SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92586; File No. 4-757)

August 6, 2021

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

I. INTRODUCTION

On August 11, 2020, pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[1] and Rule 608 of Regulation NMS thereunder,[2] Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC ("IEX"), Long Term Stock Exchange, Inc. ("LTSE"), MEMX LLC ("MEMX"), Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX LLC, Nasdaq Stock Market LLC ("Nasdaq"), New York Stock Exchange LLC ("NYSE"), NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., and Financial Industry Regulatory Authority, Inc. ("FINRA") (collectively, the "SROs" or "Participants") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed new national market system plan governing the public dissemination of real-time consolidated equity market data for national market system ("NMS") stocks (the "CT Plan or "Plan"). The CT Plan was published for comment in the Federal Register on October 13, 2020.[3]

On January 11, 2021, the Commission instituted proceedings, under Rule 608(b)(2)(i) of Regulation NMS,[4] to determine whether to approve the CT Plan, disapprove the CT Plan, or

---

1 15 U.S.C. 78k-1.

2 17 CFR 242.608.

3 See Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90096 (Oct. 6, 2020), 85 FR 64565 (Oct. 13, 2020) ("Notice").

4 17 CFR 242.608(b)(2)(i).

approve the CT Plan with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.[5] On April 8, 2021, the Commission extended the deadline for Commission action on the CT Plan and designated June 10, 2021, as the new date by which the Commission would be required to take action.[6] On June 9, 2021, the Commission further extended the deadline for Commission action on the CT Plan and designated August 9, 2021, as the date by which the Commission would be required to take action.[7]

This Order approves the CT Plan, with modifications that are described in detail below. The Commission concludes that the CT Plan, as modified, is 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 mechanism of a national market system, or is otherwise in furtherance of the purposes of the Act. A copy of the CT Plan, marked to reflect the modifications the Commission has made, is Attachment A to this Order.

II. DISCUSSION AND COMMISSION FINDINGS

A. Background

On May 6, 2020, the Commission ordered the SROs to act jointly in developing and filing with the Commission a proposed new national market system plan to govern the public dissemination of real-time, consolidated equity market data for NMS stocks ("Governance

---

5 See Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90885 (Jan. 11, 2021), 86 FR 4142 (Jan. 15, 2021) (File No. 4-757) ("Order Instituting Proceedings"). Comments received in response to the Notice and Order Instituting Proceedings can be found on the Commission's website at https://www.sec.gov/comments/4-757/4-757.htm.

6 See Securities Exchange Act Release No. 91504 (Apr. 8, 2021), 86 FR 19667 (Apr. 14, 2021).

7 See Securities Exchange Act Release No. 92130 (June 9, 2021), 86 FR 31543 (June 14, 2021).

Order")[8] to replace the existing equity data plans.[9] The Commission sought to address with the Governance Order, among other things, the inherent conflicts of interest between the self-regulatory organizations' role in collecting and disseminating consolidated equity market data and their interests in selling proprietary data products. As the Commission stated in the Governance Order, since the adoption of Regulation NMS in 2005,

> developments in technology and changes in the equities markets have heightened an inherent conflict of interest between the Participants' collective responsibilities in overseeing the Equity Data Plans and their individual interests in maximizing the viability of proprietary data products that they sell to market participants. This conflict of interest, combined with the concentration of voting power in the Equity Data Plans among a few large "exchange groups"—multiple exchanges operating under one corporate umbrella—has contributed to significant concerns regarding whether the consolidated feeds meet the purposes for them set out by Congress and by the Commission in adopting the national market system. Additionally, the Commission believes that the continued existence of three separate NMS plans for equity market data creates inefficiencies and unnecessarily burdens ongoing improvements in the provision of equity market data to market participants. Addressing the issues with the current governance structure of the Equity Data Plans … is a key step in responding to broader concerns about the consolidated data feeds.[10]

Moreover, as stated in the Governance Order, "[t]he Commission believes that the demutualization of the exchanges and the proliferation of proprietary exchange data products have heightened the conflicts between the SROs' business interests in proprietary data offerings and their obligations as SROs under the national market system to ensure prompt, accurate,

---

8 See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4-757).

9 The three equity data plans that currently govern the collection, consolidation, processing, and dissemination of SIP data are (1) the Consolidated Tape Association Plan ("CTA Plan"), (2) the Consolidated Quotation Plan ("CQ Plan"), and (3) 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 ("UTP Plan") (collectively, the "Equity Data Plans"). See Governance Order, supra note 8, 85 FR at 28703 & n.34.

10 See Governance Order, supra note 8, 85 FR at 28702.

reliable, and fair dissemination of core data through the jointly administered Equity Data Plans."[11]

Thus, the Commission determined that the current governance structure of the existing Equity Data Plans is "inadequate to respond to changes in the market and in the ownership of exchanges, and to the evolving needs of investors and other market participants,"[12] and the Commission ordered the SROs to develop and file with the Commission a proposed new NMS plan regarding equity market data with a set of specified governance provisions designed to address the issues identified by the Commission,[13] and 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."[14]

The Commission also acknowledged in the Governance Order that the SROs, "as the parties that have been operating the NMS plans, can provide unique insight in formulating the specific terms and provisions" of the new NMS plan for consolidated equity market data.[15] Accordingly, the Governance Order did not dictate all of the specific terms of the new NMS plan and contemplated that the operational and other terms of the plan not directed by the Governance Order would be proposed by the SROs and considered by the Commission after public comment.[16] The CT Plan filed by the SROs includes both provisions directed by the Commission in the Governance Order and other provisions that have been proposed by the SROs.

---

11 See id. at 28704.

12 Id. at 28702.

13 See id. at 28729–31.

14 15 U.S.C. 78k-1(c)(1)(B).

15 Governance Order, supra note 8, 85 FR at 28711.

16 See id. at 28705, 28718 n.244.

Below, this Order first addresses the threshold issue of the Commission's authority to modify the CT Plan proposed by the SROs, and then it separately addresses each of the proposed provisions of the Plan, discussing the comments received and explaining the modifications, if any, that the Commission is making.

B. The Commission's Authority to Modify the CT Plan

As noted above, the Commission is modifying the CT Plan proposed by the SROs. Several commenters argued that, before modifying the CT Plan, the Commission should publish notice for public comment of the specific changes it proposes. One commenter urges the Commission not to make substantial modifications to the CT Plan in an order purporting to approve the plan without providing the opportunity for public comment, asserting that public comment is required by the Administrative Procedure Act ("APA").[17] One commenter asserts that the Notice provides an insufficient opportunity for comment, arguing that the Commission has not stated its position regarding any of the 62 separate topics of interest identified in the Notice or proposed any specific textual changes upon which the SROs and other persons can meaningfully comment.[18] This commenter further argues that this approach does not comply with notice and comment obligations under the Act, Rule 608, or the APA.[19]

---

[17] See Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, Inc. (Nov. 12, 2020) ("Cboe Letter"), at 9. This commenter argues that any changes to the governance of the SIP operating committees should be made through amendments to the current plans. See id. at 6 n.13. As the Commission explained in the Governance Order, one of its goals was to reduce redundancies, inefficiencies, and inconsistencies among the three existing Equity Data Plans by replacing them with a new, single plan. See Governance Order, supra note 8, 85 FR at 28710.

[18] See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE (Nov. 16, 2020) ("NYSE Letter I"), at 5, 32.

[19] See NYSE Letter I, supra note 18, at 32. This commenter also generally asserts that the Commission cannot make a finding that the CT Plan is 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. See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE (Feb. 4, 2021) ("NYSE

Another commenter also asserts that, if the Commission determines to approve the CT Plan with modifications, it should first publish the exact text of its proposed amendments and seek comment on them.[20] This commenter argues that the need to publish proposed modifications for comment is evidenced by the "numerous errors and potential unintended consequences visited on the current Equity Data Plans by the Commission's hasty issuance" of the conflicts and confidentiality orders.[21] This commenter argues that if the Commission does not publish the specific proposed modifications of the CT Plan, the SROs and other interested persons will be "deprived of the opportunity to comment that is afforded them by the Administrative Procedure Act."[22]

The Commission does not agree that it is required to publish notice of specific proposed plan language in order to modify a proposed NMS plan. Under Rule 608, the Commission can approve a proposed NMS plan "with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan … is 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."[23] As set forth below, the Commission finds that each of its modifications of the CT Plan is necessary or appropriate. Moreover, the Commission asked extensive and detailed questions in the Notice that encompass

---

Letter II"), at 2. As explained throughout this Order, the Commission disagrees and finds that, as modified, the CT Plan meets these standards.

20 See Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq (Nov. 12, 2020) ("Nasdaq Letter I"), at 3.

21 Id.

22 Id. at 7.

23 17 CFR 242.608(b)(2).

each of the areas of the Plan the Commission is modifying and provided an opportunity for the public to comment on each of these topics as well as the Plan as a whole. As discussed throughout this Order, the Commission has carefully considered the comments received in response to these questions, as well as all other comments received, before finding that each of the modifications made is necessary or appropriate in order to sufficiently address the core problem identified in the Governance Order.[24] The Commission believes that this process has provided the public sufficient notice of, and an opportunity to comment on, the areas of modification and it was not necessary to provide a second round of comment on the specific language of the modifications approved in this Order. And the Commission finds that, as modified, the CT Plan is 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.[25]

C. The Provisions of the CT Plan

1. Recitals

The Recitals of the CT Plan set forth the procedural history of the CT Plan, the proposed schedule for implementation of the CT Plan, and the SROs' acknowledgement of their regulatory obligations with respect to the CT Plan. As discussed below, the Commission is modifying certain of the Recitals with respect to the timeline for implementation of the CT Plan, as well as the Recital of the regulatory obligations of the SROs to the CT Plan.

---

[24] See CSX Transp. v. Surface Transp. Bd., 584 F.3d 1076, 1081 (D.C. Cir. 2009); City of Portland v. EPA, 507 F.3d 706, 715 (D.C. Cir. 2007).

[25] See 17 CFR 242.608(b)(2).

(a) Implementation of the CT Plan

Paragraphs (b) and (c) of the Recitals set forth the implementation schedule for the CT Plan that the SROs have proposed. Paragraph (b) of the Recitals defines the "Effective Date" of the CT Plan as the later of the date that the Commission has approved the CT Plan or the date that the SROs have filed a certificate of formation with the State of Delaware to form the Company as a limited liability company ("LLC"). Paragraph (c) of the Recitals provides that the CT Plan will become operative as an NMS plan that governs the public dissemination of real-time consolidated equity market data on the "Operative Date," which is defined as the first day of the month that is at least 90 days after the latest of five specified tasks has been accomplished:

(i) SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee have been selected;

(ii) Fees have been established by the Operating Committee, are effective as an amendment to the CT Plan pursuant to Rule 608 of Regulation NMS, and are ready to be implemented;

(iii) Agreements have been entered with the Processors currently performing under the CQ Plan, CTA Plan, and UTP Plan;

(iv) Agreements have been entered with an Administrator and all required contracts with vendors and subscribers have been finalized and systems to administer distributions and fees are in place; and

(v) The Operating Committee and, if applicable, the Commission have approved all policies and procedures that are necessary or appropriate.

In the Notice, the Commission sought comment on whether the timing provisions might result in undue delay in the effectiveness of the CT Plan.[26] The Commission asked whether the CT Plan should require that the certificate of formation be filed within a certain period of time, and whether 10 days would be an appropriate amount of time.[27] The Commission also asked

[26] See Notice, supra note 3, 85 FR at 64567 (Question 1).

[27] Id.

several questions about the actions that would be required to be taken before the CT Plan becomes operative. Specifically, the Commission sought comment on, among other things, whether the CT Plan should set deadlines for completion of each of the requisite actions, whether the Operating Committee should be required by the CT Plan to provide updates on the status of implementation, and, if so, whether such updates should be made public.[28] The Commission also sought comment on whether the CT Plan should require that the selection of the Operating Committee be the first action undertaken after the Effective Date.[29]

In response to the Notice, the Commission received a number of comments supporting changes to the CT Plan to establish specified timeframes within which the requisite actions must occur for the CT Plan to be effective or operative.[30] These commenters express concern that the absence of specified deadlines in the CT Plan will cause the SROs to unduly delay its implementation.[31] Specifically, one commenter argues that it would be "nonsensical to rely on

---

28 See Notice, supra note 3, 85 FR at 64567 (Question 2).

29 Id.

30 See, e.g., Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Nov. 12, 2020) ("SIFMA Letter I"), at 3; Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Feb. 18, 2021) ("SIFMA Letter II"), at 2; Letter from Michael Blasi, SVP, Enterprise Infrastructure, and Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Nov. 12, 2020) ("Fidelity Letter"), at 2–3; Letter from John Ramsay, Chief Market Policy Officer, IEX (Nov. 13, 2020) ("IEX Letter"), at 1–2; Letter from Rich Steiner, Head of Client Advocacy and Market Innovation, RBC Capital Markets (Nov. 12, 2020) ("RBC Letter"), at 4; Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (Nov. 11, 2020) ("Virtu Letter"), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Nov. 12, 2020) ("Schwab Letter I"), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Feb. 11, 2021) ("Schwab Letter II"), at 5; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Nov. 18, 2020) ("BMO Letter I"), at 2–3; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Feb. 19, 2021) ("BMO Letter II"), at 2; Letter from Anders Franzon, General Counsel, MEMX (Feb. 5, 2021) ("MEMX Letter"), at 2–3; Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Samantha DeZur, Director, Global Public Policy, BlackRock (Feb. 5, 2021) ("BlackRock Letter II"), at 2; Letter from Jennifer W. Han, Managing Director & Counsel, Regulatory Affairs, Managed Funds Association (Nov. 18, 2020) ("MFA Letter"), at 4–5.

31 See, e.g., IEX Letter, supra note 30, at 1; MFA Letter, supra note 30, at 5; BMO Letter I, supra note 30, at 2; BMO Letter II, supra note 30, at 2; Fidelity Letter, supra note 30, at 3; Letter from Dorothy Donohue, Deputy

the SROs, many of whom have no incentive to change the current governance structure, to take actions on a timely basis to ensure the implementation of the Plan."[32] Another commenter acknowledges that the SROs will have significant control and influence over how and when the necessary steps to implement the CT Plan are completed and asserts that, without a reasonable deadline or target date for completion, there is a "significant risk" that implementation will be delayed indefinitely, undermining important public policy goals.[33] Another commenter similarly argues that the CT Plan fails to meet the core objectives of the Commission's Governance Order because the required number of steps would delay full implementation of the plan for an indefinite period, possibly years.[34]

One commenter acknowledges that there will be "some work" in implementing the CT Plan, but states that the lack of deadlines and the number of conditions associated with the effective and operative dates are "very concerning."[35] Another commenter recommends that the Commission closely monitor implementation and potentially penalize the SROs for unwarranted delays.[36] One commenter points to the National Market System Plan Governing the Consolidated Audit Trail ("CAT NMS Plan") as a cautionary tale resulting from a lack of deadlines or

---

General Counsel, Securities Regulation, Investment Company Institute (Nov. 12, 2020) ("ICI Letter I"), at 6–7; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Feb. 5, 2021) ("ICI Letter II"), at 2; RBC Letter, supra note 30, at 3; Letter from Kelvin To, Founder and President, Data Boiler Technologies, LLC (Nov. 12, 2020) ("Data Boiler Letter I"), at 20.

32 BMO Letter II, supra note 30, at 2.

33 IEX Letter, supra note 30, at 1.

34 See RBC Letter, supra note 30, at 3.

35 SIFMA Letter I, supra note 30, at 3.

36 See ICI Letter I, supra note 31, at 7; ICI Letter II, supra note 31, at 2. This commenter urges the Commission to provide financial incentives to the SROs either through fines or through not allowing the SROs to collect SIP fees for some period of time. See ICI Letter I, supra note 31, at 7.

accountability in meeting them,[37] while another commenter favorably promotes the CAT NMS Plan's use of target deadlines for critical implementation deadlines, quarterly progress reports, and financial incentives.[38]

Two commenters recommend making the Effective Date of the CT Plan the date of the Commission's approval order,[39] without regard to the proposed delay for the administrative step of filing the LLC agreement with Delaware. One commenter does not express a view about the propriety of a 10 day requirement, but recommends that the SROs be required to file the LLC's certificate of formation with Delaware "as promptly as the Commission determines is practicable following Commission approval" of the plan.[40] Another commenter anticipates no difficulty with filing the certificate of formation as an LLC and recommends ten business days as an appropriate timeframe.[41]

A number of commenters support imposing a one-year deadline for the Operative Date for the CT Plan.[42] One commenter suggests that a deadline for implementation of one year from the date of Commission approval of the CT Plan is reasonable and states that, if additional time proves necessary, the CT Plan can provide for obtaining an extension based on a showing of good cause.[43] One commenter states that, because the changes required of the plan are "primarily

---

37 See Virtu Letter, supra note 30, at 2.

38 See Fidelity Letter, supra note 30, at 3.

39 See SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Virtu Letter, supra note 30, at 2.

40 RBC Letter, supra note 30, at 3.

41 See Fidelity Letter, supra note 30, at 2–3.

42 See SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Fidelity Letter, supra note 30, at 4; IEX Letter, supra note 30, at 2; RBC Letter, supra note 30, at 4; Virtu Letter, supra note 30, at 2; Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5; BMO Letter I, supra note 30, at 2; MEMX Letter, supra note 30, at 2–3; BlackRock Letter II, supra note 30, at 2.

43 See IEX Letter, supra note 30, at 2.

organizational rather than operational," a period of no more than one year from the effective date to the operational date would be reasonable.[44] Another commenter supports a one-year deadline for the completion of the necessary steps to fully transition to operating under the CT Plan, subject to an extension only for good cause shown.[45] This commenter suggests that, immediately upon approval of the CT Plan, the Operating Committee, including the Non-SRO Voting Representatives, should be formed and begin meeting to complete the remaining prerequisites, including the adoption of fees.[46] This commenter acknowledges the timing complexity of adopting fees under the new CT Plan and selecting and onboarding a new Administrator, emphasizing that the one year deadline is an "ambitious project" that will require a commitment from both the SROs and industry participants to ensure a smooth transition.[47] Another commenter also supports requiring the CT Plan to become operational within one year and urges the Commission to finalize the proposal expeditiously.[48]

Other commenters argue that there is no reasonable way to impose deadlines on any part of the process.[49] One of these commenters expresses concern that the Commission is "vastly underestimating" the amount of time needed to implement the new CT Plan, particularly given the Commission's requirements with respect to an Administrator and a new fee schedule.[50] Another of these commenters argues that any deadline the Commission sets at this point would

---

44 RBC Letter, supra note 30, at 4.

45 See MEMX Letter, supra note 30, at 3.

46 See id.

47 See id.

48 See BlackRock Letter II, supra note 30, at 2.

49 See Nasdaq Letter I, supra note 20, at 10; Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq (Feb. 5, 2021) ("Nasdaq Letter II"), at 2; NYSE Letter I, supra note 18, at 33; Cboe Letter, supra note 17, at 5.

50 Cboe Letter, supra note 17, at 6.

be "inherently arbitrary" and would do nothing to move the project forward, cautioning that, "rushing to complete an inherently complex project may result in costly errors."[51]

In highlighting the difficulty in specifying deadlines for completing the Operative Date prerequisites, another commenter states that, because neither the SROs nor the Commission has jurisdiction over the individuals that constitute the Advisory Committee, any timeframes imposed on the Advisory Committee members to select the Non-SRO Voting Representatives would be unenforceable and the Operating Committee cannot function until the Non-SRO Voting Representatives have been selected.[52] This commenter further emphasizes the complexity and uncertainty of determining fees, selecting an independent Administrator through a request-for-proposal ("RFP") process, and negotiating new contracts with processors, data vendors and subscribers.[53] This commenter states that because the RFP process is "so specialized and idiosyncratic," there is "no way to reasonably impose time limits on any part of that process, let alone a time limit for the entire process overall."[54]

Other commenters recommend that the CT Plan require a detailed project plan with interim dates,[55] and public progress reports.[56] One of these commenters states that because implementation will be a complex undertaking, it will be important for both the Commission and

---

51 Nasdaq Letter I, supra note 20, at 11.

52 See NYSE Letter I, supra note 18, at 33.

53 See id. at 33–35. This commenter further states that the 90-day period between the finalization of earlier actions and the operational date is "prudent" and is the current industry standard for announcing the implementation of changes to market data plans. See id. at 35–36.

54 NYSE Letter I, supra note 18, at 35. As examples, this commenter points out that OPRA's process to select a processor took two years even though OPRA ultimately decided to retain the same processor and cites the CAT NMS Plan for the risk that a selected administrator might be unable to perform the necessary functions, requiring that the RFP process be repeated. See id.

55 See Fidelity Letter, supra note 30, at 2–3; IEX Letter, supra note 30, at 2.

56 See Fidelity Letter, supra note 30, at 3; IEX Letter, supra note 30, at 2; BMO Letter I, supra note 30, at 3; BMO Letter II, supra note 30, at 2; ICI Letter I, supra note 31, at 7.

outside stakeholders to have reasonable visibility into progress.[57] Another of these commenters argues that the SROs should be required to provide a detailed implementation plan with timeframes for each step and the rationale for each timeframe.[58] One of these commenters states that it will be important for the CT Plan to require the Operating Committee to provide periodic public updates on the status of implementation.[59] One commenter agrees, recommending that the CT Plan set "milestone dates while remaining flexible depending on progress."[60] This commenter favors periodic public updates on implementation from the Operating Committee.[61]

Additionally, two commenters suggest that the Commission should "clarify" that the fee schedules for the current Equity Data Plans will remain in effect and apply to the CT Plan until the CT Plan Operating Committee files a new schedule with the Commission and the Commission approves that schedule.[62]

Finally, one commenter also asserts that the implementation of the new CT Plan before the existing contracts between the Equity Data Plans and the Administrators and Processors expire would constitute a Fifth Amendment "taking."[63]

While the Commission recognizes the challenges associated with completing the actions required for implementation of the CT Plan, the Commission also believes that the SROs have

---

57 See IEX Letter, supra note 30, at 2.

58 See ICI Letter I, supra note 31, at 7.

59 See BMO Letter I, supra note 30, at 3; BMO Letter II, supra note 30, at 2.

60 Data Boiler Letter I, supra note 31, at 20. For example, this commenter argues against an overly prescriptive timeframe, suggesting that the process for nomination and selection of Non-SRO Voting Representatives should not take more than 90 days, with a 30-day extension in case of an unprecedented event, such as a pandemic. See id. at 28.

61 See id. at 20.

62 SIFMA Letter I, supra note 30, at 3; IEX Letter, supra note 30, at 2.

63 See Nasdaq Letter I, supra note 20, at 10–11.

the relevant expertise and experience—both with respect to operating NMS plans generally and with respect to the dissemination of equity market data specifically—to implement the CT Plan. In particular, the Commission found in the Governance Order that the SROs could provide "unique insight in formulating the terms and conditions of the New Consolidated Data Plan,"[64] even as it also highlighted the inherent conflicts of interest faced by SROs in the operation of the existing plans.[65] The Commission disagrees with the comment that it is "vastly underestimating" the time needed to implement the CT Plan,[66] and instead believes, consistent with the views of other market participants,[67] that the SROs should be able to use their extensive experience in operating the existing Equity Data Plans to complete the specific actions needed to implement the CT Plan within the timeframes specified below. Moreover, the Commission believes that fully implementing the CT Plan within prescribed deadlines is important, because implementation of the CT Plan is critical to reducing existing redundancies, inefficiencies, and inconsistencies in the current Equity Data Plans and to modernizing plan governance.[68] Although one commenter recommends that the CT Plan explicitly provide for obtaining an extension based on a showing of good cause, in case good faith efforts by the Operating Committee are nonetheless unable to meet one or more of the specified deadlines,[69] the Commission does not believe that it is necessary or appropriate to add a provision to the CT Plan regarding an extension of these deadlines. Further, the Commission does not believe that it is necessary or

---

64 Governance Order, supra note 8, 85 FR at 28711.

65 See, e.g., id. at 28713.

66 See Cboe Letter, supra note 17, at 6.

67 See supra notes 42–48 and accompanying text.

68 See Governance Order, supra note 8, 85 FR at 28703–05, 28711.

69 See IEX Letter, supra note 30, at 2; see also MEMX Letter, supra note 30, at 3 (supporting a one-year deadline with an extension only for good cause shown).

appropriate to suggest at this time how it might view a future request for an extension from the Operating Committee or other affected parties.[70]

Additionally, the Commission disagrees with the commenter's statement that, because neither the Commission nor the SROs have jurisdiction over Non-SRO Voting Representatives, placing timeframes on the selection of Non-SRO Voting Representatives by the existing Advisory Committee of the Equity Data Plans will be unenforceable and therefore futile.[71] The Commission fully expects, based on the widespread support among market participants for providing voting power to non-SROs,[72] that the Advisory Committee members will willingly undertake the task of selecting Non-SRO Voting Representatives. Moreover, the two-month deadline imposed on the selection of SRO and Non-SRO Voting Representatives in this provision is consistent with the timeframe set forth in the procedures proposed by the SROs in Section 4.2(b)(v) of the CT Plan for selection of Non-SRO Voting Representatives, and there is considerable overlap between the categories of market participants represented on the Advisory Committee and the categories of market participants who would be Non-SRO Voting Representatives.

Finally, the Commission disagrees with one commenter's statement that the timing of implementation of the CT Plan prior to the expiration of the existing contracts between the current Equity Data Plans and the Administrators and Processors would constitute a "taking"

---

70 There are well-known mechanisms in existing law by which affected parties make such requests. If such a request were made at some point in the future, the Commission would decide whether to grant or deny the relief sought under the facts and circumstances applicable at that time.

71 See NYSE Letter I, supra note 18, at 33.

72 See, e.g., IEX Letter, supra note 30, at 2; ICI Letter II, supra note 31, at 1; BMO Letter I, supra note 30, at 3; BMO Letter II, supra note 30, at 2.

without just compensation under the Fifth Amendment of the U.S. Constitution.[73] As the Commission stated in the Governance Order in response to similar concerns previously expressed by the same commenter,[74] the commenter fails to demonstrate how the proposal would "impermissibly interfere with a protected property interest."[75] Nor does the Commission anticipate any economic harm to the processors of the current Equity Data Plans.[76] And operation of the Equity Data Plans is a "fundamental component" of the national market system, which is itself highly regulated pursuant to the broad authority provided the Commission by Congress.[77] The Commission continues to believe that the commenter's argument that the implementation of the CT Plan would constitute a Fifth Amendment taking lacks merit.

Accordingly, the Commission finds that, to facilitate the implementation of the CT Plan on a timely basis, it is appropriate to modify the CT Plan, as discussed below, to add specified deadlines to paragraphs (b) and (c) of the Recitals of the CT Plan and to add new paragraph (d) to the Recitals.

First, with respect to the proposed definition of the Effective Date of the CT Plan, set forth in paragraph (b) of the Recitals, the Commission shares concerns raised by commenters about the uncertainty of the timing associated with defining the Effective Date as the later of the date of Commission approval or the SROs' filing of the required certificate with the State of

---

73 See Nasdaq Letter I, supra note 20, at 10–11.

74 See Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq (Feb. 28, 2020), at 13–14 (responding to the Commission's Proposed Order, infra note 483); see also Nasdaq Letter I, supra note 20, at 10–11.

75 Governance Order, supra note 8, 85 FR at 28725, 28727.

76 See id. at 28727.

77 Id. at 28725.

Delaware.[78] The Commission agrees with commenters that the act of filing the certificate of formation of the LLC is administrative and can be accomplished expeditiously.[79] Accordingly, the Commission is modifying paragraph (b) of the Recitals of the CT Plan to define the Effective Date as the date of Commission approval of the CT Plan as an NMS plan governing the public dissemination of real-time consolidated market data for Eligible Securities[80] pursuant to Rule 608 of Regulation NMS.[81] The Commission finds that the modification of this provision is appropriate because Commission approval of the CT Plan, as modified, will finalize all of the terms of the CT Plan and because defining the Effective Date in this way will support timely implementation of the CT Plan and reduce the potential for unnecessary delay.

In addition, the Commission is modifying paragraph (b) of the Recitals of the CT Plan to require that the documents needed to create the LLC be filed by the SROs with the State of Delaware within 10 business days of the Effective Date. The Commission finds that this modification is appropriate because, once the language of the CT Plan as modified by the Commission is available to the SROs, 10 business days is a sufficient period of time for the SROs to execute the modified CT Plan and undertake the administrative step of filing the necessary formation documents for the CT Plan LLC with the State of Delaware.

With respect to the proposed definition of the Operative Date, the Commission agrees with commenters that the CT Plan should set forth a date certain for the CT Plan to become

---

78 See SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Virtu Letter, supra note 30, at 2.

79 See, e.g., Fidelity Letter, supra note 30, at 2–3.

80 Section 1.1(w) of Article I of the proposed CT Plan defines the term "Eligible Securities" as "(i) any equity security, as defined in Section 3(a)(11) of the Act, or (ii) a security that trades like an equity security, in each case that is listed on a national securities exchange."

81 17 CFR 242.608.

operational and should also specify deadlines for interim steps to be completed.[82] The Commission believes that the language of paragraph (c) of the Recitals—which provides that the CT Plan will be operative on the first day of the month that is at least 90 days after the specified actions—could serve to unnecessarily delay implementation of the CT Plan because it fails to impose deadlines that will help ensure the completion of the requisite actions in a timely manner.[83]

In addition, the Commission shares the view of commenters, particularly those with experience with the operation of the current Equity Data Plans, that it is not unreasonable to require the CT Plan to become operational within one year of the date of Commission approval.[84] The Commission further agrees that meeting these deadlines is an "ambitious project" that will undoubtedly require a commitment from both the SROs and other industry participants.[85] As discussed below, while implementation of the CT Plan would, among other things, require selecting a new Administrator (which would in turn require new contracts with vendors and subscribers, as well as new billing systems) and would also require entering into new contracts with the existing Processors, the Commission believes that the SROs have the expertise and

---

82 See SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Fidelity Letter, supra note 30, at 4; IEX Letter, supra note 30, at 2; RBC Letter, supra note 30, at 4; Virtu Letter, supra note 30, at 2; Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5; BMO Letter I, supra note 30, at 2; MEMX Letter, supra note 30, at 2–3; BlackRock Letter II, supra note 30, at 2.

83 While one commenter states that the proposed 90-day testing period is consistent with the current industry standard of announcing changes to market data plans before implementation, see NYSE Letter I, supra note 18, at 35–36, the Commission's concern is not with the 90-day period itself, but with the lack of any deadlines to determine when the 90-day period would begin. The Commission believes that any such testing period should take place within a prescribed period for implementation of the CT Plan, not simply at the end of an indefinite period in which other preliminary steps take place.

84 See IEX Letter, supra note 30, at 2; MEMX Letter, supra note 30, at 2–3. See also SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Fidelity Letter, supra note 30, at 4; RBC Letter, supra note 30, at 4; Virtu Letter, supra note 30, at 2; Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5; BMO Letter I, supra note 30, at 2; BlackRock Letter II, supra note 30, at 2.

85 MEMX Letter, supra note 30, at 3.

experience, with diligence and commitment, to enable the Operating Committee of the CT Plan to complete all of the required actions within one year while avoiding costly errors. Although the CT Plan would be a new NMS plan, significant expertise and experience would be directly transferrable from the operation of the Equity Data Plans to the implementation of the CT Plan. Not only have the SROs run the Equity Data Plans for decades, but the current processors for the Equity Data Plan would, as proposed by the SROs, be the processors for the CT Plan. Therefore, the Commission disagrees that setting deadlines would be "inherently arbitrary" or "may result in costly errors."[86] A number of market participants, including market participants that have experience with the operation of the current Equity Data Plans,[87] have commented that it is appropriate for the Commission to set deadlines for implementation of the CT Plan and that the specific actions required to fully implement the CT Plan, described below, can be accomplished within the timeframe that the Commission is prescribing. The Commission agrees with these commenters and believes, for the reasons discussed below, that the prescribed timeframes are achievable and that costly errors can be avoided. Therefore, the Commission is modifying paragraph (c) of the Recitals to the CT Plan to require the LLC Agreement to become operative as an NMS plan governing the public dissemination of real-time consolidated equity market data for Eligible Securities within 12 months of the Effective Date. The Commission finds that the modification to paragraph (c) of the Recitals of the CT Plan is appropriate because it will create a certain and achievable date for implementation and require the SROs to implement the CT Plan in a timely manner for the benefit of all market participants.

---

86 Nasdaq Letter I, supra note 20, at 11.

87 See IEX Letter, supra note 30, at 2; MEMX Letter, supra note 30, at 2–3. See also SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Fidelity Letter, supra note 30, at 4; RBC Letter, supra note 30, at 4; Virtu Letter, supra note 30, at 2; Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5; BMO Letter I, supra note 30, at 2; BlackRock Letter II, supra note 30, at 2.

Paragraph (c) of the Recitals of the CT Plan also sets forth the five specified actions that must be completed before the Operative Date. The Commission is concerned that the sequence for completion of the required actions is not expressly clear from the CT Plan. If, for example, certain actions required prior to the Operative Date were taken before the selection of the entire Operating Committee, including Non-SRO Voting Representatives, those initial decisions would be made by the SROs alone, in a manner inconsistent with the Commission's Governance Order.[88]

To address this uncertainty, the Commission is modifying paragraph (c) of the Recitals by renumbering it as paragraph (d) and adding a specific deadline for each of the required actions. The Commission has modified renumbered paragraph (d) to add the following language: "[i]n support of ensuring that the CT Plan is fully operational by the Operative Date, the following actions shall be completed within the specified periods." As discussed below, the Commission is modifying each of the requisite actions now set forth in subparagraphs (i)–(iv) of renumbered paragraph (d) of the Recitals to add specificity. The new language is intended to set forth the sequence for completion of the required actions, as well as to prescribe deadlines for completion. In addition, the Commission is adding new subparagraphs (v) and (vi) of renumbered paragraph (d) of the Recitals to specify the obligations of the Operating Committee. The Commission finds that the modifications to renumbered paragraph (d) of the Recitals are appropriate because they will provide clear timelines for the Operating Committee and greater certainty for other industry participants and because they will establish achievable objectives to facilitate CT Plan implementation.

---

88 See Governance Order, supra note 8, 85 FR at 28714–20.

Specifically, the Commission is modifying subparagraph (i) of renumbered paragraph (d) of the Recitals to provide that the SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee must be determined pursuant to the requirements of Section 4.2 of Article IV of the CT Plan within two months of the Effective Date. This timeframe is consistent with subparagraph (v) of Section 4.2(b) of Article IV of the CT Plan, which, as proposed by the SROs, contemplates a process for selecting Non-SRO Voting Representatives that could be completed within two months. In light of these provisions of Section 4.2(b)(v) of the CT Plan, as well as the Commission's belief that the Advisory Committee members have an incentive to facilitate non-SROs having a vote on plan governance, the Commission believes that the Advisory Committee of the current Equity Data Plans will proceed promptly to select, pursuant to Section 4.2 of the CT Plan, the Non-SRO Voting Representatives to serve on the Operating Committee. The Commission also believes that the SROs, who have already selected their representatives to the operating committees of the existing Equity Data Plans, and who have extensive experience in doing so, should be able to select their Voting Representatives to the CT Plan Operating Committee within the timeframe provided. Accordingly, the Commission finds that the modification to this provision is appropriate because it will establish a reasonable timeframe for selecting the Non-SRO and SRO Voting Representatives to form the Operating Committee—an indispensable first step of the implementation process.

The Commission is further modifying subparagraph (ii) of renumbered paragraph (d) of the Recitals to provide that the Operating Committee must file with the Commission pursuant to

Rule 608 of Regulation NMS[89] an amendment to the CT Plan governing proposed fees with respect to the existing exclusive SIP model[90] within four months of the Effective Date, which is two months after the deadline for the formation of the Operating Committee. The Commission believes that the four-month period to file a proposed CT Plan fee schedule with the Commission is a reasonable and appropriate timeframe for several reasons. First, given the importance of market data fees to both SROs and other market participants, the Commission believes that the determination of CT Plan fees will be a critical priority for both SROs and Non-SRO Voting Representatives. Assessing fees to subscribers for access to the SIP data is one of the fundamental responsibilities of the Operating Committee and one of the issues most consequential to both SROs and other market participants. Second, the Commission believes that a number of persons selected to be members of the Operating Committee are likely to have detailed and substantial pre-existing knowledge and experience with the content and pricing of the equity data products that are disseminated under the current centralized SIP model. Third, the four-month period is a deadline solely for filing the proposed fees with the Commission and not a requirement that the fee schedule be approved by the Commission and implemented within the

---

89 17 CFR 242.608.

90 Several commenters express views with respect to the interaction of the CT Plan with Commission Rule 614(e), the recently adopted Market Data Infrastructure Rule. 17 CFR 242.614(e). One of these commenters states, "[t]he timely implementation of the CT Plan would undoubtedly facilitate the success of any new market data infrastructure regime and, at the very least, will be important to ensure that, upon Commission approval, the implementation of any such regime is not impeded." BMO Letter I, supra note 30, at 3. Another commenter, pointing to the lack of analysis of the impact of the Infrastructure rulemaking, suggests that the SROs acknowledge that the CT Plan may need to be amended to accommodate the competing consolidator model. See SIFMA Letter I, supra note 30, at 3. Other commenters express the view that the two initiatives are "inextricably intertwined." Nasdaq Letter I, supra note 20, at 34–36 (incorporating its brief filed jointly with NYSE and CBOE); see also NYSE Letter I, supra note 18, at 3. Because the existing exclusive SIP model will continue to operate during the transition to the competing consolidator model, the participation of Non-SRO Voting Representatives in Operating Committee deliberations on the fee filing required by subparagraph (ii) of renumbered paragraph (d) of the Recitals would facilitate the determination of the fee schedule that will be needed to commence consolidated equity market data dissemination under the new CT Plan. In addition, the Non-SRO Voting Representatives' participation would likely provide valuable perspectives on fees that may serve as a reference point for, among other things, future fees under the competing consolidator model.

four month period. Instead, the required fee filing would commence the process for Commission consideration of the proposed fees, which will include an opportunity for public comment. Accordingly, the Commission finds that the modification to this provision is appropriate because it provides sufficient time after the formation of the Operating Committee for proposed fees to be discussed by knowledgeable and experienced persons, agreed upon, and filed with the Commission.

The Commission is also modifying subparagraph (iii) of renumbered paragraph (d) of the Recitals to provide that the Operating Committee must enter into agreements with the Processors performing under the current Equity Data Plans within eight months of the Effective Date. The Processors performing under the current Equity Data Plans are performing pursuant to existing contracts, and the CT Plan as submitted by the SROs provides that the Operating Committee shall enter into agreements with those same Processors. While one commenter states that retaining the existing Processors would require, at a minimum, "negotiation of new contracts and related service level agreements,"[91] the Commission believes that concerns about the need to renegotiate all of the terms of the existing contracts are not well founded because the CT Plan does not by its terms change any of the technical provisions of the existing Equity Data Plans with respect to the dissemination of consolidated equity market data. And the SROs have not suggested that the terms of the new contracts of the Processors will be materially different than the existing contracts under the Equity Data Plans. Consequently, the Commission believes that the technical and business terms of the new Processor contracts with the CT Plan are likely to be substantially identical to the existing contracts. Therefore, the Commission finds that the modification to this provision is appropriate because the Operating Committee should encounter

91 NYSE Letter, supra note 18, at 34.

little unavoidable difficulty in executing agreements with the Processors within the prescribed timeframe, and the change will facilitate timely implementation for the benefit of market participants.

Moreover, the Commission is modifying subparagraph (iv) of renumbered paragraph (d) of the Recitals to require that the proposed actions relating to the selection and duties of an Administrator, discussed in greater detail below, pursuant to Section 6.4 of Article VI and Section 4.3 of Article IV of the CT Plan, be completed within eight months of the Effective Date. The amended provision provides that the Administrator must be prepared to transition to the CT Plan, by finalizing new contracts with vendors and subscribers and having in place systems to administer distributions and fees, before the Operative Date.

While commenters argue that deadlines could not reasonably be imposed on the process of selecting an Administrator and preparing to implement the CT Plan,[92] the Commission disagrees. One commenter points to the difficulties attendant in selecting a processor for the CAT NMS Plan,[93] but the Commission does not view the circumstances to be analogous. In the case of the CAT NMS Plan, the SROs were tasked with implementing the first-ever consolidated audit trail for equities trading, a complex NMS system without precedent. Here, by contrast, the Operating Committee will be conducting an RFP process to select an Administrator to perform functions with which market participants, whether SROs or market data consumers, have extensive familiarity. Thus, the Commission believes that crafting the necessary requirements for the RFP and evaluating proposals submitted in response should be a substantially less complicated and time-consuming process than searching for a processor to build an entirely new

---

92 See Nasdaq Letter I, supra note 20, at 10; Nasdaq Letter II, supra note 49, at 2; NYSE Letter I, supra note 18, at 33; Cboe Letter, supra note 17, at 5–6.

