing Party, and the service provider or subcontractor must in fact adhere to the provisions applicable to all Disclosing Parties, including the process for updating the disclosures and submitting them to the Administrator for public dissemination in Section F.1.b. and c. of the Plan as well as the recusal provisions in Section F.2 of the Plan.

responsibilities to the Plan? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Plan.

These disclosures require information that details the nature of any affiliation with other Disclosing Parties, provides information on the service provider's compensation arrangement, and asks about information barriers given the sensitive information to which such persons have access, all of which are consistent with the disclosures required of other Disclosing Parties. Finally, these disclosures include the new "catch-all" question that the Commission is adding to all Disclosing Parties' disclosures, which is discussed further below.²⁸ Together, the Commission believes that these provisions will, as with their applicability to all other Disclosing Parties, provide important transparency into potential conflicts of interest that parties that provide important services to the Plan may encounter. The Commission believes that this transparency is important for service providers and subcontractors engaged in Plan business that have access to confidential Plan information because those service providers and subcontractors act at the direction of a Disclosing Party (e.g., the Administrator or Processor) and may be affiliated with them, or may be acting at the direction of the Operating Committee and may be affiliated with one of the Participants that compose the Operating Committee. As such, those service providers and subcontractors likely are subject to the same or similar potential conflicts of interest and thus should be treated like any other Disclosing Party in making public disclosures about those potential conflicts.

²⁸ See infra Section III(A)(3)(d) (discussing the catch-all question).

Further, the Commission believes it is appropriate to modify Section F.1. of the Plan to specify that the Disclosing Parties shall complete the applicable questionnaire²⁹ “to provide the required disclosures set forth below to disclose all material facts necessary to identify potential conflicts of interest.” The Commission believes it is appropriate to add this detail to Section F.1 of the Plan to emphasize that a Disclosing Party’s responses to the required disclosures must be sufficiently detailed to disclose all material facts to identify applicable potential conflicts of interest. Disclosures that fail to disclose all material facts will be insufficient to identify potential conflicts of interest and to provide sufficient context for the public to understand how those potential conflicts of interest are relevant to the Plan’s governance and operations. An example of a “material fact necessary to identify potential conflicts of interest” could include whether a situation giving rise to a potential conflict of interest could have a potential adverse effect on the Plan.³⁰

Finally, the Commission is modifying Section F.1 of the Plan to provide that “[i]f state laws, rules, or regulations, or applicable professional ethics rules or standards of conduct, would act to restrict or prohibit a Disclosing Party from making any particular required disclosure, a

²⁹ In the reference to the applicable questionnaire, the Commission is deleting the phrase “attached to this UTP Plan as Exhibit 3.” The Amendment, as modified, will require the Administrator to update the questionnaires. The Commission is not now attaching updated questionnaires as Exhibit 3.

³⁰ For example, a Participant that offers its own top-of-book data product to SIP customers for substantially lower fees than the SIP could be conflicted when considering a Plan proposal to have the SIP offer similar top-of-book products, and this conflict could influence a decision by the Plan not to offer such a product. Similarly, a Participant that offers an enhanced depth-of-book data product to SIP customers could be conflicted when considering a Plan proposal to expand the SIP to include enhanced depth-of-book data, and this conflict also could influence a decision by the Plan not to offer such a product. See also new Section F.1.a. of the Plan (specifying that a “potential conflict of interest may exist when personal, business, financial, or employment relationships could be perceived by a reasonable objective observer to affect the ability of a person to be impartial”), which provides guidance as to the scope of the disclosures.

Disclosing Party shall refer to such law, rule, regulation, or professional ethics rule or standard and include in response to that disclosure the basis for its inability to provide a complete response. This does not relieve the Disclosing Party from disclosing any information it is not restricted from providing.” The Commission believes this modification is appropriate to accommodate the potential that a small number of Disclosing Parties, for example service providers that are licensed attorneys, may be unable to complete one or more of the disclosures due to their obligations under potentially conflicting laws, rules, or professional standards. This modification will allow such a Disclosing Party to provide responses to the required disclosures by identifying the particular conflicting laws or professional standards and discussing the basis for its inability to provide a complete response while providing information it is not restricted from disclosing.

2. Scope of the Amendments

In the Notice, the Commission solicited comment on whether the Amendment is sufficient to elicit information necessary to provide insight into all potential conflicts. Among other questions, the Commission asked whether 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” as well as whether 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.”³¹ The Commission further asked whether 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

³¹ Notice, supra note 6, 85 FR at 2205.

have on the Plan” and whether the Amendment 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.”³²

The Commission also asked questions about the nature of the potential conflicts faced by parties involved with the operation and oversight of the Plan and whether commenters believe the Amendment would require adequate disclosure in sufficient detail about and/or address those conflicts. For example, the Commission stated: “[w]ith 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”³³ The Amendment itself similarly provides 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.”³⁴

In response to the Notice, the Advisory Committee said it believes the disclosure of conflicts of interest is important for Participants, Advisors, the Administrator, and the Processor but believes publishing the conflicts of interest, as proposed by the Participants, “does not adequately address the conflicts of interest.”³⁵ For example, the Advisory Committee believes that the disclosures “do not address situations where Participants sell competing products and

³² Id. at 2205.

³³ Id. at 2204-05.

³⁴ Id. at 2205.

³⁵ Advisory Committee Letter, supra note 23, at 1-2.

may vote [on Plan matters] in ways that protect the commercial interest of the Participant, rather than furthering the goals of the Plans.”³⁶ To address this, the Advisory Committee recommended changes to expand the scope of the Amendment beyond disclosure and affirmatively require that individuals participating in the activities of the Plan’s Operating Committee act in furtherance of the goals of the Plan, that individuals recuse themselves when there is a material conflict between the goals of the Plan and their interests or their employer’s interest, and that service providers engaged in audit or other professional service functions also be subject to the conflicts of interest policy.³⁷

Another commenter agreed with this viewpoint stating “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 [Plan] to produce and provide core data.”³⁸ The commenter stated that it “does not believe the proposed amendments completely address the potential conflicts” noting that “the lower cost of exchange top of book products, coupled with the 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 Processor and may create direct conflict with their roles as Administrators.”³⁹ The commenter recommended that the “Plan(s) should require that all individuals providing disclosures include any additional relationships, whether personal,

³⁶ Id. at 2.