93 See NYSE Letter I, supra note 18, at 35.

and comprehensive database. Moreover, with respect to certain commenters' concerns that it will be difficult to find an Administrator with the necessary expertise, the Commission understands that a number of different types of entities, such as accounting firms, market data administration firms, or consulting firms, would be capable of serving as Administrator to the CT Plan and providing the requisite billing, auditing, and licensing services. The Commission finds that the modifications to the provision are appropriate because, given the extensive experience of the SROs over several decades in supervising—or serving as—the administrators of the Equity Data Plans, the process of selecting an Administrator, as well as the duties assigned to the firm selected pursuant to the provisions of the CT Plan, should be able to be completed within the established timeframes.

In addition, the Commission is adding new subparagraph (v) of renumbered paragraph (d) of the Recitals to explicitly impose responsibility on the Operating Committee to ensure that all of the requirements set forth in the preceding subparagraphs of renumbered paragraph (d) have been satisfied prior to the Operative Date. In particular, the provision provides that "before the Operative Date, the Operating Committee will be required to ensure that the Administrator and the Processors have developed, implemented, and suitably tested the systems necessary with respect to the existing exclusive SIP model[94]—including dissemination systems, billing and audit systems, and appropriate contracts with Vendors and Subscribers—and, if applicable, the Operating Committee has expeditiously filed any necessary policies and procedures with the Commission. This new language is designed to impose on the Operating Committee not only the initial obligation to select an Administrator and Processors, but also the explicit ongoing

[94] This provision is designed to require the Operating Committee to oversee the Administrator's and Processors' efforts to test all pertinent systems prior to the transition from the existing Equity Data Plans to the CT Plan.

responsibility to oversee the Administrator and Processors' specific efforts to implement the CT Plan. The Commission finds that this modification is appropriate because the inclusion of this language establishes that the Operating Committee's obligation to oversee the development of all systems, agreements, and policies and procedures necessary to facilitate the implementation of the CT Plan within the prescribed timeframe continues beyond the time when the Administrator and Processors have been selected.

Finally, the Commission is adding new subparagraph (vi) to renumbered paragraph (d) of the Recitals to impose on the Operating Committee the obligation to provide quarterly written progress reports to the Commission, and to make these reports publicly available, beginning three months after the Effective Date and continuing every three months until the Operative Date. These quarterly reports would be required to address the actions undertaken and the progress made toward completing each of the required actions listed in paragraph (d) with respect to implementation of the CT Plan. The Commission shares commenters' views that transparency with respect to the progress made to satisfy the requirements of the CT Plan would benefit not only the Commission but also interested market participants.[95] The requirement to provide progress reports in writing to the Commission on a quarterly basis and to make them publicly available is designed to help ensure that affected market participants are informed about the status of the steps that are taken to implement the CT Plan within the prescribed time periods. Providing periodic updates to the Commission should also facilitate holding the Operating

[95] See Fidelity Letter, supra note 30, at 3; IEX Letter, supra note 30, at 2; BMO Letter I, supra note 30, at 3; BMO Letter II, supra note 30, at 2; ICI Letter I, supra note 31, at 7. While one of these commenter urges the Commission to provide financial incentives to the SROs either through fines or through not allowing the SROs to collect SIP fees for some period of time, see ICI Letter I, supra note 31, at 7, the Commission believes that the required quarterly progress reports and the involvement of the Operating Committee, including the Non-SRO Voting Representatives, should be sufficient to ensure timely implementation of the CT Plan.

Committee accountable for its progress in completing the interim steps towards satisfying the longer-range requirements.

The Commission believes that the required frequency of the progress reports, one report every three months, should be sufficient to identify for the Commission any notable delays in completing the interim steps needed to satisfy the deadlines established for CT Plan implementation without imposing unnecessary burdens on efforts to implement the CT Plan. The Commission believes that this requirement should not be overly burdensome to the Operating Committee or distract from its performance of the specified actions required by the CT Plan, because the quarterly reports would essentially reflect the analysis the Operating Committee would need to undertake in any event for its diligent oversight of the implementation process. The Commission finds that the modifications to renumbered paragraph (d) of the Recitals of the CT Plan are appropriate because the specified deadlines and sequence for completion prescribed by the provision will provide greater certainty regarding timeframes for the Operating Committee and other market participants and will establish achievable objectives to facilitate implementation of the CT Plan.

For the reasons discussed above, the Commission is approving paragraph (b), which has been renumbered as paragraph (c), and renumbered paragraph (d) of the Recitals of the CT Plan, as modified.

(b) SRO Duties to the CT Plan

Paragraph (f) of the Recitals, renumbered as paragraph (g) as a result of the modifications discussed above, sets forth the SROs' statement of their regulatory obligations to the CT Plan.

With respect to several provisions of the CT Plan discussed below,[96] a commenter expresses concern that the SROs are disclaiming any duty or obligation to the CT Plan.[97] The Commission agrees with another commenter that the regulatory obligations of SROs with respect to the CT Plan are set by the federal securities laws and regulations,[98] but finds that it is appropriate to reiterate that the provisions of the CT Plan do not lessen any of the SROs' regulatory obligations. Accordingly, the Commission is modifying this provision to add the following sentence, "No provision of this Agreement shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder."[99] The Commission finds that the modification to renumbered paragraph (g) of the Recitals of the CT Plan is appropriate because it ensures that the text of the CT Plan reflects the relationship between the CT Plan's provisions and the SROs' regulatory obligations. For the reasons discussed above, the Commission is approving this provision as modified.

(c) Other Provisions of the Recitals

Paragraph (a) of the Recitals establishes that the CT Plan is filed with the Commission in response to the Commission's Governance Order. Paragraphs (d) and (e) of the Recitals as proposed establish that the current Equity Data Plans will continue to operate until the Operative Date.

---

96 See infra notes 443–454 and accompanying text.

97 See MFA Letter, supra note 30, at 1–2.

98 See Nasdaq Letter I, supra note 20, at 16–17.

99 The "Members" of the LLC Agreement, as defined in the first paragraph of the LLC Agreement, are the SROs identified in Exhibit A to the LLC Agreement.

The Commission received no comment on paragraphs (a), (d), and (e) of the Recitals as proposed. The Commission is approving paragraph (a) as proposed, and paragraphs (d) and (e), renumbered as paragraphs (e) and (f), otherwise as proposed.

2. Definitions

Article I of the CT Plan sets forth the defined terms used throughout the CT Plan and its Exhibits. In the Notice, the Commission sought comment on several of the proposed definitions.[100] Specifically, the Commission requested comment on the proposed scope and use of the following defined terms: "CT Feeds," "Covered Persons," "Fees," "Member Observer," and "Public Information." After considering the comments received, the Commission finds that it is appropriate to modify several of the proposed definitions.[101]

First, for the reasons discussed below in Section II.C.11(a) of this Order, the Commission is expanding the definition of "Company Indemnified Party,"[102] set forth in Article I, Section 1.1(k) and referred to in Article XII, Section 12.2, Section 12.3, and Section 12.4 of the CT Plan,[103] to include Non-SRO Voting Representatives.

Second, for the reasons discussed below in Section II.C.5(k)(iii) of this Order, the Commission is modifying Article I, Section 1.1(n), of the CT Plan—the proposed definition of

---

100 See Notice, supra note 3, 85 FR at 64567–68 (Questions 4–8).

101 While one commenter suggests that the definition of "fees" should be "similar to the comprehensiveness in defining 'royalties for copyright works' in the music industry," Data Boiler Letter I, supra note 31, at 22–23; Letter from Kelvin To, Founder and President, Data Boiler Technologies, LLC (Jul. 20, 2021) ("Data Boiler Letter II"), at 2, the commenter has not provided specific suggestions as to how this high-level analogy would be appropriately applied in the context of consolidated equity market data. Further, the Commission does not believe that the analogy is apt in the context of data that the SROs have a regulatory obligation to disseminate through an NMS plan.

102 As proposed, Section 1.1(k) defines the term "Company Indemnified Party" as "a Person, and any other Person of whom such Person is the legal representative, that is or was a Member or an SRO Voting Representative."

103 The term "Company Indemnified Party" is also referred to in Section 1.1(kk) ("Losses") and Section 1.1(ccc) ("Party to a Proceeding") of Article I of the CT Plan.

"Covered Persons"[104]—to define the phrase "representatives of the Members" to include SRO Voting Representatives, alternate SRO Voting Representatives, and Member Observers, to expand the definition of Covered Persons to include SRO Applicant Observers, and to delete the phrase, "and the employers of Non-SRO Voting Representatives." The term, Covered Persons, is referred to in Section 4.11 of Article IV of the CT Plan and Exhibit C to the CT Plan.[105]

Third, for the reasons discussed below in Section II.C.5(d)(iii) of this Order, the Commission is modifying the definition of "Executive Session,"[106] set forth in Article I, Section 1.1(z), to require that the other persons as deemed appropriate to attend Executive Session will be determined by "majority vote of" the SRO Voting Representatives. The term "Executive Session" is referred to in Article IV, Section 4.2(d), Section 4.3(c), and Section 4.4(g) of the CT Plan and Exhibit C to the CT Plan.

Fourth, for the reasons discussed below in Section II.C.5(j)(ii) of this Order, the Commission is modifying the definition of "Member Observer,"[107] set forth in Article I, Section 1.1(oo), to require that a Member Observer be an employee of a Member or any attorney to a Member, and to provide that a Member's designation of a Member Observer is subject to the

---

104 As proposed, Section 1.1(n) of Article I defines the term "Covered Persons" as "representatives of the Members, the Non-SRO Voting Representatives, SRO Applicants, the Administrator, and the Processors; affiliates, employees, and agents of the Operating Committee, a Member, the Administrator, and the Processors; any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of Non-SRO Voting Representatives. Covered Persons do not include staff of the SEC."

105 The term "Covered Persons" is also referred to in Section 1.1(l) ("Confidential Information") of Article I of the CT Plan.

106 As proposed, Section 1.1(z) of Article I defines the term, "Executive Session," as a meeting of the Operating Committee pursuant to Section 4.4(g), which includes SRO Voting Representatives, Member Observers, SEC staff, and other persons as deemed appropriate by the SRO Voting Representatives.

107 As proposed, Section 1.1(oo) of Article I defines the term "Member Observer" as any individual, other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member's compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings."

limitation contained in Article IV, Section 4.10(b)(i) of the CT Plan. The term "Member Observer" is referred to in Article IV, Section 4.4 and Section 4.7 of the CT Plan and Exhibit C to the CT Plan.[108]

Fifth, for the reasons discussed below in Section II.C.5(k)(ii) of this Order, the Commission is modifying the definition of "Highly Confidential Information," as set forth in Article I, Section 1.1(ii),[109] to replace the phrase, "personnel matters" with the phrase "personnel matters that affect the employees of the SROs or the Company." The term "Highly Confidential Information" is referred to in Article IV, Section 4.4 and Section 4.10 of the CT Plan and Exhibit B to the CT Plan.

Finally, for the reasons discussed below in Section II.C.11(a) of this Order, the Commission is modifying Section 1.1(eee) of Article I of the CT Plan, referred to in Article XII, Section 12.2 of the CT Plan,[110] to expand the definition of the term "Party to a Proceeding,"[111] to include Non-SRO Voting Representatives.

Except for the modifications identified above, the Commission is approving Article I of the CT Plan as proposed.

---

[108] The term "Member Observer" is also referred to in Section 1.1(z) ("Executive Session") of Article I of the CT Plan.

[109] The term "Highly Confidential Information" is also referred to in Section 1.1(l) ("Confidential Information"), and Section 1.1(kkk) ("Public Information") of Article I of the CT Plan.

[110] The term, "Party to a Proceeding," is also referred to in Section 1.1(kk) ("Losses") of Article I of the CT Plan.

[111] As proposed, Section 1.1(eee) of Article I defines the term, "Party to a Proceeding," as a "Company Indemnified Party that is, was, or is threatened to be made, a party to a Proceeding, or is involved in a Proceeding, by reason of the fact that such Company Indemnified Party is or was a Member and/or an SRO Voting Representative."

3. Organization of LLC

The SROs propose to organize the new NMS plan for consolidated equity market data in the form of a Delaware limited liability company pursuant to a limited liability company agreement, entitled the Limited Liability Company Agreement ("LLC Agreement") of CT Plan LLC ("Company" or "LLC").[112] The Members (i.e., the equity owners) of the LLC will be the 17 national securities exchanges for equities and FINRA,[113] each of which will be a "Participant" of the CT Plan as an effective NMS plan for the dissemination of consolidated equity market data.

The CT Plan states that the purposes of the LLC are to engage in the following activities on behalf of the Members: (i) the collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and such other information concerning Eligible Securities as the Members shall agree as provided therein; (ii) contracting for the distribution of such information; (iii) contracting for and maintaining facilities to support any activities permitted in the LLC Agreement and guidelines adopted thereunder, including the operation and administration of the System;[114] (iv) providing for those other matters set forth in the LLC Agreement and in all guidelines adopted thereunder; (v) operating the System to comply with Applicable Laws; and (vi) engaging in any other business or activity that now or thereafter may be necessary, incidental, proper, advisable, or convenient to accomplish any of the foregoing purposes and that is not prohibited by the Delaware Limited Liability Company Act ("Delaware Act"), the Act, or

---

[112] See Article II, Section 2.1 of the CT Plan.

[113] See Article III, Section 3.1 of the CT Plan. The names and addresses of each Member are set forth in Exhibit A to the CT Plan.

[114] Section 1.1(yyy) of Article I of the proposed CT Plan defines the term "System" as "all data processing equipment, software, communications facilities, and other technology and facilities, utilized by the Company or the Processors in connection with the collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and other information concerning Eligible Securities."

other Applicable Law.[115] The LLC Agreement itself, including its appendices, is the CT Plan. Under the CT Plan, the governing body of the LLC would be the Operating Committee, which would comprise representatives of the Members and the Non-SRO Voting Representatives.[116]

In their Transmittal Letter, the SROs assert that, while the Governance Order requires Operating Committee approval for actions other than the selection of Non-SRO Voting Representatives and the decision to enter into Executive Session, certain provisions of the CT Plan that concern solely the operation of the LLC as an LLC and that are unrelated to consolidation and distribution of equity market data should require only a majority vote of the Members. Specifically, the SROs propose that the following actions require only a majority vote of the Members: (1) the selection of Officers of the LLC (other than the Chair and Secretary), if needed, and (2) certain decisions concerning the operation of the LLC as an LLC and approval of amendments to LLC-related provisions of the CT Plan, including provisions related to indemnification, dissolution of the LLC, and tax-related matters.[117] The SROs assert that neither of these topics would affect the consolidation and distribution of equity market data and that, therefore, the Members should have the sole authority to make decisions related to these topics, with Commission approval where necessary.[118]

Several commenters raise concerns with the proposed LLC structure and the Members' exclusive powers thereunder.[119] One commenter states that the LLC structure is "flawed" and

---

115 See Article II, Section 2.4 of the CT Plan.

116 See Article IV, Section 4.1(a) of the CT Plan.

117 See Transmittal Letter, supra at 2.

118 See id.

119 See Data Boiler Letter I, supra note 31, at 4, 23, 25, 49; MFA Letter, supra note 30, at 1–2, 3; RBC Letter, supra note 30, at 10; BMO Letter II, supra note 30, at 2.

"defies America's 'Free Enterprise' concept."[120] The commenter further states that, under the LLC structure proposed, the Members of the LLC will retain control over the actions under the CT Plan.[121] Another commenter asserts that the CT Plan "appears perfectly designed to facilitate the continued neglect of the distribution of consolidated market data in order to benefit the sale of SROs' proprietary market data feeds,"[122] and states that the CT Plan would allow the SROs to prioritize the sale of their proprietary market data products over the interests and statutory purposes of the CT Plan.[123] This commenter asserts that the Plan "incentivizes the SROs to run the Plan and the LLC poorly to the extent they believe it is in their self-interest" and there is "no downside for an SRO to act in its self-interest contrary to the Plan as they are exculpated in taking any such action."[124] This commenter states that it fears that the CT Plan structure will not promote the goals of Section 11A, given the absence of any obligations on the SROs to operate the plan consistent with its statutory purpose,[125] and suggests that a balance must be struck with the principle of creating a governing arrangement that is reasonably designed to ensure that the CT Plan will carry out its statutory purpose.[126]

---

[120] Data Boiler Letter I, supra note 31, at 25. This commenter also states that because of CT Plan's role and public purpose, it should be a non-profit rather than LLC. See id. at 24. The commenter opines that a non-profit structure would be "better than an LLC in preserving an independent status when dealing with the establishment of fees, manners in entering into contracts with an Administrator and Processor(s), and other applicable policies and procedures…." Id. at 19; see also Data Boiler Letter II, supra note 101, at 2.

[121] See Data Boiler Letter I, supra note 31, at 21, 24, 30; see also RBC Letter, supra note 30, at 10.

[122] MFA Letter, supra note 30, at 3.

[123] See MFA Letter, supra note 30, at 1–2 (stating, CT Plan as proposed is likely to "preserve the misaligned incentives that gave rise to the Order."); see also BMO Letter II, supra note 30, at 2.

[124] MFA Letter, supra note 30, at 3.

[125] See id. at 2.

[126] See id.

One commenter states that the CT Plan does not include all of the necessary provisions for an LLC agreement to function appropriately as an NMS plan, but does not provide further details about what is missing.[127] Another commenter states that more detail needs to be provided on the types of decisions that would fall under "the operation of the CT Plan as an LLC" and "modifications to the LLC-related provisions of the CT Plan" in order to ensure that non-SRO representatives have an opportunity to participate in any material decisions related to the regulatory operations of the CT Plan.[128]

Another commenter, however, supports the LLC structure as proposed, arguing that the Non-SRO Voting Representatives do not need to be members of the LLC in order to fulfill their role on the Operating Committee,[129] and that providing the Non-SRO Voting Representatives with an economic interest in the CT Plan is inappropriate because "it would provide individuals with a claim on revenues that they did nothing to generate and expose them to funding obligations that they would not be prepared to support."[130]

The Governance Order did not specify the form or structure of the plan, and for the reasons discussed below, the Commission finds that it is appropriate for the SROs to organize this NMS plan as an LLC agreement. Foremost, an LLC agreement provides a formal legal structure through which the SROs will fulfill their obligations with respect to consolidated equity market data, which will necessarily entail, among other things, entering into contracts with the Administrator and the Processors, as well as, in all likelihood, outside counsel, accountants, and

---

127 See Data Boiler Letter I, supra note 31, at 25.

128 Virtu Letter, supra note 30, at 5.

129 See Nasdaq Letter I, supra note 20, at 14.

130 Id. at 14–15.

other parties. The Commission believes that structuring the CT Plan as an LLC will reduce ambiguities with respect to rights and obligations related to such contracts and with respect to the financial rights responsibilities of each SRO to the CT Plan and to each other.[131] Moreover, the use of an LLC structure for a NMS plan is not novel. The most recent NMS plan approved by the Commission, CAT NMS Plan, employs an LLC structure,[132] as does the Options Price Reporting Authority Plan ("OPRA Plan"),[133] and the Commission does not believe that it is necessary to prescribe a different legal structure here.

As described above, some commenters are concerned that the LLC Agreement as proposed would allow the SROs to continue to act exclusively in their own self-interest, rather than in the interest of the Plan, as significant powers would rest exclusively with the SROs. The Commission, however, does not believe that the choice of an LLC structure over other structures for the CT Plan will permit the SROs to act exclusively in their own self-interest. First, the terms of the LLC agreement must be consistent with the regulatory obligations of the SROs as set by the federal securities laws and regulations, and SROs also have direct obligations under the federal securities laws and regulations. And second, as required by the Governance Order, the CT Plan provides Non-SRO Voting Representatives with voting rights on the Operating Committee that is responsible for managing the activities of the CT Plan, which will provide a means to mitigate the inherent conflicts of interests between the SROs' "collective

---

131 As noted above, however, the terms of the CT Plan shall not be construed to limit or diminish the obligations and duties of the Members of the LLC as SROs under the federal securities laws. See text accompanying note 99, supra.

132 See Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (Order Approving the National Market System Plan Governing the Consolidated Audit Trail).

133 See Securities Exchange Act Release No. 61367 (Jan. 15, 2010), 75 FR 3765 (Jan. 22, 2010) (Notice of Immediate Effectiveness of Proposed Amendment To Revise the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information To Serve as the Operating Agreement for OPRA LLC).

responsibilities in overseeing the Equity Data Plans and their individual interest in maximizing the viability of proprietary data products that they sell to market participants."[134] Though one commenter suggests that a non-profit structure for the CT Plan would better ensure independence in decisions relating to fees and administrator contracts than, for example, an LLC, the Commission believes that the requirement of the Governance Order that non-SROs have a vote on matters before the Operating Committee, together with the SROs' obligations under the federal securities laws and regulations, is sufficient at this time to mitigate conflicts of interests in making such decisions, regardless of the corporate structure used.

Moreover, the Commission is modifying certain other provisions of the CT Plan to help ensure that the CT Plan meaningfully includes non-SROs in Operating Committee decision-making, consistent with the Governance Order.[135] Each of the following modifications is discussed in greater detail below.

First, as discussed below in Section II.C.5(d)(iii), the Commission is modifying the CT Plan to limit the circumstances under which the SRO Voting Representatives may meet outside the presence of the Non-SRO Voting Representatives in Executive Session. Second, as discussed below in Section II.C.5(g)(iii), the Commission is modifying the CT Plan to limit the topics that may be addressed in a legal subcommittee without the Non-SRO Voting Representatives present and to require certain records of legal subcommittee meetings be kept to enhance transparency and accountability regarding the use of that subcommittee. Third, as discussed below in Section II.C.5(h), the Commission is modifying the CT Plan to require that the creation and assignment of any officer positions and duties be subject to a vote of the Operating Committee, rather than

---

134 Governance Order, supra note 8, 85 FR at 28707, 28715–16.

135 See, e.g., Governance Order, supra note 8, 85 FR at 28707.

by a majority vote of the SROs. Fourth, as discussed below in Section II.C.5(g)(iii), the Commission is modifying the CT Plan to apply the Exculpation provisions available to the SROs to Non-SRO Voting Representatives. And fifth, as discussed below in Section II.C.12(e), the Commission is modifying the CT Plan to remove the provision that would allow the SROs to modify Article IX (Allocations), Article X (Records and Accounting; Reports), Article XI (Dissolution and Termination), and Article XII (Exculpation and Indemnification) by a majority vote of Members.

Finally, one commenter states that the CT Plan does not include all of the necessary provisions for an LLC agreement to function appropriately as an NMS plan.[136] The commenter does not, however, identify the areas in which it believes the agreement is deficient.

For the reasons stated above, the Commission finds that it is appropriate for the CT Plan to be structured as an LLC Agreement, and is approving Article II as proposed.

4. Membership (Obligations and Liabilities)

Pursuant to Article III, Section 3.2(a) of the CT Plan, any national securities association or national securities exchange whose market, facilities, or members, as applicable, trades Eligible Securities may become a Member by (i) providing written notice to the Company; (ii) executing a joinder to the LLC Agreement; (iii) paying a Membership Fee to the Company as determined pursuant to Section 3.2(b) ("Membership Fee"); and (iv) executing a joinder to any other agreements to which all of the other Members have been made party in connection with being a Member.[137] Membership Fees paid will be added to the general revenues of the Company.[138]

---

136 See Data Boiler Letter I, supra note 31, at 25

137 See Article III, Section 3.2(a) of the CT Plan.

138 See id.

Article III, Section 3.2 of the CT Plan specifies that the factors that will be considered in determining a Membership Fee are: (1) the portion of costs previously paid by the Company (or by the Members prior to the formation of the Company) for the development, expansion and maintenance of the System which, under generally accepted accounting principles ("GAAP"), would have been treated as capital expenditures and would have been amortized over the five years preceding the admission of the new member; and (2) an assessment of costs incurred and to be incurred by the LLC for modifying the System or any part thereof to accommodate the new member, which costs are not otherwise required to be paid or reimbursed by the new Member.[139] The CT Plan prohibits a Member's transfer of its Membership Interest in the LLC, except in connection with the withdrawal of a Member from the LLC, as discussed below.[140]

Pursuant to Article III, Section 3.4, any Member may voluntarily withdraw from the LLC by: (i) providing not less than 30 days' prior written notice of such withdrawal to the LLC, (ii) causing the LLC to file with the Commission an amendment to effectuate the withdrawal,[141] and (iii) transferring such Member's Membership Interest to the LLC.[142] If a Member ceases to be a registered national securities association or registered national securities exchange, that Member automatically withdraws from the LLC.[143] Section 3.4 further provides that after withdrawal from Membership, the Member will remain liable for any obligations arising prior to

---

[139] See Article III, Section 3.2(b) of the CT Plan. The proposed CT Plan provides that Participants of the CQ Plan, CTA Plan, and UTP Plan are not required to pay the Membership Fee. See Article III, Section 3.2(c) of the CT Plan.

[140] See Article III, Section 3.3 of the CT Plan.

[141] Any withdrawal will not be effective until an amendment to the Agreement is approved by the Commission. See Article III, Section 3.4(c) of the CT Plan.

[142] See Article III, Section 3.4(a) of the CT Plan.

[143] See Article III, Section 3.4(b) of the CT Plan. Article III, Section 3.5 of the CT Plan provides that a Member's bankruptcy under Section 18-304 of the Delaware Act shall not itself cause a withdrawal of such Member from the Company.

withdrawal.[144] A withdrawing Member is entitled to receive a portion of the Net Distributable Operating Income attributable to the period prior to the Member's withdrawal.[145]

Pursuant to proposed Sections 3.4(d)(iii) and (iv), a Member that has withdrawn from the LLC will no longer have the right to have its Transaction Reports, Quotation Information, or other information disseminated over the System, and the Capital Account of that Member will not be allocated profits and losses of the LLC. In addition, Article III of the CT Plan provides that no Member, unless authorized by the Operating Committee, has the authority to represent the LLC or to make any expenditure on behalf of the LLC; provided, however, that the Tax Matters Partner may represent, act for, sign for or bind the LLC as permitted under Sections 10.2 and 10.3 of the LLC Agreement.[146] In addition, the CT Plan provides that, following the Operative Date, each Member will be required to comply with the provisions of the Plan and enforce compliance with the Plan by its members.[147]

These provisions relating to joining and withdrawing from the CT Plan as a Member and enforcing compliance with the Plan are similar to those existing in other NMS Plans.[148] The Commission received no comments addressing these provisions. Accordingly, the Commission is approving Section 3.4, as proposed.

Article III of the CT Plan also sets forth the obligations and liabilities of the Members. Article III, Section 3.7(b) provides that Members will not be required to contribute capital or make loans to the LLC, nor will Members have any liability for the debts and liabilities of the

---

144 See Article III, Section 3.4(d)(i) of the CT Plan.

145 See Article III, Section 3.4(d)(ii) of the CT Plan.

146 See Article III, Section 3.7(d) of the CT Plan.

147 See Article III, Section 3.6 of the CT Plan.

148 See, e.g., CAT NMS Plan, Article III.

LLC.[149] This section also states that it is the intent of the Members that no distribution to any Member pursuant to the LLC Agreement will be considered a return of money or other property paid or distributed in violation of the Delaware Act, and that any such payment will be considered a compromise within the meaning of Delaware Act, and the Member receiving any payment will not be required to return any payment to any person, provided that a Member will be required to return any payment made due to a clear accounting or similar error or as otherwise provide in Section 3.7(b).[150] Finally, Section 3.7(e) provides that no Member owes any duty (fiduciary or otherwise) to the LLC or to any other Member other than the duties expressly set forth in the LLC Agreement.

In the Notice, the Commission sought comment on Article III, Section 3.7 and the provision that states that SROs shall have no liability for the debt, liabilities, commitments, or any other obligations of the CT Plan or for any losses of the CT Plan. The Commission asked if the provision is consistent with the SROs' obligations to, and purposes of, the CT Plan. Several commenters express concern with this provision.[151] One commenter states that the Members should not receive special liability protections.[152] Another commenter states that the liability

---

149 However, in the event that the Processors or the Administrator have not been paid pursuant to the terms of the Processor Services Agreements and Administrative Services Agreement, the proposed CT Plan requires each Member to return to the Company its pro rata share of any moneys distributed to it by the Company until an aggregated amount equal to the amount owed has been recontributed to the Company. The Company will pay the amount(s) owed. See Article III, Section 3.7(b) of the CT Plan.

150 See Article III, Section 3.7(c) of the CT Plan. The proposed CT Plan further provides that if any court of competent jurisdiction holds that any Member is obligated to make any such payment, such obligation shall be the obligation of such Member and not of the Operating Committee. See id.

151 See Notice, supra note 3, 85 FR at 64568 (Question 11).

152 See RBC Letter, supra note 30, at 9. This commenter recommends that the CT Plan should make clear that the liability protection and indemnification provisions apply to non-SRO representatives acting in their role on the Operating Committee. See id. at 10. See also infra Section II.C.11 (discussing modification to the proposed CT Plan to provide indemnity to the Non-SRO Voting Representatives).

carve-out for SROs is too broad.[153] This commenter states that the provisions in Article III, Section 3.7 would "significantly increase the likelihood that Plan activities would be contrary to the role and public purpose of the Plan as part of the national market system," thereby creating a conflict of interest with SROs' obligations with respect to the Plan under federal securities rules and regulations.[154] Another commenter views the provisions of Article III, Section 3.7 as allowing the LLC to have upside profit, but relieving the SROs of responsibility for any debt, liabilities, commitment, or any other obligations.[155] This commenter further states that the SROs have significant influence on how the LLC operates through control of the Operating Committee, but no consequence for that control, and recommends that Article III, Section 3.7(e) be removed from the CT Plan.[156]

In contrast, one commenter states that the liability protections in Article III, Sections 3.7(b) and (e) are standard protections for the members of an LLC and are commonly included in LLC agreements.[157] This commenter further argues that the Non-SRO Voting Representatives do not need similar protection since they are not members of the LLC.[158] Another commenter states that the provisions in Article III are consistent with Delaware business organization law.[159] This commenter also argues that including the principle that no Member of the CT Plan is liable for

---

153 See Virtu Letter, supra note 30, at 3.

154 Id.

155 See Data Boiler Letter I, supra note 31, at 24.

156 See id.

157 See NYSE Letter I, supra note 18, at 37. This commenter points to Section 4.8 of the CAT NMS Plan as precedent for including the limitation on liability provisions at Section 3.7(b) and (e) and states that, similar to the proposed CT Plan, the CAT NMS Plan extends liability protection and indemnification coverage only to SROs that created the LLC. See id. at 37–38. Another commenter notes that the OPRA Plan is an LLC with similar limitation on liability provisions. See Nasdaq Letter I, supra note 20, at 16 n.26.

158 See NYSE Letter I, supra note 18, at 38.

159 See Nasdaq Letter I, supra note 20, at 15 (citing Section 18-303 of the Delaware Act).

the obligations of the CT Plan "is not an attempt to avoid appropriate funding for the CT Plan,"[160] and states that the requirements in CT Plan that each Member make capital contributions for "reasonable administrative and other reasonable expenses" of the CT Plan and that each Member return its pro rata share of distributions from the CT Plan in the one year period prior to a default in payment to the Processors or Administrator are evidence of appropriate funding responsibilities for the CT Plan.[161]

While certain commenters object to the provisions that would absolve the Members of financial liabilities incurred by the LLC, arguing that the provisions are too broad and would allow the Members to act in their own self-interest, contrary to the purpose of the CT Plan,[162] after careful consideration of the comments, the Commission is not modifying these provisions. As the Commission stated above, the SROs' regulatory obligations pursuant to the CT Plan flow from the federal securities laws and regulations, and the Commission has, as noted above, modified the language of the Recitals of the CT Plan to reiterate that the terms of the CT Plan cannot act to diminish those obligations.[163] Further, the language proposed by the SROs for Section 3.7(b) states that an SRO shall not have liability to the CT Plan as a Member except as provided in the Agreement or "Applicable Law" (a defined term in the CT Plan), which means that the express terms of this provision of the LLC agreement do not contemplate limiting any regulatory obligations SROs might have under the federal securities laws and regulations with respect to the operation of the CT Plan. Finally, the Commission does not believe that it is

---

160 Id. at 16.

161 Id.

162 See RBC Letter, supra note 30, at 9; Virtu Letter, supra note 30, at 3; see also Data Boiler Letter I, supra note 31, at 24.

163 See supra Section II.C.1(b).

necessary to extend these provisions to apply to Non-SRO Voting Representatives, as one commenter suggests,[164] because while these persons serve on the Operating Committee, they have no financial obligation under the CT Plan and thus do not require the protections afforded to the Members in Article III. Accordingly, the Commission is approving Article III, Section 3.7 as proposed.

In the Notice, the Commission specifically sought comment on Article III, Section 3.7(e) of the CT Plan, which absolves Members of any duty to the LLC or other Members, and on the provision's potential impact on the CT Plan's responsibilities for the collection, processing, and dissemination of equity market data.[165] Two commenters object to the provision that relieves Members of a duty (fiduciary or otherwise) to the CT Plan or each other.[166] One of these commenters asserts that the SROs' disclaimer of duty or obligation to the CT Plan appears to be a "complete abdication" of responsibility to ensure that the Plan carries out its intended function, and that it is "unclear" why an SRO's representative to the CT Plan would not have a fiduciary duty to the LLC.[167] This commenter states that the SROs should, at a minimum, establish a duty in the CT Plan to promote the plan's function of assuring the widespread availability of equity market data on terms that are fair and reasonable, consistent with statutory requirements, or to promote the interests of fair and orderly markets and the protections of investors and the public interest.[168] This commenter encourages the SROs to adopt a fiduciary duty as well as to

---

164 See NYSE Letter I, supra note 18, at 38.

165 See Notice, supra note 3, 85 FR at 64568 (Question 12).

166 See MFA Letter, supra note 30, at 2; RBC Letter, supra note 30, at 9.

167 MFA Letter, supra note 30, at 2 (also stating that the SROs cannot both disclaim any duty to the LLC and maintain the current level of control over the LLC if the CT Plan is to function properly.).

168 See id.

affirmatively articulate the duties that are owed to the CT Plan.[169] Another commenter similarly believes that the SROs should assume fiduciary duties to the LLC.[170]

One commenter disagrees that the CT Plan should impose a fiduciary duty on Members.[171] This commenter states that, while individuals or entities that manage a limited liability company may have fiduciary duties under Delaware law, a member generally does not have fiduciary duties so long as it does not exercise control over the company.[172] This commenter argues that under the CT Plan, the Operating Committee, not the Members, have managerial responsibility for the operations of the CT Plan and the Members only have limited rights to take actions.[173] Further, the commenter explains, no individual Member of the CT Plan has the ability to control the actions of the CT Plan.[174] The commenter concludes that "it is unlikely that under Delaware law the Members of the CT Plan, when acting in such capacity, would owe fiduciary duties to the CT Plan or the Members."[175] This commenter also argues that the proposed language of the CT Plan has no effect on the SROs' obligations under federal securities laws and that it is those obligations, rather than the SROs' obligations to the CT Plan and each other, that will ensure that the SROs comply with their responsibilities regarding the dissemination of real-time consolidated equity market data.[176]

---

169 See id.

170 See RBC Letter, supra note 30, at 9.

171 See Nasdaq Letter I, supra note 20, at 16–17.

172 See id.

173 See id.

174 See id.

175 Id.

176 See id. at 16. This commenter further states that "since the Plan is a product of federal law, it would be inappropriate to subject its Members to state fiduciary duties, as this would give rise to a potential conflict between state and federal law." Id.

With respect to providing a disclaimer of fiduciary duty for Non-SRO Voting Representatives, this commenter states that there would be some logic in expanding the disclaimer of fiduciary duties to cover Non-SRO Voting Representatives, but that this would not address the discrepancy between the federal law obligations of the Members and the Non-SRO Voting Representatives.[177] This commenter states that Rule 608 of Regulation NMS "would require the Members to comply with the Plan, and enforce compliance by their broker members, but that neither that rule, nor any other provision of law, imposes corresponding duties on the Non-SRO Voting Representatives."[178]

The Commission agrees that the proposed language of the CT Plan has no effect on the SROs' obligations under the federal securities laws, and that it is those obligations than will ensure compliance with SRO responsibilities regarding consolidated equity market data. As discussed above,[179] any disclaimer of fiduciary duty to the LLC cannot dilute, diminish, or otherwise alter the Members' regulatory responsibilities under the federal securities laws and rules because, as SROs and pursuant to the requirements under the national market system, the Members are prohibited from acting in contravention of Commission rules and regulations, which include rules for the protection of investors 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."[180] However, the Commission understands the concerns raised by commenters

---

177 See id. at 17.

178 Id. at 17; see also NYSE Letter I, supra note 18, at 7.

179 See supra Section II.C.1(b).

180 15 U.S.C. 78k-1(c)(1)(B).

that the terms of the CT Plan fail to impose any express duty on the Members to act to promote the purpose of the Plan and expressly disclaim any such duty.[181] To address this concern, as discussed above, the Commission is modifying the terms in the CT Plan's Recitals to explicitly state that no provision of the CT Plan shall be construed to limit or diminish the obligations of SRO Members to the CT Plan that arise pursuant to federal securities laws and regulations.[182] The Commission is not, however, modifying the Plan to include a disclaimer of fiduciary duty for the Non-SRO Voting Representatives who serve on the Operating Committee, a possibility raised by one commenter,[183] because Non-SRO Voting Representatives will not have the same legal obligations as the SRO Voting Representatives and because they may also have separate legal duties to their employers.

5. Management of the LLC

(a) Duties and Powers of the Operating Committee

Article IV of the CT Plan establishes the overall governance structure for the management of the LLC. Article IV, Section 4.1(a) proposes that the LLC be managed by the Operating Committee.[184] Article IV, Section 4.1 also provides that the Operating Committee has the authority to take actions it deems necessary to accomplish the purposes of the LLC, including: (1) proposing amendments or implementing policies and procedures[185]; (2) selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of the Administrator,

---

181 See MFA Letter, supra note 30, at 2; RBC Letter, supra note 30, at 9.

182 See supra Section II.C.1(b).

183 See Nasdaq Letter I, supra note 20, at 16–17.

184 See Article IV, Section 4.1(a) of the CT Plan.

185 See Article IV, Section 4.1(a)(i) of the CT Plan.

the Processor, an auditor, and any other professional service providers[186]; (3) developing fair and reasonable fees for equity market data[187]; (4) reviewing the performance of the Processor and ensuring public reporting of the Processors' performance and other metrics and information about the processors[188]; (5) assessing the marketplace for equity data products and ensuring that the CT Feeds are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of CT Feeds data to investors and market participants[189]; (6) designing a fair and reasonable formula to be applied by the Administrator for allocating revenue, and reviewing and revising the formula as needed[190]; (7) interpreting the LLC Agreement and its provisions[191]; and (8) other specific responsibilities provided for in the LLC Agreement.[192]

One commenter expresses general support for the provision of the CT Plan that states that the responsibilities of the Operating Committee include interpreting the LLC Agreement and its provisions, with the caveats that "the Non-SRO Voting Representatives have the opportunity to meaningfully participate in the process of interpreting a provision of the plan"[193] and that the CT Plan should provide more detail on what role the Non-SRO representatives would have with respect to such decisions.[194] This commenter also recommends that the Operating Committee

---

[186] See Article IV, Section 4.1(a)(ii) of the CT Plan. This section further provides that any expenditure for professional services paid by the Company must be authorized by the Operating Committee and must be for activities consistent with the CT Plan. See id.

[187] See Article IV, Section 4.1(a)(iii) of the CT Plan.

[188] See Article IV, Section 4.1(a)(iv) of the CT Plan. See also infra Section II.C.6.

[189] See Article IV, Section 4.1(a)(v) of the CT Plan.

[190] See Article IV, Section 4.1(a)(vi) of the CT Plan.

[191] See Article IV, Section 4.1(a)(vii) of the CT Plan.

[192] See Article IV, Section 4.1(a)(viii) of the CT Plan.

[193] Virtu Letter, supra note 30, at 3.

[194] See id.

adopt policies and procedures distinguishing operational interpretations of the CT Plan from amendments required to be submitted to the Commission under Rule 608 of Regulation NMS.[195]

One commenter states that the Operating Committee has "full and complete control over the business and affairs of the CT Plan, including interpretations of the CT Plan."[196] This commenter argues that any interpretation of the CT Plan would be subject to a discussion at a meeting of the Operating Committee and that the minutes of such a meeting would include sufficient detail to inform the public of the matters under discussion and the views expressed (without attribution).[197] Another commenter states that the CT Plan's language describing the power of the Operating Committee to "develop[] and maintain[] fair and reasonable Fees and consistent terms for the distribution, transmission, and aggregation of core data" is confusing and recommends that "[i]f the intent of this language is to empower the Operating Committee to set fees, after public notice and comment, and subject to Commission approval, it should clearly say as much."[198]

In response to the comment addressing the Operating Committee's authority to interpret the provisions of the CT Plan and stating that the Non-SRO Voting Representatives should participate in any interpretations,[199] the Commission notes that the terms of the CT Plan provide that the Non-SRO Voting Representatives, as members of the Operating Committee, will be able to participate in any discussions regarding interpretations and will have a vote on whether to

---

195 See id.

196 Nasdaq Letter I, supra note 20, at 17 (internal citations omitted). Another commenter similarly states that interpretation of the CT Plan is a decision for the SROs to make, not the Commission. See NYSE Letter I, supra note 18, at 38–39.

197 See Nasdaq Letter I, supra note 20, at 17–18.

198 RBC Letter, supra note 30, at 6.

199 See Virtu Letter, supra note 30, at 3.

adopt an interpretation. Further, the Commission believes that, while operational interpretations in order to implement the CT Plan are appropriately within the authority of the Operating Committee, any such interpretations must be consistent with terms of the CT Plan and may not in any way modify the CT Plan. Any change to a provision of the CT Plan would require an amendment pursuant to Rule 608 of Regulation NMS.[200]

Another commenter argues that the provision granting power to the Operating Committee to develop and maintain fair and reasonable fees is confusing and suggests that the provision expressly state that the Operating Committee has the authority to set fees, after public notice and comment, and subject to Commission approval.[201] The Commission does not believe such a clarification is necessary. Market Data Fees will be established at a later date as proposed amendments to the CT Plan.[202] Rule 608(b) under Regulation NMS sets forth the requirements for amending an NMS plan,[203] and includes specific provisions relating to establishing and amending fees set forth in an NMS plan. Therefore, the Commission does not believe that this requirement needs to be restated in the CT Plan.

Finally, one commenter states that the Operating Committee should function as a legislature, with management to execute the Plan and "the SIP's public purpose."[204] This commenter further states that the diversified Operating Committee will be ill-equipped to run

---

200 17 CFR 242.608(b)(2). As proposed, Article XIII, Section 13.5(b) of the CT Plan, would permit the Members to implement amendments that relate to the functioning of Company as an LLC. As discussed below, the Commission is modifying this provision such that all amendments to the CT Plan must be filed with the Commission. See supra Section II.C.12(e).

201 See RBC Letter, supra note 30, at 6.

202 See supra Recitals paragraph (d)(ii) (requiring that within four months of the Effective Date of the CT Plan, the Operating Committee file proposed fees).

203 17 CFR 242.608(b)(2).

204 Data Boiler Letter I, supra note 31, at 26.

daily operation management functions to the detriment of the LLC.[205] The terms of the proposed CT Plan do, however, contemplate that the Operating Committee will act as a general decision-making body, while the Administrator and the Processors will be responsible for the day-to-day operational decisions.

For the reasons stated above, the Commission is approving Article IV, Section 4.1(a) as proposed.

Article IV, Section 4.1(b) proposes to permit the Operating Committee to delegate all or part of its administrative functions to (1) a subcommittee; (2) one or more of the Members; (3) one or more Non-SRO Voting Representatives; or (4) any other Persons (including the Administrator), provided that a delegation would not convey the authority to take action on behalf of the CT Plan.

Two commenters state that the CT Plan should clearly state the scope and nature of an "administrative function."[206] One commenter states that it supports allowing administrative functions to be delegated, as long as the Non-SRO Voting Representatives have an opportunity to participate in the decision to delegate the matter and any delegation to an SRO Voting Representative or subcommittee controlled by SRO Voting Representatives is subject to an augmented majority vote of the Operating Committee.[207] This commenter also expresses concern about delegating undefined administrative functions solely to SRO Voting Representatives.[208] The second commenter expresses similar concerns and suggests that administrative functions

---

[205] See id. This commenter further states, "having members dominating the Legislative branch and assigning an 'observer' to scrutinize everything the Operating Committee may try to do, [would] indeed tie the hands of Executive branch." Id.

[206] See Virtu Letter, supra note 30, at 5; Data Boiler Letter I, supra note 31, at 29–30.

[207] See Virtu Letter, supra note 30, at 5.

[208] See id.

should not be permitted to be delegated to a subcommittee composed only of either SRO Voting Representatives or Non-SRO Voting Representatives, and that both groups should be represented on any subcommittee to which administrative functions are delegated.[209]

One commenter rejects these concerns, explaining that there would be no delegation of the Operating Committee's voting authority, but instead solely a delegation of the authority to implement a decision by the Operating Committee, to develop a proposal for Operating Committee consideration, or to perform other ministerial functions on the Operating Committee's behalf.[210] This commenter further explains that an Operating Committee vote is necessary for any delegation of administrative functions and that this should mitigate concerns about undue delegation of authority to an SRO Voting Representative or Non-SRO Voting Representative.[211] Finally, another commenter states that decisions relating to the administrative functions are for the SROs alone to make.[212]

The Commission agrees with commenters that the concept of "administrative functions" of the Operating Committee should be limited to prohibit certain delegations of authority and is therefore modifying Section 4.1(b) to exclude from the functions that may be delegated those administrative functions to be performed by the independent Administrator pursuant to Section 6.1. The Commission finds that this modification is appropriate because the functions delegated to the independent Administrator, particularly those that involve administering Vendor and Subscribers contracts, performing audits, or assessing fees, necessarily involve access to sensitive information of significant commercial or competitive value and therefore raise

---

209 See Data Boiler Letter I, supra note 31, at 29–30.

210 See Nasdaq Letter I, supra note 20, at 22.

211 See id.

212 See NYSE Letter I, supra note 18, at 38–39.

heightened concerns about conflicts of interest that can be adequately addressed only if these functions are performed by the independent Administrator.

In response to the comment that suggests that any delegation to an SRO Voting Representative or subcommittee controlled by SRO Voting Representatives should be subject to a vote of the Operating Committee,[213] the Commission agrees and notes that the terms of the CT Plan state that delegations of administrative functions under this provision are subject to a vote of the Operating Committee. Additionally, in response to the comment that argues that administrative functions should not be delegated to a subcommittee composed only of either SRO Voting Representatives or Non-SRO Voting Representatives,[214] the Commission recognizes the concern that SRO Voting Representatives or Non-SRO Voting Representatives could have exclusive control of an administrative function delegated under this provision. However, the Commission believes that this concern is mitigated by the requirement that a vote of the Operating Committee is required to approve any delegation of administrative functions. Further, the modification discussed above limits the types of functions that are eligible for delegation. The Commission agrees with the comment that states that a delegation under this provision does not convey any authority to take action.[215] Such authority resides with the Operating Committee, and Article IV, Section 4.1(b) of the CT Plan permits the Operating Committee to delegate authority only to implement a decision by the Operating Committee, develop a proposal for Operating Committee consideration, or perform other ministerial functions on the Operating Committee's behalf.

---

213 See Virtu Letter, supra note 30, at 5.

214 See Data Boiler Letter I, supra note 31, at 26–27.

215 See Nasdaq Letter I, supra note 20, at 22.

For the reasons discussed above, the Commission is approving Section 4.1(b) as modified.

Finally, Article IV, Section 4.1(c) provides that neither the Company nor the Operating Committee will have authority over any Member's proprietary systems or the collection and dissemination of quotation or transaction information in Eligible Securities in any Member's Market, or, in the case of FINRA, from FINRA Participants. The Commission received no comments on this provision of the CT Plan and is approving it as proposed.

(b) Composition and Selection of the Operating Committee

Article IV, Section 4.2 of the CT Plan addresses the composition and selection of the Operating Committee members.

(i) SRO Voting Representatives

Section 4.2(a) provides that each group of Members that are Affiliates (an "SRO Group")[216] and each Non-Affiliated SRO[217] will select an SRO Voting Representative to serve on the Operating Committee and vote on its behalf.[218] The Commission is approving this Section as proposed.[219]

---

[216] For example, NYSE, NYSE American, NYSE Chicago, and NYSE National would be one SRO Group for purposes of the proposed CT Plan and would select one individual to represent the SRO Group on the Operating Committee.

[217] Currently, the Non-Affiliated SROs are FINRA, IEX, LTSE, and MEMX.

[218] See Article IV, Section 4.2(a) of the CT Plan. Each SRO Group and each Non-Affiliated SRO may designate an alternate individual or individuals who shall be authorized to vote on its behalf if the SRO Voting Representative is unable. Each SRO Voting Representative may serve as such at the discretion of the SRO Group or Non-Affiliated SRO that it represents. See id.

[219] Discussion of the allocation of SRO votes by SRO Group appears in Section II.C.5(c)(i), infra.

(ii) Non-SRO Voting Representatives

(A) Inclusion of Non-SRO Voting Representatives

Section 4.2(b) provides that Non-SRO Voting Representatives will also be permitted to serve and vote on Operating Committee matters.[220] Several commenters express support for including Non-SRO Voting Representatives on the Operating Committee.[221] One commenter states that the requirement for voting representation by a diverse set of stakeholders is "a core element of the Governance Order, with the purpose of reducing conflicts of interest and providing 'more meaningful inclusion of key stakeholders' views in New Consolidated Data Plan decision making."[222] Another commenter similarly states that it supports expanding voting representation to non-SROs and having them participate as full voting members of the Operating Committee to allow non-SROs to have a role in the CT Plan's decision-making process and therefore help address conflicts of interest.[223] Another commenter states that allowing only SROs to have a vote "would impair [the] credibility of CT Plan as a public utility."[224] Another commenter states that giving Non-SRO Voting Representatives a vote on the Operating Committee will "break the current SRO voting monopoly."[225]

Other commenters oppose the CT Plan's provisions that grant non-SROs voting rights on the Operating Committee. Three commenters state that these provisions are contrary to Section

---

220 See Article IV, Section 4.2(b) of the CT Plan.

221 See IEX Letter, supra note 30, at 2; ICI Letter II, supra note 31, at 1; BMO Letter I, supra note 30, at 3; BMO Letter II, supra note 30, at 2. See also Letter from Kenneth E. Bentsen, Jr., President and CEO, SIFMA (June 9, 2021), at 2.

222 IEX Letter, supra note 30, at 2 (quoting the Commission's Governance Order, supra note 8, 85 FR at 28707).

223 See BMO Letter I, supra note 30, at 3; BMO Letter II, supra note 30, at 2.

224 Data Boiler Letter I, supra note 31, at 30.

225 Schwab Letter II, supra note 30, at 6.

11A of the Act.[226] These commenters state that Section 11A of the Act authorizes the Commission to direct only the SROs to jointly develop and operate NMS plans, and does not provide the authority to give non-SROs voting power on the operating committee of an NMS plan.[227] While acknowledging that the non-SROs should have some voice in the operations of the CT Plan, one commenter argues that Congress "determined to entrust the planning, development, operation, and regulation of NMS plans to SROs that have specific regulatory obligations to act in furtherance of the public interest."[228] This commenter also argues that, because Rule 608 provides that only SROs have the authority to act jointly to file and amend NMS plans, providing voting rights to non-SROs violates Rule 608.[229] Another commenter argues that the Act leaves no discretion for the Commission to grant votes to non-SROs,[230] and that providing votes to non-SROs would conflict with the design and purpose of the Act, which entrusted responsibility for the planning, development, operation, and regulation of the national market system to SROs, which are subject to comprehensive regulation,[231] rather than to non-SROs, whose representatives would have no obligation to act in the public interest and would be free to act in their own personal self-interest.[232] This commenter further states that the Non-SRO Voting

---

226 See Cboe Letter, supra note 17, at 2, 3–4 (arguing that only SROs have the authority to act jointly to file, amend, implement, and administer an NMS plan); NYSE Letter I, supra note 18, at 6–7 (arguing that neither Section 11A nor Rule 608(a)(3) authorize non-SROs to act jointly along with SROs with respect to NMS plans); Nasdaq Letter I, supra note 20, at 1–2 (attaching and incorporating by reference all arguments made by Petitioners in their opening brief challenging the Order). The Commission has responded to the arguments made by Nasdaq in its brief. See Brief for the Respondent, Securities and Exchange Commission, The Nasdaq Stock Market, et al. v. Securities and Exchange Commission (Case No. 20-1181) (D.C. Cir. 2020).

227 See Cboe Letter, supra note 17, at 2; Nasdaq Letter I, supra note 18, at 1–2. See also NYSE Letter I, supra note 18, at 6–7; NYSE Letter II, supra note 19, at 3.

228 Cboe Letter, supra note 17, at 3.

229 See id. at 4.

230 See NYSE Letter I, supra note 18, at 7.

231 See id.

232 See id. at 7–8.

Representatives would not have an obligation to protect investors or further the public interest, or to comply with the terms of the CT Plan, despite being voting members of the Operating Committee.[233]

The Commission specifically considered and addressed these arguments in the Governance Order.[234] As stated therein, the Commission believes that it is within its authority under Section 11A to require the operating committee to include voting rights for non-SROs. In Section 11A(a)(2), Congress directed the Commission to use its authority under the Act to facilitate the establishment of the NMS in accordance with and in furtherance of its specific findings and objectives. Here, the Commission is acting pursuant to its authority under Section 11A(a)(3)(B) to further Congress's express objective of assuring the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.[235] Section 11A(a)(3)(B) expressly permits the Commission to require SROs to "act jointly" with respect to a "matter[]" as to which they "share authority in planning, developing, operating, or regulating the national market system (or a subsystem thereof)."[236] But Congress left to the Commission's discretion the determination of which "matters" to require joint action and how such joint action should occur. The requirement for the CT Plan to include minority voting rights for non-SROs on the Operating Committee falls comfortably within that discretion.

The particular "matter" as to which the Commission is requiring joint action here—the planning, development, and operation of an NMS plan governing dissemination of consolidated

---

233 See NYSE Letter I, supra note 18, at 7 ("While these individuals are intended to 'represent' each of the six enumerated categories of non-SRO market participants, such individuals would not even have the obligation to further the purportedly represented non-SROs' interest nor the public interest when voting on the Operating Committee, leaving each free to act in his or her own personal self-interest.").

234 See Governance Order, supra note 8, 85 FR at 28715–16.

235 See 15 U.S.C. 78k-1(a)(3)(B).

236 Id.

equity market data—is designed to achieve the goals of Section 11A(c), in particular by ensuring 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. Not only does that provision expressly contemplate the involvement of non-SROs,[237] but as the Commission explained in the Governance Order, 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.[238] As the Commission further stated, "including representatives from non-SROs alongside the SROs on the operating committee will enhance the ability of all relevant constituencies to work together to facilitate the goals of Section 11A of the Act."[239] These findings had substantial support in the comment file for the Governance Order, as a diverse set of commenters expressed the view that the governance of market data plans should include a broader array of viewpoints.[240] And the Commission reiterates those findings here.

The Commission disagrees with comments that argue that because Section 11A of the Act and Rule 608 of Regulation NMS authorize the Commission to permit or require SROs to "act jointly" in planning, developing, and operating the NMS plans, the Commission has no authority to mandate that SROs provide minority voting rights for certain non-SROs on the

---

237 See 15 U.S.C. 78k-1(c) (prohibiting any SRO "securities information processor, broker or dealer" from collecting, processing, distributing, or publishing market data in contravention of Commission rules).

238 See Governance Order, supra note 8, 85 FR at 28715–16.

239 Id. at 28716.

240 See id. at 28706.

operating committee of the new plan. Nothing in Section 11A precludes the involvement of non-SROs in the national market system.[241] Nor do the text or structure of Section 11A demonstrate that in permitting the Commission to authorize or require SROs to "act jointly" with respect to matters over which they share authority, Congress intended to entrust the development or operation of the NMS exclusively to SROs. "Act jointly" does not clearly connote "act jointly and exclusively."[242] Likewise, the Commission's grant of authority to SROs in Rule 608(a)(3) authorizes SROs to act jointly but, in doing so, does not by implication limit the Commission's authority to set forth a governance structure that includes non-SROs with some measure of voting power on an NMS plan operating committee. Rather, as the Governance Order notes, both Section 11A and Rule 608 are silent as to the participation of non-SROs in the operation of the plan.

Further, the Commission does not believe, as suggested by some commenters, that permitting non-SROs to serve on the Operating Committee will impede the SROs' ability to act

---

241 To the contrary, Section 11A expressly contemplates the involvement of non-SROs. See, e.g., Section 11A(b), 15 U.S.C. 78k-1(b) (regarding Securities Information Processors); Section 11A(c), 15 U.S.C. 78k-1(c) (prohibiting any SRO "securities information processor, broker or dealer" from collecting, processing, distributing, or publishing market data in contravention of Commission rules); Section 11A(d)(3), 15 U.S.C. 78k-1(d)(3) (listing brokers, dealers, securities information processors, issuers, and investors with "other persons interested in or likely to participate in the establishment, operation, or regulation of the national market system").

242 Indeed, history indicates that there is a different congressional intent behind the inclusion of this language. As the Commission has explained, the "act jointly" provision "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." Order Directing the Exchanges and the National Association of Securities Dealers, Inc. to Submit a Phase-in Plan to Implement Decimal Pricing in Equity Securities and Options, Securities Exchange Act Release No. 42914 (June 8, 2000), 65 FR 38010, 38012 (June 19, 2000); see also Application Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 41843 (Sept. 8, 1999), 64 FR 50126, 50127 (Sept. 15, 1999); Order Directing Options Exchanges To Submit an Inter-Market Linkage Plan, Securities Exchange Act Release No. 42029 (Oct. 19, 1999), 64 FR 57674, 57675 (Oct. 26, 1999). In other words, Congress permitted the Commission to authorize SROs to engage in joint action that may otherwise give rise to antitrust concerns in circumstances in which they are acting "with respect to matters as to which they share authority … in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one of more facilities thereof."

jointly or interfere with their ability to operate the national market system. The CT Plan simply requires the SROs to include Non-SRO Voting Representatives in the decision-making process for plan action.[243] Additionally, nothing in the legislative history of Section 11A indicates that Congress sought to preclude the Commission from directing the SROs to provide non-SROs with a voice in NMS plan governance, particularly where, as here, the Commission has reasonably concluded that doing so will promote the Plan's effectiveness, consistent with Section 11A's enumerated goals.

Further, the Commission does not believe that allowing a broader representation of market participants in the governance of the CT Plan by including non-SROs as voting members on the Operating Committee will diminish the SROs' ability to ensure that the CT Plan meets the requirements of Section 11A of the Act and Rule 608 of Regulation NMS. As discussed below, the proposed voting structure, provides the SROs, by themselves, sufficient voting power to ensure that the Plan meets the requirements of Section 11A and Rule 608. In addition, the inclusion of non-SROs as voting members does not create a risk that the CT Plan could be amended in a manner inconsistent with the SROs' regulatory obligations or with the Act, as any substantive amendments to the CT Plan would require Commission approval, and the Commission would determine if each such amendment was consistent with the Act and Rule 608. Therefore, the Commission continues to believe that inclusion of Non-SRO Voting Representatives on the Operating Committee would not interfere with the Commission's ability to exercise its oversight over the CT Plan.

[243] See Governance Order, supra note 8, 85 FR at 28715.

(B) Categories of Non-SRO Voting Representatives

Article IV, Section 4.2(b) provides that one Non-SRO Voting Representative will be chosen from each of the following categories to serve on the Operating Committee, with the right to vote on Operating Committee matters: (A) an institutional investor; (B) a broker-dealer with a predominantly retail investor customer base; (C) a broker-dealer with a predominantly institutional investor customer base; (D) a securities market data vendor that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; (E) an issuer of NMS stock that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; and (F) a Retail Representative.[244]

One commenter states it is "not against" the proposed categories of Non-SRO Voting Representatives, but argues that the representatives' ability to introduce new and useful innovation to reform the SIP should be emphasized.[245] Another commenter expresses support, in particular, for the inclusion of an institutional investor, such as an asset manager, on the Operating Committee.[246] One commenter opposes the proposed restriction that would prohibit the Non-SRO Voting Representative representing issuers from being affiliated with an SRO, a broker-dealer, or an investment adviser.[247] This commenter argues that such a limitation would "eliminate a significant portion of qualified issuer representatives with the industry experience

---

[244] See Article IV, Section 4.2(b) of the CT Plan. For purposes of the CT Plan, a Retail Representative is an individual who (1) represents the interests of retail investors, (2) has experience working with or on behalf of retail investors, (3) has the requisite background and professional experience to understand the interests of retail investors, the work of the Operating Committee of the Company, and the role of market data in the U.S. equity market, and (4) is not affiliated with a Member or broker-dealer. See id.

[245] Data Boiler Letter I, supra note 31, at 28.

[246] See ICI Letter II, supra note 31, at 1.

[247] See Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Samantha DeZur, Director, Global Public Policy, BlackRock (Nov. 12, 2020) ("BlackRock Letter I"), at 3.

necessary to be effective non-SRO members," and would unreasonably discriminate against ETF issuers as they are typically affiliated with a broker-dealer or investment adviser, denying representation to a significant segment of the market.[248]

Another commenter disagrees with the proposed restriction that would prohibit the Non-SRO Voting Representative representing Market Data Vendors from being affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients.[249] The commenter explains that many market data vendors partner with broker-dealers to create, and have available, technology that will complement traditional vending technology. The commenter argues that if these vendors are excluded from the pool of possible adviser candidates, no employees of major vendors would be eligible to serve, and that would eliminate many candidates that have the depth and breadth of understanding that comes from working for a large vendor. The commenter suggests that the restriction on who is eligible to serve as the securities Market Data Vendor Non-SRO Voting Representative be revised so that the individual representing the vendor community may not be associated with or in a direct control relationship with a broker-dealer.[250]

Although some commenters object to the restriction that the securities market data vendor representative and the issuer representative cannot be affiliated with SROs, broker-dealers, and investment advisers with third-party clients,[251] the Commission continues to believe that these restrictions are appropriate. These restrictions would operate to prevent certain affiliates of SROs, broker-dealers, or investment advisers from gaining additional representation on the

---

248 Id.

249 See Letter from Sherry Madera, Chief Industry & Government Affairs Officer, Refinitiv (Nov. 12, 2020) ("Refinitiv Letter"), at 1–2.

250 See id.

251 See BlackRock Letter I, supra note 247, at 3; Refinitiv Letter, supra note 249, at 1–2.

Operating Committee by virtue of their affiliations. Under the CT Plan, SROs would have two-thirds of the votes on the Operating Committee, broker-dealers would have two representatives on the Operating Committee, and institutional investors would have one representative on the Operating Committee. Allowing a person from an issuer or market data vendor affiliated with an SRO to serve as a Non-SRO Voting Representative would increase SRO representation and correspondingly diminish the representation of non-SROs on the Operating Committee.

The Commission also believes that it is important that the securities market data vendor representative and the issuer representative not be affiliated with a broker-dealer or an investment adviser with third-party clients so that there are entities with potentially diverse views on the Operating Committee. The Commission believes that adding an issuer representative that is not affiliated with an investment adviser would be more likely to add a different and valuable perspective than a second representative affiliated with an investment adviser. Similarly, the Commission believes that, although it is likely that the affiliation restrictions for a market data vendor representative would prevent at least some qualified and experienced persons from serving in that role, the Commission believes that this disadvantage is justified by the benefits of having a non-affiliated market data vendor, because the non-affiliated market data vendor would be more likely to add a different and valuable perspective to the deliberations of the Operating Committee than a third Non-SRO Voting Representative that is affiliated with a broker-dealer and would also be less likely to be affected by the same potential conflicts of interest. Moreover, as stated in the Governance Order, the Commission believes that even with these restrictions, the Operating Committee will be able to attract knowledgeable representatives of securities market data vendors and issuers, as the CT Plan will address issues and make important decisions that

will impact these constituencies.[252] The Commission believes that the opportunity to have a voice on the operating committee of an NMS plan responsible for issues related to market data will be highly coveted and that there will be qualified nominees willing to serve as representatives from organizations that are not affiliated with SROs, broker-dealers, or institutional investors.

The Commission therefore concludes that including representatives from these categories of Non-SRO Voting Representatives, as set forth in the CT Plan as proposed, will provide a diversity of views on the Operating Committee such that perspectives from key stakeholders in matters related to equity market data are heard. Accordingly, the Commission is approving the provision of Article IV, Section 4.2(b) that enumerates the categories of Non-SRO Voting Representatives as proposed.

(C) Term Limits

Article IV, Section 4.2(b) of the CT Plan provides that Non-SRO Voting Representatives are eligible to serve for two-year terms for a maximum of two terms total, whether consecutive or non-consecutive.[253] Under this provision, after the expiration of a Non-SRO Voting Representative's term, a replacement will be selected by a majority of the then-serving Non-SRO Voting Representatives.[254] The CT Plan provides for a staggered start of the Non-SRO Voting Representatives official terms,[255] but provides that those Non-SRO Voting Representatives

---

252 See Governance Order, supra note 8, 85 FR at 28718.

253 See Article IV, Section 4.2(b) of the CT Plan.

254 See Article IV, Section 4.2(b)(i) and (ii) of the CT Plan. See also infra Section II.C.5(b)(ii)(D).

255 Specifically, the proposed CT Plan provides that the terms for the Issuer Representative, the Retail Representative, and the Institutional Representative would begin at the First Quarterly Operating Committee Meeting and the Securities Market Data Vendor Representative, the Broker-Dealer with a predominantly retail customer base Representative and the Broker-Dealer with a predominantly institutional investor base

whose official terms would not begin until the Third Quarterly Operating Committee Meeting after the Effective Date, would temporarily serve as a Non-SRO Voting Representative upon their selection and would still be eligible to be selected for another two-year term.[256]

Several commenters express views on the term limits proposed in Article IV, Section 4.2(b).[257] One commenter states that the maximum term limit imposed on Non-SRO Voting Representatives in the CT Plan could adversely affect the operations of the Operating Committee by barring members with more experience from serving on it and by making it more difficult to attract qualified candidates for all the categories of Non-SRO Voting Representatives.[258] Another commenter recommends allowing Non-SRO Voting Representatives to serve two two-year terms and then take a break for two years before being eligible to serve again.[259] The commenter believes that this term structure will "promote qualified participation by non-SROs, while preserving an egalitarian process which allows for a rotation of representatives and provides any interested candidate the opportunity to serve."[260] Another commenter recommends that Non-SRO Voting Representatives be permitted to serve two consecutive terms and then serve again after a one-term break, arguing that there is a limited pool of individuals with adequate experience and knowledge that can serve and that there are benefits from institutional knowledge

---

Representative would begin at the Third Quarterly Operating Committee Meeting. See Article IV, Section 4.2(b)(i) of the CT Plan.

256 See Article IV, Section 4.2(b) of the CT Plan.

257 See RBC Letter, supra note 30, at 8; MFA Letter, supra note 30, at 3–4; BlackRock Letter I, supra note 247, at 2; ICI Letter I, supra note 31, at 3–4; SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Virtu Letter, supra note 30, at 4; Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA (Nov. 12, 2020) ("FINRA Letter I"), at 7–8; MEMX Letter, supra note 30, at 3.

258 See RBC Letter, supra note 30, at 8.

259 See BlackRock Letter I, supra note 247, at 2.

260 Id.

gained from serving on the Operating Committee.[261] In addition, one commenter believes that a Non-SRO Voting Representative should be permitted to serve more than two terms, provided there is a sufficiently lengthy (e.g., two years) cooling-off process.[262] This commenter believes that the cooling-off process should provide a check on any firm's or individual's influence and would foster a sufficiently deep pool of candidates.[263]

Similarly, another commenter that supports a maximum term limit for Non-SRO Voting Representatives to allow for fresh perspectives from new industry representatives recommends that Non-SRO Voting Representatives be permitted to serve three consecutive two-year terms with ability to serve the same term limits after a two-year break.[264] This commenter believes that the maximum term of four years proposed in the CT Plan would "impede meaningful and informed participation of Non-SRO Representatives" and "does not allow sufficient time for the representative to provide meaningful contribution as it may take new members … some time to get up to speed on the many diverse and complex issues."[265] Another commenter states that it supports term limits to "incentivize a healthy rotation of industry experts on the [Operating] Committee," but it does not believe that the term limits proposed "offer enough runway for experts to get up to speed and to participate meaningfully in the work of the [Operating] Committee," and recommends permitting Non-SRO Voting Representatives to serve three two-

---

261 See MFA Letter, supra note 30, at 3–4.

262 See ICI Letter I, supra note 31, at 3–4.

263 See id.

264 See SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2.

265 SIFMA Letter I, supra note 30, at 3; see also SIFMA Letter II, supra note 30, at 2. FINRA similarly supports a longer maximum term to "ensure that Non-SRO Voting Representatives are able to gain knowledge and experience with the specifics of SIP operations, which can be very technical in nature, and allow them to provide more meaningful input into the CT Plan's operations." FINRA Letter I, supra note 257, at 7–8.

year terms.[266] Another commenter states that there is a sufficient number of qualified people to serve on the Operating Committee such that it is not necessary to have any person serve for more than six years, whether terms are consecutive or not.[267] This commenter supports allowing Non-SRO Voting Representatives to serve for two three-year terms, arguing that such a term would provide continuous fresh ideas to the Operating Committee.[268]

Other commenters address when the Non-SRO Voting Representatives should commence their duties on the Operating Committee.[269] One commenter suggests that the Operating Committee be established with both SRO and non-SRO voting representation before the CT Plan becomes effective to allow non-SROs the ability to participate in the process of operationalizing the CT Plan.[270] Another commenter recommends that the Non-SRO Voting Representatives' terms begin at the first meeting of the Operating Committee and that the terms be staggered such that three Non-SRO Voting Representatives would serve for three years and three Non-SRO Voting Representatives would serve for two years to allow all representatives to be present from the start.[271] Other commenters similarly support staggered terms. One commenter argues that staggered terms would reduce the distractions that could occur if all the Non-SRO Voting Representatives were replaced every two to four years.[272] Another commenter believes that the

---

266 Virtu Letter, supra note 30, at 4.

267 See Fidelity Letter, supra note 30, at 4.

268 See id.

269 See RBC Letter, supra note 30, at 4; BlackRock Letter II, supra note 30, at 1–2; ICI Letter II, supra note 31, at 2; Data Boiler Letter I, supra note 31, at 31.

270 See BlackRock Letter II, supra note 30 at 1–2; see also Data Boiler Letter I, supra note 31, at 31 (stating that Non-SRO Voting Representatives should be selected before the Effective Date so they can assist with implementation of governance policies and procedures).

271 See ICI Letter II, supra note 31, at 2.

272 See Data Boiler Letter I, supra note 31, at 31.

terms for Non-SRO Voting Representatives should be staggered so that no more than half of the representatives are elected in one year.[273] Similarly, another commenter recommends staggering terms "by at least one or two years to ensure sufficient continuity and consistency in representation."[274]

Several commenters recommend imposing term limits on SRO Voting Representatives.[275] One commenter believes that by applying term limits to Non-SRO Voting Representatives only, the CT Plan could advantage SROs relative to non-SROs with respect to relevant information and experience.[276] Another commenter states that SRO Voting Representatives should be subject to the same term limits as Non-SRO Voting Representatives.[277] Another commenter similarly states that allowing SRO Voting Representatives to serve indefinitely may be "counterproductive."[278]

Other commenters disagree that SRO Voting Representatives should be subject to term limits. Two commenters objecting to term limits for SRO Voting Representatives explain that these representatives do not serve as individuals, but as representatives of a legal entity, and must vote based on that entity's position.[279] Therefore, one commenter argues, changing the individual would not serve to bring new perspectives to the Operating Committee.[280] Another commenter

---

273 See MEMX Letter, supra note 30, at 3. To accomplish this, the commenter suggests modifying the initial term of three of the Non-SRO Voting Representatives. See id.

274 BlackRock Letter I, supra note 247, at 2; see also Virtu Letter, supra note 30, at 4.

275 See RBC Letter, supra note 30, at 8; Virtu Letter, supra note 30, at 4; MFA Letter, supra note 30, at 3–4.

276 See RBC Letter, supra note 30, at 8.

277 See MFA Letter, supra note 30, at 3–4.

278 Virtu Letter, supra note 30, at 4.

279 See FINRA Letter I, supra note 257, at 7–8; Nasdaq Letter I, supra note 20, at 23.

280 See Nasdaq Letter I, supra note 20, at 23. This commenter also argues that imposing term limits on SRO Voting Representatives would interfere with the SRO's ability to discharge its responsibilities under the Act through the individual that it believes best able to exercise those functions. See id.

stated that whether term limits apply to either Non-SRO Voting Representatives or SRO Voting Representatives is a decision for the SROs to make, not the Commission.[281]

In the Governance Order, the Commission explained that term limits for Non-SRO Voting Representatives must balance the advantages of institutional knowledge with the potential benefits to be derived from new perspectives.[282] Further, the Commission stated that it believed that a term of two years, with the potential for additional terms, would provide sufficient time for a member to become familiar with the issues dealt with by the operating committee.[283] Several commenters, however, argue that Non-SRO Voting Representatives would need to be permitted to serve for longer than two two-year terms to get fully up to speed on all the complex matters covered by the CT Plan before rotating off the Operating Committee.[284]

After considering the concerns raised by commenters, the Commission is modifying Section 4.2(b) of the CT Plan to provide that Non-SRO Voting Representatives shall serve no more than two consecutive three-year terms, but shall be eligible, after a period of three years of non-service, to serve additional terms, subject to the requirement that three years of non-service must follow every set of two three-year terms of service.[285] The Commission finds that the modification from two two-year terms to two three-year terms is appropriate because the

---

281 See NYSE Letter I, supra note 18, at 38–39.

282 See Governance Order, supra note 8, 85 FR at 28720.

283 See id.

284 See RBC Letter, supra note 30, at 8; MFA Letter, supra note 30, at 3–4; BlackRock Letter I, supra note 247, at 2; SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Virtu Letter, supra note 30, at 4; Fidelity Letter, supra note 30, at 4; FINRA Letter I, supra note 257, at 7–8. Some of these commenters proposed alternative terms. See SIFMA Letter I, supra note 30, at 3; SIFMA Letter II, supra note 30, at 2; Virtu Letter, supra note 30, at 4; Fidelity Letter, supra note 30, at 4; FINRA Letter I, supra note 257, at 7–8; MEMX Letter, supra note 30, at 3.

285 The Commission is modifying references to the Non-SRO Voting Representatives' term limits in Article IV, Sections 4.2(b)(iii) and (b)(vii) of the CT Plan to reflect this modification for consistency. See infra Section II.C.5(b)(ii)(C).

Commission believes that these longer terms will better allow Non-SRO Voting Representatives to obtain sufficient experience with the operation of the CT Plan and to make informed contributions as members of the Operating Committee. The Commission also finds that—in order to preserve an appropriate balance between retaining institutional knowledge and allowing new perspectives to be heard—it is appropriate to require that, after serving a defined amount of time, Non-SRO Voting Representatives should be required to observe a "cooling-off" period before serving again so as to allow others the opportunity to serve. In response to a commenter's claim that the SROs should have discretion to set Non-SRO Voting Representatives' term limits, the Commission believes, as it stated in the Governance Order, that the determination of term limits for Non-SROs falls within its statutory authority under Section 11A of the Act.[286] Moreover, the Commission believes that full participation by the Non-SRO Voting Representatives on the Operating Committee is a critical component of the governance of the CT Plan and that permitting the SROs to set the terms of Non-SRO Voting Representatives would grant the SROs influence over the Non-SRO Voting Representatives and diminish the independence and effectiveness of Non-SRO Voting Representatives as they serve on the Operating Committee.

The Commission, however, disagrees with comments suggesting that term limits should also apply to SRO Voting Representatives.[287] Rather, the Commission agrees with those comments that argue that the SRO Voting Representatives serve on the Operating Committee as representatives of a legal entity and vote at the direction of that entity. The SROs are, by virtue of their status as SROs, permanent participants in the CT Plan, and the Commission does not

---

[286] See supra note 281. See also Brief for the Respondent, Securities and Exchange Commission, The Nasdaq Stock Market, et al. v. Securities and Exchange Commission (Case No. 20-1181) (D.C. Cir. 2020).

[287] See RBC Letter, supra note 30, at 8; Virtu Letter, supra note 30, at 4; MFA Letter, supra note 30, at 3–4.

expect that varying the identity of the individuals representing a given SRO Group or Non-Affiliated SRO on the Operating Committee is likely to vary the views expressed or the votes cast by that SRO Group or Non-Affiliated SRO on the Operating Committee. The Non-SRO Voting Representatives, by contrast, will vary over time, and most will be employees of a set of firms that will vary over time, and the Commission expects that these individuals may have different perspectives regarding market data issues. Therefore, the Commission finds that imposing term limits on SRO Voting Representatives would not be appropriate, because it does not believe that doing so would bring fresh perspectives to the Operating Committee or further promote the goals of the CT Plan in the same manner as it would for Non-SRO Voting Representatives.

The Commission agrees with comments that suggest that all Non-SRO Voting Representatives should commence their duties upon selection and that the terms of Non-SRO Voting Representatives should be staggered,[288] and the Commission believes that Sections 4.2(b)(ii) and (iii) of the CT Plan allow for both. Specifically, Section 4.2(b)(ii) provides that the terms of the Non-SRO Voting Representatives will begin on a staggered basis with half of the Non-SRO Voting Representatives beginning their term with the First Quarterly Meeting of the Operating Committee and half beginning their term with the Third Quarterly Meeting. However, Section 4.2(b)(iii) also states that, although the official term for certain of the Non-SRO Voting Representatives will not begin until the Third Quarterly Meeting, these Non-SRO Voting Representatives will temporarily serve on the Operating Committee, including having voting rights, before the official commencement of their terms and may be selected for a second full

[288] See RBC Letter, supra note 30, at 4; BlackRock Letter I, supra note 247, at 2; BlackRock Letter II, supra note 30, at 1–2; ICI Letter II, supra note 31, at 2; Data Boiler Letter I, supra note 31, at 31.

term. Therefore, all Non-SRO Voting Representatives will participate in, and have votes on, the Operating Committee as of the First Quarterly Meeting, even though the official term for half of the Non-SRO Voting Representatives will not begin to run until the Third Quarterly Meeting. Thus, the expiration of the Non-SRO Voting Representatives' terms will be staggered by approximately six months pursuant to this scheme.

In response to comments recommending that the terms of Non-SRO Voting Representatives be staggered by at least one or two years to ensure continuity and consistency in representation,[289] the Commission believes that the scheme for staggered terms proposed in the CT Plan, in combination with the Commission's modifications to the CT Plan's provisions regarding term length and term limits for Non-SRO Voting Representatives, as discussed above, appropriately balances the goal of continuity of service among Non-SRO Voting Representatives with the goal of providing for a rotation of Non-SRO Voting Representatives over time to help ensure a diversity of non-SRO viewpoints on the CT Plan Operating Committee. While it is possible that every Non-SRO Voting Representative would serve two three-year terms, leading to complete turnover among those representatives over the course of a single year in the future, it is also possible that the terms of Non-SRO Voting Representatives will, over time, naturally become staggered as some representatives serve single terms or, for personal or business reasons, do not complete a full term. Moreover, prescribing a significant staggering of terms at the outset of CT Plan operations would require granting materially longer initial terms to certain categories of Non-SRO Voting Representatives and materially shorter initial terms to others, without a

[289] See BlackRock Letter I, supra note 247, at 2; MEMX Letter, supra note 30, at 3; Data Boiler Letter I, supra note 31, at 28.

meaningful distinction on which to base that disparity. Therefore, the Commission is not modifying the approach proposed in the CT Plan.

Finally, one commenter argues that the Non-SRO Voting Representatives should be empowered to participate in the governance of the current Equity Data Plans, as soon as those representatives are selected.[290] While the Commission believes that adding the perspectives of Non-Voting SRO Representatives will be an important improvement to the governance structure for equity market data, the Commission does not believe that adding the Non-SRO Voting Representatives to the operating committees of the currently existing Equity Data Plans can be accomplished in the context of approving the proposed CT Plan or under the auspices of the Governance Order. The Commission agrees, however, that the input of Non-SRO Voting Representatives should be included in the governance of consolidated equity market data plans as soon as practicable, and the Commission has, as discussed above,[291] sought to address this issue by adding deadlines to the CT Plan for the achievement of the steps necessary for implementation.

For the reasons discussed above, the Commission is approving the provisions of Article IV, Section 4.2(b) of the CT Plan that govern the terms of members of the Operating Committee as modified.