³⁷ Id.

³⁸ TD Ameritrade Letter, supra note 24, at 2.

³⁹ Id. at 2-3.

employment, or commercially related, which may present a perceived or actual conflict of interest with their assigned role(s) for the Plan(s).”⁴⁰

A third commenter similarly stated that “the structure of the Plans and their governance model is inherently conflicted” and only fundamental reform can address the conflicts, which the commenter said could involve “true independence” of the Participants from the Administrator and the Processor.⁴¹ One commenter broadly asserted that the “required disclosures fail to identify many of the potential conflicts of interest inherent in the system, and utterly fail to quantify the magnitude of firms’ conflicts of interest, financial incentives, and other relationships” and “perhaps at the most basic level, they generally don’t provide the public with any information we didn’t already know.”⁴²

The Commission agrees that the proposed amendments do not adequately address potential conflicts, and believes that a Disclosing Party’s access to confidential information it obtains as a result of its involvement with the Plan can create potential conflicts of interest that could influence the decisions it makes with respect to the Plan’s operation. The Commission believes that the Amendments should be modified to provide more transparency into those potential conflicts. These conflicts can impede 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

⁴⁰ Id. at 6.

⁴¹ See Letter from Jeff Brown, Senior Vice President – Legislative and Regulatory Affairs, Charles Schwab, to Vanessa Countryman, Secretary, Commission, dated February 4, 2020 (“Charles Schwab Letter”), at 3-4. See also infra note 72.

⁴² Letter from Tyler Gellasch, Executive Director, The Healthy Markets Association, to Vanessa Countryman, Secretary, Commission, dated February 20, 2020 (“Healthy Markets Letter”), at 18.

such information.”⁴³ For example, the exchanges’ commercial interests in their proprietary data businesses, as well as the exchange-affiliated Administrator’s access to confidential subscriber and audit information that is commercially and competitively valuable to that proprietary data business, have created conflicts of interest that could influence decisions as to the Plan’s operation. As the Participants acknowledged in the Notice, disclosure of these conflicts and other potential conflicts of interest is an important step in addressing potential conflicts of interest.⁴⁴

Given the importance of disclosing these potential conflicts of interest, the Commission is modifying the proposed Amendment to help ensure that the Amendment is clear and that the objectives of the disclosure requirements are uniformly applied. Specifically, as discussed above, the Commission is adding to Section F.1. of the Plan further detail to specify that the disclosures are eliciting information on “all material facts necessary to identify potential conflicts of interest.” Further, the Commission is including language to specify in new Section F.1.a. of the Plan that a “ potential conflict of interest may exist when personal, business, financial, or employment relationships could be perceived by a reasonable objective observer to affect the ability of a person to be impartial.” This new text establishes an objective standard for the disclosures by requiring that the potential conflicts of interest to be disclosed are to be viewed through the lens of a reasonable objective observer considering impartiality. This standard is needed so that the requirement to disclose potential conflicts of interest is not triggered solely based on the subjective views of the Disclosing Party. Impartial third parties, including members of the public, will be among those reviewing the disclosures and they should be assured that,

⁴³ 15 U.S.C. 78k-1(c)(1)(B).

⁴⁴ See Notice, supra note 6, 85 FR at 2205.

across all Disclosing Parties, the disclosures are comprehensive, consistent, and do not display the potentially biased perspective of the Disclosing Party. The disclosures must be meaningful and sufficiently detailed to provide any reasonable objective observer that reads the disclosures with adequate transparency into matters such that she is able to determine whether the Disclosing Party would be able to be impartial in its role with the operation and oversight of the Plan.

3. Enhanced Party-Specific Disclosures

In addition to asking questions about the overall scope and sufficiency of the Amendment and the general disclosure-based approach it contains, the Commission also solicited comment on a number of detailed questions in the Notice about the potential conflicts faced by various entities, including individual Disclosing Parties, service providers, and subcontractors.

a. Participants

In addition to those questions mentioned above, the Commission asked whether commenters “believe that any individual representing a Participant that is directly involved in the management, development, pricing, or sale of proprietary data products offered to SIP customers should participate in discussions and related Plan votes regarding the pricing of SIP data products” and how commenters “believe Participants should address the conflicts their representatives may face in their dual role of pricing and developing SIP data products as well as their own proprietary data products.”⁴⁵

In response to the Notice, one commenter suggested that “in addition to disclosing whether a participant’s firm charges a fee for the provision of data, the participant should reveal the percentage of revenues derived from the sale of proprietary data, and separately core SIP

⁴⁵ Notice, supra note 6, 85 FR at 2205.

data, as a percentage of total revenue.”⁴⁶ Another commenter urged the Commission to either deny the Amendment or to expand it dramatically to include information that “might actually help the Commission and third parties quantify and assess the Disclosing Parties’ conflicts of interest” such as “a disclosure by each exchange of its costs in producing SIP data, the revenues from the SIP data, costs in producing competing proprietary data products, revenues from the competing data products, analyses of the extent of the customer overlap of those products, details regarding the projected impact of improving the content and timeliness of the SIPs on those competing data products, and more.”⁴⁷

On this issue, another commenter expressed concern about the “potential for and perception of conflicts of interest between the exchanges’ commercial interests and their regulatory obligations... to provide core data.”⁴⁸ One commenter recommended broadly that questions eliciting disclosures for Participants, the Processor, the Administrator, and Advisory Committee members should “provide detailed and specific information regarding a potential conflict of an individual (and not specifically their employer)” and the information should include not only the individual’s general role “but also specific information about that individual’s contractual requirements, compensation structures, resource allocations, and information access that may cause a perceived conflict.”⁴⁹ The commenter stated that enhanced

⁴⁶ Letter from Rich Steiner; Head of Client Advocacy and Market Information, RBC Capital Markets, to Vanessa Countryman, Secretary, Commission, dated February 4, 2020 (“RBC Letter”), at 2.

⁴⁷ Healthy Markets Letter, supra note 42, at 18.

⁴⁸ TD Ameritrade Letter, supra note 24, at 2. See supra text accompanying note 39.

⁴⁹ Id. at 4. The commenter stated that “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.” Id. at 3-4.

disclosure “would ensure sufficient, transparent information is available for the public to effectively analyze the potential conflicts being disclosed.”⁵⁰

After considering the comments received in response to the Notice, the Commission believes it is appropriate to enhance the required disclosures of Participants in two ways. First, the Commission is adding requested disclosures to a question regarding whether Participants offer proprietary data. Currently, the question asks whether the Participant firm offers real-time proprietary equity data and, if so, whether the Participant charges a fee. The Commission is modifying the question to require a Participant also to “list each product, describe its content, and provide a link to the fee schedules where fees for each product are disclosed.”⁵¹ As suggested by a commenter, this additional disclosure follows logically from, and provides more information in relation to, the existing question of whether a Participant offers proprietary data and whether it charges for it. The Commission believes it is insufficient merely to ask a “yes or no” question on an issue that is at the core of the potential conflicts of interest inherent to the Plan’s current governance structure. There are various types of proprietary data offered and fees charged for it, and these offerings and fees serve as the principal sources of the potential conflict. Without more information on the material underlying facts related to specific proprietary data offerings and fees, a simple disclosure that such offerings and fees exist is not sufficient to elucidate the nature and extent of the potential conflict. The Commission believes Participants should identify and describe the specific proprietary data products they offer. Doing so will

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Id.

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In requiring Participants to provide a link to the fee schedules where fees for each product are disclosed, the Commission is not requiring additional information to be disclosed concerning such fees, but rather, to promote accessibility of that information to readers of the conflicts disclosures, is requiring Participants to provide a specific location indicating where Participants currently disclose those fees.

allow anyone who reads the disclosure to evaluate the proprietary data products and assess whether and how they overlap with the SIP.

For example, as stated above, a Participant may offer more expensive proprietary data products with content in excess of the core data offered by the SIPs, as well as other top-of-book proprietary data products with less content that can be marketed as a less expensive alternative to the SIP. Both types of proprietary data products contain information that overlaps to some extent with what the SIP provides, but one is offered as a more expensive and enhanced data product while the other is offered as a less expensive and less expensive alternative to the SIP. In doing so, the Participant offers its own data product because the SIP does not offer something similar. The Participant, however, is not just offering a different product (potentially expanded in content or lower in price) compared to the SIP in this respect; it, together with other Participants, governs (and possibly operates) the SIP. Disclosure of certain information about these proprietary data products offered by a Participant, and a link to fee schedules for such products, can reveal material facts (i.e., the Participant's pricing of its proprietary data products that it offers to SIP customers). These material facts are relevant to whether a Participant may, for example, be disincentivized to support expanding the content of SIP core data or to support the SIP offering an optional and less expensive data feed, as well as material facts relevant to a Participant's pricing strategy for the SIP as compared to its own proprietary data product offerings. Either of those cases would involve the SIP offering a similar product to that already offered as a proprietary data product by the Participant. With full disclosure of these material facts, a reasonable objective observer would better understand the potential conflict of interest the Participant faces in its governance of the Plan, including what conflicts of interest the Participant would face when it discusses and votes on SIP proposals to provide data products similar to

those provided by the Participants at prices that match or undercut the Participant's own fees for proprietary products. As revised, the disclosures will provide valuable additional insight into the nature and extent of a principal source of the potential conflict of interest an exchange has in its dual role of overseeing the Plan while offering its own proprietary data products.

Second, the Commission is modifying the disclosures for the Participant's representative to require greater disclosure of the individual's connection with the Participant's proprietary market data business. Specifically, the Commission is adding the phrase "sufficient for the public to identify the nature of any potential conflict of interest that could be perceived by a reasonable objective observer as having an effect on the Plan." Further, the Commission is adding to the question the following: "If the representative works in or with the Participant's Proprietary Market Data business, describe the representative's roles and describe how that business and the representative's Plan responsibilities impact his or her compensation. In addition, describe how a representative's responsibilities with the Proprietary Market Data business may present a conflict of interest with his or her responsibilities to the Plan."

This modification, which conforms to the modification of the scope of the Amendment discussed above, requires that Participants provide sufficient detail in their responses to this particular item because it is central to the potential conflicts of interest at issue. Without sufficiently detailed disclosure of the underlying facts, the disclosure would not provide effective insight into the potential conflicts of interest the Participant's representative personally has in his or her role with the Plan. For example, if the representative's compensation is tied directly and substantially to the profitability of the Participant's proprietary market data business, then the representative might face a conflict of interest when working on Plan matters, most notably when considering whether to enhance or more competitively price Plan data products in ways that

would compete with the Participant’s proprietary data products. While the Commission would expect this information to be disclosed in response to the existing question, the Commission seeks to avoid any doubt and ensure sufficiently detailed responses to the question on this important disclosure.

b. Processor

In the Notice, the Commission asked whether commenters “have concerns about affiliations between a Plan’s Processor and a Participant” and, if so, whether commenters “believe the conflicts of interest disclosure is sufficient to address those concerns” or whether “the Amendment [should] require a description of the nature of the affiliation.”⁵² In addition, the Commission asked whether commenters “have concerns about affiliations between a Plan’s Processor and a Participant” and, if so, whether they “believe the conflicts of interest disclosure is sufficient to address those concerns” or whether “the Amendment [should] require a description of the nature of the affiliation.”⁵³ Further, the Commission asked whether commenters “believe that the proposed Processor questions effectively require all material facts necessary to not only identify the nature of the potential conflict, but also the effect it may have on the Plan” and whether commenters believe the Amendment should “elaborate on what ‘profit or loss responsibility for a Participant’s Proprietary Market Data products’ means in the context of the required disclosures.”⁵⁴

⁵² Notice, supra note 6, 85 FR at 2206.