(D) Process for Selecting Non-SRO Voting Representatives

Article IV, Section 4.2(b)(i) provides that the initial Non-SRO Voting Representatives will be selected by a majority vote of the then-current members of the Advisory Committee. This

[290] See RBC Letter, supra note 30, at 4.

[291] See supra Section II.C.1(a).

section further provides that the Advisory Committee Members will follow the procedures set forth in the CT Plan applicable for selection of Non-SRO Voting Representatives for those whose terms are expiring for selection of the initial Non-SRO Voting Representatives.[292]

The Commission is modifying this Section to expressly permit Advisory Committee Members to nominate themselves to serve as Non-SRO Voting Representatives regardless of their length of service on the Advisory Committee, as well as to nominate other candidates. As proposed, under the procedure in Section 4.2(b)(v), although the Advisory Committee Members would be permitted to nominate themselves, only Members would be permitted to nominate other candidates. The Commission finds that it is appropriate to allow the Advisory Committee Members to nominate candidates, in addition to themselves, because the Advisory Committee Members have the background, based on their experience with the Equity Data Plans, to select nominees from the industry who have the knowledge that is essential to effectively serve on the Operating Committee. The Commission also finds that it is appropriate to the modify the CT Plan to expressly state that Advisory Committee Members may nominate themselves, regardless of the length of their prior service, because service in an advisory capacity under the Equity Data Plans should not preclude a person's eligibility to serve on the CT Plan's Operating Committee as a voting representative under the CT Plan. To provide otherwise could prevent candidates who have direct experience with the operation of an NMS plan for consolidated equity market data, and who could provide continuity of ideas on the initial CT Plan Operating Committee, from being considered for Non-SRO Voting Representative positions. For these reasons, the Commission is approving Article IV, Section 4.2(b)(i) as modified.

[292] See Article IV, Section 4.2(b)(i) of the CT Plan.

Article IV, Section 4.2(b)(v) proposes a procedure for nominating and electing Non-SRO Voting Representatives following their initial selection. Pursuant to the proposed procedure, the Operating Committee must post a notice on its website seeking nominations from the public for an upcoming position at least two months prior to the expiration of a Non-SRO Voting Representative's term. Members may submit individuals for consideration, and Non-SRO Voting Representatives may nominate themselves if they have not already served their maximum term.[293] The Non-SRO Voting Representatives will review the nominations and confirm by majority vote that a nominated individual meets the requirements for the category up for election at least one month prior to expiration of the term for the position to be filled.[294] Within a week of the Non-SRO Voting Representatives' confirmation of eligible nominees, the Operating Committee must post the list of nominees on its website and solicit comment from the public.[295] The Non-SRO Voting Representatives will then consider and discuss the comments received and elect an individual by majority vote.[296] In the event that no nominee receives a majority vote, the individual with the lowest number of votes will be eliminated from consideration, and a new vote will be taken. The Non-SRO Voting Representatives will repeat this process until an individual receives a majority vote.[297] Because Non-SRO Voting Representatives are elected to represent a category of market participants, in the event representatives leave their jobs or change duties such that they are in a position unrelated to the category that they represent, they must submit

---

293 See Article IV, Section 4.2(b)(v)(A) of the CT Plan.

294 See Article IV, Section 4.2(b)(v)(B) of the CT Plan.

295 See Article IV, Section 4.2(b)(v)(C) of the CT Plan. The Non-SRO Voting Representative will screen the comments for appropriateness prior to their posting on the LLC's website. See id.

296 See id. Non-SRO Voting Representatives whose terms are expiring may vote in an election for an open position, provided they are not nominees for the position. See Article IV, Section 4.2(b)(v)(D) of the CT Plan.

297 See Article IV, Section 4.2(b)(v)(E) of the CT Plan.

their resignation to the Chair of the Operating Committee. If representatives do not tender their resignation under such circumstances, they may be removed upon a vote of the Operating Committee.[298] Each Non-SRO Voting Representative must agree in writing to comply with the provisions of the CT Plan relating to conflicts of interests[299] and confidentiality.[300]

The Commission is modifying Article IV, Section 4.2(b)(v)(A) of the CT Plan in three respects. First, the Commission modifying this section to provide that SRO Voting Representatives, rather than Members, will be permitted to submit names for consideration for open Non-SRO Voting Representative positions.[301] The Commission finds that this modification is appropriate because, while the Members of the CT Plan are the SRO entities, the CT Plan generally is organized such that it is the SRO Voting Representatives that act on behalf of the SROs in the operation of the CT Plan.

Second, the Commission is modifying this provision to permit Non-SRO Voting Representatives to submit the names of individuals for consideration during the nominating process. The Commission finds that this modification is appropriate because it permits the Non-SRO Voting Representatives to use the same process as SRO Voting Representatives to nominate candidates for consideration to fill open Non-SRO Voting Representative positions. Without this modification, Non-SRO Voting Representatives would need to use the public

---

298 See Article IV, Section 4.2(b)(vi) of the CT Plan. The proposed CT Plan provides that if a Non-SRO Voting Representative resigns or is removed from the Operating Committee, a replacement will be selected by a majority vote of the then-serving Non-SRO Voting Representatives, and will serve out the remainder of the term. If the remainder of the term is less than a year, the individual will serve an additional two-year term, and if the remainder of the term is more than one year, the selection process outlined in Section 4.2(b)(v) will be followed. See Article IV, Section 4.2(b)(vii) of the CT Plan.

299 See Article IV, Section 4.10 and Exhibit B of the CT Plan.

300 See Exhibit C of the CT Plan.

301 The Commission is also making a non-substantive change to this Section of the CT Plan to insert "the names of" before "individuals" for clarity.

process to nominate candidates, while the SRO Voting Representatives could directly nominate candidates. The Commission does not believe that such asymmetrical treatment of members of the Operating Committee is justified.

Third, the Commission is modifying this provision to replace the language that permits Non-SRO Voting Representatives to nominate themselves "if they have not served the maximum number of terms" with the phrase "if they are not then completing a second consecutive term." The Commission finds that this modification is appropriate because Non-SRO Voting Representatives cannot serve more than two consecutive three-year terms and they therefore cannot nominate themselves to serve if they are completing a second consecutive term.[302]

One commenter states that Non-SRO Voting Representative seats should go to whoever can contribute to positive innovations in market data infrastructure, and questions whether allowing Non-SRO Voting Representatives to nominate themselves would further this end.[303] The Commission does not share this concern because it believes that non-SRO market participants—for whom equity market data is a crucial aspect of business operations—will have a strong interest in the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of consolidated equity market data. Thus, the Commission believes that it will be in the Non-SRO Voting Representatives' interest to select persons to serve on the Operating Committee who will further advance improvements and innovations in market data infrastructure. And the Commission further believes that the public process for nominations, and the turnover of Non-SRO Voting Representatives required by the term limits included in the CT

---

302 See supra Section II.C.5(b)(ii)(C).

303 See Data Boiler Letter I, supra note 31, at 31, 32. This commenter also questions whether there would be a bias toward top elite firms, see Data Boiler Letter II, supra note 101, at 1, and states Non-SRO Voting Representatives should earn their seats by bringing in new and useful innovation, and if they do not do so, they should not be granted a seat regardless of how many terms or years they have served. See id. at 32.

Plan, will help ensure that no set of individuals becomes permanently entrenched as Non-SRO Voting Representatives by virtue of the ability to nominate themselves.

Another commenter states that the ability of Non-SRO Voting Representatives to select themselves without SRO approval is inconsistent with the statutory authorization for the national market system under Section 11A and Rule 608, as well as with the authority granted to SROs under Sections 6 and 19 of the Act.[304] As previously stated, the Commission believes that it has broad authority under Section 11A of the Act to grant non-SROs voting rights with regard to the governance of the CT Plan. The Commission believes that the requirement that non-SRO members of the Operating Committee collectively select replacement non-SRO members will help to ensure that the individuals selected will represent their constituencies' views on important market data issues, and that the most effective and knowledgeable advocates for their views will serve on the Operating Committee.

For the reasons discussed above, the Commission is approving the provisions of Article IV, Section 4.2(b)(v) as modified.

(iii) SRO Applicant Observers

Article IV, Section 4.2(c) of the CT Plan provides that entities that have not yet been registered with the Commission as national securities exchanges may appoint an individual to attend regularly scheduled Operating Committee Meetings (an "SRO Applicant Observer") if such an entity has submitted, and the Commission has published, a Form 1 to be registered as a

[304] See Nasdaq Letter I, supra note 20, at 19; Nasdaq Letter II, supra note 49, at 1. See also MFA Letter, supra note 30, at 3. The Commission believes that in its comment letter, MFA may have misunderstood the proposed CT Plan to permit the SROs to exclusively select the Non-SRO Voting Representatives. As a result, MFA opposes providing such authority to the SROs and suggests alternatives for more equitable selection of Non-SRO Voting Representatives. See id. at 3. However, in fact, it is the Non-SRO Voting Representatives that exclusively select the Non-SRO Voting Representatives. See Article IV, Section 4.2(b)(iv) of the CT Plan.

national securities exchange or national securities association, or if such an entity is a national securities exchange that is not a Member and the Commission has published the exchange's proposed rule change to operate a Market.[305] The CT Plan further provides that if the SRO Applicant's Form 1 or proposed rule change is withdrawn, returned, or otherwise not actively pending before the Commission, the SRO Applicant will no longer be permitted to attend Operating Committee meetings.[306]

The Commission finds that is reasonable to allow an entity to attend meetings of the Operating Committee as a non-voting observer when it has filed a Form 1 or proposed rule change to operate a Market and the Commission has published notice of that filing. The Commission believes that attending meetings of the Operating Committee as an observer will allow an equities market pending registration to be aware of and familiarize itself with issues before the Operating Committee before it becomes a national securities exchange or national securities association. The Commission received no comments on Section 4.2(c) of the CT Plan and is approving this Section as proposed.

(iv) Prohibiting Voting by Non-Operational Equity Trading Venues

The CT Plan provides that in the event that a Non-Affiliated SRO, or that all national securities exchanges in an SRO Group, cease operations as a market (or have not commenced operation of a market), those entities will not be permitted to appoint an SRO Voting Representative. Such a Non-Affiliated SRO or SRO Group will, however, be permitted to attend

[305] See Article IV, Section 4.2(c) of the CT Plan. The SRO Applicant may select an alternate to act on behalf of the SRO Applicant in his or her absence. See id.

[306] See id.

meetings of the Operating Committee as an observer, except for Executive Sessions.[307] If such a Non-Affiliated SRO or SRO Group does not commence operations within six months of attending the first Operating Committee as a non-operational exchange(s), it will no longer be permitted to attend Operating Committee meetings until it resumes operations as a market.[308]

The Commission did not receive any comments on this provision of the CT Plan. The Commission believes that this provision will help ensure that only those SROs that are contributing to the generation or collection of the core data disseminated by the CT Plan will have a vote on CT Plan decisions. Accordingly, the Commission is approving the provision as proposed.

(c) Operating Committee Action / Voting Structure

Article IV, Section 4.3 of the CT Plan sets forth the voting allocation and voting structure for actions of the Operating Committee.

(i) Allocation of Votes to the SROs

Article IV, Section 4.3(a)(i) provides that each SRO Voting Representative will have one vote to cast on behalf of the SRO Group or Non-Affiliated SRO that he or she represents with a second vote provided if the SRO Group or Non-Affiliated SRO has a market center or centers that trade more than 15 percent of consolidated equity market share[309] for four of the six consecutive months preceding a vote of the Operating Committee.[310]

---

307 See Article IV, Section 4.2(d) of the CT Plan.

308 See id.

309 Article IV, Section 4.3(a)(i) of the CT Plan defines "consolidated equity market share" as the average daily dollar equity trading volume of Eligible Securities of an SRO Group or Non-Affiliated SRO as a percentage of the average daily trading volume of all the SRO Groups and Non-Affiliated SROs.

310 Article IV, Section 4.3(a)(i) of the CT Plan states that FINRA is not considered a market center under this section of the proposed CT Plan solely by virtue of facilitating trades through any trade reporting facility that

Several commenters object to the proposed allocation of voting rights.[311] One commenter argues that the CT Plan's provisions for SRO group voting violate the Act and that the concept of "exchange groups" is found nowhere in the Act.[312] Another commenter argues that the proposed exchange-group structure for SRO voting would impermissibly impair the ability of SROs to act jointly in administering the CT Plan and is inconsistent with both the Act and Rule 608.[313] This commenter further argues that the proposed allocation would dilute each affiliated exchange's voting power relative to unaffiliated exchanges[314] and that limiting votes to exchange groups would be a change from the Commission's "long-standing practice of treating each SRO individually for regulatory purposes, regardless of its corporate affiliation with other SROs."[315] This commenter also opposes tying the number of votes cast by each Non-Affiliated SRO and SRO Group to market share, arguing that an SRO's statutory responsibilities "bear no relationship to its market share,"[316] and specifically opposes the proposed 15% threshold as well, stating that it is "arbitrary and may quickly become meaningless."[317]

FINRA operates in affiliation with a national securities designed to report transactions otherwise than on an exchange.

311 See Cboe Letter, supra note 17, at 4; NYSE Letter I, supra note 18, at 8; NYSE Letter II, supra note 19, at 3; Nasdaq Letter I, supra note 20, at 1–2 (attaching and incorporating by reference all arguments made by Petitioners in their opening brief challenging the Governance Order). The Commission has responded to the arguments made by Nasdaq in their brief in its own brief before the U.S. Circuit Court for the District of Columbia Circuit. See Brief for the Respondent, Securities and Exchange Commission, The Nasdaq Stock Market, et al. v. Securities and Exchange Commission (Case No. 20-1181) (D.C. Cir. 2020).

312 See Cboe Letter, supra note 17, at 4.

313 See NYSE Letter I, supra note 18, at 8; NYSE Letter II, supra note 19, at 3.

314 See NYSE Letter I, supra note 18, at 10.

315 Id. at 9. NYSE provides examples of the Commission's practice of treating individual exchanges separately, including its requirements for separate pools of liquidity, separate fee schedules, and separate proposed rule changes. See id. at 9–10.

316 Id. at 9 ("An SRO with 1% market share has the same obligations as one with 18% market share, yet under the [CT] Plan's voting structure, the latter SRO would have double the votes of the former.").

317 Id.

While one commenter argues that the concept of an exchange group is not created by statute or rule,[318] there is no statutory or regulatory provision that mandates "one SRO, one vote" either. Individual exchanges that historically had only one vote on NMS plans are now a part of groups that can control blocs of four or five votes. As the Commission stated in the Governance Order, "in its oversight of the Equity Data Plans, [it] is unaware of an individual affiliated exchange member" ever having "cast its vote differently than the votes cast by its affiliated exchanges."[319] Further, in response to the comment that the proposed allocation would dilute each affiliated exchange's voting power relative to unaffiliated exchanges, the Commission believes that this bloc voting has diluted the voting power of unaffiliated SROs over time, and that this concentration of "voting power in a small number of exchange group stakeholders, which also have inherent conflicts of interest," has "perpetuated disincentives for the Equity Data Plans to make improvements to the SIP data products."[320]

The Commission also disagrees with the comment that the Commission has treated affiliated exchanges as separate entities for regulatory purposes in the past, and therefore, should not treat them as a group for purposes of voting on the CT Plan's Operating Committee. The Commission agrees that each SRO has individual obligations with respect to compliance with its responsibility pursuant to Sections 6, 15A, 17, and 19 of the Act to comply with the statutory and regulatory requirements that apply to its operation and self-regulation of its individual market center.[321] But both the applicable legal requirements and the function being performed here by the SROs differ in the context of the responsibility of the SROs to jointly operate the NMS plans

---

318 See supra note 312 and accompanying text.

319 Governance Order, supra note 8, 85 FR at 28713.

320 Id.

321 15 U.S.C. 78f; 15 U.S.C. 78o-3; 15 U.S.C. 78q; 15 U.S.C. 78s.

pursuant to Section 11A of the Act and to disseminate consolidated market data, to which different SROs may contribute in varying degrees. The Commission therefore believes that it is appropriate to approach this circumstance differently. And, for the reasons discussed, the Commission finds it appropriate to treat affiliated exchanges under common management and control as one SRO Group limited to one vote, or at most two, in the context of NMS plan governance.

Moreover, the Commission's treatment of corporate affiliations varies based on the particular facts and circumstances and regulatory implications and concerns. Sometimes, the Commission treats affiliated entities independently. Other times, the Commission takes into account corporate relationships when deciding how to regulate.[322] Because 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.

The Commission believes that reallocating votes by SRO Group should help to ensure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information. The Commission disagrees that the proposed exchange-group structure for SRO voting would impermissibly impair the ability of

---

322 See, e.g., Securities Exchange Act Release Nos. 90209 (Oct. 15, 2020), 85 FR 67044, 67047–48 (Oct. 21, 2020), pet. for review docketed, No. 20-1470 (D.C. Cir. 2021) (Commission action concluding that an asset, service, or function may be a "facility" of an exchange despite being owned or operated by a legal entity other than the particular entity holding the exchange license); 39086 (Sept. 17, 1997), 62 FR 50036 (Sept. 24, 1997) (similar).

SROs to act jointly in administering the CT Plan and is inconsistent with both the Act and Rule 608. The Commission believes, as it stated in the Governance Order, that the allocation of voting power to exchanges, either individually or in groups, based on common management or control falls within its statutory authority under Section 11A of the Act.[323]

In response to the comment that objects to tying market share to the number of votes an SRO Group or Non-Affiliated SRO is allocated, arguing that an SRO's regulatory responsibilities have no bearing on market share of the SRO,[324] the Commission disagrees, because using a threshold amount of consolidated equity market share of more than 15 percent over a specified period of time to provide a second vote to an SRO Group or Non-Affiliated SRO reflects the significance within the national market system of those exchanges that, in their roles as SROs, oversee trading activity that generates a significant amount of equity market data.

For the reasons stated above, the Commission is approving Sections 4.3(a)(i) as proposed.

(ii) Allocation of Votes to Non-SROs[325]

Article IV, Section 4.3(a)(ii) provides that, at all times, the Non-SRO Voting Representatives will have one-half the aggregate number of votes that the SRO Voting Representatives have. In other words, the SRO Voting Representatives will, in aggregate, have two-thirds of the voting power on the Operating Committee, and the Non-SRO Voting Representatives will, in aggregate, have one-third of the voting power. The number of votes

---

323 See Brief for the Respondent, Securities and Exchange Commission, The Nasdaq Stock Market, et al. v. Securities and Exchange Commission (Case No. 20-1181) (D.C. Cir. 2021).

324 See NYSE Letter I, supra note 18, at 9.

325 See also supra Section II.C.5(b)(ii) (discussing Non-SRO Voting Representatives' participation on the Operating Committee).

attributed to the Non-SRO Voting Representatives will increase or decrease as necessary to preserve this ratio, in fractional share if necessary.

One commenter expresses support for the allocation of voting power on the Operating Committee as proposed in Sections 4.3(a)(i) and (ii), stating that the proposed allocation of voting power between the Non-SRO Voting Representatives and SRO Voting Representatives is consistent with the Act and the Governance Order.[326] Another commenter suggests that there should be "consideration to increase Non-SRO representation if SROs on the [Operating Committee] increases or perhaps adjusted if the 'weight' of the user community increase/decreases in certain categories."[327] In response, the Commission notes that the number of votes for Non-SRO Voting Representatives will always be one-half of the SRO Voting Representatives' votes. Therefore, if the number of SRO Voting Representatives, and their aggregates votes, increases, the votes of the Non-SRO Voting Representatives will similarly increase.

The Commission believes that 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. Accordingly, the Commission is approving Article IV, Sections 4.3(a)(ii) as proposed.

(iii) Operating Committee Actions and Voting

Article IV, Section 4.3(b) of the CT Plan provides that, with limited exceptions, action by the Operating Committee requires an "augmented majority vote," meaning a two-thirds majority

[326] See ICI Letter II, supra note 31, at 1–2.

[327] Data Boiler Letter I, supra note 31, at 28.

of all votes on the Operating Committee, provided that this vote also includes a majority of the SRO Voting Representative votes. And Article IV, Section 4.3(c) provides that the only Operating Committee actions that would not require an augmented majority vote are: (1) the selection of Non-SRO Voting Representatives[328]; (2) the decision to enter into Executive Session[329]; (3) decisions concerning the operation of the Company as an LLC[330]; (4) modifications to LLC-related provisions of the Agreement pursuant to Section 13.5 of the CT Plan[331]; and (5) the selection of Officers of the Company, other than the Chair, pursuant to Section 4.8.[332]

The Commission received comments on this aspect of the CT Plan. One commenter expressly supports requiring an augmented majority vote that requires at least two-thirds of the votes of SRO Voting Representatives and Non-SRO Voting Representatives, and a majority of the SRO Voting Representatives' votes.[333] Another commenter recommends that the

---

328 See Article IV, Section 4.2(b) of the CT Plan (providing that Non-SRO Voting Representatives will be selected by a majority vote of the then-serving Non-SRO Voting Representatives).

329 See Article IV, Section 4.4(g) of the CT Plan (providing that the decision to enter into Executive Session will be subject to a majority vote of the SRO Voting Representatives).

330 See Article X, Section 10.3 of the CT Plan (providing that any compromise or settlement of any tax audit or litigation affecting members, as well as any material proposed inaction or election to be taken by the Partnership Representative, require a majority vote of Members); and Article XI, Section 11.2 of the CT Plan (providing that the distribution of proceeds from the liquidation of the Company to Members is subject to a majority vote of the Members).

331 See Article XIII, Section 13.5(b) of the CT Plan (providing that Articles IX, X, XI, and XII may be modified upon approval by a majority of Members).

332 See Article IV, Section 4.8 of the CT Plan (providing that, the Members may, from time to time, designate and appoint one or more persons as an Officer of the Company by a majority vote of the Members).

333 See Data Boiler Letter I, supra note 31, at 30. This commenter, however, expresses concern that "numbers are always a problem as SRO counts increase as exchanges are added or merged, whereas Non-SRO counts stay at six." Id. at 30. This commenter also states that dividing the voting rights two-thirds and one-third between SROs and Non-SROs "may result in a divide along partisan line…only passing trivia matters" and the "division would lead the SIP to run astray because of the bureaucracy." Id. at 4, 13, 30. See also Data Boiler Letter II, supra note 101, at 1.

Commission amend the existing Equity Data Plans to adopt augmented majority voting.[334] One commenter states that the CT Plan does not address instances where recusal of a Non-SRO Voting Representative would result in the Non-SROs having less than one third of the aggregate votes of the Operating Committee and "strongly suggest[s]" that the CT Plan be amended to provide that the votes of the Non-SROs will always equal one-third of the votes of the Operating Committee, even if one or more Non-SRO representatives has recused.[335] Another commenter expresses concern about the proposed augmented majority voting scheme, particularly as it would be applied to Operating Committee actions, such as interpreting the CT Plan's provisions.[336] This commenter believes that the augmented voting requirement should apply to the SROs only to the extent needed to carry out their explicit regulatory obligations under the law, rather than to meet general responsibilities under the Plan.[337]

Other commenters state that the augmented majority vote will interfere with the SROs ability to comply with the Act.[338] One commenter argues that the "Commission's mandate that votes be allocated by exchange group would prevent SROs from fulfilling their duty under the Act to act jointly to implement the CT Plan. This is because that voting structure could result in a situation where actions and plan amendments might be approved by the individuals representing

---

334 See RBC Letter, supra note 30, at 4.

335 Virtu Letter, supra note 30, at 7.

336 See RBC Letter, supra note 30, at 6–7.

337 See id. This commenter further suggests that "the proposed Plan specify the limited matters requiring augmented voting, and state that all other matters – including procedural votes thereon – are to be decided by majority vote of the Operating Committee. This simple majority standard should also extend to any votes requiring a quorum. Otherwise, the SROs would have the ability to thwart decisions of the Operating Committee by denying the Operating Committee a quorum." Id.

338 See Nasdaq Letter I, supra note 20, at 1–2 (attaching and incorporating by reference all arguments made by Petitioners in their opening brief challenging the Governance Order). The Commission responded to the arguments made by Nasdaq in their brief. See Brief for the Respondent, Securities and Exchange Commission, The Nasdaq Stock Market, et al. v. Securities and Exchange Commission (Case No. 20-1181) (D.C. Cir. 2021).

non-SROs and a minority of the SROs, even if those actions or amendments were opposed by a majority of the individual SROs."[339] Another commenter echoes this concern stating, "it is feasible that a minority of individual SROs would be able to adopt proposals over the objection of a majority of individual SROs" under the proposed augmented majority voting scheme, and consequently, "it would be possible for the non-SRO voting representatives and a minority of Non-Affiliated SROs to force through plan actions and amendments without the assent of a majority of individual SROs."[340] This commenter further states that allowing the CT Plan Operating Committee to act with only the concurrence of a minority of the individual SROs would subvert the ability of the SROs to act jointly pursuant to Section 11A.[341]

Contrary to commenters' concerns, and as explained in the Governance Order, the Commission believes that the requirement for an augmented majority vote strikes an appropriate balance between the plan receiving meaningful input from a broad range of stakeholders while also providing the SROs with voting power to help ensure that Plan actions meet the requirements of Section 11A of the Act and Rule 608 of Regulation NMS. Specifically, the proposed augmented majority voting structure provides the SROs in the aggregate with two-thirds of the voting power on the operating committee—and non-SRO members of the Operating Committee in aggregate with one-third of the voting power—with proportionate fractional votes allocated to non-SRO members of the Operating Committee as necessary to preserve this ratio at all times. Further, as proposed, an "augmented majority vote," requires a two-thirds majority of all votes on the Operating Committee, provided that this vote also includes a majority of the votes allocated to the SROs.

---

339 Cboe Letter, supra note 17, at 4 (emphasis in original).

340 NYSE Letter I, supra note 18, at 8–9; see also NYSE Letter II, supra note 19, at 3.

341 See NYSE Letter I, supra note 18, at 9; NYSE Letter II, supra note 19, at 3.

In response to those comments that the augmented majority vote could result in a scenario in which a proposal is adopted with the support of a supermajority of votes on the Operating Committee and a majority of the votes allocated to the SROs, but without the support of a majority of the individual exchanges,[342] the Commission notes, as it did in the Governance Order,[343] that this outcome is intended to be permissible. The Commission believes that in order to break the voting monopoly currently held by the three SRO Groups, and give non-SROs a meaningful voice on the Operating Committee, requiring that plan action be supported by a supermajority of the Operating Committee (which would include a majority of the votes allocated to SROs along with sufficient non-SRO votes to achieve the supermajority), and that it not be constrained by the votes of one or two SRO Groups, is appropriate.

In response to comments that suggest modifications to the voting allocation between SRO Voting Representatives and Non-SRO Voting Representatives to account for a recusal by a Non-SRO Voting Representative or a change in the number of SROs Members,[344] the Commission does not believe it is necessary to modify the CT Plan. In the event a Non-SRO Voting Representative must recuse itself pursuant to the terms of the CT Plan, proposed Article IV, Section 4.4(c) provides that if a Voting Representative is recused, he or she will not count in the calculation to determine if there is a quorum necessary for the Operating Committee to vote.[345]

For the reasons stated above, the Commission is approving Article IV, Section 4.3(b) of the CT Plan as proposed. The Commission is, however, modifying Section 4.3(c) of the CT Plan to limit the circumstances in which the Operating Committee could act without an augmented

---

342 See Cboe Letter, supra note 17, at 4; NYSE Letter I, supra note 18, at 9; NYSE Letter II, supra note 19, at 3.

343 See Governance Order, supra note 8, 85 FR at 28713.

344 See Virtu Letter, supra note 30, at 7; Data Boiler Letter I, supra note 31, at 30.

345 See Article IV, Section 4.4(c) of the CT Plan.

majority vote. Specifically, for the reasons discussed in Section II.C.5(d)(iii), infra, the Commission is modifying Section 4.3(c)(ii) of the CT Plan to provide that an augmented majority vote is required before a topic not specifically listed in Section 4.4(g)(i) of the CT Plan as appropriate for discussion in Executive Session may be discussed in Executive Session. In addition, for the reasons discussed in Section II.C.12(e), infra, the Commission is modifying Section 4.3(c) of the CT Plan to delete the reference to modifications to LLC-related provisions of the Agreement pursuant to Section 13.5(b) of the CT Plan, as well as, for the reasons discussed in Section II.C.5(h), infra, the reference to the selection of Officers, other than the Chair, pursuant to Section 4.8 of the CT Plan, as circumstances where an augmented majority vote is not required.

For the reasons discussed, the Commission is approving Section 4.3 of the CT Plan as modified.

(d) Meetings of the Operating Committee

Article IV, Section 4.4 of the CT Plan addresses meetings of the Operating Committee.

(i) Conduct of Meetings and Attendance

Section 4.4(a) provides that meetings of the Operating Committee may be attended by the Voting Representatives, Member Observers, SRO Applicant Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee.[346] As proposed, Member Observers would be entitled to receive notice of all meetings of the Company and to attend and participate in any discussion, but would not be entitled to vote on any matter.[347]

---

[346] The time and location of meetings will be determined by the Operating Committee. See Article IV, Section 4.4(a) of the CT Plan. The location of meetings will be in a location capable of holding the number of attendees of such meetings, or such other locations as may from time to time be determined by the Operating Committee. See Article IV, Section 4.4(e) of the CT Plan.

[347] See Article IV, Section 4.4(a) of the CT Plan.

As discussed above,[348] in Article I, Section 1.1(oo) of the CT Plan, the exchanges have proposed to define a new type of individual, a Member Observer, who may attend meetings of the CT Plan. As proposed, a Member Observer would be an "individual other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member's compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings."[349] In the Notice, the Commission solicited commenters' views on whether an SRO would reasonably find it necessary to select a Member Observer to comply with its obligations under Rule 608(c) of Regulation NMS and under what circumstances, if any, the representation of an SRO on the Operating Committee by its selected SRO Voting Representative would be an insufficient means for the SRO to fulfill its obligations under Rule 608 of Regulation NMS.[350] The Commission also asked whether persons who hold certain positions within an SRO should be prohibited from serving as Member Observers, and whether, if Member Observers are necessary, only persons who perform certain roles within an SRO (e.g., legal or compliance personnel) should be able to serve as Member Observers.[351] Lastly, the Commission solicited further comment on whether the CT Plan should limit the number of Member Observers that each SRO would be permitted to name or the frequency with which the person serving as a Member Observer can be changed.[352]

---

348 See supra Section II.C.2.

349 See Notice, supra note 3, 85 FR at 64576.

350 See id. at 64568.

351 See id.

352 See id.

In response to the questions in the Notice, the Commission received several comment letters regarding the proposed inclusion of Member Observers.[353] Several commenters support including Member Observers in the CT Plan.[354] Specifically, one commenter supports including Member Observers to "account for the practical realities involved with the day-to-day operation of, and the SROs' participation in, the Equity Market Data Plans, which will be equally as relevant for the CT Plan if it is approved."[355] The commenter explains that Member Observers are necessary because the SRO Voting Representative collaborates with others within their organization to make the best and most informed decisions, acknowledging that, while the SRO Voting Representative may cast the vote, staff and senior management from various departments within the organization provide input into decisions made, as needed.[356] Another commenter that supports permitting SROs to designate Member Observers describes the SRO Voting Representative as a generalist and states that the SRO Voting Representative may be asked to opine on a wide variety of topics (legal, technical, regulatory, system, and business matters) that require the expertise of specialists in those areas.[357] This commenter states that most Member Observers would be employees of the Member charged with that Member's compliance obligations under Rule 608(c).[358] This commenter also states that other Member Observers may

---

353 See FINRA Letter I, supra note 257, at 4; Nasdaq Letter I, supra note 18, at 6, 13–14; NYSE Letter I, supra note 18, at 38; ICI Letter I, supra note 31, at 4; BMO Letter I, supra note 30, at 4; SIFMA Letter I, supra note 30, at 4–5; MFA Letter, supra note 30, at 4; Schwab Letter I, supra note 30, at 5; BlackRock Letter I, supra note 247, at 4–5; Fidelity Letter, supra note 30, at 5; RBC Letter, supra note 30, at 7; Data Boiler Letter I, supra note 31, at 5.

354 See FINRA Letter I, supra note 257, at 2-3; Nasdaq Letter I, supra note 20, at 26-27; Fidelity Letter, supra note 30, at 5; ICI Letter I, supra note 31, at 4; SIFMA Letter I, supra note 30, at 4.

355 FINRA Letter I, supra note 257, at 3.

356 See id.

357 See Nasdaq Letter I, supra note 20, at 14.

358 See id. at 27.

be outside counsel, experts reporting to counsel, or other individuals advising the Member on compliance or other obligations.[359] Another commenter contends that whether the SROs should be permitted to have Member Observers is a decision for the SROs to make, not the Commission, stating that, while the Commission has a role in supervising and enforcing SRO obligations, Commission rules establish that the SROs make operational decisions such as these.[360]

Some commenters state that it would be inappropriate to restrict Member Observers to those who serve a particular role in the SRO, to limit the number of Member Observers that an SRO could name, or to limit the frequency with which such appointment of Member Observers could be changed.[361] Two commenters argue that such limitations would be arbitrary, as there is no way to predict when expert assistance may be necessary, and they further assert that such restrictions would not provide any benefit and would otherwise restrict the SROs' ability to make decisions about how to fulfill their regulatory responsibilities.[362] One commenter argues that any restrictions on the ability to call on such expertise when needed would interfere with the ability of the Operating Committee to address complex legal, regulatory, and technical issues as they arise.[363] While one commenter does not recommend limiting the number of Member Observers permitted, it suggests that the Operating Committee members provide a reasonable basis for

---

359 See id.

360 See NYSE Letter I, supra note 18, at 38–39.

361 See FINRA Letter I, supra note 257, at 4; Nasdaq Letter I, supra note 20, at 27; ICI Letter I, supra note 31, at 5.

362 See FINRA Letter I, supra note 257, at 4; Nasdaq Letter I, supra note 20, at 27.

363 See Nasdaq Letter I, supra note 20, at 14.

inviting Member Observers, taking into account criteria such as the person's area of expertise, potential or actual conflicts of interest, and the Operating Committee's agenda for the meeting.[364]

The Commission also received several comment letters expressing concerns regarding Member Observers as proposed in the CT Plan.[365] One commenter states that without reasonable constraints, Member Observers may dilute the voice of Non-SRO Voting Representatives and enhance the SROs' ability to operate the CT Plan in their own interests instead of consistent with the statutory purposes for which the Plan exists.[366] One commenter states that Member Observers should be limited so that an SRO cannot "stack the deck" with multiple Member Observers.[367] Another commenter expresses concern that if Member Observers participate in Operating Committee meetings, it could exacerbate or create conflicts of interest and place the Non-SRO Voting Representatives at a competitive disadvantage, as they would not have a similar ability to consult with outside persons who have expertise in the matter being discussed.[368]

Several commenters state that Non-SRO Voting Representatives should also be permitted to invite observers to attend Operating Committee meetings, Executive Sessions, and subcommittee meetings.[369] These commenters argue that better informed colleagues could advise Non-SRO Voting Representatives before, during, and after Operating Committee meetings, resulting in more informed discussions. Specifically, one commenter states that permitting Non-

---

364 See ICI Letter I, supra note 31, at 5.

365 See ICI Letter I, supra note 31, at 4–5; BMO Letter, supra note 30, at 3–4; SIFMA Letter I, supra note 30, at 4; MFA Letter, supra note 30, at 4; BlackRock Letter I, supra note 247, at 4; Fidelity Letter, supra note 30, at 5; RBC Letter, supra note 30, at 7; Data Boiler Letter I, supra note 31, at 5.

366 See MFA Letter, supra note 30, at 4.

367 Data Boiler Letter I, supra note 31, at 6, 38.

368 See RBC Letter, supra note 30, at 8.

369 See ICI Letter I, supra note 31, at 5; ICI Letter II, supra note 31, at 2; Schwab Letter I, supra note 30, at 2; BlackRock Letter I, supra note 247, at 3; Fidelity Letter supra note 30, at 5; RBC Letter, supra note 30, at 7–8.

SRO observers would provide for broader participation, improve transparency, and enhance the quality of guidance, as well as assist in creating a pool of potential Non-SRO Voting Representatives.[370] One commenter recommends that the CT Plan provide all Voting Representatives with the ability to request an observer to participate in Operating Committee meetings, so long as the Voting Representative specifies the purpose for their inclusion, including the relevancy to the topic under discussion, and subject to the Operating Committee's approval.[371]

After careful consideration of the comments received, the Commission believes that it is appropriate for SROs to be permitted to designate Member Observers under the CT Plan. The Commission agrees that there may be instances in which an SRO Voting Representative will require input from, or benefit from collaboration with, individuals with specialized views, experience with day-to-day operations, or expertise (including legal, regulatory, and technical knowledge) who are not designated as the SRO Voting Representative in order to facilitate an SRO's compliance with its regulatory obligations with respect to the CT Plan.[372]

The Commission also finds that it is appropriate to modify the definition of Member Observer because the role of a Member Observer is intended to include certain individuals employed by the Member, or its counsel. Specifically, the Commission is modifying the definition of "Member Observer" in Section 1.1(oo) of CT Plan to remove the reference to "individual" and replace it with "employee of a Member" and adding "or any attorney to a

---

370 See BlackRock Letter I, supra note 247, at 3.

371 See RBC Letter, supra note 30, at 8–9.

372 The Commission further notes that Sections 4.4(a) and 4.7(b) of the CT Plan, respectively, permit other persons as deemed appropriate by the Operating Committee to attend general session meetings and subcommittee meetings.

Member" to provide for an employee or counsel that a Member determines is necessary in connection with the Member's compliance under Rule 608(c).[373] Additionally, because Member Observers are permitted to attend Operating Committee meetings and subcommittee meetings, the Commission is deleting "in its sole discretion" from the definition of Member Observer and adding language that would prohibit a Member from designating as a Member Observer an individual who is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary equity market data products (called "PDP" in the CT Plan)[374] offered to customers of the CT Feeds, consistent with the Commission's modifications to Section 4.10(b)(i).[375] Specifically, the Commission is adding the following clause to the definition of Member Observer: "provided that the designation of the Member Observer is consistent with the prohibition in Section 4.10(b)(i)." The Commission finds that this modification is appropriate to mitigate the effect of an SRO's conflicts of interests on the operation of the CT Plan. Specifically, to the extent that a Member offers proprietary market data products and designates an employee that has a financial interest that is tied directly to the Member's proprietary data business, that individual has an inherent conflict of interest and cannot be designated as a Member Observer.

In response to comments regarding Member Observer limitations, the Commission believes that, because it is difficult to predict who, when, and how many individuals may be called upon to assist with CT Plan related matters, it is appropriate not to limit the number of Member Observers an SRO may appoint. However, the Commission believes that participation

---

373 See Section 1.1(oo) of the CT Plan, as modified.

374 Section 1.1(fff) of Article I defines the term "PDP" as "a Member or non-Member's proprietary market data product that includes Transaction Reports and Quotation Information data in Eligible Securities from a Member's Market or a Trading Center, and if from a Member, is filed with the Commission."

375 See infra Section II.C.5(j)(iii).

of Member Observers in CT Plan meetings is appropriately limited by the requirement that appointment of a Member Observer be "necessary in connection with a Member's compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings."[376] The Commission further believes that this requirement, in addition to the provisions permitting other persons to attend CT Plan meetings as discussed below and the non-voting status of Member Observers, would reasonably preclude the SROs from diluting the role and contributions of Non-SRO Voting Representatives and bolstering their own agendas.

While the Commission believes it is appropriate to allow Member Observers to participate in Operating Committee meetings, the Commission is modifying Article IV, Section 4.4(a) to eliminate the requirement that the Operating Committee provide notice of all meetings of the Company to Member Observers. The Commission finds that this modification is appropriate because the proposed requirement would place an unnecessary burden on the Operating Committee, and believes that it is appropriate instead for the SROs, on whose behalf the Member Observers will attend Operating Committee meetings, to provide notice of meetings to their Member Observers. Additionally, the Commission is modifying this subsection to provide that Member Observers may not attend or participate in Operating Committee meetings if their attendance or participation would be inconsistent with the conflicts of interest provisions requiring recusal. The Commission finds that this modification is appropriate because it is consistent with, and serves the same purposes as, modifications the Commission is making to Article IV, Section 4.10(b), discussed below, which make the CT Plan's conflicts of interest

[376] Section 1.1(oo) of the CT Plan, as modified.

provisions applicable to Member Observers, just as they apply to SRO Voting Representatives and any alternate SRO Voting Representative.[377]

Finally, because Non-SRO Voting Representatives will serve on the Operating Committee in their individual capacity and do not have regulatory obligations paralleling those of the SROs, the Commission does not believe that Non-SRO Voting Representatives require a similar observer provision in the CT Plan. However, the Commission notes that Section 4.4(a) of the CT Plan permits other persons as deemed appropriate by the Operating Committee to attend Operating Committee meetings and that Section 4.7(b) of the CT Plan similarly permits other persons as deemed appropriate by the Operating Committee to attend subcommittee meetings.[378] The Commission believes that a Non-SRO Voting Representative may draw upon these provisions to seek the approval of the Operating Committee to permit attendance by an informed colleague or other person at a CT Plan meeting when the Non-SRO Voting Representative believes that discussion of a matter may benefit from that person's additional expertise or input.

For the reasons stated above, the Commission is approving Section 4.4(a), as modified.

(ii) The Chair of the Operating Committee

Article IV, Section 4.4(e) provides for the selection of a Chair of the Operating Committee. As proposed, a Chair will be elected from among the SRO Voting Representatives to serve a one-year term beginning on the date of the first quarterly meeting of the Operating Committee following the Operative Date.[379] An election to select the Chair of the Operating

---

[377] See Article IV, Section 4.10(b) of the CT Plan. See also infra Section II.C.5(j) (discussing the Commission's modification to the proposed CT Plan to make the recusal provisions of Article IV, Section 4.10(b) applicable to Member Observers and the rationale therefore).

[378] See Article IV, Sections 4.4(a) and 4.7(b) of the CT Plan.

[379] See Article IV, Section 4.4(e) of the CT Plan.

Committee will be held every year.[380] Pursuant to the CT Plan, to elect a Chair, the Operating Committee will elicit nominations for individuals to be considered for the Chair position.[381] If no candidate is elected by an augmented majority vote of the Operating Committee, the candidate with the lowest number of votes will be eliminated from consideration, and the Operating Committee will take another vote and repeat this process until a candidate is elected by an augmented majority vote of the Operating Committee.[382] In the event two candidates remain and neither is elected by an augmented majority vote of the Operating Committee, the candidate receiving the most votes from SRO Voting Representatives will be elected.[383] The Chair of the Operating Committee will have the authority to enter into contracts on the Company's behalf and otherwise bind the Company, but only as directed by the Operating Committee.[384] In addition, the Chair will designate a person to serve as Secretary of the Operating Committee to record minutes of each meeting.[385]

The Commission finds that the provisions governing the nomination of candidates and the selection of a Chair of the Operating Committee, as well as the proposed term for service as Chair, are appropriate. These provisions provide for a nomination and selection process that allows input from all members of the Operating Committee. The Commission further believes that a one-year term will allow for frequent rotation of the duties and responsibilities that are associated with the Chair position. Additionally, the Commission finds that the specified authority of the Chair of the Operating Committee is appropriate in that it allows the Chair to

---

380 See id.

381 See Article IV, Section 4.4(e)(i) of the CT Plan.

382 See Article IV, Section 4.4(e)(ii) of the CT Plan.

383 See id.

384 See Article IV, Section 4.4(e) of the CT Plan.

385 See id.

enter into agreements on behalf of the Company, thus streamlining the process of contracting with the Company, but does not permit the Chair to act except as directed by the Operating Committee. The Commission also finds that because the Chair has authority to act only at the direction of the Operating Committee, it is not unreasonable to require that the Chair be an SRO Voting Representative, as this will not undermine the voting power that the Non-SRO Voting Representatives have with respect to action by the Operating Committee. The Commission received no comments addressing these provisions and is approving Article IV, Section 4.4(e) as proposed.

(iii) Executive Session

Article IV, Section 4.4(g) of the CT Plan provides that, notwithstanding any other provision of the CT Plan, the SRO Voting Representatives, Member Observers, SEC staff, and other persons as deemed appropriate by the SRO Voting Representatives may meet in an Executive Session to discuss an item of business for which it is appropriate to exclude Non-SRO Voting Representatives. A request to meet in Executive Session must be included on the written agenda for an Operating Committee meeting, along with identification of the item to be discussed and a clearly stated rationale as to why that item would be appropriate for discussion in Executive Session.[386] A majority vote of the SRO Voting Representatives would be required to create an Executive Session.[387] The SRO Voting Representatives would be permitted to discuss only the topic for which the Executive Session was created and would disband upon fully discussing the topic.[388]

---

386 See Article IV, Section 4.4(g) of the CT Plan. The rationale provided may be that the topic falls within the list of topics in Section 4.4(g)(i). See id.

387 See Article IV, Section 4.4(g) of the CT Plan.

388 See id.

Article IV, Section 4.4(g)(i) of the CT Plan also provides that topics discussed in Executive Session should be limited to the following: (1) any topic that requires discussion of Highly Confidential Information; (2) Vendor or Subscriber Audit Findings; and (3) Litigation matters.[389] Section 4.4(g)(ii) adds a catch-all provision stating that this list of enumerated items "is not dispositive of all matters that may by their nature require discussion in an Executive Session," adding, however, that "the mere fact that a topic is controversial or a matter of dispute does not, by itself, make a topic appropriate for Executive Session."[390] This section further provides that the minutes for an Executive Session must include the reason for including any item in Executive Session.[391] As proposed, any action that requires a vote in Executive Session would require a majority of the vote of the SRO Voting Representatives eligible to vote on such action.[392]

In the Notice, the Commission sought comment on whether the specified items proposed in the CT Plan are appropriate topics for Executive Session, including whether the proposed provision that the topics identified in the CT Plan are "not dispositive of all matters that may by their nature require discussion in an Executive Session" would allow the SROs excessive discretion to meet in Executive Session.[393] In response, the Commission received numerous comments. In particular, certain commenters express the view that the topics proposed as

---

389 See Article IV, Section 4.4(g)(i)(A)–(C) of the CT Plan.

390 Article IV, Section 4.4(g)(ii) of the CT Plan.

391 See id.

392 See Article IV, Section 4.4(g)(iv) of the CT Plan.

393 Notice, supra note 3, 85 FR at 64569 (Question 21).

appropriate for Executive Session are too broad,[394] and recommend eliminating the language in Section 4.4(g)(ii) that would permit the SROs to enter into Executive Session for matters that by their nature require discussions in Executive Session.[395] One commenter believes that the "broad and open-ended use of Executive Sessions" proposed in the CT Plan is inconsistent with the SEC's goals of transparency, effective operations of the Plan, and eliminating conflicts of interest.[396] This commenter states that "[s]anctioning the ability of competitors to meet in secret to discuss confidential business raises antitrust concerns,"[397] and believes that there should be a presumption against use of Executive Session except upon a showing of need and explanation why Non-SRO Voting Representatives should not be included.[398]

One commenter states that the proposed list of topics for discussion in Executive Session is too broad and should be tightened to ensure that such sessions are not abused and used to cut non-SROs out of discussions.[399] Another commenter asserts that the broad list of topics proposed for Executive Session "essentially grants the SROs unfettered discretion about what topics are appropriate for Executive Session."[400] This commenter believes that the determination of what

---

394 See RBC Letter, supra note 30, at 9; Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5–6; Virtu Letter, supra note 30, at 5; SIFMA Letter I, supra note 30, at 4; SIFMA Letter II, supra note 30, at 4; MEMX Letter, supra note 30, at 4.

395 See ICI Letter I, supra note 31, at 6; ICI Letter II, supra note 31, at 2; BMO Letter I, supra note 30, at 5; SIFMA Letter I, supra note 30, at 4; SIFMA Letter II, supra note 30, at 4; BlackRock Letter I, supra note 247, at 5; Fidelity Letter, supra note 30, at 4.

396 RBC Letter, supra note 30, at 9.

397 Id.

398 See id. at 10–11. This commenter also believes that the Commission should amend the existing Equity Data Plans to adopt the same Executive Session policies it includes in the CT Plan. See id. at 4.

399 See Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5–6.

400 Virtu Letter, supra note 30, at 5. This commenter also questions why Non-SRO Voting Representatives should be excluded from discussions of litigation matters if they sign a non-disclosure agreement. See id.; see also RBC Letter, supra note 30, at 11 (stating that information of a sensitive nature can be addressed by the confidentiality policies of the CT Plan).

belongs in Executive Session should not be left to the discretion of the SROs.[401] One commenter states that Executive Sessions could be used to circumvent the policy underlying the Market Data Structure reforms.[402] Another commenter believes that use of Executive Sessions should be narrowly tailored given that Executive Session presents an exception to the general rule that non-SROs will participate with SROs in operation of the CT Plan.[403] This commenter believes that Executive Sessions should be reserved for instances where there is a direct conflict of interest for participation by Non-SRO Voting Representatives.[404] Another commenter states that it recognizes that there may be circumstances for SRO-only deliberations in Executive Session, but is concerned that overuse of Executive Session would limit transparency of the CT Plan's governance.[405] This commenter supports either limiting the topics that can be discussed to the three enumerated topics[406] or changing the mechanism for approval of a topic as appropriate for Executive Session.[407]

One commenter recommends eliminating the broad language in the CT Plan that would permit Executive Sessions for "matters that by their nature require discussions in Executive Session."[408] Another commenter states that this provision risks providing SROs with "excessive discretion to limit or prevent the participation of Non-SRO Voting Representative in certain CT Plan matters" and thus believes that the list of permissible topics for Executive Session should be

---

401 See Virtu Letter, supra note 30, at 5.

402 See ICI Letter I, supra note 31, at 6; ICI Letter II, supra note 31, at 2.

403 See Fidelity Letter, supra note 30, at 4.

404 See id.

405 See MEMX Letter, supra note 30, at 4.

406 See id.; see also Fidelity Letter, supra note 30, at 4.

407 See MEMX Letter, supra note 30, at 4.

408 See ICI Letter I, supra note 31, at 6; ICI Letter II, supra note 31, at 2.

listed specifically in the CT Plan.[409] Another commenter states that this provision gives the SROs too much latitude to meet outside the presence of the Non-SRO Voting Representatives and creates inherent conflicts of interest, and recommends eliminating it.[410] One commenter states that the presence of the Commission staff at Executive Session meetings, as well as the requirement that a written agenda for an Executive Session must be provided at an Operating Committee meeting, will help ensure that Executive Sessions are used properly, but continues to have concerns that use of Executive Sessions will limit information available to Non-SRO Voting Representatives and impair the effectiveness of their participation on the Operating Committee.[411] Another commenter believes that in order to preserve the independence of Voting Representatives, Member Observers should not participate in Executive Sessions unless a Voting Representative requests the Member Observer to testify on a particular matter during the Executive Session.[412]

One commenter, however, supports the use of Executive Sessions as proposed in the CT Plan and states that Executive Sessions have been used rarely in recent years and that the requirement that the basis for using Executive Session must be publicly disclosed in the Operating Committee Agenda will ensure that Executive Sessions will be used only when necessary.[413]

---

409 BMO Letter I, supra note 30, at 5; see also SIFMA Letter I, supra note 30, at 4; SIFMA Letter II, supra note 30, at 4. Additionally, one commenter asserts that "personnel matters" under the definition of Highly Confidential Information, which, as proposed, the SROs can discuss in Executive Session, should be limited to matters that exclusively affect the employees of SROs or the LLC. See SIFMA Letter I, supra note 30, at 4.

410 See BlackRock Letter I, supra note 247, at 5; see also Data Boiler Letter II, supra note 101, at 1.

411 See Fidelity Letter, supra note 30, at 4.

412 See Data Boiler Letter I, supra note 31, at 31.

413 See Nasdaq Letter I, supra note 20, at 25–26.

The Commission agrees with comments that the scope of matters that could be discussed in Executive Session, outside the presence of the Non-SRO Voting Representatives, is too broad as proposed in the CT Plan.[414] While the Commission acknowledges that, as stated by one commenter,[415] Executive Sessions are rarely used today, the Commission believes that the CT Plan must be clearer regarding the scope of topics eligible for discussion in Executive Session and that the CT Plan language should be narrowly tailored to permit the SRO Voting Representatives to meet outside the presence of the Non-SRO Voting Representatives—who are full members of the Operating Committee—to discuss only limited matters that exclusively concern the SROs or that pose direct conflicts of interest with respect to non-SRO participation. In particular, the Commission believes that the proposed "catch-all" language in Section 4.4(g)(ii)—providing that certain matters may, by their nature, require discussion in an Executive Session—is too broad to serve the limited purpose of Executive Sessions. In addition, though the Commission believes that the requirement for a written agenda and the presence of Commission staff at Executive Sessions may curb the potential misuse of Executive Sessions, the Commission believes that the topics that may be discussed in Executive Session should be specifically enumerated in the CT Plan to provide transparent and clear boundaries. Accordingly, the Commission is modifying Article IV, Section 4.4(g) in several ways to clarify who may attend Executive Sessions and to explicitly state the topics regarding which SRO Voting Representatives may meet in Executive Session.

---

414 See RBC Letter, supra note 30, at 9; Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5–6; Virtu Letter, supra note 30, at 5; SIFMA Letter I, supra note 30, at 4; SIFMA Letter II, supra note 30, at 4; MEMX Letter, supra note 30, at 4.

415 See Nasdaq Letter I, supra note 20, at 25–26.

First, the Commission is deleting the phrase in Section 4.4(g) that provides that Executive Sessions may be held "[n]otwithstanding any other provision" of the CT Plan. The Commission finds that this modification is appropriate because it will serve to make all other provisions of the CT Plan—most importantly the provisions regarding conflicts of interest and confidentiality—applicable to Executive Sessions. Permitting the SROs to meet in Executive Session without the conflicts of interest and the confidentiality policies being applicable would substantially undermine the effectiveness of those policies and the Commission's goals in reforming the governance of the Equity Data Plans. This concern is magnified where, as here, the SROs have proposed an open-ended set of topics that could be discussed in Executive Session.

Second, the Commission is modifying Section 4.4(g) to require that the "other persons" authorized to attend Executive Sessions will be determined collectively "by majority vote of the SRO Voting Representatives." The Commission finds that this modification is appropriate because it is unclear how the SRO Voting Representatives would "deem appropriate" other persons to attend Executive Session as proposed; this modification will resolve that ambiguity. Further, this modification will ensure that any selection of "other persons" authorized to attend Executive Sessions will be made in a manner consistent with the allocation of voting power by SRO Group, as set forth in Section 4.3(a)(i) of the CT Plan.

Third, the Commission is modifying Section 4.4(g) to provide that topics appropriate for discussion in Executive Session must not only be topics for which it is appropriate to exclude Non-SRO Voting Representatives, as the CT Plan proposes, but must also fall within a list of enumerated topics, as discussed below.[416] The Commission finds that this modification is

[416] The Commission is also modifying Article IV, Section 4.4(g)(i) of the CT Plan to state that the items for discussion within an Executive Session shall be limited to the topics enumerated in subsections 4.4(g)(i)(A)–(E) and for which it is appropriate to exclude Non-SRO Voting Representatives. So, for example, as an enumerated

appropriate because coupling the requirement that Non-SRO Voting Representatives may only be excluded from discussions of an item of business for which it is appropriate to exclude them with a list of specific topics appropriate for discussion in Executive Session will appropriately narrow the discussions that may be held in Executive Session so that Non-SRO Voting Representatives are not excluded from Operating Committee discussions without sufficient justification.

Fourth, the Commission is modifying the list of topics appropriate for discussion in Executive Session in Section 4.4(g)(i) of the CT Plan to exclude discussions regarding contract negotiations with Processors or the Administrator. The CT Plan as proposed provides that any topic that requires discussion of Highly Confidential Information is appropriate for Executive Session,[417] which would include discussions regarding the Company's contract negotiations with the Processors or Administrator; personnel matters; information concerning the intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.[418] The Commission finds that this modification is appropriate because discussions regarding contract negotiations with Processors or the Administrator are integral to the management and operation of the CT Plan, for which the Operating Committee, including the Non-SRO Voting Representatives, is responsible. The Commission believes that inclusion of views from the Non-SRO Voting Representatives at this critical stage of development of CT Plan

topic eligible for discussion in Executive Session, a litigation matter may be discussed in Executive Session if it involves a matter for which it is appropriate to exclude the Non-SRO Voting Representatives. The Commission believes that, as a practical matter, it is likely that discussions of litigation matters that are not appropriate to include Non-SRO Voting Representatives will take place in the forum of a legal subcommittee of the Operating Committee. See infra Section II.C.5(k)(iii).

417 See Article IV, Section 4.4(g)(i)(A) of the CT Plan.

418 See Article I, Section 1.1(ii) of the CT Plan (defining "Highly Confidential Information" as "any highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information").

operations is important, as decisions made in these contracts negotiations may have important consequences for the categories of market participants whose views Non-SRO Voting Representatives represent on the Operating Committee. Further, with respect to these contract negotiations, there are not issues that would uniquely affect the SROs and warrant excluding the Non-SRO Voting Representatives from such discussions.

Fifth, the Commission is modifying Section 4.4(g)(i) to add two topics to the list of items eligible for discussion in Executive Session. The Commission is adding discussion of "[r]esponses to regulators with respect to inquiries, examinations, or findings" as new Section 4.4(g)(i)(D). The Commission believes that it is appropriate to permit the SRO Voting Representatives to discuss responses to regulators with respect to inquiries, examinations, or findings in Executive Session, because the SROs have unique regulatory obligations with respect to the operation of the CT Plan. However, this provision is not intended to prevent or limit the Non-SRO Voting Representatives from receiving copies of any regulatory inquiries, examinations, or findings directed to the Operating Committee of CT Plan (as opposed to those directed solely to one or more SROs). As voting members of the Operating Committee that is charged with the operation of the CT Plan, Non-SRO Voting Representatives need to be informed of inquiries, examinations, and findings that are directed to the Operating Committee in order to be active and informed participants on the Operating Committee with respect to ongoing and future operations of the CT Plan. For example, a regulatory inquiry, examination, or finding might identify areas of non-compliance with the terms of the Plan, shortcomings in the performance of the Administrator or Processors, or areas in which amendments to the CT Plan might be necessary or appropriate, and the full Operating Committee should be aware of such issues because the full Operating Committee will vote on any CT Plan actions taken or proposed

in response. The Commission believes, however, that because the SROs have unique obligations for, and potential liability for, meeting regulatory obligations in the operation of the CT Plan, SRO Voting Representatives should be permitted to discuss outside the presence of the Non-SRO Voting Representatives any reply by the SROs to regulators regarding any inquiry, examination, or finding.

The Commission is also adding Section 4.4(g)(i)(E), which would permit discussion in Executive Session of "[o]ther discrete matters approved by a vote of the Operating Committee." The Commission finds that this modification is appropriate because it recognizes that not every topic that may be appropriate for Executive Session can be foreseen, and because some provision must therefore be made in the CT Plan for unanticipated topics suitable for Executive Session. The Commission believes that allowing matters that have been presented to, and approved by, the Operating Committee for discussion in Executive Session strikes a balance by providing leeway for unanticipated topics to be discussed in Executive Session, while also giving the Non-SRO Voting Representatives an opportunity to review the topic being considered and vote as part of the Operating Committee on whether the topic is appropriate for discussion in Executive Session.

Finally, as recommended by several commenters,[419] the Commission is modifying Section 4.4(g)(ii) to remove the language that states the list of topics considered appropriate for Executive Session "is not dispositive of all matters that may by their nature require discussion in an Executive Session." The Commission finds that this modification is appropriate because the language in Section 4.4(g)(ii) of the CT Plan is too broad and leaves it to the SRO Voting

[419] See RBC Letter, supra note 30, at 9; Schwab Letter I, supra note 30, at 2; Schwab Letter II, supra note 30, at 5–6; Virtu Letter, supra note 30, at 5; SIFMA Letter I, supra note 30, at 4; SIFMA Letter II, supra note 30, at 4; MEMX Letter, supra note 30, at 4.

Representatives' discretion which additional topics would require discussion in Executive Session. This provision has the potential to be used by the SRO Voting Representatives to limit transparency to discuss significant topics outside the presence of the Non-SRO Voting Representatives. For this reason, the Commission is approving Section 4.4(g) of the CT Plan as modified.

While one commenter suggests that Non-SRO Voting Representatives should be permitted to attend Executive Sessions if they sign a non-disclosure agreement,[420] the Commission is declining to include such a provision in light of the other modifications the Commission has made to the Executive Session provisions of the CT Plan, which are discussed above. These modifications are designed to limit the permissible topics for Executive Sessions to those for which it appropriate to exclude Non-SRO Voting Representatives, such as matters that exclusively concern the SROs or that pose direct conflicts of interest with respect to non-SRO participation. Because the reason for excluding Non-SRO Voting Representatives in such instances would not be a concern about confidentiality, a non-disclosure agreement would not sufficiently resolve the underlying concerns.

(iv) Other Provisions

The CT Plan provides that the Chair of the Operating Committee may call a special meeting of the Operating Committee on at least 24 hours' notice to each Voting Representative and all persons eligible to attend Operating Committee meetings.[421]

Article IV, Section 4.4(c) of the CT Plan sets forth quorum requirements for a vote of the Operating Committee. Specifically, the CT Plan requires that a quorum of all Voting

[420] See supra note 400.

[421] See Article IV, Section 4.4(b) of the CT Plan.

Representatives be present for a vote of the Operating Committee, and that a quorum is equal to the minimum votes necessary to obtain approval under Section 4.3(b), i.e., Voting Representatives reflecting two-thirds of Operating Committee votes eligible to vote on an action and Non-SRO Voting Representatives reflecting 50% of SRO Voting Representative votes eligible to vote on that action. A Voting Representative will only be considered present if he or she is either in physical attendance at the meeting or participating by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.[422] This section further provides that if a Voting Representative has been recused from voting on a particular action, he or she will not be considered for purposes of determining whether a quorum is present.[423]

Article IV, Section 4.4(d) of the CT Plan requires that at least one week prior to a meeting, a summary of any action sought to be resolved at a meeting must be sent to each Voting Representative entitled to vote on the matter via electronic mail, portal notification, or regular U.S. or private mail (or if one week is not practicable, then with as much time as may be reasonably practicable under the circumstances).[424] Finally, Article IV, Section 4.4(f) of the CT Plan provides that meetings may be held by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.

The Commission believes that the provisions in Article IV, Sections 4.4(b)–(d) and (f) of the CT Plan relating to special meetings of the Operating Committee, quorum requirements, notice of actions to be resolved at Operating Committee meetings, and the mediums through

---

422 See Article IV, Section 4.4(c)(ii) of the CT Plan.

423 See Article IV, Section 4.4(c)(i) of the CT Plan.

424 This requirement may be waived by a vote of the Operating Committee. See id.

which meetings may be held, are reasonable. The Commission received no comments addressing these Sections and is approving these provisions as proposed.

(e) Certain Transactions

Article IV, Section 4.5 of the CT Plan states that the CT Plan is not prohibited from employing or dealing with persons in which an SRO or any of its affiliates has a connection or a direct or indirect interest. Specifically, the section provides that the fact that a Member or any of its affiliates is directly or indirectly interested in or connected with any person employed by the Company to render or perform a service, or from which or to whom the Company may buy or sell any property, shall not prohibit the Company from employing or dealing with such person.

In the Notice, the Commission sought comment on this provision, asking, among other things, if there are specific types of employment relationships or business dealings that should be permitted, and similarly if there are ones that should be prohibited.[425] The Commission also asked for commenters' views regarding whether the CT Plan should require the relevant SROs to maintain information barriers between themselves and the affiliates or persons that have employment relationships or business dealings with the CT Plan, and if so, what type of information barriers would be appropriate.[426] The Commission further asked whether Section 4.5 could permit conflicts of interests that should be disclosed under the conflicts of interest policy, and if so, what modifications to that policy, if any, should be made.[427] Finally the Commission asked if commenters thought that any additional disclosure, recusal, or voting procedures should

[425] See Notice, supra note 3, 85 FR at 64569 (Question 22).

[426] See id. at 64569–70 (Question 22).

[427] See id. at 64570 (Question 22).

be required before the CT Plan employs or deals with persons in which an SRO or any of its affiliates has a direct or indirect interest or connection.[428]

In response to the questions posed in the Notice, one commenter states that permitting the LLC to engage with a person with whom a Member or its affiliate may have a connection would "significantly increase the likelihood that Plan activities would be contrary to the role and public purpose of the Plan as part of the national market system," and would create a conflict of interest with the SROs' obligations with respect to the CT Plan under federal securities rules and regulations.[429] While another commenter expresses a similar concern, it acknowledges that there may be limited circumstances in which it would be appropriate for Members of the CT Plan to employ or transact with its affiliates.[430] This commenter suggests that there be robust disclosures of, and guardrails around, the terms of such activity to ensure that no further conflicts arise. Specifically, the commenter recommends, in addition to the disclosure requirements, that the CT Plan adopt detailed policies and procedures that articulate the specific circumstances where it would be appropriate for the Member to employ an SRO-affiliated entity, and that mandate recusals when there is a potential conflict of interest.[431] Another commenter also supports a clearly defined conflicts of interest policy and recusal for certain transactions and prefers that structure to prohibiting the CT Plan from transacting with a Member or its affiliate.[432]

In response to the Commission's question regarding information barriers, one commenter states that, while the disclosure requirements may, to an extent, elicit relevant information to

---

428 See id.

429 RBC Letter, supra note 30, at 9.

430 See Virtu Letter, supra note 30, at 6.

431 See id.

432 See Data Boiler Letter I, supra note 31, at 32–33.

mitigate conflicts of interest resulting from certain business activities, it recommends additional measures to address such conflicts.[433] The commenter recommends that the SROs be required to maintain information barriers between themselves and the affiliates or persons that have employment relationships or business dealing with the CT Plan.[434] Additionally, the commenter suggests that any necessary recusals should be required before the CT Plan employs or deals with persons in which an SRO or any of its affiliates has a direct or indirect interest or connection.[435]

Regarding the types of employment relationships or business dealings that Section 4.5 may permit, one commenter argues that the provision allows for the Company to employ a Member or its affiliate to continue to serve as a Processor of the CT Plan.[436] The commenter states that selecting an SRO to serve as a Processor of the Plan would allow the Operating Committee to apply the cutting-edge technology that Members have developed to the dissemination of consolidated data, which could result in a beneficial relationship.[437] The commenter opposes any limitation on the CT Plan's ability to contract with a Member, arguing that it would jeopardize this relationship.[438] Thus, the commenter recommends that any potential conflicts of interest concerns be addressed in the CT Plan's related policies or contractual agreements, rather than by prohibiting the Plan's ability to engage with an entity that, in the commenter's view, may be best equipped to provide the service.[439]

---

433 See BMO Letter I, supra note 30, at 4.

434 See id.

435 See id. The Commission notes that this comment letter applies to both the discussion regarding Certain Transactions, as well as Article IV, Section 4.6 (Company Opportunities) of the CT Plan.

436 See Nasdaq Letter I, supra note 20, at 23.

437 See id.

438 See id.

439 See id.

The Commission recognizes that an SRO or its affiliates may at times, and based on its experience or expertise, provide the best (or only) option in supporting the business operations of the CT Plan. In particular, the current processors for the existing Equity Data Plans are affiliates of SROs. Accordingly, the Commission believes that prohibiting the employment or dealings with an individual or entity because of a direct or indirect affiliation or connection with a Member could be detrimental to the CT Plan, despite the potential conflict of interest. The Commission, however, agrees with comments that conflicts of interest should be managed by the CT Plan's policies, and the Commission believes that Section 4.10 of the CT Plan, discussed below, provides the framework for handling conflicts of interest and recusals. In particular, Section 4.10(b)(iii) requires a Member's recusal, including the recusal of its representatives and its affiliates and their representatives, from voting on matters in which it or its affiliates is (i) seeking a position or contract with the Company or (ii) has a position or contract with the Company, and whose performance is being evaluated by the Company. As discussed below, the Commission believes that the recusal policy appropriately balances the potential influence a Member may have in employing or dealing with an affiliated person or entity, while also permitting the CT Plan to consider a broad range of individuals or entities that would best support the CT Plan's interests. Additionally, the Commission believes that the Administrator of the CT Plan, which will be required to be independent of any entity that offers for sale its own proprietary data products for Eligible Securities, can play an important role in reducing the effect of conflicts of interest on the operation of the CT Plan. Further, as noted above, the Commission is modifying the CT Plan to make explicit that no provision of the CT Plan shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations

under the federal securities laws and the regulations thereunder.[440] As discussed above, the Commission believes that the provisions of Section 4.10 and the requirement for an independent Administrator sufficiently address the concerns raised by commenters with respect to the transactions permitted by Section 4.5, and is approving Article IV, Section 4.5 as proposed.

(f) Company Opportunities

Article IV, Section 4.6(a) of the CT Plan provides that each Member, its affiliates, and each of its respective equity holders, controlling persons, and employees may have business interests and engage in business activities in addition to those relating to the Company. Section 4.6(b) provides that none of the SROs shall be obligated to recommend or take any action that prefers the interest of the CT Plan or any other Member over its own interests, and it also provides that none of the SROs will be obligated to inform or present to the CT Plan any opportunity, relationship, or investment. This provision defines investments or other business relationships with persons engaged in the business of the CT Plan other than through the CT Plan as "Other Business." Separately, Exhibit B of the CT Plan provides a list of questions and instructions tailored to elicit responses that disclose potential conflicts of interest.

In the Notice, the Commission asked whether, in response to the questions set forth in Exhibit B, the SROs would be required to disclose certain opportunities, relationships, or investments, and whether these disclosures would sufficiently mitigate any conflicts of interest. In the Notice, the Commission also requested comment on, among other things, the specific types of business activities that would be covered by the provision, and whether any of these business activities could create a conflict of interest with an SRO's obligations with respect to

[440] See supra Section II.C.1(b).

the CT Plan under the federal securities laws, rules, and regulations. The Commission also asked if any potential conflicts of interest are sufficiently mitigated by the conflicts of interest policy and, if not, how the CT Plan should address such conflicts of interest.[441]

The Commission further solicited comment on whether the CT Plan should require that an SRO's representatives (i.e., SRO Voting Representative or Member Observer, as applicable) be recused from discussion of, or voting on, matters relating to opportunities, relationships, or investments when the SRO's interests may be in conflict with the goals of the CT Plan.[442] Lastly, the Commission asked if commenters believe that Section 4.6(b) could be interpreted in a manner that could result in the SROs acting inconsistently with their obligations under the federal securities laws, rules, and regulations, and whether the language could result in an SRO voting against needed improvements to the provision of consolidated equity market data.[443]

In response to the questions presented in the Notice, one commenter argues that the provisions would permit the SROs to disclaim a duty or obligation to the CT Plan and appear to be a "complete abdication" of responsibility in ensuring that the CT Plan carries out its intended function.[444] The commenter suggests that the SROs should, at a minimum, establish a duty in the CT Plan to promote the plan's function of "assuring the widespread availability of equity market data on terms that are fair and reasonable, consistent with statutory requirements, or to promote the interests of fair and orderly markets and the protections of investors and the public interest."[445]

---

441 See Notice, supra note 3, 85 FR at 64570 (Question 23).

442 See id. (Question 24).

443 See id. (Question 25).

444 MFA Letter, supra note 30, at 2.

445 Id.

Another commenter asserts that the CT Plan does not address situations in which an SRO's interest conflicts with its obligations to the Plan, and recommends that an SRO Voting Representative be recused from voting on matters relating to opportunities, relationships or investments when the interests of the SRO Voting Representative conflict with the interests of the CT Plan.[446]

Regarding SRO engagement in Other Business that may be in competition with the CT Plan, one commenter argues that imposing limits on the business activities of the SROs is not within the scope of the CT Plan, is unwarranted, and would require specific rulemaking by the Commission. The commenter further asserts that the CT Plan is not an appropriate vehicle for substantive regulation of SRO operations.[447] In response to the Commission's question regarding whether Other Business activities would create a conflict of interest with an SRO's obligations pursuant to federal securities laws, the commenter affirms that each Member has obligations under the federal securities laws, and states that it is those requirements, rather than obligations to the CT Plan, that will ensure that Members comply with their responsibilities regarding the dissemination of real-time consolidated equity market data.[448] Additionally, the commenter maintains that the required disclosures set forth in Exhibit B are adequate to identify and mitigate any potential conflict of interest.[449]

In response to whether Section 4.6(b) could be interpreted in a manner that results in an SRO acting inconsistently with its obligations under the federal securities laws, rules, and

---

446 See SIFMA Letter I, supra note 30, at 4–5; SIFMA Letter II, supra note 30, at 2.

447 See Nasdaq Letter I, supra note 20, at 23.

448 See id. at 24.

449 See id.

regulations, one commenter contends that the subsection is intended to be a waiver of the corporate opportunities doctrine. According to the commenter, the doctrine generally provides "that a person with fiduciary duties may not divert to themselves or their affiliates any business opportunity that belongs to the company."[450] The commenter claims that the Members "likely do not have fiduciary duties to the CT Plan under default Delaware law, and Section 3.7(e) further clarifies that the Member do not have such duties."[451] For these reasons, the commenter believes that, while the Members likely are not subject to the corporate opportunities doctrine, because the Members are large companies with complex business dealings, the CT Plan should be explicit that a Member cannot be sued for breach of the corporate opportunities doctrine by the Plan or the Members of the CT Plan.[452] The commenter further asserts that an express waiver does not affect any of the obligations that the SROs have under the federal securities laws.[453]

The Commission agrees that no provision of the CT Plan, as modified, dilutes or diminishes any Member's regulatory obligations under the federal securities laws, rules, and regulations. While Section 4.6 may permit a Member to engage in Other Business that may be complementary or competitive with the Company, SROs must act consistently with their statutory and regulatory obligations. Accordingly, the Commission does not believe it is necessary to include a fiduciary duty provision in the CT Plan. However as discussed above, the Commission is modifying the Recitals of the CT Plan to explicitly state that no provision of the

450 Id.

451 Id.

452 See id. at 25.

453 See id.

CT Plan shall be construed to limit or diminish the obligations and duties of the Members as SROs under the federal securities laws and the regulations thereunder.[454]

The Commission further believes the conflicts of interest provisions set forth in Section 4.10 of the CT Plan, along with the required disclosures in Exhibit B, would serve to mitigate potential conflicts of interest arising from Other Business activities. As the Commission has previously stated, 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 the CT 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 CT Plan, as those competing interests could materially affect the ability to carry out the purposes of the CT Plan.[455] Accordingly, the Commission is approving Article IV, Section 4.6 as proposed.

(g) Subcommittees

Section 4.7 of Article IV of the CT Plan governs the Operating Committee's discretion to create and disband subcommittees, as well as the selection of subcommittee chairs, permissible attendees at subcommittee meetings and special provisions applicable to meetings of a legal subcommittee.

(i) Selection of Subcommittee Chairs

Paragraph (a) of Section 4.7 permits the Operating Committee to determine the duties, responsibilities, powers, and composition of any of its subcommittees. This paragraph also grants

---

454 See supra Section.II.C.1(b).

455 See Conflicts of Interest Approval Orders, infra note 509, 85 FR at 28120 and 85 FR at 28047.

the Chair of the Operating Committee the authority to select the chair of any subcommittee from SRO Voting Representatives or Member Observers, with input from the Operating Committee.

In the Notice, the Commission sought comment on, among other things, whether Non-SRO Voting Representatives should be permitted to serve as the chair of a subcommittee.[456] In response, most commenters addressing this issue agree that Non-SRO Voting Representatives should be permitted to serve as the chair of a subcommittee.[457] One commenter states that chairs should be selected from all Operating Committee members.[458] Another commenter states that it is appropriate for Non-SRO Voting Representatives to serve as subcommittee chairs, and that subcommittees should be chaired by the individual who is the most qualified and an expert in the area of the subcommittee.[459] One commenter states that subcommittee chairs should be selected by the members of the subcommittee,[460] while another commenter states that decisions about whether Non-SRO Voting Representatives should be permitted to chair a subcommittee should be left to the discretion of the SROs.[461] Several other commenters also express the view that a Non-SRO Voting Representative should be permitted to serve as the chair of a subcommittee.[462] Another commenter states that it does not object to Non-SRO Voting Representatives serving as the chair of a subcommittee, but, as discussed below, argues that Non-SRO Voting

---

456 See Notice, supra note 3, 85 FR at 64570 (Question 26).

457 See, e.g., RBC Letter, supra note 30, at 9, Schwab Letter I, supra note 30, at 3; Schwab Letter II, supra note 30, at 5; Virtu Letter, supra note 30, at 6.

458 See RBC Letter, supra note 30, at 9.

459 See Virtu Letter, supra note 30, at 5.

460 See Data Boiler Letter I, supra note 31, at 35.

461 See NYSE Letter I, supra note 18, at 38–39.

462 See SIFMA Letter I, supra note 30, at 5; SIFMA Letter II, supra note 30, at 2; MEMX Letter, supra note 30, at 4; Schwab Letter I, supra note 30, at 3; Schwab Letter II, supra note 30, at 5.

Representatives should be prohibited from serving on the legal subcommittee, as that would "potentially waive the attorney-client privilege."[463]

The Commission believes that Non-SRO Voting Representatives should be eligible to serve as the chair of a subcommittee of the CT Plan's Operating Committee. Non-SRO Voting Representatives are full members of the Operating Committee and should not be excluded from serving as subcommittee chairs, particularly in light of the expertise that a specific Non-SRO Voting Representative might bring to a given subcommittee. In addition, the proposed exclusion of Non-SRO Voting Representatives from serving as subcommittee chairs would be contrary to the objectives of the Commission's Governance Order to broaden participation in the governance of the NMS plan for consolidated equity market data.[464] Further, apart from objecting to the participation of Non-SRO Voting Representatives on the legal subcommittee,[465] which is addressed below,[466] the SROs provide no rationale for limiting the Non-SRO Voting Representatives' participation in this categorical manner. Accordingly, the Commission is modifying Section 4.7(a) of the CT Plan to expressly provide that Non-SRO Voting Representatives are eligible to serve as chairs of subcommittees to the Operating Committee. The Commission finds that this modification to Section 4.7(a) is appropriate because it supports the objective of broader participation in Plan governance as set forth in the Governance Order.[467]

In the Commission's view, however, Member Observers should not be eligible to serve as subcommittee chairs, and the Commission is therefore modifying Section 4.7(a) of the CT

---

463 Nasdaq Letter I, supra note 20, at 25.

464 See Governance Order, supra note 8, 85 FR at 28714–20.

465 See Nasdaq Letter I, supra note 20, at 25.

466 See text accompanying notes 486–490, infra.

467 See Governance Order, supra note 8, 85 FR at 28714–20.

Plan to preclude Member Observers from serving as subcommittee chairs. The Commission finds this modification to be appropriate because, based on its observation of the operation of the existing Equity Data Plans, the Commission expects that important, substantive decisions of the CT Plan Operating Committee are likely to be based on work discussed and developed through subcommittees. Accordingly, the Commission believes that the chairs of those subcommittees should be selected from among the voting members of the Operating Committee, rather than delegated to persons who may be serving as a Member Observer on an ad hoc basis and for limited purposes. The Commission also notes that the CT Plan permits Members Observers to attend and participate in meetings of CT Plan subcommittees, as well as meetings of the Operating Committee, and the Commission therefore believes that precluding Member Observers from serving as subcommittee chairs will not limit the ability of the CT Plan to benefit from the specific expertise that persons selected as Member Observers possess.

Finally, the Commission believes that, along with the authority to determine the duties, responsibilities, powers, and composition of any subcommittees, the Operating Committee, rather than solely the Chair of the Operating Committee, should have the authority to select subcommittee chairs. Accordingly, the Commission is modifying Section 4.7(a) of the CT Plan to provide that the Operating Committee, rather than the Chair of the Operating Committee, will select the chair of each subcommittee, and to delete the phrase, "with input from the Operating Committee," to conform to this change. The Commission finds that this modification is appropriate because it further aligns the CT Plan with the objectives of the Governance Order to foster broader participation in plan governance.[468]

[468] See id.

For the reasons discussed above, the Commission is approving Section 4.7(a) of the CT Plan as modified.

(ii) Permissible Attendees of Subcommittee Meetings

Paragraph (b) of Section 4.7 of the CT Plan states that SRO Voting Representatives, Non-SRO Voting Representatives, Member Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee may attend subcommittee meetings.