⁵³ Id.

⁵⁴ Id.

The Commission did not receive any comments that specifically addressed the questions raised or alternatives suggested by the Commission, though the commenters discussed above supported enhanced disclosures for all Disclosing Parties.⁵⁵

The Commission believes that it is appropriate to modify the required disclosures of the Processor to require more detailed disclosures relevant to potential conflicts of interest in a manner similar to the modifications it is making for the Administrator. As proposed, the disclosures for the Administrator and the Processor were substantively identical, and the Commission believes that modifying the Processor's disclosures to remain consistent with the Administrator's disclosures keeps with the intent of the proposed Amendments. Like the Administrator, the Processor also is responsible for Plan operations; as a result the proposed conflict of interest disclosures are similar. To keep those disclosures comparable, the Commission is making modifications to the required disclosures for the Processor similar to the modifications it made for the Administrator. First, the Commission is adding to the question requiring the Processor to disclose whether it is affiliated with any Participant additional language to require that the Processor must also "describe the nature of the affiliation," identify the name of the affiliate, and "[i]nclude an entity-level organizational chart depicting the Processor and its affiliates." The Commission believes that merely providing a name of an affiliate without disclosing how the two parties are related to each other is not sufficient. Many different levels of affiliation are possible, and the relationship between the Processor and a Participant is meaningful information that should be disclosed in order to allow the public to assess the impact of the affiliation on the potential conflicts the Processor may face when acting on behalf of the Plan.

⁵⁵ See, e.g., TD Ameritrade Letter, supra note 24, at 3-4.

In addition, the Commission is modifying the question that requires a narrative description of the functions performed by the manager to also require a similar description for “senior staff” that may be senior to the manager but that also provide services in the Processor capacity. By adding senior staff to that question, the disclosures will be able to provide more insight into the parties involved with the Processor function of the Plan including by those persons senior to, and with authority over, the manager.

Second, the Commission is adding to the question on whether the Processor provides any services to the Participant’s proprietary market data products, and whether the Processor has profit or loss responsibility for that business, a further requirement for the Processor to disclose “any other professional involvement with persons the Processor knows are engaged in” the Participant’s proprietary data business and to describe it. The information that a Processor obtains by virtue of its service to the Plan as the Processor can be sensitive non-public information of considerable commercial value. Even if the Processor does not have “profit or loss responsibility” for the Participant’s proprietary data business, the Processor may have significant professional involvement with other people that do.⁵⁶ Any affiliated people in the Participant’s proprietary data business with whom the Processor may interact may be incentivized to use information provided by the Processor to the competitive advantage of the Participant and to benefit the Participant’s proprietary data business. The Commission therefore

⁵⁶ With respect to protecting the confidentiality of Plan-related information, the Commission separately is approving modified amendments to address the Plan’s confidentiality policy. See Securities Exchange Act Release No. 88826 (May 6, 2020). The Commission does not believe that the separate confidentiality amendments obviate the need for these Amendments dealing with conflicts of interest. Rather, the Commission believes that both sets of amendments complement each other and take an important first step towards strengthening the Plan’s ability to protect against the potential misuse of confidential Plan information while addressing the potential conflicts of interest inherent in Plan governance.

is modifying the question to elicit material information that is directly relevant to the potential conflicts of interest faced by the Processor if the Processor has involvement or contact with persons engaged in a Participant’s proprietary market data business.

c. Administrator

In the Notice, the Commission asked whether commenters believe the proposed disclosure questions for the Administrator “are sufficient to identify the specific interests and employment, commercial or other relationships that may give rise to a conflict” or whether more disclosures and more detailed items should be required.⁵⁷

In response to the Notice, one commenter stated that the proposed disclosures for all Disclosing Parties, including the Administrator, were “not completely sufficient to elicit the necessary information to provide insight into all potential conflicts for an individual” and recommended that the disclosures 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.”⁵⁸

After considering the comments received in response to the Notice, the Commission believes it is appropriate to enhance the required disclosures of the Administrator. The Commission is modifying the question about whether the Administrator is affiliated with a Participant in the same way that it modified the parallel question about the Processor and is making that modification for the same reasons. Specifically, the Commission is requiring an Administrator that is affiliated with a Participant also (i) to “describe the nature of the affiliation”

⁵⁷ Notice, supra note 6, 85 FR at 2206.

⁵⁸ TD Ameritrade Letter, supra note 24, at 3- 4.

in addition to identifying the name of the affiliate, and (ii) to include “an entity-level organizational chart depicting the Administrator and its affiliates.” As is true for the disclosure applicable to the Processor, the Commission believes that merely providing the name of an affiliate without disclosing how the two parties are related to each other is not sufficient to identify what might give rise to a potential conflict of interest.

In addition, the Commission is modifying the question that requires a narrative description of the functions performed by the administrative services manager to also require a similar description for “senior staff” that may be senior to the administrative services manager but that also provide services in the Administrator capacity. By adding senior staff to that question, the disclosures will be able to provide more insight into the parties involved with the administration of the Plan including by those persons senior to, and with authority over, the manager. Further, the Commission is modifying the question that requires disclosure of whether the Plan Administrator has profit or loss responsibility for a Participant’s proprietary market data products to also encompass “licensing responsibility” for the same to require disclosure of whether the Administrator performs the central task of licensing for the Participant’s proprietary market data products, which would overlap substantially with the Administrator’s licensing responsibility to a similar customer base. Finally, for the same reasons discussed above for the Processor, the Commission is adding to that same question a further requirement for the Administrator to disclose “any other professional involvement with persons the Administrator knows are engaged in” the Participant’s proprietary data business and to describe it. This change harmonizes the same question asked of both the Processor and the Administrator, who are similarly situated in when it comes to involvement or contact with persons engaged in a Participant’s proprietary market data business.