The Commission sought comment on whether the relative balance of membership should be the same in the subcommittees.[469] In response, the Commission received several comments on this proposed provision. One commenter suggests there should be balanced participation among all Voting Representatives.[470] This commenter expresses concern that subcommittees "could conceivably make decisions without input from or regard for the Operating Committee as a whole, including non-SRO Voting Representatives."[471] Another commenter states that, generally, both Non-SRO Voting Representatives and SRO Voting Representatives should be permitted to serve on subcommittees.[472] This commenter expresses the view that Non-SRO Voting Representative input may not always be essential, but is concerned that an SRO-only subcommittee could discuss important administrative matters without non-SRO input.[473] One commenter states that decisions about the composition requirements for subcommittees should be left to the discretion of the SROs.[474]

---

469 See Notice, supra note 3, 85 FR at 64570 (Question 26).

470 See RBC Letter, supra note 30, at 8.

471 Id.

472 See ICI Letter I, supra note 31, at 6.

473 See id.

474 See NYSE Letter I, supra note 18, at 38–39.

The Commission agrees that both SRO Voting Representatives and Non-SRO Voting Representatives should be permitted to serve on any subcommittees of the Operating Committee, albeit, as discussed below, with some provision to limit participation on a legal subcommittee.[475] The Commission disagrees, however, with the view that it is necessary to require balanced participation on any subcommittees to prevent a subcommittee from making decisions without input or regard for the Operating Committee as a whole. First, any SRO Voting Representative or Non-SRO Voting Representative can voluntarily participate on any subcommittee, other than a legal subcommittee, as discussed below. Second, a subcommittee would have no decision making authority under the terms of the CT Plan—subcommittees would be permitted to make recommendations, but all actions of the CT Plan are subject to the vote of the Operating Committee. The Commission further disagrees with the view that the composition of subcommittees should be left to the discretion of the SROs,[476] because the potential exclusion of the Non-SRO Voting Representatives who would like to participate on a subcommittee would not be consistent with the objectives of the Commission's Governance Order.[477]

The Commission finds that Section 4.7(b), which permits SRO Voting Representatives, Non-SRO Voting Representatives, Member Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee to attend subcommittee meetings, is reasonably designed to help ensure that all interested participants of Operating Committee meetings are provided an opportunity to participate in subcommittee meetings if they so choose. Accordingly, the Commission is approving Section 4.7(b) as proposed.

---

475 See infra Section II.C.5(g)(iii).

476 See NYSE Letter I, supra note 18, at 38–39.

477 See Governance Order, supra note 8, 85 FR at 28714–20.

(iii) Legal Subcommittee

Article IV, Section 4.7(c) provides that SRO Voting Representatives, Member Observers, and other persons as deemed appropriate by the SRO Voting Representatives may meet in a subcommittee to discuss an item subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan.

The Commission requested comment in the Notice on the scope of the "other persons" who may be deemed appropriate by the SRO Voting Representatives to discuss an item that is subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan, including whether there should there be any limitations.[478] One commenter expresses the view that Non-SRO Voting Representatives should not serve on a legal subcommittee as their presence could result in a waiver of attorney-client privilege.[479] This commenter further states that "[p]lacing any sort of limitation on the ability of the Members to consult with counsel or the persons whom counsel may consult in order to provide legal advice to the Members would place an arbitrary and capricious limitation on the attorney-client relationship, and is beyond the power of the Commission."[480]

One commenter questions why Non-SRO Voting Representatives should be excluded from discussions of litigation matters if they sign a non-disclosure agreement.[481] Another commenter believes that the same considerations that apply to subcommittee deliberations generally also would apply to subcommittee discussions that may be subject to attorney-client

---

478 See Notice, supra note 3, 85 FR at 64570 (Question 27).

479 See Nasdaq Letter I, supra note 20, at 25.

480 Id. at 26.

481 See Virtu Letter, supra note 30, at 5.

privilege or the attorney-work-product doctrine.[482] Further, commenters responding to the Commission's Notice of Proposed Order,[483] raise related points. One of these commenters expresses concerns that the Executive Session could be used to shield discussions by invoking privilege,[484] and another states that one of the few legitimate uses of Executive Session would be to discuss legal issues.[485]

The Commission believes the Non-SRO Voting Representatives must participate as full members of the CT Plan's Operating Committee. The Commission thus shares the concern some commenters have raised that the legal subcommittee may, if a blanket prohibition on Non-SRO Voting Representative participation applies, be used as a forum for SROs to inappropriately make decisions relating to plan business under the pretext that all such discussions necessarily invoke the attorney-client privilege. The Commission believes that, while the Operating Committee of the CT Plan should be able to engage in discussions regarding legal advice of plan counsel outside the presence of Commission staff, it does not believe that all matters involving the plan's attorney-client privilege are necessarily appropriate for discussion outside the presence of the Non-SRO Voting Representatives, who are full members of the Operating Committee. To the extent that the Operating Committee retains legal counsel to advise it with respect to the operation of the CT Plan—for example, to provide advice on whether proposed Operating Committee actions are consistent with or required by the Plan, or whether proposed actions or Plan amendments are consistent with or required by the federal securities laws—the Commission

---

482 See FINRA Letter I, supra note 257, at 6.

483 See Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 87906 (Jan. 8, 2020), 85 FR 2164 (Jan. 14, 2020) ("Proposed Order").

484 See Letter from Joseph Kinahan, Managing Director, Client Advocacy and Market Structure, TD Ameritrade, Inc. (Feb. 24, 2020), at 7; see also Schwab Letter I, supra note 30, at 2.

485 See Refinitiv Letter, supra note 249, at 3.

believes that Non-SRO Voting Representatives, as full members of the Operating Committee, must participate in those discussions with Plan counsel and be informed by the advice counsel provides to the Operating Committee. Moreover, commenters do not explain how the presence of Non-SRO Voting Representatives would waive the Plan's attorney-client privilege when the Non-SRO Voting Representatives themselves are full members of the Operating Committee of the CT Plan.

The Commission recognizes, however, that even though Non-SRO Voting Representatives should be permitted to attend legal subcommittee meetings unless there is a legitimate reason to preclude their attendance, there are specific circumstances in which it would be appropriate for the SROs to meet collectively with counsel outside the presence of the Non-SRO Voting Representatives to discuss CT Plan business. The Commission further finds that it is appropriate to apply limits to the ability of the SROs to exclude Non-SRO Voting Representatives from legal subcommittee meetings and discussions so that those subcommittee meetings do not become the equivalent of an Executive Session meeting that inappropriately excludes Non-SRO Voting Representatives.[486]

The Commission therefore believes that the CT Plan should explicitly state the basis on which Non-SRO Voting Representatives could be excluded from the legal subcommittee meetings so that these circumstances are narrowly drawn to help ensure that such meetings are called on an appropriate basis. The Commission believes that such meetings should be limited to those that bear on matters that exclusively affect the SROs with respect to: (1) litigation matters

[486] The Commission notes that while Commission staff historically have attended Executive Sessions, staff have not attended legal subcommittee meetings.

or responses to regulators with respect to inquiries, examinations, or findings; and (2) other discrete legal matters approved by the Operating Committee.[487]

Accordingly, in an effort to reflect the status of Non-SRO Voting Representatives as full members of the Operating Committee, while also reflecting the unique responsibilities of the SROs under the federal securities laws, the Commission is modifying paragraph (c) of Section 4.7 of the CT Plan to provide that Non-SRO Voting Representatives may be excluded from legal subcommittee meetings and discussions only under specified circumstances. As modified, Section 4.7(c) of the CT Plan would permit the SROs to exclude Non-SRO Voting Representatives from discussions within the legal subcommittee only to the extent that those meetings and discussions bear on matters that exclusively affect the SROs with respect to: (1) litigation matters or responses to regulators with respect to inquiries, examinations, or findings; and (2) other discrete legal matters approved by the Operating Committee.[488] The Commission believes that litigation matters or responses to regulators with respect to inquiries, examinations, or findings affect the SROs uniquely, given that the SROs have not only the express regulatory obligation as SROs for operation of the CT Plan, but they also, unlike the Non-SRO Voting Representatives, have financial responsibility for the CT Plan itself. As noted above with respect to a similar provision relating to the use of Executive Session,[489] the Commission believes that—while Non-SRO Voting Representatives could be precluded from

---

[487] Of course, nothing in the CT Plan would prevent an SRO from seeking advice from its own internal or external legal counsel regarding any matter of CT Plan business.

[488] The Notice, in the context of the CT Plan provisions regarding Executive Session, sought comment about the circumstances under which it would be appropriate to exclude Non-SRO Voting Representatives from CT Plan meetings. See Notice, supra note 3, 85 FR at 64569 (Question 21). Moreover, the Governance Order contemplated that a valid use of Executive Session might be attorney-client communications relating to matters that exclusively affect the SROs with respect to the Commission's oversight of the CT Plan. See Governance Order, supra note 8, 85 FR at 28727.

[489] See supra Section II.C.5(d)(iii).

participating in legal subcommittee discussions regarding SRO responses to regulatory inquiries, examinations, or findings—to serve as active and informed participants on the Operating Committee, Non-SRO Voting Representatives would need to be informed about any regulatory inquiries, examinations, or findings that relate to the CT Plan. Consequently, this provision is not intended to prevent or limit the Non-SRO Voting Representatives' access to regulatory inquiries, examinations, or findings directed to the CT Plan or its Operating Committee.

Moreover, the Commission is mindful that not every appropriate use of an SRO-only legal subcommittee meeting can be precisely foreseen, so the Commission's modification to this section of the CT Plan also provides that other discrete legal matters may be approved by the Operating Committee for SRO-only consideration in the legal subcommittee on a case-by-case basis. The Commission believes that this provision is designed to help ensure that the Operating Committee is sufficiently informed and can make reasonable decisions about unforeseen matters that may arise and exclusively affect the SROs. The Commission finds that these modifications to Section 4.7(c) of the CT Plan are appropriate because they are consistent with the objective of the Governance Order to include Non-SRO Voting Representatives as full members of the Operating Committee,[490] while also recognizing, given the SROs' unique regulatory responsibilities, that certain legal matters relevant to the operating of the CT Plan may exclusively affect the SROs.

Additionally, the Commission is modifying paragraph (c) of Section 4.7 of Article IV, to require that the "other persons as deemed appropriate by the SRO Voting Representatives" to attend meetings of the legal subcommittee will be determined collectively "by majority vote of the SRO Voting Representatives." The Commission finds that this modification is appropriate

[490] See Governance Order, supra note 8, 85 FR at 28714–20.

because it is designed ensure that any vote taken pursuant to Section 4.7(c) will be taken in a manner consistent with the allocation of voting power by SRO Group, as set forth in Section 4.3(a)(i) of the CT Plan.

For the reasons discussed above, the Commission is approving Section 4.7(c) of the CT Plan as modified.

(iv) Transparency of Subcommittee Meetings

One commenter expresses concern that the work of subcommittees under the CT Plan lacks transparency and accountability.[491] To address these failings, this commenter recommends that all subcommittees should: "(1) have a clearly identified purpose; (2) balanced participation among all Voting Representatives; (3) Chairs drawn from all Operating Committee members; (4) be required to keep minutes and distribute those minutes to the Operating Committee; and (5) be time- and product-limited."[492]

The Commission believes that the activities of the CT Plan's Operating Committee's subcommittees, if any, should be transparent to the Operating Committee. Transparency should help to ensure that the subcommittee meetings, including the legal subcommittee meetings, further the objectives of the CT Plan, as discussed in the Commission's Governance Order,[493] particularly with respect to the full participation of Non-SRO Voting Representatives in the operation of the CT Plan. The Commission therefore is modifying the CT Plan, by adding new paragraph (d) to Section 4.7, to require that all subcommittees prepare minutes of all meetings

491 See RBC Letter, supra note 30, at 8.

492 Id.

493 See Governance Order, supra note 8, 85 FR at 28714–20.

and make those minutes available to all members of the Operating Committee.[494] In addition, for each meeting of a legal subcommittee, discussed above, the Commission is modifying the CT Plan by including language in new paragraph (d) to Section 4.7 to require that the minutes include (i) attendance at the meeting; (ii) the subject matter of each item discussed; (iii) sufficient non-privileged information to identify the rationale for referring the matter to the legal subcommittee, (iv) the privilege or privileges claimed with respect to that item; and (v) for each matter, if applicable, sufficient non-privileged information to identify the basis on which the matter was determined to exclusively affect the SROs. The Commission finds that modifying Section 4.7 to add new paragraph (d) is appropriate because these elements of information—similar to those required for privilege logs, with respect to legal subcommittee meetings—will provide for transparency and accountability, particularly regarding the use of the legal subcommittee, while preserving the attorney-client privilege with respect to discussions at legal subcommittee meetings. For the reasons discussed above, the Commission is approving new Section 4.7(d) of the CT Plan.

(h) Officers

Section 4.8 of Article IV of the CT Plan governs the selection of CT Plan Officers by the SROs, with such authority and duties as the SROs may delegate to them. Paragraph (a) of Section 4.8 provides that, other than the Chair and the Secretary, the SROs may, from time to time, designate and appoint one or more persons as Officers of the LLC by a majority vote of the

494 Separately, Section 4.9 of the proposed CT Plan provides that nothing in the LLC Agreement shall limit or impede the rights of the Commission to access information of the Company or any of the Members pursuant to the federal securities laws and, as discussed below, the Commission is modifying Section 4.9 to provide that the Commission shall have access to all information "and records." See infra Section II.C.5(i).

SROs. This provision further provides the SROs with sole discretion by majority vote to assign titles, determine compensation, if any, and revoke the delegation of authority at any time.

In the Notice, the Commission sought comment on, among other things, whether it is appropriate for decisions about Officers and their attendant duties to be made solely by the SROs.[495] The Commission received several comments on this issue. Some commenters criticize the proposed provision that grants the power to select Officers solely to the SROs,[496] and one of these commenters argues that the selection (including appointment and removal) of Officers should be subject to an augmented majority vote.[497]

One commenter states that the "selection of Officers of the plan is one of the most important functions of the Participants, and it is vital that Non-SRO representatives have a voice in this critical and material decision."[498] This commenter further states that "permitting only the SROs to control the appointment of Officers would be inconsistent with the CT Plan's objective of providing a meaningful role to Non-SROs in the governance of the collection, processing, and dissemination of equity market data."[499] Another commenter states that the absence of SRO duties and obligations in the CT Plan is particularly problematic in light of the significant control the SROs would retain over control of the Company and the CT Plan, including the ability to select Officers.[500]

---

495 See Notice, supra note 3, 85 FR at 64570 (Question 28).

496 See Virtu Letter, supra note 30, at 6; MFA Letter, supra note 30, at 2; Data Boiler Letter I, supra note 31, at 26.

497 See Virtu Letter, supra note 30, at 5.

498 Id. at 6.

499 Id. at 5.

500 See MFA Letter, supra note 30, at 2.

One commenter counters that matters relating to Officers would have no bearing on the governance of the CT Plan or the collection, processing, and dissemination of equity market data.[501] This commenter states, instead, that these matters pertain solely to the LLC form and structure and, because only the SROs are Members of the LLC, only the SROs can vote on such matters.[502] Another commenter argues that the power to appoint and remove persons as Officers of the CT Plan, delegate duties to such persons, and approve salary or other compensation for such persons belongs solely to the SROs.[503]

The Commission disagrees that decisions regarding the selection, appointment, and removal of Officers of the CT Plan, as well as Officers' authority, duties, and compensation, have no bearing on the governance or operation of the CT Plan. The SROs have proposed to structure the new NMS plan for consolidated equity market data as an LLC and to conduct all operations of that NMS plan directly through or under the auspices of that LLC. Thus, particularly depending on the nature, breadth, and scope of authority and duties assigned to the Officers of the LLC, those Officers could be, and would likely be, directly involved in the fulfillment by the SROs of their duties with respect to consolidated market data through the operation of the CT Plan. In addition, the SROs do not identify any LLC-specific functions for which an Officer might be selected that do not relate to the operation of the CT Plan and there is nothing in the CT Plan, as proposed by the SROs, that expressly limits the functions of any Officers selected to "organizational aspects of the LLC's existence."[504] The SROs' unilateral decision to propose the CT Plan in the form of an LLC Agreement of which the SROs alone are

---

501 See NYSE Letter I, supra note 18, at 36.

502 See id.

503 See Nasdaq Letter I, supra note 20, at 11–12.

504 Id. at 10.

members does not in any way justify reserving to the SROs alone the ability to direct operations of the CT Plan by selecting the Officers of the CT Plan. Such a structure would significantly undermine the Commission's objective to broaden participation in the plan governance, with Non-SRO Voting Representatives serving as full members of the Operating Committee, as set forth in the Commission's Governance Order.[505] In addition, the provision of decision making authority in Section 4.8 based on the vote of the majority of Members, rather than on the vote of the majority of SRO Voting Representatives, is inconsistent with the voting structure reflected in the Commission's Governance Order, which allocates voting rights by SRO Group, rather than by exchange license.[506]

Consequently, the Commission believes that it is imperative that it be the Operating Committee by augmented majority vote, and not solely the SRO Members by majority vote, that decides on the creation and assignment of any officer positions and duties under the CT Plan. Accordingly, the Commission is modifying Section 4.8 of the CT Plan[507] to require that the designation, appointment, delegation of authority and duties, and removal of Officers, and the revocation of any officer positions and duties, be subject to a vote of the Operating Committee. As discussed in the Governance Order, the voting scheme directed by the Commission, while it grants votes to Non-SRO Voting Representatives, nonetheless preserves for the SROs sufficient

505 See Governance Order, supra note 8, 85 FR at 28714–20.

506 See id. at 28716.

507 The Commission is also modifying Section 4.8 to substitute the phrase, "Except as provided for in Section 4.4(e)" for the language, "In addition to the Chair and Secretary," that was proposed by the SROs. This modification is intended to make clear that the annual election of the Chair (from among the SRO Voting Representatives) and the selection of the Secretary (by the Chair) as set forth in Section 4.4(e) would not be affected by the Commission's modifications to Section 4.8.

voting power at all times to act jointly on behalf of the CT Plan, which would include the selection of Officers of the CT Plan.[508]

The Commission therefore finds that modification of Section 4.8 of the CT Plan is appropriate because it should help to ensure meaningful participation in the governance of the CT Plan by Non-SRO Voting Representatives, including with respect to the selection of Officers who may be tasked to implement significant decisions of the Operating Committee. For the reasons discussed above, the Commission is approving Section 4.8, as modified.

(i) Commission Access to Information and Records

Section 4.9 of Article IV of the CT Plan, as proposed, provides that the CT Plan "shall not be interpreted to limit or impede the rights of the Commission to access information of the Company or any of the Members (including their employees) pursuant to U.S. federal securities laws and the rules and regulations promulgated thereunder." The Commission received no comment on this provision. Because the term "information" is not defined in the CT Plan, the Commission is modifying Section 4.9 of Article IV of the CT Plan to add the phrase, "and records," to state explicitly that this Agreement does not in any manner limit the Commission's existing rights under the federal statutes, regulations, and rules to access such records. Accordingly, the Commission finds that this modification to Section 4.9 of the CT Plan is appropriate because it is consistent with the Commission's statutory authority for oversight of the governance and operation of the CT Plan. For the reasons discussed above, the Commission is approving Section 4.9 of the CT Plan, as modified.

[508] See Governance Order, supra note 8, 85 FR at 28716.

(j) Disclosure of Potential Conflicts of Interest; Recusal

(i) General Provisions

Article IV, Section 4.10 of the CT Plan sets forth the disclosure requirements with respect to conflicts of interest, and the provisions for recusal, as approved by the Commission.[509] Specifically, Section 4.10(a) provides that the Members, the Processors, the Administrator, the Non-SRO Voting Representatives, and each service provider or subcontractor (each a "Disclosing Party") engaged in Company business that has access to Restricted or Highly Confidential Information, as defined in the Plan,[510] shall be subject to the disclosure requirements as described in Section 4.10(c) and Exhibit B to the Plan. Exhibit B to the CT Plan provides a list of questions and instructions tailored to elicit responses that disclose potential conflicts of interest. Section 4.10(a) also states that the Operating Committee, a Member, Processors, or Administrator may not use a service provider or subcontractor unless that service provider or subcontractor has agreed in writing to provide the disclosures. Section 4.10(a)(i) states that a 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.[511] Section 4.10(a)(ii) requires that the disclosures be updated following a material change in information and that a Disclosing Party update annually any inaccurate information prior to the first quarterly meeting. Section 4.10(a)(iii) requires that the Disclosing Parties provide the Administrator with their disclosures and any required updates and that the

---

509 See Securities Exchange Act Release Nos. 88823 (May 6, 2020), 85 FR 28046 (May 12, 2020); 88824 (May 6, 2020), 85 FR 28119 (May 12, 2020) (collectively, the "Conflicts of Interest Approval Orders"). In the Governance Order, the Commission ordered the SROs to incorporate into the CT Plan provisions consistent with the Conflicts of Interest Approval Orders. See Governance Order, supra note 8, 85 FR at 28726.

510 See infra Section II.C.5(k).

511 See Article IV, Section 4.10(a) of the CT Plan.

Administrator will ensure that the disclosures are posted to the Company's website. Finally, Section 4.10(a)(iv) requires that the Company arrange for Disclosing Parties that are not Members or Non-SRO Voting Representatives to comply with the required disclosures and recusal pursuant to Section 4.10 and Exhibit B of the CT Plan.[512]

The Commission received a number of comment letters addressing the conflicts of interest policy in general.[513] Most commenters support including conflicts of interest provisions. Specifically, one commenter states that the CT Plan should require the Operating Committee to adopt detailed policies and procedures articulating, among other things, specific circumstances where it is appropriate for the Plan to deal with or employ an SRO affiliated entity, disclosure requirements, and a process mandating recusal of an individual SRO in circumstances where there is a potential conflict of interest.[514] This commenter argues that the policies should also apply to transactions with Non-SRO Voting Representatives or any of their affiliates.[515] Another commenter states that a conflicts of interest policy must be rigorous enough to ensure that SROs take actionable steps to mitigate such conflicts.[516] The commenter also contends that the policy cannot be based solely on disclosure and recommends additional steps, such as recusal and explicit prohibition of certain action and certain persons.[517] Another commenter agrees, stating

---

512 See Article IV, Section 4.10 of the CT Plan.

513 See Cboe Letter, supra note 17; BlackRock Letter I, supra note 247; RBC Letter, supra note 30; Virtu Letter, supra note 30; Fidelity Letter, supra note 30; Nasdaq Letter I, supra note 20; Data Boiler Letter I, supra note 31; ICI Letter I, supra note 31; FINRA Letter I, supra note 30; SIFMA Letter I, supra note 30; NYSE Letter I, supra note 18; BMO Letter, supra note 30; MFA Letter, supra note 30; NYSE Letter II, supra note 19; ICI Letter II, supra note 31; Schwab Letter II, supra note 30; SIFMA Letter II, supra note 30; Letter from Patrick Flannery, Chief Executive Officer and Co-Founder, MayStreet (Feb. 19, 2021) ("MayStreet Letter"); BMO Letter II, supra note 30.

514 See Virtu Letter, supra note 30, at 6.

515 See id.

516 See BMO Letter II, supra note 30, at 2.

517 See BMO Letter I, supra note 30, at 3.

that the proposed disclosures are not sufficiently transparent and that self-disclosure to mitigate conflicts would not be effective.[518]

In contrast, several commenters oppose including the conflicts of interest policy in the CT Plan.[519] The commenters argue that the conflicts of interest policy is inconsistent with Section 11A of the Act and Rule 608.[520] Specifically, one commenter states that the proposed policy would preclude the SROs from fulfilling their obligations under securities laws, in particular Rule 608, and is inconsistent with Rule 608(b)(2), and that therefore the CT Plan cannot be approved by the Commission.[521] Another commenter requests that, if the Commission approves the CT Plan, it exclude the conflicts of interest policy from the Plan. Alternatively, the commenter suggests that the Commission publish the exact text of its intended amendments and seek comment before issuing any approval.[522]

One commenter argues that the policies, as amended by the Commission, are vague and onerous and impede the ability of the Operating Committee to conduct its business.[523] In support of its concern, the commenter states that "representatives for the current equity data plans have been engaged in ongoing discussions with Commission staff for six months to establish how the policies applicable to those plans should be interpreted."[524] Another commenter states that the required disclosures of the SRO Voting Representative, Processors, and the Administrator under

---

518 See Data Boiler Letter I, supra note 31, at 5, 49.

519 See Cboe Letter, supra note 17; NYSE Letter I, supra note 18; Nasdaq Letter I, supra note 20.

520 See NYSE Letter I, supra note 18, at 12, 15; NYSE Letter II, supra note 19, at 4; Nasdaq Letter I, supra note 20, at 1–2; Cboe Letter, supra note 17, at 2–4.

521 See NYSE Letter I, supra note 18, at 15, 20.

522 See Nasdaq Letter I, supra note 20, at 2–3, 7, 13.

523 See Cboe Letter, supra note 17, at 6–7. See also Nasdaq Letter I, supra note 20, at 6–7 (stating that the policy is unclear whether certain SRO employees are barred from attending meetings).

524 Cboe Letter, supra note 17, at 7.

the conflicts of interest policy would impose substantial costs without any benefit, as those parties do not have any regulatory obligations under the Act, and that, as the Processors and Administrator are agents of the CT Plan, they are obligated contractually and not under the Plan.[525] The commenter further states that required disclosures of service providers and subcontractors would also impose onerous and burdensome requirements, while providing few, if any, benefits. In particular, the commenter claims that the service providers and subcontractors that would have access to Restricted or Highly Confidential Information would likely be accounting or legal firms, both of which have no role or responsibilities in the governance of the CT Plan.[526]

The Commission agrees with the comments that support a robust conflicts of interest and recusal policy in the CT Plan. As the Commission stated in the Conflicts of Interest Approval Orders, detailed, clear, and meaningful disclosures that provide insight into otherwise non-transparent structures and operations can raise awareness of potential conflicts of interest inherent in the current equity market data structure, and increased access to information can facilitate public confidence in Plan operations.[527] The Commission continues to believe that full disclosure of all material facts necessary for market participants and the public to understand the conflicts of interest is one important approach to dealing with those conflicts.

In response to commenters' objections to the conflicts of interest policy, the Commission continues to believe, as it stated in the Conflicts of Interest Approval Orders, that because

---

525 See NYSE Letter I, supra note 18, at 30.

526 See id. at 30–32.

527 See Conflicts of Interest Approval Orders, supra note 509, 85 FR at 28120 and 85 FR at 28047 (agreeing with the Members 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 Members in running the public market data stream).

Administrators and Processors will have access to highly sensitive and commercially valuable non-public information that would be of substantial value to a Member's proprietary data business, it is appropriate to provide insight into some of the key potential conflicts of interest faced by the parties engaged in Plan business.[528] Similarly, the Commission has also stated that service providers and subcontractors can be affiliated with a Member that offers proprietary data products and connectivity services and that, because they may have access to competitively sensitive and commercially valuable Plan-related information, the potential for competitive harm exists if they share such information with the Member or its affiliates. Thus, the Commission continues to find that it is appropriate to include service providers and subcontractors within the conflicts of interest policies, as they would be under the direction of a Member, engaged in Plan business, and have access to Restricted or Highly Confidential Information.[529]

Further, the Commission disagrees with commenters' assertions that the proposed conflicts of interest policy is inconsistent with Section 11A of the Act and Rule 608. Section 11A of the Act directs the Commission to facilitate the establishment of a national market system for trading in securities,[530] under which consolidated data about quotations for and transactions in securities is collected and disseminated by the Equity Data Plans governed and operated by the SROs. As the Commission stated in the Governance Order, the demutualization of exchanges and the proliferation of proprietary exchange data products have heightened the conflicts between the SROs' business interests in proprietary data offerings and their obligations as SROs under the national market system to ensure the prompt, accurate, reliable, and fair dissemination

---

528 See Conflicts of Interest Approval Orders, supra note 509, 85 FR at 28126 and 85 FR at 28053.

529 See Conflicts of Interest Approval Orders, supra note 509, 85 FR at 28121 and 85 FR at 28048.

530 See 15 U.S.C. 78k-1(a)(1).

of core data through the jointly administered Equity Data Plans.[531] In requiring that the CT Plan include the particular disclosure provisions identified in the Governance Order,[532] the Commission reasonably exercised its authority under Section 11A to address the conflicts inherent in the dual responsibilities exchange representatives have with respect to proprietary data products and consolidated equity data products. Furthermore, the Commission reasonably required additional disclosure of the relevant conflicts of interest, as well as safeguards to mitigate the possibility that a Member's proprietary data business could benefit from commercially valuable data obtained by its SRO Voting Representative or other employees that have responsibilities to the Plan.

Additionally, with respect to Rule 608, that rule provides that the Commission shall approve a proposed plan or plan amendment, "with such changes or subject to such conditions as the Commission may deem necessary or appropriate."[533] The Commission provided a notice and comment period with respect to the proposed CT Plan and has acted within its discretion in determining that certain modifications are appropriate after considering comments received in response to the Notice. Further, the Commission does not believe that the conflict of interest policies are vague or onerous. Consistent with its findings in the Conflicts of Interest Approval Orders,[534] the Commission concludes that the conflicts of interest policy of the CT Plan, as modified, would facilitate detailed, clear, and meaningful disclosures that would provide insight into otherwise non-transparent structures and operations of the Plan.

---

531 See Governance Order, supra note 8, 85 FR at 28704.

532 See id. at 28726.

533 17 CFR 242.608(b)(2).

534 See Conflicts of Interest Approval Orders, supra note 509, 85 FR at 28120 and 85 FR at 28047.

Finally, certain commenters argue that the Conflicts of Interest Approval Orders constituted impermissible rulemaking that required notice and comment because the Commission made substantial and material changes to the conflicts of interest policies proposed by the SROs for the Equity Data Plans,[535] and that therefore the conflicts of interest policy should not be included in the CT Plan. The Commission disagrees with the assertion that the separate Conflicts of Interest Approval Orders constituted impermissible rulemaking, and the Commission responded to these objections both in the Conflicts of Interest Approval Orders and in subsequent litigation. In any event, those procedural objections have no bearing on the adequacy of the procedure resulting in this Order. The Governance Order required the SROs to include in the CT Plan provisions consistent with the Conflicts of Interest Approval Orders,[536] and the public has had the opportunity to consider and comment on the provisions proposed for the CT Plan on multiple occasions. The provisions were published in the Conflicts of Interest Approval Orders, and the Governance Order issued the same day required that similar provisions be included in the New Consolidated Data Plan.[537] Additionally, the CT Plan, including the proposed conflicts of interest policy was published for comment,[538] providing interested persons with a further opportunity to consider the proposed language of the conflicts of interest policy and to express

---

535 See Cboe Letter, supra note 17, at 6–7; Nasdaq Letter I, supra note 20, at 28–29 (stating that the policies are unlawful and that the proposed Plan would perpetuate the arbitrary and capricious rulemaking undertaken by the Commission when it failed to provide notice or seek comment on its own modifications to the policy language proposed by the Equity Data Plans); NYSE Letter I, supra note 18, at 14 (stating that both policies are subject to pending litigation and that it would be inappropriate to mandate continued effectiveness following a judicial determination that they are contrary to law). These commenters also undertook a legal challenge to the Conflicts of Interest Approval Orders.

536 See Governance Order, supra note 8, 85 FR at 28726.

537 See id.

538 See Notice, supra note 3, 85 FR at 64583–84.

their views. Furthermore, the Order Instituting Proceedings provided yet another opportunity to comment on the relevant provisions of the proposed CT Plan.[539]

(ii) Applicability to Member Observers

In the Notice, the Commission solicited comment on whether the same disclosure requirements and recusal provisions that apply to Members and other identified persons would sufficiently mitigate any conflicts of interest faced by Member Observers, and if not, what additional disclosures or recusal provisions commenters believe would be appropriate.[540]

In response, several commenters support extending the policies to include Member Observers.[541] Specifically, these commenters recommend that all observers be subject to the conflicts of interest policy and procedures of the CT Plan.[542] In contrast, one commenter objects to the application of the conflicts of interest policy to Member Observers, stating that most Member Observers are employees of the Member charged with that Member's compliance obligations under Rule 608(c), and as such are already included in the disclosures of the Member.[543] The commenter further argues that the identity and affiliation of a Member Observer would be disclosed in meeting minutes and that reasonable questions regarding the Member Observer's affiliation could be addressed at the Operating Committee meeting.[544]

After considering the comments received, the Commission believes that the provisions regarding disclosures of potential conflicts of interest and recusal should be modified to apply to

---

539 See Order Instituting Proceedings, supra note 5.

540 See Notice, supra note 3, 85 FR at 64570–71.

541 See RBC Letter, supra note 30; ICI Letter I, supra note 31; Fidelity Letter, supra note 30.

542 See RBC Letter, supra note 30, at 8–9; ICI Letter I, supra note 31, at 5; Fidelity Letter, supra note 30, at 5.

543 See Nasdaq Letter I, supra note 20, at 27.

544 See id.

all Member Observers. Specifically, because Member Observers, under the definition modified by the Commission, will be an employee of a Member or any attorney to a Member,[545] the Commission believes that the potential conflicts of interests that apply to the Member would equally apply to the Member Observer. The Commission does not agree with the assertion that all relevant information regarding a Member Observer would necessarily be included in the disclosures as the proposed Member disclosures require only the names of the Voting Representative and any alternate Voting Representative designated by the Member. As required in Exhibit B, a Member is also required to provide the name of each designated individual and a narrative description of each such persons' role within the Member organization, and the Commission believes that these disclosures should include Member Observers. Additionally, because Member Observers are by definition permitted to attend Operating Committee meetings, subcommittee meetings, and Executive Sessions,[546] they may have access to competitively sensitive and commercially valuable information related to the CT Plan.

The Commission believes that Member Observers should also be subject to Section 4.10, the disclosures pursuant to Exhibit B, and the recusal requirements of the conflicts of interest policy. Specifically, the Commission finds that it is appropriate to modify Section 4.10(a) of the CT Plan to expressly require that all Member Observers be included in the Members' disclosures because Member Observers may face conflicts of interest similar to those faced by SRO Voting Representatives. The Commission is also making a corresponding modification to Exhibit B of the CT Plan to expressly include Member Observers. The Commission finds that these modifications are appropriate because a Member Observer can have his or her own conflicts of

[545] See supra Section II.C.5(d)(i).

[546] See Article I, Sections 1.1(z) & 1.1(oo) of the CT Plan.

interest, and consequently, a Member should also be required to respond to questions regarding whether its Member Observers 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 Company and to 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 CT Plan. Additionally, because the Commission is requiring that Member Observers be included in a Member's conflicts disclosures, and because the Member disclosures as proposed would have required the name and narrative description of only the Voting Representative and alternate SRO Voting Representative, the Commission finds that it is appropriate to modify Exhibit B (a)(iii) to replace references to "representatives" with "persons" to account for the new category of Member Observer, in addition to the Voting Representative and alternate SRO Voting Representative.

(iii) Recusals

Article IV, Section 4.10(b) of the CT Plan discusses recusals and expressly prohibits a Member from appointing as its Voting Representative a person that is responsible for or involved with procurement for, or development, modeling, pricing, licensing, or sale of, PDP offered to customers of the CT Feeds, if the person has a financial interest (including compensation) that is tied directly to the Disclosing Party's market data business or the procurement of market data, and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.[547] Section 4.10(b)(ii) further requires recusal of a Disclosing Party from participating in Company activities if the individual

[547] See Article IV, Section 4.10(b) of the CT Plan.

has not submitted the required disclosure,[548] and Section 4.10(b)(iii) states that a Disclosing Party, including its representatives(s), and its Affiliates and their representatives(s), is recused from voting on matters in which it or its Affiliate is seeking a position or contract with the Company or has a position or contract with the Company and whose performance is being evaluated.[549] The subsection also states that all recusals will be reflected in the meeting minutes.[550]

The Commission received several comments regarding the recusal provisions. One commenter expresses the view that the CT Plan as proposed is unclear regarding whether individuals that work on the proprietary operations of an SRO would be required to be recused from acting as a Member Observer. The commenter suggests that there be a clear approach to Member Observers that limits those individuals eligible for appointment to persons who are not involved in the management, marketing, sale or development of proprietary equity data products at the SRO.[551] Several commenters made similar statements, recommending that persons who hold positions with an SRO, particularly those who are responsible for equity data products offered separately by the SRO, or who receive compensation tied to the sale of proprietary market data, should be prohibited from serving as a Member Observer, which in turn would help to address potential conflicts of interest.[552] In support of this recommendation, one commenter believes that, because Member Observers are permitted to attend Executive Sessions and receive

---

548 See Article IV. Section 4.10(b)(ii) of the CT Plan.

549 See Article IV, Section 4.10(b)(iii) of the CT Plan.

550 See Article IV, Section 4.10(b)(iv) of the CT Plan.

551 See SIFMA Letter I, supra note 30, at 4; SIFMA Letter II, supra note 30, at 2.

552 See BMO Letter, supra note 30, at 4; ICI Letter I, supra note 31, at 5; ICI Letter II, supra note 31, at 2, Fidelity Letter, supra note 30, at 5; FINRA Letter I, supra note 257, at 5; BlackRock Letter I, supra note 247, at 4–5.

highly confidential information, an individual responsible for the sale of proprietary market data would face an inherent conflict of interest.[553]

In contrast, one commenter argues that the recusal provisions of the conflicts of interest policy would impair the SROs' abilities to choose how to manage their businesses and fulfill their regulatory responsibilities.[554] The commenter is particularly concerned with the standard of "impartiality" regarding appointment of a potential Voting Representative, stating that the Commission does not define impartiality in this context and assumes that the SRO is only appropriately impartial when there is a total separation between its involvement in an NMS plan and its proprietary data activities.[555] The commenter further argues that there is no requirement under Section 11A of the Act or Rule 608 for an SRO to be impartial when discharging its obligations to act jointly in the planning, development, operation, and regulations of an NMS plan.[556]

The Commission continues to believe that, while it is an SRO rather than an individual SRO employee that has obligations to the CT Plan, to the extent an exchange that offers proprietary equity market data products appoints as its representative to the CT Plan an individual responsible for the sale of proprietary market data, that person has an inherent conflict of interest arising from his or her financial interest in the exchange's proprietary data business.[557] The Commission believes that such an individual's financial interest in the exchange's proprietary data businesses, as well as the exchange's own commercial interest, could influence

---

553 See BlackRock Letter I, supra note 247, at 4–5.

554 See NYSE Letter I, supra note 18, at 18.

555 See id.

556 See id. at 19.

557 See Conflicts of Interest Approval Orders, supra note 509, 85 FR at 28128 and 85 FR at 28054.

the individual's and the exchange's decision-making regarding the CT Plan's operations. As the Commission has previously stated, in light of this conflict, even if such individuals have the requisite expertise, the Commission believes that it is appropriate to prohibit a Member from appointing such an individual as its SRO Voting Representative to the CT Plan.[558]

Separately, as discussed above,[559] the Commission believes that certain discussions under the CT Plan may include Member Observers. The Commission believes that because Member Observers may attend CT Plan meetings and potentially receive and assess Highly Confidential Information, a Member Observer who is responsible for and has a financial interest (including compensation) in an exchange's proprietary market data products has an inherent conflict of interest. Thus, the Commission believes that Member Observers should be subject to the same restriction as SRO Voting Representatives and is therefore modifying the text of Section 4.10(b)(i) of the CT Plan to include any Members Observer, as well as any alternate SRO Voting Representative.[560] The Commission finds that this modification is appropriate because it will prohibit a Member from appointing to either role a person that is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, PDP offered to customers of the CT Feeds if the person has a financial interest (including compensation) that is tied directly to the Member's market data business or the procurement of market data, and if that

---

558 See Conflicts of Interest Approval Orders, supra note 509, 85 FR at 28128 and 85 FR at 28055.

559 See supra Section II.C.5(d)(i).

560 Pursuant to Article IV, Section 4.10(b) of the CT Plan, a Member is prohibited from appointing as its Voting Representative a person that is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, PDP offered to customers of the CT Feeds if the person has a financial interest (including compensation) that is tied directing to the Member's market data business or the procurement of market data and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative. Accordingly, the Commission is specifying that a Member would similarly be prohibited from appointing such a person as an alternate Voting Representative.

compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.

Separately, in the Notice, the Commission asked whether the disclosure requirements under Section 4.10 and Exhibit B would elicit sufficient relevant information to mitigate conflicts of interest that may result from Members engaging in certain business activities outside of the business activities of the CT Plan as provided for in Section 4.6.[561] Although the Commission received comment letters acknowledging that the disclosure requirements may elicit relevant information to identify and mitigate potential conflicts of interest, one commenter recommends that an SRO Voting Representative be recused from voting on matters relating to opportunities, relationships, or investments when the interests of the Member employing the voting representative conflicts with the interests of the CT Plan.[562] This Order addresses these comments in Section II.C.5(f) above, regarding Company Opportunities.[563]

(iv) Effect of Pending Petitions for Review

Finally, the Commission also solicited comment on Section 4.10(d) of the CT Plan, which provides that if the Commission's Conflicts of Interest Approval Orders are stayed or overturned by a court, the requirements of Section 4.10 and Exhibit B shall not apply.[564] The Commission sought commenters' views on whether such a provision is necessary or appropriate for the CT Plan and whether the CT Plan should, at a minimum, contain provisions for addressing conflicts of interests that are not subject to elimination, or provisions specifying that

---

561 See Notice, supra note 3, 85 FR at 64571.

562 See SIFMA Letter I, supra note 30, at 4–5; SIFMA Letter II, supra note 30, at 2; Nasdaq Letter I, supra note 20, at 24.

563 See supra Section II.C.5(f).

564 See Article IV, Section 4.10(d) of the CT Plan.

the CT Plan must be amended to include a new policy with respect to conflicts of interest before the existing policy can be removed.[565] One commenter supports retaining the current provisions of Section 4.10 in the event that the Conflicts of Interest Approval Orders are stayed or overturned so that conflicts remain disclosed.[566]

As the Commission previously stated in the Conflicts of Interest Approval Orders, 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 CT Plan, as those competing interests could materially affect their ability to carry out the purposes of the Plan.[567]

The Commission is modifying Section 4.10 to remove subsection (d), which provides that if the Commission's Conflicts of Interest Approval Orders are stayed or overturned, the requirements of Section 4.10 and Exhibit B would not be applicable. The Commission finds that it is appropriate to remove this provision from the CT Plan. The U.S. Court of Appeals for the D.C. Circuit has dismissed the petitions for review of the Conflicts of Interest Approval Orders that were pending when the SROs filed the proposed CT Plan.[568] Moreover, even if a court were to vacate the Conflicts of Interest Approval Orders, the CT Plan would be able to file an amendment with the Commission to align the policy with the court's decision, and the Commission could, on its own initiative, propose an amendment as well.

---

565 See Notice, supra note 3, 85 FR at 64571 (Question 32).

566 See RBC Letter, supra note 30, at 11.

567 See Conflicts of Interest Approval Orders, supra note 509, 85 FR at 28120 and 85 FR at 28047.

568 See New York Stock Exchange, et al. vs. Securities and Exchange Commission, Nos. 20-1242, 20-1243, 20-1244, --- F.4th ----, 2021 WL 2654987, *1–4 (D.C. Cir., June 29, 2021).

For the reasons discussed above, the Commission is approving Article IV, Section 4.10 of the CT Plan and Exhibit B, as modified.

(k) Confidentiality Policy

(i) General Provisions

Article IV, Section 4.11 of the CT Plan sets forth the proposed confidentiality policy.[569] As proposed, Section 4.11(a) provides that the Members and Non-SRO Voting Representatives are subject to the policy as set forth in Exhibit C to the Plan (the "Confidentiality Policy"). The provision further states that the Company will arrange for Covered Persons that are neither Members nor Non-SRO Voting Representatives to comply with the Confidentiality Policy under their respective agreements with the Company, a Member, the Administrator, or the Processors. Section 4.11(b) states that if the Commission's Confidentiality Policy Approval Orders are stayed or overturned by a court, the requirements of Section 4.11 and related Confidentiality Policy in Exhibit C shall not apply.[570]

For the reasons discussed below, the Commission is modifying the CT Plan to delete Section 4.11(b) from the CT Plan,[571] and the Commission is therefore renumbering Section 4.11(a) of the CT Plan as Section 4.11. As discussed below, the requirements of the Confidentiality Policy apply to all Covered Persons. For consistency with Exhibit C, the Commission finds that it is appropriate to modify the first sentence of renumbered Section 4.11 to replace the phrase "The Members and Non-SRO Voting Representatives" with the phrase "All

---

[569] See Securities Exchange Act Release Nos. 88825 (May 6, 2020), 85 FR 28090 (May 12, 2020); 88826 (May 6, 2020), 85 FR 28069 (May 12, 2020) (collectively, the "Confidentiality Policy Approval Orders"). In the Governance Order, the Commission ordered the SROs to incorporate into the CT Plan provisions consistent with the Confidentiality Policy Approval Orders. See Governance Order, supra note 8, 85 FR at 28726.

[570] See Article IV, Section 4.11(b) of the CT Plan.

[571] See infra Section II.C.5(k)(iv) (discussing the effect of pending petitions for review).

Covered Persons." Additionally, because the defined term Covered Persons, as modified by the Commission[572] will include Member Observers, the Commission finds that it is appropriate to modify the second sentence of renumbered Section 4.11 to replace the term "Members" with the phrase "SRO Voting Representatives and Member Observers." As modified, Section 4.11 of the CT Plan will state that the Company "will arrange for Covered Persons that are not SRO Voting Representatives, Member Observers, or Non-SRO Voting Representatives to comply with the Confidentiality Policy under their respective agreements with either the Company, a Member, the Administrator, or the Processors."

Separately, Exhibit C to the CT Plan[573] describes the purpose and scope of the Confidentiality Policy, the procedures regarding the custodian and designations of all documents, and the procedures concerning Restricted Information,[574] Highly Confidential Information,[575] and Confidential Information.[576] Section (a)(ii) of Exhibit C states that the Confidentiality Policy applies to all Covered Persons,[577] and provides that Covered Persons must adhere to the policy

---

572 See infra Section II.C.5(k)(iii) (discussing the defined term Covered Persons).

573 See Exhibit C to the CT Plan.

574 Article I, Section 1.1(mmm) of the CT Plan defines Restricted Information as highly sensitive customer-specific financial information, customer-specific audit information, other customer financial information, and personal identifiable information.

575 Article I, Section 1.1(ii) of the CT Plan defines Highly Confidential Information as highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information. Highly Confidential Information includes: the Company's contract negotiations with the Processors or Administrator; personnel matters; information concerning the intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.

576 Article I, Section 1.1(l) of the CT Plan describes Confidential Information to mean, except to the extent covered by the definitions for Restricted Information, Highly Confidential Information, or Public Information: (i) any non-public data or information designated as Confidential by the Operating Committee pursuant to Section 4.3; (ii) any document generated by a Member or Non-SRO Voting Representative and designated by that Member or Non-SRO Voting Representative as Confidential; and (iii) the individual views and statements of Covered Persons and SEC staff disclosed during a meeting of the Operating Committee or any subcommittees thereunder.

577 Article I, Section 1.1(n) of the CT Plan defines Covered Persons.

and may not receive Company data and information until they affirm in writing that they have read and undertake to abide by the terms of the Confidentiality Policy.

The Commission received several comments regarding the Confidentiality Policy.[578] Generally, commenters support having a confidentiality policy in the CT Plan. Specifically, one commenter states that not all confidential information is the same and favors having tailored procedures for Restricted, Highly Confidential, and Confidential Information.[579] The commenter further states that the specified procedures should also permit all Voting Representatives, and not just SRO Voting Representatives, to have access to Restricted and Highly Confidential Information so that they are able to make informed decisions, and that a strong confidentiality policy would improve the flow of information to decision-makers, including all Voting Representatives, which in turn would improve those decisions.[580]

In contrast, several commenters oppose having such a policy in the CT Plan.[581] These commenters state that the Confidentiality Policy is inconsistent with Section 11A of the Act and Rule 608,[582] and that the Confidentiality Policy would frustrate the purposes of the Act and the

---

578 See Cboe Letter, supra note 17, at 6–8; BlackRock Letter I, supra note 247, at 5; RBC Letter, supra note 30, at 9–11; Fidelity Letter, supra note 30, at 5; Nasdaq Letter I, supra note 20, at 2–7, 28–29; Data Boiler Letter I, supra note 31, at 38; ICI Letter I, supra note 31, at 4; FINRA Letter I, supra note 257, at 5–6; SIFMA Letter I, supra note 30, at 4; NYSE Letter I, supra note 18, at 12, 15–18, 20–29; BMO Letter, supra note 30, at 4; MFA Letter, supra note 30, at 4; NYSE Letter II, supra note 19, at 4–5; ICI Letter II, supra note 31, at 2; Schwab Letter I, supra note 30, at 2; MayStreet Letter, supra note 513, at 4.

579 See RBC Letter, supra note 30, at 11.

580 See id. In support, this commenter also suggests that Non-SRO Voting Representatives could be required to sign non-disclosure agreements. See id.

581 See Cboe Letter, supra note 17, at 6–8; NYSE Letter I, supra note 18, at 12; NYSE Letter II, supra note 19, at 4; Nasdaq Letter I, supra note 20, at 2–3.

582 See Cboe Letter, supra note 17, at 6; NYSE Letter I, supra note 18, at 12, 15; NYSE Letter II, supra note 19, at 4; Nasdaq Letter I, supra note 20, at 1–2.

national market system.[583] Generally, these commenters state that by restricting an SRO Voting Representative from sharing CT Plan information with other personnel at an SRO—in the commenters' words, putting the SRO Voting Representative on an "informational island"[584]—the Confidentiality Policy would preclude Members from fulfilling their obligations under the securities laws, including Rule 608.[585] One of these commenters argues that if the Commission determines to approve the Plan with amendments, it should publish the exact text of the intended amendments and seek comment prior to issuing an approval. The commenter states that the necessity of seeking comment is demonstrated by the "numerous errors and potential unintended consequences" in the Conflicts of Interest Approval Orders and Confidentiality Policy Approval Orders currently applicable to the Equity Data Plans.[586]

Both here and in the Confidentiality Policy Approval Orders, the Commission has followed the procedures in Rule 608 for approval of an NMS plan. Moreover, what one commenter describes as "errors" and "unintended consequences" in the Confidentiality Policy Approval Orders of the Equity Data Plans reflect instead a fundamental disagreement over whether any restrictions may be imposed on the use by SROs of commercially sensitive information garnered through their participation in the Equity Data Plans. And what one commenter[587] asserts is guidance from Commission staff that is inconsistent with the Confidentiality Policy Approval Orders reflects instead the staff's good faith efforts to engage

---

583 See NYSE Letter I, supra note 18, at 20; NYSE Letter II, supra note 19, at 2; Nasdaq Letter I, supra note 20, at 1–2, 7; Cboe Letter, supra note 17, at 2, 6.

584 See Cboe Letter, supra note 17, at 8; NYSE Letter I, supra note 18, at 17.

585 See NYSE Letter I, supra note 18, at 15, 17; NYSE Letter II, supra note 19, at 4; Nasdaq Letter I, supra note 20, at 3; Cboe Letter, supra note 17, at 8.

586 Nasdaq Letter I, supra note 20, at 3.

587 See NYSE Letter I, supra note 18, at 24 & Attachment A.

with the SROs and their counsel regarding their proposed "interpretations" of the Confidentiality Policy Approval Orders.

One commenter also states that the Confidentiality Policy imposes unreasonable burdens and risks upon the SROs, their representatives, and their senior management by failing to recognize that the SRO, not its voting representative, is the CT Plan's Member and that the SRO itself and its senior management are ultimately responsible for all aspects of the SRO's operations, including participating in national market system plans and compliance with Rule 608.[588]

In response to commenters' concerns, the Commission notes that the SRO Voting Representative may, subject to certain conditions, share confidential information with individuals within the SRO. Depending on the type of confidential information, the provisions provide that Confidential Information may be disclosed "in furtherance of the interests of the Company," Highly Confidential Information may be disclosed when employees are "authorized to receive it," or when "required by law,"[589] and Restricted Information may be disclosed by the Administrator when it determines that it is appropriate to share a customer's financial information with the Operating Committee after redacting the customer's name and other personal information. Accordingly, if the SRO's Voting Representative has a legitimate need to share Plan information with, for example, the SRO's senior management, the CT Plan's provisions provide the means to do so.

Separately, one commenter claims that Section (b)(i)(B) of Exhibit C—which provides that the Administrator may, under delegated authority, designate documents as Restricted,

---

[588] See Nasdaq Letter I, supra note 20, at 3.

[589] See infra Section II. C. 5(k)(ii) (discussing modifications to Treatment of Highly Confidential Information).

Highly Confidential, or Confidential—is unlawful. Specifically, this commenter argues that, because the Administrator has no obligations under the securities laws and would only be acting as an agent of the Members, the Administrator's obligations are solely to the Operating Committee pursuant to its contract to perform functions required to allow the Members to meet their obligations under the securities laws.[590] The commenter further contends that the Confidentiality Policy is unclear as to how the Operating Committee could provide oversight of the Administrator's designation of documents as Restricted, Highly Confidential, or Confidential, given the restrictions on sharing Restricted, Highly Confidential, and Confidential Information.[591] Accordingly, the commenter recommends that the Commission propose and publish for comment provisions authorizing the Operating Committee to direct the Administrator and Processors to apply confidentiality designations to such documents, which the Members could jointly administer and implement through CT Plan contracts with the Administrator and Processors.[592]

The provisions of the CT Plan and Confidentiality Policy define and specify the types of Restricted, Highly Confidential, and Confidential Information. The Commission notes that the Administrator would be required to adhere to the defined terms and policy provisions as discussed below, rather than having unfettered discretion to categorize information under the Confidentiality Policy. Moreover, the Commission believes that permitting the Operating Committee, rather than the Administrator, to determine what information should be treated as Restricted, Highly Confidential, or Confidential would both fatally undermine the Confidentiality Policy and wholly defeat the purpose of having an independent Administrator

590 See NYSE Letter I, supra note 18, at 27; NYSE Letter II, supra note 19, at 5.

591 See NYSE Letter I, supra note 18, at 27.

592 See id. at 28.

that is not compromised by the core conflict faced by SROs that sell their own proprietary equity data products.

Finally, one commenter argues that, while Exhibit C to the CT Plan includes the same provisions as the Confidentiality Policy Approval Orders, the CT Plan, if approved, would "perpetuate the arbitrary and capricious rulemaking undertaken by the Commission when it failed to provide notice or seek comment on its own modifications to the policy language proposed by the Equity Data Plans."[593] Accordingly, the commenter recommends that the confidentiality provisions be excluded from the Plan. The Commission, however, disagrees with the procedural objections raised to the separate Confidentiality Policy Approval Orders, and the Commission has responded to the procedural objections both in the Confidentiality Policy Approval Orders and in subsequent litigation. In any event, those procedural objections have no bearing on the adequacy of the procedure resulting in this Order. Here, the Commission noticed the SROs' proposed CT Plan, provided an opportunity for comment, and posed detailed and specific questions with respect to particular issues raised by the proposed CT Plan's provisions, including the Confidentiality Policy. Moreover, because the Confidentiality Policy Approval Orders were issued on the same day as the Governance Order, the language of the confidentiality policies of the Equity Data Plans as approved was available to commenters when discussing whether similar provisions should be included in the CT Plan. The Commission's modifications here both directly respond to the public comments received and more fully accomplish the CT Plan's stated purpose, consistent with the changes made by the Commission in the Confidentiality Policy Approval Orders. These changes are well within the Commission's discretion in deciding that additional measures are necessary or appropriate to address the

[593] Nasdaq Letter I, supra note 20, at 3.

conflict between an SRO both selling proprietary data in its commercial capacity and discharging its obligation to collect and disseminate consolidated data through a national market system plan.

(ii) Treatment of Restricted, Highly Confidential, and Confidential Information

Restricted Information.

Section (b)(ii) of Exhibit C provides the procedures concerning Restricted Information, generally prohibiting a Covered Person in possession of Restricted Information from disclosing it to others, including Agents, and provides that this prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by Applicable Law, or to other Covered Persons as expressly provided for by the policy. Section (b)(ii) further states that Restricted Information will be kept in confidence by the Administrator and Processors and will not be disclosed to the Operating Committee or any subcommittee thereof or during Executive Session. However, Restricted Information may be shared if the Administrator determines that it is appropriate to share a customer's financial information with the Operating Committee and first anonymizes the information. The Administrator may disclose the identity of a customer in Executive Session if, in good faith, the Administrator determines that it is necessary to disclose the customer's identity in order to obtain input or feedback from the Operating Committee or a subcommittee thereof about a matter of importance to the Company. In such case, the Administrator will change the designation from Restricted Information to Highly Confidential Information.[594]

As proposed, Section (b)(ii) of Exhibit C does not include a clause that is present in the Confidentiality Policy Approval Orders. That clause permits the Administrators of the existing Equity Data Plans to share with the staff of the SEC Restricted Information related to any willful,

[594] See Section (b)(ii)(B) of Exhibit C of the CT Plan.

reckless, or grossly negligent conduct by a customer discovered by an Administrator, upon majority vote of the Operating Committee in Executive Session, and that clause served as a specific exception to the general provision in that same paragraph that "Restricted Information will be kept in confidence by the Administrator and Processor and will not be disclosed to the Operating Committee or any subcommittee thereof, or during Executive Session, or to the Advisory Committee."[595] The Commission in the Confidentiality Policy Approval Orders also modified Section 3(b)(i) of the Equity Data Plans' confidentiality policies to more broadly provide that "Covered Persons in possession of Restricted Information are prohibited from disclosing it to others, including Agents," but specifically further provided that this prohibition "does not apply to disclosure to the staff of the SEC or as otherwise required by law, or to Covered Persons as expressly provided for by this Policy."[596] Although the CT Plan as proposed does not contain the specific exception that appears in the Equity Data Plans regarding the sharing by the Administrator of Restricted Information regarding certain customer conduct, the Commission believes that the broader language of Section (b)(ii) of Exhibit C to the CT Plan, which provides that the restrictions on sharing of Restricted Information do not apply to disclosure to the staff of the Commission, is sufficient to ensure that Restricted Information regarding any willful, reckless or grossly negligent conduct by a customer can be shared with the Commission.

Some commenters oppose the language in Sections (b)(ii) and (b)(iii)(A)(1) of Exhibit C that limits a Covered Person's ability to disclose Restricted Information and Highly Confidential Information to others, "including agents."[597] Generally, these commenters are concerned that the

---

595 Confidentiality Policy Approval Orders, supra note 569, 85 FR at 28103 and 85 FR at 28081.

596 Confidentiality Policy Approval Orders, supra note 569, 85 FR at 28098 and 85 FR at 28077.

597 See NYSE Letter I, supra note 18, at 15, 23; Nasdaq Letter I, supra note 20, at 4–6.

restriction is broad and impedes the ability of the Plan Administrator and Processors to perform tasks—such as hiring independent auditors and outside counsel to perform administrative functions—necessary for a Member to comply with its obligations pursuant to Rule 608.[598] For example, these commenters argue that for the Administrator to provide services to the CT Plan, such as audited financial statements, the Administrator must be able to provide Restricted Information and Highly Confidential Information to an independent auditor, but would be restricted from doing so under the Confidentiality Policy.[599] One commenter argues that the policies are impermissibly vague and states that it has had ongoing discussions with Commission staff to establish how the policies should be interpreted.[600] Another commenter similarly states that it has raised policy interpretation questions with Commission staff.[601] The commenter argues that the staff's response to the questions is not sufficiently clear and is inconsistent with the plain language of the Confidentiality Policy Approval Orders, and the commenter recommends that the Commission eliminate or substantially modify the prohibition on providing confidential information to agents and publish a new proposal for comment.[602]

After considering comments received, the Commission finds that it is appropriate to modify Exhibit C to the CT Plan to provide for additional sharing of protected information in

---

598 See NYSE Letter I, supra note 18, at 23–24; NYSE Letter II, supra note 19, at 4–5; Nasdaq Letter I, supra note 20, at 5–6; Cboe Letter, supra note 17, at 8 (stating that policy could be read to prohibit the sharing of certain types of confidential information with outside legal counsel, auditors, or other service providers that have a need to access that information).

599 See NYSE Letter I, supra note 18, at 23–24. See also Nasdaq Letter I, supra note 20, at 6 (stating that its auditors have expressed concerns about whether the policy is consistent with professional obligations that require them to subject their work to peer review and that may therefore require making Restricted or Highly Confidential Information available to persons who are not Covered Persons).

600 See Cboe Letter, supra note 17, at 7–8 (arguing that the policies would limit access to certain confidential information to the particular individual who is representing an SRO and would further limit the ability of an individual SRO representative to share information and consult with other employees of the SRO that is the actual plan participant).

601 See NYSE Letter I, supra note 18, at 23.

602 See NYSE Letter I, supra note 18, at 24; NYSE Letter II, supra note 19, at 5.

certain circumstances. As discussed above, commenters raise concerns that the Confidentiality Policy improperly limits the Administrator's and Processors' ability to share Restricted Information with others, including agents, impeding the ability of an agent to perform its specific services to the CT Plan. The Commission has carefully considered these commenters' concerns and finds that it is appropriate to permit such disclosure when the Operating Committee, consistent with the purposes and goals of the CT Plan, determines that it is appropriate to do so, because there may be instances in which Restricted Information is required to be disclosed to a Covered Person or third party in the service of the CT Plan. Accordingly, the Commission is adding new subparagraph (C) to Section (b)(ii) of Exhibit C to provide that the Operating Committee may authorize the disclosure of specified Restricted Information to specific Covered Persons or third parties, if it determines that doing so is in furtherance of the interests of the Plan, which is 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, consistent with Section 11A of the Act.[603]

The new subparagraph (C) also requires that Covered Persons and third parties authorized by the Operating Committee that receive or have access to Restricted Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy. The Commission finds that this modification is appropriate because it will provide additional safeguards to ensure that highly sensitive customer and personally identifiable information is properly protected and not misused. Finally, new subparagraph (C) provides that such authorization will be granted on a case-by-case basis, unless the Operating

[603] 15 U.S.C. 78k-1(c)(1)(B).

Committee grants standing approval to allow disclosure of specified recurring information to specific Covered Persons. The Commission finds that this modification is appropriate because it promotes efficiency by allowing for the disclosure of Restricted Information to specific Covered Persons on an ongoing basis, where appropriate, without having to continually seek Operating Committee approval.

Highly Confidential Information.

As proposed, Section (b)(iii)(A) of Exhibit C permits Highly Confidential Information to be disclosed in Executive Session or to the subcommittee established pursuant to Section 4.7(c) of the CT Plan, and provides that Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents, except to other Covered Persons who need the information to fulfill their responsibilities to the Company. The prohibition does not apply to disclosures to the SEC staff or as otherwise required by law, or to other Covered Persons authorized to receive it. Thus, Highly Confidential Information may be disclosed to Commission staff unless it is protected by the Attorney-Client Privilege or the Work Product Doctrine. This section further states that the Operating Committee cannot authorize any other disclosure of Highly Confidential Information.

Section (b)(iii)(B) provides that in the event that a Covered Person is determined by an affirmative vote of the Operating Committee to have disclosed Highly Confidential Information, "the Operating Committee will determine the appropriate remedy for the breach based on the facts and circumstances of the event. For an SRO Voting Representative or Member Observer, remedies include a letter of complaint to the SEC, which may be made public by the Operating

Committee. For a Non-SRO Voting Representative, remedies include removal of that Non-SRO Voting Representative."[604]

As noted above, some commenters express concerns that the Confidentiality Policy would preclude Members from fulfilling their obligations under the securities laws. Specifically, commenters argue that the SROs—not the individual Voting Representatives—have responsibilities under the Act and rules of the Commission and must be able to determine what information is available to individuals within an SRO in order to satisfy the SRO's regulatory obligations.[605] Another commenter agrees, arguing that the Confidentiality Policy, as written, wrongly assumes that the SRO Voting Representative has sole responsibility for all CT Plan decisions without the ability of that individual to seek guidance from the SRO's senior management, technical advice from other SRO employees, or legal advice from SRO corporate counsel.[606] The commenter is concerned that under the proposed Confidentiality Policy an SRO's senior management would not be able to access information that may be necessary to make decisions related to the Plan if that information is determined to be Highly Confidential Information or Confidential Information. For example, the commenter states that an SRO's senior management would be denied access to privileged information and prevented from participating in decisions regarding legal strategy and litigation involving the CT Plan or regulatory interactions with the Commission.[607] Thus, these commenters conclude that the Commission may not approve an NMS plan that prohibits SROs' senior management from

---

604 Exhibit C, Section (b)(iii)(B) of the CT Plan.

605 See NYSE Letter I, supra note 18, at 16–17; NYSE Letter II, supra note 19, at 4–5; Nasdaq Letter I, supra note 20, at 3.

606 See Nasdaq Letter I, supra note 20, at 3.

607 See NYSE Letter I, supra note 18, at 17.

having access to information that may be necessary to their informed decision-making related to regulatory obligations.[608]

In response to commenters' concerns regarding the provisions governing disclosure of Highly Confidential Information, the Commission finds that it is appropriate to modify Section (b)(iii)(A) of Exhibit C to the CT Plan to specify the instances in which Highly Confidential Information can be shared. Specifically, the Commission is removing the language in subparagraph (A)(1) that permits disclosure to "Covered Persons who need the Highly Confidential Information to fulfill their responsibilities to the Company." The Commission believes that this language is too general to provide a meaningful limitation on the sharing of commercially sensitive information or to provide useful guidance regarding what disclosures are permissible. The Commission therefore believes that the CT Plan should clearly specify the situations where Highly Confidential Information may be disclosed. Accordingly, the Commission is modifying the second sentence in Section (b)(iii)(A) of Exhibit C to state, "Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents, except as provided below." The Commission finds that this modification is appropriate because the general prohibition on sharing, paired with specific instances of permissible sharing, which are discussed below, would specify and establish clear and limited circumstances for permitted disclosure of Highly Confidential Information.

In connection with these changes, the Commission is also modifying subparagraph (A)(1) of Section (b)(iii) of Exhibit C to remove the language that states that the prohibition does not apply to disclosures "or as otherwise required by law (such as those required to receive the information to ensure the Member complies with its regulatory obligations), or to other Covered

---

[608] See id.; NYSE Letter II, supra note 19, at 5. See also Nasdaq Letter I, supra note 20, at 3.

Persons authorized to receive it." In response to commenters' request for greater clarity, the Commission finds that it is appropriate to remove this broad language. Accordingly, the Commission is adding, in new subparagraph (A)(2), that Highly Confidential Information may be disclosed as required by Applicable Law.[609] The Commission believes that this modification is appropriate because it provides greater specificity as to when Highly Confidential Information may be disclosed, consistent with the defined term.

The Commission is also modifying Exhibit C to the CT Plan to re-number the subparagraphs in Section (b)(iii) so that subparagraph (A)(2) will now be subparagraph (A)(3), and to add new Section (b)(iii)(A)(4), which specifies the circumstances under which SRO Voting Representatives are permitted to share Highly Confidential Information with officers of their SRO or agents of the Member. Specifically, new Section (b)(iii)(A)(4) provides that SRO Voting Representatives may share certain types of Highly Confidential Information with officers

---

609 As defined in the CT Plan in Article I, Section 1.1(e), "Applicable Law" means all applicable provisions of (a) constitutions, treaties, statutes, laws (including the common law), rules, regulations, decrees, ordinances, codes, proclamations, declarations or orders of any Governmental Authority; (b) any consents or approvals of any Governmental Authority; and (c) any orders, decisions, advisory or interpretative opinions, injunctions, judgments, awards, decrees of, or agreements with, any Governmental Authority. Article I, Section 1.1(hh) of the CT Plan defines "Governmental Authority" to mean (a) the U.S. federal government or government of any state of the U.S., (b) any instrumentality or agency of any such government, (c) any other individual, entity or organization authorized by law to perform any executive, legislative, judicial, regulatory, administrative, military or police functions of any such government, or (d) any intergovernmental organization of U.S. entities, but "Governmental Authority" excludes any self-regulatory organization registered with the Commission.

Although one commenter asks for the Commission's "endorsement" of the conclusion that a disclosure "required by law" would encompass the disclosure of financial information in connection with an audit, see Nasdaq Letter I, supra note 20, at 6, other provisions of the CT Plan as modified would permit sharing of information that is required for the preparation of an exchange's financial statements. As discussed above, the Commission is modifying the CT Plan to provide that the Operating Committee may authorize disclosure of Restricted Information under certain circumstances. See text accompanying note 603, supra. And as discussed immediately below, the Commission is also modifying the proposed CT Plan to provide for disclosure of Highly Confidential Information by SRO Voting Representatives to officers of the Member they represent who have direct or supervisory responsibilities for the Member's participation in the CT Plan. See also Section (b)(iii)(A)(4) of Exhibit C to the CT Plan, as modified. For the same reasons, the phrase "required by Applicable Law" does not authorize disclosure of Restricted Information or Highly Confidential Information on the basis of a determination by a Covered Person, or any other person, that disclosure of the information is required to ensure that a Member complies with its regulatory obligations.

of their Member SRO who have direct or supervisory responsibility for the SRO's participation in the Company, or with Agents for that Member, provided that such information may not be used in the development, modeling, pricing, licensing, or sale of, PDP. The Commission finds that this modification is appropriate because it recognizes that certain officers and agents of the SRO may require relevant CT Plan information in order to comply with regulatory obligations. However, the Commission believes that such individuals should be limited to officers of a Member who have a direct or supervisory responsibility for the SRO's participation in the CT Plan, or with agents for the Member that support the SRO's participation in the CT Plan, and that the information shared must not be used in the development, modeling, pricing, licensing, or sale of, PDP.

New Section (b)(iii)(A)(4) also specifies certain types of Highly Confidential Information that an SRO Voting Representative may share. Specifically, the Commission believes it is appropriate to identify the types of Highly Confidential Information permitted to be disclosed by the SRO Voting Representative as: (i) the Company's contract negotiations with the Processor(s) or Administrator; (ii) communications with, and work product of, counsel to the Company; and (iii) information concerning personnel matters that affect the employees of the SRO or of the Company. The Commission finds that it is appropriate for an SRO Voting Representative to share the contract negotiations with the Processor(s) or Administrator because the SRO will directly interact with the Processors(s) and Administrator pursuant to such contracts and would need to know the terms and conditions to ensure that it complies with the requirements of the CT Plan. Similarly, the Commission finds that it is appropriate for communications and work product of counsel to the Company to be shared because counsel would be representing the

SROs, and SRO officers would need to be informed in order to provide relevant information to counsel or make decisions related to Plan matters.

With respect to the definition of "personnel matters" as used in the definition of Highly Confidential Information, two commenters raise concerns that the definition is too broad and that the definition of Highly Confidential Information should include only those personnel matters that affect the employees of the SROs or of the Company.[610] The Commission believes that it is appropriate to modify this aspect of the definition of Highly Confidential Information so that the definition of personnel matters is limited to personnel matters that affect the employees of the SROs or the Company and thus is not construed broadly to include, for example, the performance of outside persons under contract with the CT Plan, which may be significant matters in which Non-SRO Voting Representatives, as full members of the Operating Committee, should be able to participate. The Commission further finds that it is appropriate for information regarding personnel matters that affect the employees of the SROs or of the Company to be shared with officers of the SROs because the SROs are the Members of the LLC and are responsible for compliance with the terms of the CT Plan and Rule 608.

The Commission, however, does not believe that information concerning the intellectual property of Members or customers should be shared. For example, customer audit information is excluded and may not be shared as it contains highly sensitive information and could be commercially valuable. Additionally, the Commission does not believe that SRO officers require detailed audit information regarding individual customers' use of and payment for consolidated data to comply with the provisions of the CT Plan or with their regulatory obligations under Plan. The policies that would support the prompt, accurate, reliable, and fair collection,

---

[610] See Schwab Letter I, supra note 30, at 2; SIFMA Letter I, supra note 30, at 4.

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 would not require detailed knowledge about specific amounts of an individual, identified customer's use of and payment for Plan data. Rather, appropriate policies for the CT Plan should be based on relevant information about the data usage and payments of different categories of customers. For similar reasons, the Commission does not believe that officers of an SRO would require information concerning the intellectual property of another Member, as SROs are in competition with each other, and sharing such information would not be in furtherance of the purposes of the CT Plan.

The Commission's modifications to this subparagraph also provide that, to the extent that an SRO Voting Representative discloses Highly Confidential Information pursuant to Section (b)(iii)(A)(4), the individual will be required to maintain a log documenting each instance of such disclosure, including the information shared, the persons receiving the information, and the date the information was shared. The Commission is further modifying this subparagraph to add a requirement that Covered Persons who receive or have access to Highly Confidential Information pursuant to the new subparagraph must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy. The Commission believes that the requirement to log Highly Confidential Information when it is shared and to segregate the shared information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy will provide greater transparency and accountability regarding the sharing of Highly Confidential Information of the CT Plan.[611]

[611] The Commission notes that Section (b)(iii)(A)(1) of Exhibit C to the CT Plan specifies that the prohibition of disclosing Highly Confidential Information does not apply to disclosures made to the staff of the Commission. Additionally, Section (b)(iii)(A)(2) of Exhibit C permits disclosure of Highly Confidential Information as required by Applicable Law.

The Commission finds that these modifications are appropriate because they will help to guard against misuse of that information for commercial or other purposes.

The Commission is similarly modifying Section (b)(iii)(A) of Exhibit C to add new subparagraph (5), which will allow the Operating Committee to authorize the disclosure of specified Highly Confidential Information to specific third parties that are acting as Agents of the Company. The Commission finds that this modification is appropriate because it recognizes that certain Agents of the Company may at times require necessary information to make informed decisions regarding the CT Plan and to assist a Member's compliance with its regulatory obligations. Subparagraph (5) will also require that third parties that receive or have access to Highly Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy.[612] The language further provides that authorization will be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific third parties. The Commission finds that these modifications are appropriate because they are designed to ensure that the disclosed information is properly protected and not misused and because they will promote an efficient process by allowing for the ongoing disclosure of Highly Confidential Information to a specific Agent without having to continually seek Operating Committee approval.

Confidential Information.

As proposed, Section (b)(iv) of Exhibit C provides that Confidential Information may be disclosed during a meeting of the Operating Committee or any subcommittee thereof, and a

[612] For example, the Operating Committee, when granting access to Highly Confidential Information to a third party (other than the Commission), could accomplish this by requiring the recipient to sign an agreement to abide by these requirements for storage and restrictions on use.

Covered Person may disclose Confidential Information to other persons to allow such other persons to fulfill their responsibilities to the Company. Section (b)(iv)(D) of Exhibit C provides that a Covered Person that is a representative of a Member may be authorized by the Operating Committee to disclose particular Confidential Information to other employees or agents of the Member or its affiliates only in furtherance of the interests of the Company as needed for that Covered Person to perform his or her function on behalf of the Company.

One commenter raises concerns with Section (b)(iv)(A) of Exhibit C, arguing that no Covered Person other than Members has responsibilities to the CT Plan, and as such, the provision would imply that "Confidential Information cannot be shared at all, or at a minimum, casts substantial doubt on what can be shared."[613] The commenter states that it has discussed with Commission staff how Confidential Information may be shared with service providers who need access to such information but have no such responsibilities to the Plan.[614] The commenter acknowledges that, in response, Commission staff stated its view that sharing Confidential Information is permissible because the Operating Committee can authorize its disclosure if the disclosure is not inconsistent with the goals and aims of the Confidentiality Policy.[615] Nonetheless, the commenter believes that the provision impedes the functioning of the national market system and requests that the Commission propose to eliminate or substantially modify the restriction and solicit comment.[616]

In response to the commenter's concern, the Commission is modifying certain provisions of the Confidentiality Policy. Specifically, the Commission is modifying Section (b)(iv)(A) of

---

613 NYSE Letter I, supra note 18, at 24.

614 See id. at 25.

615 See id.

616 See id.

Exhibit C, to state that Covered Persons may disclose Confidential Information only to other persons who need to receive such information to fulfill their responsibilities pursuant to the CT Plan, including oversight of the CT Plan. The Commission notes that, as defined in the CT Plan, Confidential Information may include non-public data or information designated as Confidential by the Operating Committee pursuant to Article IV, Section 4.3. The Commission finds that this modification is appropriate because, consistent with the current practices of the Equity Data Plans, financial information necessary for the leadership of an SRO to make decisions regarding the SRO's participation in the Plan—namely, Plan expenses and revenues—will be designated as Confidential and thus permitted to be shared. Consistent with other provisions of the Confidentiality Policy as discussed above, the Commission is also modifying this section of the Confidentiality Policy to provide that recipients of Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the Confidentiality Policy. The Commission is also modifying Section (b)(iv)(B) of Exhibit C, which authorizes disclosure of Confidential Information by an affirmative vote of the Operating Committee, to add language to clarify that such authorization must be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific Covered Persons. The Commission finds that these modifications are appropriate because expressly including these requirements for handling Confidential Information will provide additional safeguards regarding disclosure of Confidential Information and help to guard against misuse of this information for commercial or other purposes.

(iii) Covered Persons

In the Notice, the Commission solicited comment primarily focused on the applicability of the Confidentiality Policy to Member Observers. Specifically, the Commission asked whether

Section 4.11(a) should be modified to expressly apply to Member Observers and if the definition of Member Observer should be more narrowly tailored to limit the individuals within an SRO that have access to Highly Confidential or Confidential Information.[617] Among other questions, the Commission also asked if Member Observers should be prohibited from receiving Restricted or Highly Confidential Information, excluded from being present when such information is discussed, or required to demonstrate a legitimate or particularized need for specific Restricted or Highly Confidential Information before being granted access.[618]

Separately, in the Notice, the Commission also solicited comment on the definition of Covered Persons. As proposed, the CT Plan defines "Covered Persons" as the representatives of the Members, the Non-SRO Voting Representatives, SRO Applicants, the Administrator, and the Processors; affiliates, employees, and Agents of the Operating Committee, a Member, the Administrator, and the Processors; any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of Non-SRO Voting Representatives. Covered Persons do not include staff of the SEC. Specifically, the Commission asked whether other types of representatives, such as Member Observers, should be specifically included in the definition.[619]

In response, the Commission received several comment letters discussing Covered Persons.[620] One commenter notes that, as proposed, the definition of "Covered Persons" includes representatives of the Members as well as employees of a Member, and states that Member

---

617 See Notice, supra note 3, 85 FR at 64571 (Question 33).

618 See id. at 64567 (Question 5).

619 See id. at 64567 (Question 5).

620 See ICI Letter I, supra note 31, at 4 n.9; ICI Letter II, supra note 31, at 2; FINRA Letter I, supra note 257, at 3; MayStreet Letter, supra note 513, at 4; Data Boiler Letter I, supra note 31, at 22; Nasdaq Letter I, supra note 20, at 4–5; NYSE Letter I, supra note 18, at 21.

Observers would be implicitly included in the definition.[621] However, the commenter does not oppose explicitly adding Member Observers for clarity and agrees that individuals qualifying as Member Observers should be subject to the Confidentiality Policy.[622] Other commenters also support expressly including Member Observers in the definition of Covered Persons, stating that the CT Plan's Confidentiality Policy should apply to all Member Observers,[623] particularly given the significant role a Member Observer may have in Plan deliberations and subcommittee recommendation formation.[624]

In response to the Commission's question regarding whether Member Observers given access to confidential information should be required to demonstrate a legitimate or particularized need for such access, one commenter states that Members Observers and others given access to confidential information should be required to demonstrate the need for such access.[625] Similarly, another commenter states that protecting confidential and proprietary information from misuse is important and believes that Member Observers should be required to demonstrate a legitimate or particularized need for Restricted or Highly Confidential Information before being granted access to such information.[626]

Separately, one commenter raises concerns regarding Section (a)(ii) of Exhibit C, which requires all Covered Persons that are natural persons to affirm in writing that they have read the

---

621 See FINRA Letter I, supra note 257, at 3.

622 See id.

623 See ICI Letter I, supra note 31, at 4; ICI Letter II, supra note 31, at 2; Nasdaq Letter I, supra note 20, at 13, BMO Letter, supra note 30, at 4; MFA Letter, supra note 30, at 4, MayStreet Letter, supra note 513, at 4.

624 See MayStreet Letter, supra note 513, at 4.

625 See RBC Letter, supra note 30, at 10–11.

626 See BMO Letter, supra note 30, at 4.

policy and undertake to abide by its terms before receiving Company data and information.[627] Specifically, the commenter argues that it imposes onerous and impractical burdens on agents of the Members that would be providing services to the Plan, including auditors, bankers, and outside counsel and that it conflicts with independent professional standards and obligations, and standard market practice.[628] The commenter states that existing customer relationship documents, such as engagement letters, are more than sufficient to protect the confidentiality of Restricted, Highly Confidential, or Confidential Information that such agents may need to perform services for the CT Plan.[629] Accordingly, the commenter recommends that the Commission propose and solicit comment on changes to the CT Plan that would eliminate the current requirement, or alternatively that the Commission propose revisions that would modify the undertaking such that Covered Persons must agree to abide with the Confidentiality Policy so long as it does not conflict with the applicable professional standards of conduct and such that a single representative may sign such an undertaking on behalf of an entire firm.[630]

One commenter states that while the Confidentiality Policy provisions purport to cover the Non-SRO Voting Representatives and their employers, such parties have no regulatory obligations under the CT Plan, and the commenter is concerned that Members do not have a way to monitor Non-SRO Voting Representatives' and their employers' compliance.[631] The commenter thus questions whether Non-SRO Voting Representatives and their employers should

---

627 See NYSE Letter I, supra note 18, at 21.

628 See id. at 21–22.

629 See id. at 22.

630 See id. at 22–23. See also Nasdaq Letter I, supra note 20, at 6 (acknowledging that while the Confidentiality Policy Approval Orders states that disclosures "required by law or professional ethics obligations" are permitted, the approved Confidentiality Policy included as Exhibit C to the Plan does not reference professional ethics obligations).