Administrators have access to highly sensitive and commercially valuable non-public information that would be of substantial value to a Participant’s proprietary data business. For example, access to the SIP customer lists that an Administrator has through its responsibilities to the Plan would be very valuable to a Participant. If the staff associated with the Administrator has access to that information and also bears responsibility for the Participant’s proprietary market data products, the potential conflict of interest is considerable and should be disclosed. The Commission believes that these modifications to the disclosures applicable to the Administrator are appropriate to provide insight into some of the key potential conflicts of interest faced by the Administrator.⁵⁹

d. Catch-all Question

In the Notice, the Commission solicited comment on whether the Amendment would elicit the information necessary to provide sufficient transparency of the potential conflicts of interest faced by parties involved with operating and overseeing the Plan. Among other things, the Commission asked whether commenters “believe that the Plan should require additional public disclosures of any personal, business, or financial interests, and any employment or other

⁵⁹ The Commission believes it is appropriate for the Administrator to make the required disclosures even if it is independent and not owned or controlled by a corporate entity that offers for sale its own proprietary market data product, either directly or via another subsidiary, for the same reasons that other independent parties (e.g., Advisors and service providers) are required to make the disclosures. Among other things, the Administrator’s disclosures contain important information about any services provided to Participants’ proprietary market data products, policies and procedures to safeguard confidential information, and the catch-all question about additional relationships or material economic interests. See Securities Exchange Act Release No. 88827 (May 6, 2020) (ordering the Participants to act jointly in developing and filing with the Commission a proposed new single national market system plan that would, among other things, require an independent Administrator).

commercial relationships that could materially affect the ability of a party to be impartial regarding actions of the Plan.”⁶⁰

In response to the Notice, one commenter suggested that all parties disclose “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).”⁶¹

After considering the comments received in response to the Notice, the Commission believes it is appropriate to modify the Amendment to include a “catch-all” question for each Disclosing Party. The catch-all question asks whether the Disclosing Party or its representative “have any additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the Plan” and, if so, “provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Plan.”⁶² This catch-all question would require disclosure of any other relationships or material economic interests, such as employment, financial, or commercial arrangements, not otherwise discussed in the disclosures, but which a reasonable objective observer could perceive as presenting a potential conflict.

⁶⁰ Notice, supra note 6, 85 FR at 2205.

⁶¹ TD Ameritrade Letter, supra note 24, at 6. See also supra text accompanying note 40 (discussing TD Ameritrade Letter); and Healthy Markets Letter, supra note 42, at 18 (stating that the disclosures should be expanded to “disclose any personal, organizational, or financial relationships”).

⁶² For Disclosing Parties that are Participants, the catch-all question extends to an “alternative representative” and “any affiliate” of the Participant. For Disclosing Parties that are Advisors, the catch-all question extends to the “Advisor’s firm.” These additions capture specific parties that are unique and relevant to the Participants and Advisors for purposes of the Amendment.

The Commission believes that the catch-all question is appropriate as it elicits information broadly on Disclosing Parties and their representatives, which is designed to ensure that no relevant connections are omitted in the disclosures. Further, by covering additional relationships or material economic interests, the catch-all question is designed to ensure that the disclosures have not omitted any other sources of potential conflicts that could affect the Plan. Disclosure of this information may provide valuable insight into potential conflicts that would not otherwise be disclosed and the circumstances behind a potential conflict.

B. Review of the Disclosures

In the Notice, the Commission solicited comment on whether a disclosure-based regime is sufficient to address the potential conflicts that Participants, the Processor, the Administrator, and members of the Advisory Committee may face in their roles within the Plan and whether additional steps are necessary. One additional step the Commission highlighted is the role of the Operating Committee in the disclosure regime. Among other questions, the Commission asked whether commenters believe “that Operating Committee members should be permitted to raise the issue of a potential conflict of interest of another Participant for discussion before the Operating Committee, even if the Participant did not itself disclose the potential conflict” and whether the Operating Committee “should have the ability to take action in response to disclosed or undisclosed conflicts”

In response to the Notice, one commenter suggested that the Plan should alleviate potential 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).”⁶³

⁶³ TD Ameritrade Letter, supra note 24, at 4.

After considering the comments received, the Commission is not modifying the Amendment to institute a formal review process for the disclosures. The disclosures will continue to be publicly posted, and the Participants, Advisors, and others will be able to continue to review the disclosures and amendments thereto. To the extent a party believes that a Disclosing Party has not adequately responded to a particular disclosure item or has not clearly explained the necessary information to disclose a potential conflict, the Commission would encourage Disclosing Parties and other individuals to bring such concerns to the attention of the Operating Committee for its consideration, as Participants would have an interest in promoting a high standard for the disclosures that is consistently applied across all Disclosing Parties. The Commission encourages the Participants to consider further whether to propose a formal review process with appropriate consequences for violations.

C. Recusal

In the Notice, the Commission solicited comment on whether additional steps, including recusal, are necessary to address the potential conflicts that arise in connection with the operation and oversight of the Plan. Among other questions, the Commission asked whether commenters “believe that a Participant should be recused from voting when it or an affiliate is competing for a contract to serve as a Processor for the Plan.”⁶⁴ The Commission asked whether recusal is “an appropriate mechanism to address conflicts” and, if so, whether it should be mandatory or voluntary.⁶⁵ The Commission also asked whether “the Operating Committee should have the

⁶⁴ Notice, supra note 6, 85 FR at 2205.

⁶⁵ Id.

ability to take action in response to disclosed or undisclosed conflicts, such as requiring the Participant to recuse itself from a certain discussion or vote on a particular matter.”⁶⁶

In response to the Notice, the Advisory Committee supports a “requirement for individuals to recuse themselves from discussions and/or voting when there is a material conflict between the requirement to further the goals of the plan and the specific interest of the individual or their employer.”⁶⁷ In particular, the Advisory Committee recommended mandatory recusal in situations “regarding processor bids or voting to choose a processor, when the individual’s firm is bidding for the processor role.”⁶⁸ The Advisory Committee further suggested that recusal be required when “either (i) the individual, acting in good faith, or (ii) the Operating Committee, by majority vote, determines that such individual has a material conflict.”⁶⁹

Another commenter similarly stated that there should be a mechanism for recusal when a “conflict becomes material,” such as when the “Operating Committee is considering selection of a service provider for a SIP, and the participant’s firm has a relationship with a bidder.”⁷⁰ The

⁶⁶

Id.

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Advisory Committee Letter, supra note 23, at 2.

⁶⁸

Id. See also Healthy Markets Letter, supra note 42, at 14 (recommending detailed recusal provisions that preclude a person “from voting on any matter that directly impacts its costs or revenues, or those of its affiliates”); and Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, to Vanessa Countryman, Secretary, Commission, dated March 4, 2020 (submitted in response to Release No. 34-87906; File No. 4-757).

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Advisory Committee Letter, supra note 23, at 2.

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RBC Letter, supra note 46, at 3. See also Letter from Rich Steiner Head of Client Advocacy and Market Information, RBC Capital Markets, to Vanessa Countryman, Secretary, Commission, dated February 28, 2020 (submitted in response to Release No. 34-87906; File No. 4-757), at 4 (discussing the need for disclosure of material information, and citing as an example when a Participant has a relationship with a person bidding for a contract with the Plan). As discussed above, the Commission is modifying the Amendment to require a Participant’s recusal from voting on matters in which it or its affiliate (i) is seeking a position or contract with the Plan or (ii) has a position or contract

commenter recommended that there should be a “mechanism for responding to a participant’s failure to comply with the disclosure requirement including, if appropriate, dismissal from the Operating Committee.”⁷¹

A third commenter suggested that “there should be a mechanism or process whereby recusal is required from discussion and voting in case of a material conflict of interest.”⁷² The commenter recommended requiring recusal when “a Participant exchange, or Advisory Committee member’s employer could be competing to be a service provider to the Plans such as processor, or auditor.”⁷³

One commenter asserted that “[d]isclosure of potential conflicts in and of itself does not necessarily mitigate any such conflict or the perception of such conflict.”⁷⁴ The commenter suggested that “[e]ffectively addressing an individual’s conflict of interest, whether perceived or in fact, includes mitigating and/or removing such conflict.”⁷⁵ This commenter advocated for a

with the Plan and whose performance is being evaluated by the Plan. The commenter also believed that the Advisory Committee members should only provide the disclosures on a voluntary basis as they do not currently have voting rights, such that the disclosures should only be mandatory for voting members of the Operating Committee. See id. at 2. The Commission, however, believes that Advisors, because they are engaged in Plan business, just like other Disclosing Parties engaged in Plan business, should be required to make the mandatory conflicts of interest disclosures. With such disclosures, other Disclosing Parties and the public can assess whether the Advisors are subject to any conflicts as they carry out their responsibilities with the Plan.

⁷¹ RBC Letter, supra note 46, at 3.

⁷² Charles Schwab Letter, supra note 41, at 4. The commenter stated that “only a complete separation of functions – true independence – of the Participants from the Administrators and Processors can mitigate the conflict.” Id. The Commission believes that the modifications made are appropriate for this Amendment and is not including this requirement in the Amendment.

⁷³ Id.

⁷⁴ TD Ameritrade Letter, supra note 24, at 3.

⁷⁵ Id.

recusal policy with review of disclosures by a committee composed of both SRO and non-SRO members, guidance from Plan legal counsel, and a vote by the committee.⁷⁶ The commenter suggested that individuals may be required to recuse themselves for certain topics or for the tenure of their term depending on the severity of the conflict.⁷⁷

After considering the comments received in response to the Notice, the Commission believes it is appropriate to require mandatory recusal in certain situations. To promote transparency when recusals occur, new Section F.2.d. of the Plan requires that all recusals, including a person's determination of whether to voluntarily recuse himself or herself, be reflected in the applicable meeting minutes. Increased transparency of recusals will allow the public to assess whether Plan decisions have, or have not, been informed by persons subject to potential conflicts of interest.

With respect to specific recusals, the Commission is adding new Section F.2.a. of the Plan to specify that a Disclosing Party "may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing, or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative." To the extent an exchange that offers proprietary market data products appoints as its representative to the Plans such an individual, that person has an inherent conflict of interest arising from his or her financial interest in the exchange's proprietary data business.

⁷⁶ See id. at 4.

⁷⁷ See id.

The effect of this requirement is that a Participant will not be able to appoint as its representative a person that has a financial interest (including compensation) that is tied directly to the Participant's proprietary data business if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative. For example, if a person's primary job function is tied directly to the success or growth of proprietary data products, and/or some percentage of a person's compensation is tied directly to the revenues or profits specifically of the exchange's proprietary data business (as opposed to being tied more generally to the Participant's overall revenue), that person could not serve as the Participant's representative if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative. If such person currently serves as the Participant's representative, that person could either no longer serve as the Participant's representative or no longer have such a financial interest that is tied directly to the exchange's proprietary data business.⁷⁸

The Commission believes that the exchanges' commercial interests in their proprietary data businesses, as well as the exchange Administrator's access to confidential subscriber information, create a potential conflict of interest that could influence decisions as to the Plan's operation. In the case where a Participant chooses as its representative a person who has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business, then a reasonable objective observer could question whether the representative is able

⁷⁸ This requirement is not designed to impact or reduce the amount of any person's overall compensation, but rather to ensure that the Participants do not choose as their representatives individuals who receive compensation that is directly linked to proprietary market data products.

to act in a manner consistent with the interests of the Plan.⁷⁹ In light of this conflict, even if such individuals have the requisite expertise, the Commission believes that it is appropriate to prohibit a Disclosing Party from appointing such individuals as its representative to the Plan.⁸⁰

The Commission is further modifying Section F.2. of the Plan by setting forth the following scenarios in which recusal will be required. First, a Disclosing Party will be “recused from participating in Plan activities if it has not submitted a required disclosure form or the Operating Committee votes that its disclosure form is materially deficient.”⁸¹ Such recusal will be in effect until the Disclosing Party submits a sufficiently complete disclosure form to the Administrator. Consistent with the comments discussed above, this provision imposes a mechanism to recuse a representative due to a Disclosing Party’s complete failure to comply with the disclosure requirements. For other cases where the disclosures are made but found to be materially deficient by vote of the Operating Committee, recusal also would be appropriate as an

⁷⁹ For example, a Participant’s representative whose compensation is tied directly to the Participant’s proprietary market data business could face a conflict of interest that is not possible to sufficiently mitigate when working on Plan initiatives that could potentially result in lower revenues for the Participant’s proprietary data business, such as SIP fee reductions or expansions in SIP core data content that match what the Participant provides in some of its proprietary market data products. Those Plan initiatives could result in lower revenues for the Participant’s proprietary data business, which would correspondingly reduce the representative’s compensation that is tied directly to that business.

⁸⁰ While a Participant could not appoint such person as its representative to the Plan, it could utilize such person in other capacities involving Plan business, such as the Processor role.

⁸¹ While the Operating Committee does not have an affirmative responsibility to review each disclosure document and updates thereto in the ordinary course, it may elect to do so, including, for example, in instances where it has reason to suspect a disclosure may be materially deficient, and the Operating Committee may determine the best procedure for undertaking or completing such a review. The ability of the Operating Committee to undertake this review and vote on the matter is appropriate as a mechanism to ensure that Disclosing Parties submit clear and complete disclosures.

incentive for Disclosing Parties to carefully prepare their disclosures and ensure that they are not materially deficient.

In either case, these bases for recusal could be readily cured by the recused party submitting a new or updated disclosure that is complete in providing responses to all required items. Thus, the recusal could be lifted by the party's submission of an updated disclosure, though the Operating Committee could potentially again vote that the disclosure form is materially deficient if it decides the Disclosing Party did not rectify the material deficiency. The Commission believes that these requirements provide a consequence for failure to file a required disclosure or for filing a disclosure that the Operating Committee votes to be materially deficient, and therefore should promote both timely filings and consistency in the quality of disclosures across Disclosing Parties.

Second, the Commission is adopting a requirement for a Disclosing Party to be recused from voting on matters, in which it or its affiliate (i) is seeking a position or contract with the Plan or (ii) has a position or contract with the Plan and whose performance is being evaluated by the Plan. In both cases, the Commission believes recusal is appropriate because the conflict of interest, real or perceived, between the Disclosing Party's interests and the interest of the Plan would be so material and potentially irreconcilable that a reasonable objective observer would question the party's ability to be impartial and not favor its own interests. Exchanges face considerable potential conflicts as a result of their dual role of serving, or competing to serve, as operators of the SIPs while simultaneously serving as a Participant that participates in the discussion of, and ultimately votes on, the selection and performance of such parties. The Commission believes that recusal in those situations is appropriate because the conflict of interest in those scenarios is so pronounced, and the Disclosing Party and its affiliates are so

materially conflicted, that their participation and vote on the matter cannot be impartial and additional measures are needed in those scenarios.

IV. Commission Findings

For the reasons discussed throughout, the Commission finds that the proposed Amendment to the Plan, as modified by the Commission, is consistent with the requirements of the Act and the rules and regulations thereunder, and in particular, Section 11A of the Act⁸² and Rule 608⁸³ thereunder in that it is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and order markets, to remove impediments to, and perfect the mechanisms of, a national market system.

Section 11A of the Act⁸⁴ sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets 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. The conflicts of interest Amendment, as modified by the Commission, furthers these goals set forth by Congress.

⁸² 15 U.S.C. 78k-1.

⁸³ 17 CFR 240.608.

⁸⁴ 15 U.S.C. 78k-1(c)(1)(B).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act,⁸⁵ and the rules thereunder, that the proposed Amendment to the Nasdaq/UTP Plan (File No. S7-24-89), as modified by the Commission, is approved.

By the Commission.

J. Matthew DeLesDernier,
Assistant Secretary.

⁸⁵ 15 U.S.C. 78k-1.

EXHIBIT A

MARKED TO SHOW CHANGES FROM THE PROPOSAL

The Commission's additions are italicized; deletions are [bracketed].

UTP PLAN

IV. Administration of Plan

A. – E. No change.

F. [Disclosure of]Potential Conflicts of Interests

[(a)]1. Disclosure Requirements. The Participants, the Processor, the Plan Administrator, [and]members of the Advisory Committee, and each service provider or subcontractor engaged in Plan business (including the audit of subscribers' data usage) that has access to Restricted or Highly Confidential Plan information (for purposes of this section, "Disclosing Parties") shall complete the applicable questionnaire [attached to this UTP Plan as Exhibit 3]to provide the required disclosures set forth below to disclose all material facts necessary to identify potential conflicts of interest. The Operating Committee, a Participant, Processor, or Administrator may not use a service provider or subcontractor on Plan business unless that service provider or subcontractor has agreed in writing to provide the disclosures required by this section and has submitted completed disclosures to the Administrator prior to starting work. If state laws, rules, or regulations, or applicable professional ethics rules or standards of conduct, would act to restrict or prohibit a Disclosing Party from making any particular required disclosure, a Disclosing Party shall refer to such law, rule, regulation, or professional ethics rule or standard and include in response to that disclosure the basis for its inability to provide a complete response. This does not relieve the Disclosing Party from disclosing any information it is not restricted from providing.

a. A potential conflict of interest may exist when personal, business, financial, or employment relationships could be perceived by a reasonable objective observer to affect the ability of a person to be impartial.

[(b)]b. Updates to Disclosures. Following a material change in the information disclosed pursuant to subparagraph (a), a Disclosing Party shall promptly update its disclosures. Additionally, a Disclosing Party shall update annually any

inaccurate information prior to the Operating Committee's first quarterly meeting of a calendar year.

- [(c)]c. Public Dissemination of Disclosures. The Disclosing Parties shall provide the Administrator with its disclosures and any required updates. The Administrator shall ensure that the disclosures are promptly posted to the Plan's website.

2. Recusal

- a. A Disclosing Party may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing, or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.
- b. A Disclosing Party (including its representative(s), employees, and agents) will be recused from participating in Plan activities if it has not submitted a required disclosure form or the Operating Committee votes that its disclosure form is materially deficient. The recusal will be in effect until the Disclosing Party submits a sufficiently complete disclosure form to the Administrator.
- c. A Disclosing Party, including its representative(s), and its affiliates and their representative(s), are recused from voting on matters in which it or its affiliate (i) are seeking a position or contract with the Plan or (ii) have a position or contract with the Plan and whose performance is being evaluated by the Plan.
- d. All recusals, including a person's determination of whether to voluntarily recuse himself or herself, shall be reflected in the meeting minutes.

* * * * *

Required Disclosures for the UTP Plan

As part of the disclosure regime, [the Participants propose that]the Participants, the Processors, the Administrators, [and]members of the Advisory Committee, and service providers and subcontractors must respond to questions that are tailored to elicit responses that disclose the potential conflicts of interest.

The [Participants propose that the]Participants must respond to the following questions and instructions:

- Is the Participant's firm for profit or not-for-profit? If the Participant's firm is for profit, is it publicly or privately owned? If privately owned, list any owner with an interest of 5% or more of the Participant, where to the Participant's knowledge, such owner, or any affiliate controlling, controlled by, or under common control with the owner, subscribes, directly or through a third-party vendor, to SIP and/or exchange Proprietary Market Data products.
- Does the Participant firm offer real-time proprietary equity market data that is filed with the SEC ("Proprietary Market Data")? If yes, list each product, describe its content, and provide a link to where fees for each product are disclosed.[does the firm charge a fee for such offerings?]
- Provide the names of the representative and any alternative representatives designated by the Participant who are authorized under the Plans to vote on behalf of the Participant. Also provide a narrative description of the representatives' roles within the Participant organization, including the title of each individual as well as any direct responsibilities related to the development, dissemination, sales, or marketing of the Participant's Proprietary Market Data, and the nature of those responsibilities sufficient for the public to identify the nature of any potential conflict of interest that could be perceived by a reasonable objective observer as having an effect on the Plan. If the representative works in or with the Participant's Proprietary Market Data business, describe the representative's roles and describe how that business and the representative's Plan responsibilities impacts his or her compensation. In addition, describe how a representative's responsibilities with the Proprietary Market Data business may present a conflict of interest with his or her responsibilities to the Plan.
- Does the Participant, its representative, or its alternative representative, or any affiliate have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the Plan? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Plan.

The [Participants propose that the]Processors must respond to the following questions and instructions:

- Is the Processor an affiliate of or affiliated with any Participant? If yes, disclose the Participant(s) and describe the nature of the affiliation. Include an entity-level organizational chart depicting the Processor and its affiliates.[?]
- Provide a narrative description of the functions directly performed by senior staff, the manager employed by the Processor to provide Processor services to the Plans, and the staff that reports to that manager (collectively, the "Plan Processor").

- Does the Plan Processor provide any services for any Participant's Proprietary Market Data products or other Plans? If Yes, disclose the services the Plan Processor performs and identify which Plans. Does the Plan Processor have any profit or loss responsibility for a Participant's Proprietary Market Data products or any other professional involvement with persons the Processor knows are engaged in the Participant's Proprietary Market Data business? If so, describe.
- List the policies and procedures established to safeguard confidential Plan information that is applicable to the Plan Processor.
- Does the Processor, or its representatives, have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with the representatives' responsibilities to the Plan? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Plan.

The [Participants propose that the]Administrators must respond to the following questions and instructions:

- Is the Administrator an affiliate of or affiliated with any Participant? If yes, disclose the[which] Participant(s) and describe the nature of the affiliation. Include an entity-level organizational chart depicting the Administrator and its affiliates.[?]
- Provide a narrative description of the functions directly performed by senior staff, the administrative services manager, and the staff that reports to that manager (collectively, the "Plan Administrator").
- Does the Plan Administrator provide any services for any Participant's Proprietary Market Data products? If yes, what services? Does the Plan Administrator have any profit or loss responsibility, or licensing responsibility, for a Participant's Proprietary Market Data products or any other professional involvement with persons the Administrator knows are engaged in the Participant's Proprietary Market Data business? If so, describe.
- List the policies and procedures established to safeguard confidential Plan information that is applicable to the Plan Administrator.
- Does the Administrator, or its representatives, have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with the representatives' responsibilities to the Plan? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Plan.

The [Participants propose that the]Members of the Advisory Committee must respond to the following questions and instructions:

- Provide the Advisor's title and a brief description of the Advisor's role within the firm.

- Does the Advisor have responsibilities related to the firm's use or procurement of market data?
- Does the Advisor have responsibilities related to the firm's trading or brokerage services?
- Does the Advisor's firm use the SIP? Does the Advisor's firm use exchange Proprietary Market Data products?
- Does the Advisor's firm have an ownership interest of 5% or more in one or more Participants? If yes, list the Participant(s).
- Does the Advisor actively participate in any litigation against the Plans?
- Does the Advisor or the Advisor's firm have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the Plan? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Plan.

Pursuant to Section IV.F.1. of the Plan, each service provider or subcontractor that has agreed in writing to provide required disclosures and be treated as a Disclosing Party pursuant to Section IV.F of the Plan shall respond to the following questions and instructions:

- Is the service provider or subcontractor affiliated with a Participant, Processor, Administrator, or member of the Advisory Committee? If yes, disclose with whom the person is affiliated and describe the nature of the affiliation.
- If the service provider's or subcontractor's compensation is on a commission basis or is tied to specific metrics, provide a detailed narrative summary of how compensation is determined for performing work on behalf of the Plan.
- Is the service provider or subcontractor subject to policies and procedures (including information barriers) concerning the protection of confidential information that includes affiliates? If so, describe. If not, explain their absence.
- Does the service provider or subcontractor, or its representative, have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with its responsibilities to the Plan? If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the Plan.

The [Participants will post the]responses to these questions will be posted on the Plan's website. If a Disclosing Party has any material changes in its responses, the Disclosing Party must promptly update its disclosures. Additionally, the Disclosing Parties must[will] update the disclosures on an annual basis to reflect any changes. This annual update must be made before the first quarterly session meeting of each calendar year, which is generally held in mid-February.