631 See NYSE Letter I, supra note 18, at 26; NYSE Letter II, supra note 19, at 5.

be included in the definition of Covered Persons, and subsequently subject to the Confidentiality Policy. Specifically, the commenter states that Rule 608(c) would obligate the Members to monitor Non-SRO Voting Representatives and their employers, but SROs have no authority over the Non-SRO Voting Representatives, their employers, nor the ability to monitor or enforce compliance, and no authority to impose sanctions for violations.[632] Accordingly, the commenter recommends removing both Non-SRO Voting Representatives and their employers from the definition of Covered Persons, and separately requiring that the Non-SRO Voting Representatives enter into contractual agreements with the CT Plan to protect the confidentiality of the CT Plan information.[633]

The Commission agrees that the definition of Covered Persons should specify the individuals that would be included in "representatives of the Members." Specifically, the Commission believes that the definition should be clarified to include SRO Voting Representatives, alternate SRO Voting Representatives, and Member Observers. As any individual qualifying as one of these representatives may attend Operating Committee and subcommittee meetings and potentially receive and have access to confidential information, the Commission believes that they should be subject to the provisions of Section 4.11 and Exhibit C of the CT Plan and thus explicitly included as a Covered Person. Similarly, because the CT Plan also permits SRO Applicant Observers to attend Operating Committee meetings,[634] the Commission likewise believes that the same provisions and policy should apply equally to this category of individuals. For the reasons stated above, the Commission finds that it is appropriate to modify Article I, Section 1.1(n), the proposed definition of Covered Persons, to clarify that the

632 See NYSE Letter I, supra note 18, at 26.

633 See id.

634 See Article IV, Section 4.4(a) of the CT Plan.

phrase "representatives of the Members" includes SRO Voting Representatives, alternate SRO Voting Representatives, and Member Observers, and to expand the definition of Covered Persons to include SRO Applicant Observers.

In response to comments regarding inclusion of Non-SRO Voting Representatives and their employers in the definition of Covered Persons, the Commission believes that Non-SRO Voting Representatives should be included in that definition, but agrees that the employers of Non-SRO Voting Representatives should not be included. As Non-SRO Voting Representatives will serve as full members of the Operating Committee and charged with carrying out the objectives of the CT Plan, Non-SRO Voting Representatives will have greater access to confidential information, including but not limited to contract negotiations with outsourced service providers, such as firms and persons that provide audit services, accounting services, or legal services to the CT Plan, Administrator, or Processors. As the Commission stated in the Confidentiality Policy Approval Orders, all parties that generate, receive, or have access to sensitive plan-related information by virtue of their service to the plan, or their affiliation with a party that has access, should be subject to the same standards to protect the confidentiality of that information.[635] For the reasons stated above, the Commission finds that the inclusion of the Non-SRO Voting Representatives in the definition of Covered Persons, and in turn subjecting them to the Confidentiality Policy, is appropriate because it will strengthen the confidentiality of information protections afforded by the policy.

By contrast, the Commission is modifying the CT Plan to delete "employers of Non-SRO Voting Representatives" from the definition of Covered Persons because Non-SRO Voting Representatives will not be authorized to share non-public Plan information with their

[635] See Confidentiality Policy Approval Orders, supra note 569, 85 FR at 28093 and 85 FR at 28071.

employers, and those employers will not otherwise be entitled to access non-public Plan information. Further, a Non-SRO Voting Representative's employer will have no regulatory duties or responsibilities to the CT Plan and no corresponding need to receive confidential Plan information. Excluding the employers of Non-SRO Voting Representatives from the definition of Covered Persons would permit the sharing of Confidential Information with those employers only when specifically authorized by the Operating Committee in a manner permitted by the Confidentiality Policy. While the Commission previously modified the definition of Covered Persons under the existing Equity Data Plans to include the employer of an Advisory Committee member to protect the confidentiality of Plan information in a manner similar to how a Member's SRO employer is required to protect the confidentiality of Plan information,[636] the role of Non-SRO Voting Representatives as full members of the Operating Committee provides them with significantly greater access to confidential Plan information, and the Commission believes that this greater access to protected information makes it appropriate to modify the CT Plan. Accordingly, the Commission is modifying Article 1, Section 1.1 (n) to remove "employers of Non-SRO Voting Representative" from the definition of Covered Persons. The Commission finds that the modification to remove the employers of Non-SRO Voting Representatives from the definition of Covered Persons is appropriate, because Non-SRO Voting Representatives will participate on the operating committee in their individual capacity, and their employer will not be authorized to have access to confidential Plan information.

[636] See Confidentiality Policy Approval Orders, supra note 569, 85 FR at 28093 and 85 FR at 28072.

(iv) Effect of Pending Petitions for Review

The Commission also solicited comment on Section 4.11(b), which states that if the Commission's Confidentiality Policy Approval Orders are stayed or overturned by a court, the requirements of Section 4.11 and related Confidentiality Policy in Exhibit C would no longer be applicable.[637] The Commission sought commenters' views on whether such a provision is necessary or appropriate for the CT Plan and whether the CT Plan should, at a minimum, contain provisions for identifying and protecting confidential information that are not subject to elimination, or provisions specifying that the CT Plan must be amended to include a new policy with respect to confidential information before the existing policy can be removed.[638] One commenter supports retaining the current provisions of the Confidentiality Policy in the event that the Confidentiality Policy Approval Orders are stayed or overturned so that information remains protected.[639]

As the Commission previously stated in the Confidentiality Policy Approval Orders, the Commission believes that the CT Plan should include a confidentiality policy.[640] The Commission continues to believe that a confidentiality policy is necessary and that the policy must balance protection against the potential misuse of confidential information with the strong interest in public transparency of the operations of the CT Plan in light of the important function the CT Plan will serve in the national market system.[641] Accordingly the Commission is modifying Section 4.11 to remove subsection (b), which provides that if the Commission's

---

637 See Notice, supra note 3, 85 FR at 64571 (Question 34).

638 See id.

639 See RBC Letter, supra note 30, at 11.

640 See Confidentiality Policy Approval Orders, supra note 569, 85 FR at 28092 and 85 FR at 28070.

641 See Confidentiality Policy Approval Orders, supra note 569, 85 FR at 28090 and 85 FR at 28069.

Confidentiality Policy Approval Orders are stayed or overturned, the requirements of Section 4.11 and Exhibit C would not be applicable. The Commission finds that it is appropriate to remove this provision in the CT Plan. The U.S. Court of Appeals for the D.C. Circuit has dismissed the petitions for review of the Confidentiality Policy Approval Orders that were pending when the SROs filed the proposed CT Plan.[642] Moreover, even if a court were to vacate the Confidentiality Policy Approval Orders, the CT Plan would be able to file an amendment with the Commission to align the policy with the court's decision, and the Commission could, on its own initiative, propose an amendment as well.

For the reasons discussed above, the Commission is approving Article IV, Section 4.11 of the CT Plan and Exhibit C, as modified.

6. The Processors; Information; Indemnification

(a) General Functions of the Processors

Article V of the CT Plan sets forth the provisions related to the Processors. Pursuant to Article V, Section 5.1, the Company, under the direction of the Operating Committee, shall be required to enter into agreements with the Processors obligating the Processors to perform certain processing functions on behalf of the Company (the "Processor Services Agreements").[643] The CT Plan specifies that, among other things, the Company shall require the Processors to collect from the Members, and consolidate and disseminate to Vendors and Subscribers, Transaction Reports and Quotation Information in Eligible Securities in a manner

642 See New York Stock Exchange, et al. vs. Securities and Exchange Commission, Nos. 20-1242, 20-1243, 20-1244, --- F.4th ----, 2021 WL 2654987, *1–4 (D.C. Cir., June 29, 2021).

643 See Article V, Section 5.1 of the CT Plan.

designed to ensure the prompt, accurate, and reliable collection, processing, and dissemination of information with respect to all Eligible Securities in a fair and non-discriminatory manner.[644]

In the Notice, the Commission solicited comment on Article V, Section 5.1 and, in particular, on whether further details on the terms and responsibilities of the Processors should be specified in the body of the CT Plan.[645] One commenter states that the minimum technical and operational requirements for the Processors, along with any contractual terms and responsibilities, should either be detailed in the CT Plan or made publicly available (e.g., on the CT Plan website).[646] This commenter argues that, today, public disclosure regarding Processor operations and standards of service is inadequate.[647] Another commenter states that the Processor functions described in Section 5.1 are insufficient and suggests additional functions and responsibilities to be specified in the CT Plan, including provisions related to business continuity and disaster recovery for the SIPs and to providing analytical support for the consolidated audit trail project.[648]

In contrast, one commenter states that codifying technical standards of the Processors in the CT Plan would interfere with the Operating Committee's ability to respond to changing technology conditions.[649] This commenter states that "[i]t is the responsibility of the Operating Committee to establish standards and adjust them in light of changing technology."[650] Another

---

644 See id.

645 See Notice, supra note 3, 85 FR at 64571 (Question 35).

646 See BlackRock Letter I, supra note 247, at 4.

647 See id. This commenter states that "[f]ull disclosure of performance standards improves transparency over the operation of the SIP and increases public confidence in the technical capability and operational resiliency of our market data system." Id.

648 See Data Boiler Letter I, supra note 31, at 4, 12, 40.

649 See Nasdaq Letter I, supra note 20, at 29.

650 Id.

commenter argues that the decision to include detailed terms about the responsibilities of the Processors in the LLC Agreement itself, as opposed to in the Processor Services Agreements, is a decision that should be left to the SROs rather than the Commission.[651] Citing to Rule 608(a)(3)(iii) of Regulation NMS,[652] this commenter states that it is the SROs—and not the Commission—that are authorized to act jointly in "[i]mplementing or administering an effective [NMS] plan."[653]

In the Notice, the Commission also solicited comment on whether the terms of the CT Plan should require the Processors to ensure the "fairness and usefulness of the form and content" of consolidated and disseminated transaction and quotation information.[654] Two commenters state that the terms of the CT Plan should require the Processors to ensure the "fairness and usefulness of the form and content" of such information.[655] One of these commenters states that including this obligation on Processors would "add a layer of much needed accountability to the process."[656]

In response to commenters that seek additional detail in the CT Plan on the Processor operations and standards of service, the Commission believes that it is reasonable for detailed disclosures of the Processor functions to be addressed in the Processor Services Agreements rather than to be incorporated as requirements in the body of the CT Plan, which would require a

---

651 See NYSE Letter I, supra note 18, at 39.

652 17 CFR 242.608(a)(3)(iii).

653 See NYSE Letter I, supra note 18, at 39.

654 See Notice, supra note 3, 85 FR at 64571 (Question 36).

655 See Data Boiler Letter I, supra note 31, at 40; Virtu Letter, supra note 30, at 7. One of the commenters suggests that "mandating the use of time-lock encryption to make market data available securely in synchronized time" is a way to ensure the fairness and usefulness of SIP information. Data Boiler Letter I, supra note 31, at 40.

656 Virtu Letter, supra note 30, at 7.

formal amendment of the CT Plan each time the requirements changed. The Commission agrees with the comment that codifying technical standards of the Processors in the CT Plan would interfere with the Operating Committee's ability to respond to changing technology conditions.[657] Moreover, setting forth detailed rights and obligations of the Processors in service agreements outside of the CT Plan would be consistent with the framework utilized in the current NMS plans.[658] Further, the Operating Committee of the CT Plan, including Non-SRO Voting Representatives, will have visibility into the process of setting the requirements in the Processor Services Agreements. The Commission also expects that establishing the technical and operational requirements of the Processors will be an iterative process between the Operating Committee and the Processors. Setting forth the requirements in the CT Plan itself may unnecessarily hinder the ability of the Operating Committee and the Processors to negotiate and modify the technical details of the functions and responsibilities of the Processors in response to, among other things, changing technology conditions.

While one commenter argues that public disclosure of Processor operations and standards of service are currently inadequate, Article IV, Section 4.1 of the CT Plan would expressly require the Operating Committee to ensure the public reporting of Processors' performance and other metrics and information about the Processors.[659] With respect to this public reporting requirement, the Commission continues to believe that, as it stated in the Proposed Order, "making this information public would provide all market participants with a view of how well or poorly a processor is performing across various metrics, which would allow market

---

657 See supra note 649.

658 See, e.g., Article V(c) of the CTA Plan, available at https://www.ctaplan.com/plans; Article V, Section 5.1 of the OPRA Plan, available at https://www.opraplan.com/document-library.

659 See Article IV, Section 4.1(a)(iv) of the CT Plan.

participants to provide meaningful input to the operating committee and to the Commission."[660] The Commission further continues to believe that, if performance metrics are made public, the Operating Committee of the CT Plan will have enhanced incentives to ensure that the Processors are functioning well and that the CT Plan is providing prompt, accurate, and reliable publication of information with respect to quotations for and transactions in NMS stocks.[661]

Regarding comments that the terms of the CT Plan should require the Processors to ensure the "fairness and usefulness of the form and content" of consolidated and disseminated transaction and quotation information, the Commission believes that Article IV, Section 4.1 of the CT Plan incorporates this requirement, as it requires the Operating Committee to implement "policies and procedures as necessary to ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to Transaction Reports and Quotation Information in Eligible Securities and the fairness and usefulness of the form and content of that information."[662] For the reasons discussed above, the Commission is approving Article V, Section 5.1, as proposed.

(b) Evaluation of the Processors

Article V, Section 5.2 of the CT Plan requires that the Processors' performance of their functions under the Processor Services Agreements shall be subject to review at any time as determined by an affirmative vote of the Operating Committee, pursuant to Article IV, Section 4.3 of the CT Plan; provided, however, that a review will be conducted at least once every two

660 Proposed Order, supra note 7, 85 FR at 2183.

661 See id.

662 Article IV, Section 4.1(a)(i) of the CT Plan (emphasis added).

calendar years but not more than once each calendar year.[663] If the Processors have materially defaulted in their obligations under the Processor Services Agreements and such default has not been cured within the applicable cure period pursuant to the Processor Services Agreements, the CT Plan provides that the review period limitations will not apply.[664] Furthermore, the CT Plan provides that the Operating Committee may review the Processors at staggered intervals.[665]

In the Notice, the Commission solicited comment on the Processors' performance review process.[666] One commenter states that Processor reviews are important and "should not be done out of formality."[667] This commenter, without identifying a specific area of deficiency, believes that the review mechanism as proposed in the CT Plan "would cause continuous arguments rather than concrete improvements of SIP performance."[668] As a solution, the commenter suggests that the Processor assessment should "review potential implications/threats as a result of upcoming techs … and be used to plan ahead for the future."[669]

The Commission believes that the provisions of the CT Plan setting forth the Processors' biennial review requirement, and the Operating Committee' ability to change the frequency of the review for circumstances in which the Processors have materially defaulted in their obligations, are reasonably designed to ensure that the Processors meet their performance obligations under the Processor Services Agreements. Indeed, the biennial review requirement is

---

663 See Article V, Section 5.2 of the CT Plan. See also Article IV, Section 4.1(a)(ii) of the CT Plan, which requires the Operating Committee to ensure the public reporting of Processors' performance and other metrics and information about the Processors.

664 See Article V, Section 5.2 of the CT Plan.

665 See id.

666 See Notice, supra note 3, 85 FR at 64571 (Question 37).

667 Data Boiler Letter I, supra note 31, at 40–41.

668 Id.

669 Id. at 40.

similar to the long-standing review process under the current Equity Data Plans,[670] and the Commission believes that the biennial review requirement has provided a sufficient sample time period for the operating committees of the existing Equity Data Plans to evaluate the performance of the Processors without overburdening the operating committees with frequent reviews that might produce little additional information. Regarding a commenter's suggestion that the assessment should review technological developments in anticipation of future implications,[671] the Commission believes that the CT Plan reasonably leaves the determination of the metrics used to evaluate the Processors to the discretion of the Operating Committee. Pursuant to Article IV, Section 4.1, the Operating Committee is expressly tasked with evaluating the performance of the Processors.[672] Section 4.1 also requires the Operating Committee to assess the marketplace for equity data products and ensure that the CT Feeds are designed to ensure the widespread availability of CT Feeds data to investors and market participants. The Commission continues to believe that, as it stated in the Proposed Order, "[i]mposing a direct responsibility on the operating committee to keep abreast of changes in the marketplace regarding demands for and pricing of equity market data, and to ensure that SIP data meets those demands and are widely distributed at fair and reasonable prices, should help ensure that the SIPs' data feeds support the findings and goals of Section 11A of the Act."[673] For the reasons discussed above, the Commission is approving Article V, Section 5.2, as proposed.

---

670 See Section V.A of the UTP Plan and Section V(d) of the CT Plan.

671 See Data Boiler Letter I, supra note 31, at 40–41.

672 See Article IV, Section 4.1(a)(ii) of the CT Plan.

673 Proposed Order, supra note 483, 85 FR at 2183.

(c) Process for Selecting New Processors

Article V, Section 5.3 of the CT Plan requires that the Operating Committee, by an affirmative vote pursuant to Section 4.3 of the CT Plan, establish procedures for selecting a new Processor (the "Processor Selection Procedures").[674] The CT Plan requires that the Processor Selection Procedures be established no later than upon the termination or withdrawal of a Processor or the expiration of a Processor Services Agreement with a Processor.[675] The Processor Selection Procedures are required to set forth, at a minimum: (i) the minimum technical and operational requirements to be fulfilled by the Processor; (ii) the criteria for selecting the Processor; (iii) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Processor; and (iv) the entity that will: (A) draft the Operating Committee's request for proposal for a new Processor; (B) assist the Operating Committee in evaluating bids for the new Processor; and (C) otherwise provide assistance and guidance to the Operating Committee in the selection process.[676] The Operating Committee, as part of the process of establishing the Processor Selection Procedures, is permitted to solicit and consider the timely comment of any entity affected by the operation of the CT Plan.[677]

In the Notice, the Commission solicited comment on the requirement to establish the Processor Selection Procedures, including the ability to seek comment on the selection of the Processor and whether to require a subcommittee of disinterested members of the Operating Committee ("disinterested subcommittee") to vote and select a new Processor.[678] One

---

674 See Article V, Section 5.3 of the CT Plan.

675 See Article V, Section 5.3(a) of the CT Plan.

676 See Article V, Section 5.3(b) of the CT Plan.

677 See Article V, Section 5.3(a) of the CT Plan.

678 See Notice, supra note 3, 85 FR at 64571–72 (Question 38).

commenter supports allowing the public to comment on the selection of a new Processor because this commenter expects the CT Plan to be "run as a public utility."[679] This commenter also questions the value of including in the Processor Selection Procedures a requirement that a disinterested subcommittee vote and select a new Processor, asserting that this requirement "would add more hands in the pool asking for resources" and states that, at most, the subcommittee should be allowed only to "consult" and have no authority to vote.[680]

With respect to the comment in support of public comment on the selection of a new Processor, Section 5.3 provides that the Operating Committee may solicit and consider public comment as part of the process of establishing the Processor Selection Procedures, and the Processor Selection Procedures are required to set forth the entities (other than the Voting Representatives) that are eligible to comment on the selection of the Processor.[681] The Commission also believes that the inclusion of Non-SRO Voting Representatives as full members of the Operating Committee, together with the Commission's modification of the proposed CT Plan in Section 4.4(g)(i) to prohibit discussions regarding contract negotiations with Processors in Executive Session, will help ensure that the Operating Committee considers broad industry viewpoints in the process of establishing the Processor Selection Procedures. As a result, the Commission believes that the CT Plan, as modified, addresses this issue.

With respect to the comment on the value of requiring a disinterested subcommittee to vote and select a new Processor, Section 5.3 provides the Operating Committee with the responsibility to establish the procedures for selecting a Processor, including whether to include a disinterested subcommittee as part of the Processor Selection Procedures. The Commission

---

679 Data Boiler Letter I, supra note 31, at 41.

680 Id.

681 See Article VI, Section 5.3(b)(iv) of the CT Plan.

believes that this authority is reasonable and does not believe it is necessary to require the Operating Committee to use a disinterested subcommittee, because the inclusion of Non-SRO Voting Representatives on the Operating Committee will help address conflicts of interest in the decision-making process to select a new Processor (which could, if the Operating Committee so choses, include a disinterested subcommittee). Additionally, the Commission notes that, while the current Equity Data Plans do not require the use of a disinterested subcommittee in the selection of a new Processor, the use of a disinterested subcommittee regarding certain critical plan matters, including the selection of a Processor, is a common practice under the current Equity Data Plans. Finally, with respect to the comment that the disinterested subcommittee should have no authority to vote on the selection of the Processor and can only be consulted on the matter, it is the Operating Committee that is authorized by Article IV, Section 4.1 of the CT Plan to select the Processors,[682] and the Commission does not believe that it is necessary to preclude any disinterested subcommittee formed by the Operating Committee from holding a vote to, for example, recommend a Processor candidate to the Operating Committee.

The Commission believes that the provisions for the establishment of the Processor Selection Procedures are reasonably designed to ensure that the Operating Committee establishes a process that governs the selection of a new Processor through a fair, transparent, and competitive process. By setting forth the minimum requirements for Processor Selection Procedures, the CT Plan sets forth a reasonable outline of the Processor selection process without unnecessarily hindering the flexibility of the Operating Committee in determining the appropriate procedural requirements for future Processor selections. Additionally, the

[682] See Article IV, Section 4.1(a)(ii) of the CT Plan.

requirements of Section 5.3 of the CT Plan are similar to those of the UTP Plan.[683] For the reasons discussed above, the Commission is approving Article V, Section 5.3, as proposed.

(d) Transmission of Information to Processor by Members

Article V, Section 5.4 of the CT Plan sets forth the manner in which each Member is responsible for promptly collecting and transmitting to the Processors accurate Quotation Information and Transaction Reports as set forth in the Processor Services Agreements.[684] In particular, this section requires Members to include the following elements in their Quotation Information: (i) identification of the Eligible Security, using the listing market's symbol; (ii) the price bid and offered, together with size; (iii) for FINRA, the FINRA participant along with the FINRA participant's market participant identification or Member from which the quotation emanates; (iv) appropriate timestamps; (v) identification of quotations that are not firm; and (vi) through appropriate codes and messages, withdrawals and similar matters.[685] In the case of a national securities exchange, the Quotation Information includes the reporting Participant's matching engine publication timestamp.[686] In the case of FINRA, the Quotation Information includes the quotation publication timestamp that FINRA's bidding or offering member reports to FINRA's quotation facility in accordance with FINRA rules.[687]

---

683 See Section V.E of the UTP Plan, available at https://utpplan.com/utp_plan.

684 See Article V, Section 5.4(a)(i) of the CT Plan.

685 See Article V, Section 5.4(a)(ii) of the CT Plan.

686 See Article V, Section 5.4(d)(iii)(A) of the CT Plan.

687 See Article V, Section 5.4(d)(iii)(B) of the CT Plan. The CT Plan specifies that if FINRA's quotation facility provides a proprietary feed of its Quotation Information, then the quotation facility shall also furnish the Processors with the time of the quotation as published on the quotation facility's proprietary feed. See id. FINRA shall convert any quotation times reported to it to nanoseconds and shall furnish such times to the Processors in nanoseconds since Epoch. See id.

In addition, Section 5.4 requires Members to report the following elements in their Transaction Reports: (i) identification of the Eligible Security, using the listing market's symbol; (ii) the number of shares in the transaction; (iii) the price at which the shares were purchased or sold; (iv) the buy/sell/cross indicator; (v) appropriate timestamps; (vi) the market of execution; and (vii) through appropriate codes and messages, late or out-of-sequence trades, corrections, and similar matters.[688] Each Member must also (a) transmit Transaction Reports to the Processors as soon as practicable, but not later than ten seconds, after the time of execution, (b) establish and maintain collection and reporting procedures and facilities reasonably designed to comply with this requirement, and (c) designate as "late" any last sale price not collected and reported as described above or as to which the Member has knowledge that the time interval after the time of execution is significantly greater than the time period referred to above.[689] The CT Plan provides that Members shall seek to reduce the time period for reporting last sale prices to the Processors as conditions warrant.[690] The CT Plan also sets forth the symbols used to denote the applicable Member.[691]

Section 5.4 excludes the following types of transactions from being required to be reported to the Processors: (i) transactions that are part of a primary distribution by an issuer or of a registered secondary distribution or of an unregistered secondary distribution; (ii) transactions made in reliance on Section 4(a)(2) of the Securities Act of 1933; (iii) transactions in which the buyer and the seller have agreed to trade at a price unrelated to the current market for the security (e.g., to enable the seller to make a gift); (iv) the acquisition of

---

688 See Article V, Section 5.4(b)(ii)(A)–(G) of the CT Plan.

689 See Article V, Section 5.4(d)(iv) of the CT Plan.

690 See id.

691 See Article V, Section 5.4(c) of the CT Plan.

securities by a broker-dealer as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange; (v) purchases of securities pursuant to a tender offer; (vi) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market; and (vi) transfers of securities that are expressly excluded from trade reporting under FINRA rules.[692]

Furthermore, Section 5.4 provides that each Member agrees to indemnify the Company, each other Member, the Processors, the Administrator, the Operating Committee, and each of their respective directors, officers, employees, agents, and affiliates (each, a "Member Indemnified Party") against any liabilities as a result of a system error or disruption at a Member's Market affecting the information reported to the Processor by such Member and disseminated by the Processor to vendors and subscribers.[693]

In the Notice, the Commission solicited comment on whether the CT Plan should set minimum standards for the timely dissemination of information applicable to the Processors and, if so, the minimum standards that would be appropriate.[694] One commenter argues the maximum ten second transaction reporting requirement to the Processors under Section 5.4(b)(iv) of the CT Plan is "not acceptable" and has the "potential to be frequently exploited."[695] This commenter states that "thousands of trades can occur in 50+ milliseconds,"[696] and refers to the CAT NMS

---

692 See Article V, Section 5.4(b)(v)(A)–(G) of the CT Plan.

693 See Article V, Section 5.4(d)(i) of the CT Plan. Section 5.4(d)(ii) of the CT Plan specifies the procedures for addressing claims by a Member Indemnified Party.

694 See Notice, supra note 3, 85 FR at 64572 (Question 39).

695 Data Boiler Letter I, supra note 31, at 12. This commenter also suggested several minimum performance standards of the Processors related to the use of "time-lock encryption" that would enable both the proprietary data feeds and the SIPs to be available securely in synchronized time. See id. at 42.

696 Id. at 12.

Plan as requiring broker-dealers to comply with a 50+ milliseconds standard.[697] The commenter further states that the "SROs should pledge to provide SIP(s) the fastest connection and be mandated to maintain a maximum connectivity disparity ratio not more than 2.5 times."[698]

With respect to the comment on reducing the maximum ten-second transaction reporting limit, the Commission notes that the ten-second reporting requirement is consistent with the current Equity Data Plans.[699] As stated in the Governance Order, the Commission believed that, "at least initially, most of the detailed provisions relating to the operation of the existing [NMS plans] could be imported into the [CT] Plan."[700] The Commission also believes that the commenter fails to take into account that the language in Section 5.4 specifies that Members must transmit all Transaction Reports to the Processors "as soon as practicable,"[701] which means that transaction reporting to the Processors will in nearly all circumstances occur faster than the ten-second reporting limit. If the Operating Committee determines that the ten-second reporting limit, or any other provision related to the transmission of information to the Processors, needs to be amended, the Operating Committee may amend the CT Plan according to Article XIII, Section 13.5. Indeed, Article IV, Section 4.1 specifies that one of duties of the Operating Committee is proposing amendments to the CT Plan as necessary to ensure the prompt processing, distribution, and publication of information with respect to Transaction Reports in NMS stocks.[702]

---

697 See id. at 42.

698 Id. at 7, 42.

699 See Section VIII.B of the UTP Plan and Section VIII(a) of the CTA Plan.

700 Governance Order, supra note 8, 85 FR at 28711. The Commission further stated in the Governance Order that the CT Plan "could retain the same SIP processors under the same terms and conditions, thereby eliminating what otherwise would be a significant burden for the development of the [CT] Plan." Id.

701 Article V, Section 5.4(b)(iv) of the CT Plan.

702 See Article IV, Section 4.1(a)(i) of the CT Plan.

Therefore, the Commission believes that the provisions of Section 5.4 relating to each Member's obligations to collect and transmit to the Processors accurate and reliable Quotation Information and Transaction Reports are reasonably designed to facilitate the collection and dissemination of consolidated equity market data for NMS stocks for the beneficial use of investors and the market. Accordingly, the Commission is approving Article V, Section 5.4, as proposed.

(e) Operational Issues

Article V, Section 5.5 of the CT Plan requires each Member to be responsible for collecting and validating quotes and last sale reports within its own system prior to transmitting this data to the Processors.[703] This section also requires each Member to promptly notify the Processors whenever a level of trading activity or unusual market conditions prevent such Member from collecting and transmitting Transaction Reports or Quotation Information to the Processor, or where a trading halt or suspension in an Eligible Security is in effect in its market.[704] This provision further requires the Member to resume collecting and transmitting Transaction Reports and Quotation Information to the Processors as soon as the condition or event is terminated.[705] In the event of a system malfunction that prevents a Member or its members from transmitting Transaction Reports or Quotation Information to the Processors, the Member is required to promptly notify the Processors of such event or condition.[706] Upon receiving such a notification, Section 5.5 of the CT Plan requires the Processors to take

---

703 See Article V, Section 5.5(a) of the CT Plan. Section 5.5 also provides that each Member may utilize a dedicated Member line into the Processors to transmit Transaction Reports and Quotation Information to the Processors. See Article V, Section 5.5(b) of the CT Plan.

704 See Article V, Section 5.5(c) of the CT Plan.

705 See id.

706 See id.

appropriate action, including either closing the quotation or purging the system of the affected quotations.[707]

In the Notice, the Commission solicited comment on whether the CT Plan should set minimum standards for the timely dissemination of information applicable to the Processors.[708] One commenter states that the requirement for Members to promptly notify the Processors of market events in Section 5.5 is "insufficient as a performance standard" and states that "promptly" does not equal "immediacy" for reporting such events to the Processors.[709]

The Commission does not agree with the comment that prompt notification is insufficient as a performance standard for reporting market events to the Processors. The commenter did not explain the basis for its statement. The Commission believes that changing technology conditions mean that prescribing a specific definition of "prompt" in this context might lead over time to an outdated standard for reporting market events to the Processors, and the Commission therefore believes that the prompt notification requirement, which is consistent with the UTP Plan, is a reasonable standard that is designed to provide the Processors with timely notice of any reporting issues by a Member.[710] Accordingly, the Commission is approving Article V, Section 5.5, as proposed.

7. The Administrator

As discussed in detail below, the Commission is modifying Article VI of the CT Plan to create a new stand-alone Section 6.2 to govern the independence of the Administrator, which results in the renumbering of the sections of this Article. The modified numbering is as follows:

---

707 See id.

708 See Notice, supra note 3, 85 FR at 64572 (Question 39).

709 Data Boiler Letter I, supra note 31, at 42. This commenter also states that the proprietary data feeds and SIPs "ought to be in synch [sic] before, during, and after such event(s)." Id.

710 See Section VII.D of the UTP Plan.

Section 6.1, General Functions of the Administrator; Section 6.2, Independence of the Administrator; Section 6.3, Evaluation of the Administrator; and Section 6.4, Process for Selecting New Administrator.

(a) General Functions of the Administrator

Article VI of the CT Plan sets forth the provisions relating to the Administrator. Pursuant to Article VI, Section 6.1, the LLC, under the direction of the Operating Committee, will be required to enter into an agreement with the Administrator obligating the Administrator to perform certain administrative functions on behalf of the LLC, including: recordkeeping; administering vendor and subscriber contracts; administering fees, including billing, collection, and auditing of vendors and subscribers; administering distributions; tax functions of the LLC; and the preparation of the LLC's audited financial reports (the "Administrative Services Agreement").[711]

In the Notice, the Commission solicited comment on Article VI, Section 6.1 and whether further details on the terms and responsibilities of the Administrator should be specified in the CT Plan.[712] One commenter states that the CT Plan should specify in detail the minimum performance standards applicable to the Administrator.[713] Another commenter states that the minimum technical and operational requirements for the Administrator, along with any contractual terms and responsibilities, should either be detailed in the CT Plan or made publicly available (e.g., on the CT Plan website).[714] This commenter argues that, today, public disclosure

---

711 See Article VI, Section 6.1 of the CT Plan.

712 See Notice, supra note 3, 85 FR at 64572 (Question 40).

713 See SIFMA Letter I, supra note 30, at 3. This commenter further states that such minimum performance standards "will be needed if the competing consolidator model is adopted by the Commission." Id.

714 See BlackRock Letter I, supra note 247, at 4.

regarding Administrator operations and standards of service are inadequate.[715] Finally, one commenter states that the CT Plan should clarify the level of discretion the Administrator has to "mobilize budget."[716]

In contrast, one commenter argues that the decision to include detailed terms about the responsibilities of the Administrator in the LLC Agreement itself, as opposed to in the Administrative Services Agreement, is a decision that should be left to the SROs rather than the Commission.[717] Citing Rule 608(a)(3)(iii) of Regulation NMS,[718] this commenter states that it is the SROs—and not the Commission—that are authorized to act jointly in "[i]mplementing or administering an effective [NMS] plan."[719]

In the Notice, the Commission also solicited comment on whether the Administrator's duties with respect to the preparation of the CT Plan's audited financial reports should include unaudited reports.[720] One commenter states that including the preparation of unaudited financial reports as a duty of the Administrator is unnecessary because "SROs may not care to discuss any unaudited matters with non-SROs, thereby pushing the matter down the road until actual audits are performed."[721] This commenter further states that unaudited information may be claimed as confidential, thereby preventing appropriate access.[722]

---

715 See id.; see also supra note 647.

716 Data Boiler Letter I, supra note 31, at 44.

717 See NYSE Letter I, supra note 18, at 39.

718 17 CFR 242.608(a)(3)(iii).

719 NYSE Letter I, supra note 18, at 39.

720 See Notice, supra note 3, 85 FR at 64572 (Question 41).

721 Data Boiler Letter I, supra note 31, at 4, 43.

722 Id.

The Commission believes that it is reasonable for detailed disclosures of the Administrator functions and standards of service to be addressed in the Administrative Services Agreement rather than incorporated as requirements in the CT Plan, which would require a formal amendment of the CT Plan each time the requirements changed.[723] The Commission expects that establishing the technical and operational requirements of the Administrator will be an iterative process between the Operating Committee and the Administrator. Setting forth the requirements in the CT Plan itself may unnecessarily hinder the ability of the Operating Committee and the Administrator to negotiate and modify the technical details of the functions and responsibilities of the Administrator in response to, among other things, changing administrative needs of the CT Plan.

While one commenter argues that public disclosure of Administrator operations and standards of service are currently inadequate, the Commission believes that fully setting forth the contractual relationship between the CT Plan and the Administrator in the Administrative Services Agreement would provide greater specificity and transparency regarding the functions of the Administrator as compared to the current Equity Data Plans, which do not specifically contemplate a separate Administrative Services Agreement. Moreover, the Operating Committee of the CT Plan, including Non-SRO Voting Representatives, will have visibility into the process of setting the requirements in the Administrative Services Agreement. Regarding the comment that the CT Plan should clarify the level of discretion for the Administrator to "mobilize budget," the Commission believes that Section 6.1, as proposed, reasonably addresses the general functions of the Administrator, which include administering financial matters of the CT Plan,

[723] Moreover, the Commission notes that it did not receive any comments specifying the minimum technical and operational requirements for the Administrator.

and that further determinations of the specific functions of the Administrator should be subject to contractual negotiations between the Operating Committee and the Administrator in order not to impede the ability of the Operating Committee to negotiate terms and attract qualified administrative service providers for the role of Administrator. Accordingly, the Commission is approving Section 6.1 of the CT Plan as proposed.

(b) Independence of the Administrator

Article VI, Section 6.3 of the CT Plan as proposed requires that the Administrator selected by the Operating Committee may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.[724]

The Commission received a number of comments regarding the requirement that the CT Plan use an independent Administrator. A number of commenters express support for the independent Administrator requirement.[725] One of these commenters states that, in order to eliminate conflicts of interest associated with the management of consolidated equity market data, there should be a "complete separation of the administrator of CT [Plan] data from proprietary data interests."[726] This commenter states that the CT Plan "should be administered by a team that is completely unaffiliated with Member exchanges."[727] This commenter further states that, in the past, there have been complaints that the exchange administrators "allowed their proprietary data interests to negatively influence the promotion and management of the

[724] See Article VI, Section 6.3 of the CT Plan.

[725] See Refinitiv Letter, supra note 249, at 3; ICI Letter II, supra note 31, at 1; Schwab Letter II, supra note 30, at 2; MFA Letter, supra note 30, at 1.

[726] Refinitiv Letter, supra note 249, at 3.

[727] Id.; see also ICI Letter II, supra note 31, at 1.

consolidated tape."[728] Another commenter argues that moving to an independent single plan Administrator will "minimize any real or perceived conflicts that exist today with the non-independent administrators."[729] This commenter further states that under the independence requirement, the independent Administrator "should have no formal or informal role with any of the exchanges or their affiliates or subsidiaries, and no immediately past, present, or planned future business relationship with any of the exchanges or their affiliates or subsidiaries."[730]

In contrast, other commenters oppose the independent Administrator requirement and reiterate many of the same concerns these commenters expressed in response to the Proposed Order.[731] First, commenters opposing the requirement states that the Commission fails to provide any evidence of problems in the current Administrator framework for the existing Equity Data Plans.[732] One commenter argues that the Commission's concern of conflicts of interest faced by the existing administrators is unsupported by evidence.[733] This commenter argues that, as a result, the independent Administrator requirement is contrary to the purposes of the Act and Rule 608(b) of Regulation NMS,[734] as "it is not necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets; it would disrupt the

---

728 Refinitiv Letter, supra note 249, at 3.

729 Schwab Letter II, supra note 30, at 6.

730 Id.

731 See NYSE Letter I, supra note 18, at 11; NYSE Letter II, supra note 19, at 4; Cboe Letter, supra note 17, at 5; Appendix B of Nasdaq Letter I, supra note 20, at 52–57 (attaching and incorporating by reference all arguments made by Nasdaq and other petitioners in their opening brief challenging the Governance Order); see also Opening Brief for Petitioners, The Nasdaq Stock Market, et al. v. Securities and Exchange Commission (Case No. 20-1181) (D.C. Cir. 2020). The Commission responded to the arguments made by Nasdaq and other petitioners in their brief. See Brief for the Respondent, Securities and Exchange Commission, The Nasdaq Stock Market, et al. v. Securities and Exchange Commission (Case No. 20-1181) (D.C. Cir. 2021).

732 See NYSE Letter I, supra note 18, at 11; NYSE Letter II, supra note 19, at 4; Appendix B of Nasdaq Letter I, supra note 20, at 53.

733 See NYSE Letter I, supra note 18, at 11; NYSE Letter II, supra note 19, at 4.

734 17 CFR 242.608(b).

mechanisms of the national market system; and it is contrary to the purposes of the Act."[735] This commenter further states that the Commission "did not allow the SROs to consider other ways to address the potential conflict, such as through information barriers, which are commonly allowed under Commission rules, or the use of confidentiality requirements."[736] Another commenter states that concerns about conflicts and confidentiality should be addressed in the context of the conflicts and confidentiality policies, or contractual agreements, not by limiting "the ability of the CT Plan to contract with the entity best able to provide the required services."[737]

The Commission disagrees with the commenters' views that the Commission has not provided evidence of problems in the current Administrator framework for the existing Equity Data Plans. The Commission continues to believe, as it stated in the Governance Order, that "an entity that acts as the administrator while also offering for sale its own proprietary data products faces a substantial, inherent conflict of interest, because it would have access to sensitive SIP customer information of significant commercial value."[738] Additionally, the Commission in the Governance Order described these issues and cited the concerns of market participants that the audit function of the Administrator creates special conflicts when managed by an affiliate of an SRO, with the potential for the misuse of audit data to advance the business objectives of the SROs.[739] And as the Commission stated in the Proposed Order, "Participants and Participant representatives have been privy to confidential information of substantial commercial or

---

735 NYSE Letter I, supra note 18, at 11.

736 Id. at 12; see also NYSE Letter II, supra note 19, at 4. This commenter states that prior to the issuance of the Governance Order, the current Administrators to the existing Equity Data Plans had already implemented information barriers designed to protect SIP customer information, and "the Commission has not articulated any deficiencies with this information barrier approach." NYSE Letter I, supra note 18, at 12.

737 Nasdaq Letter I, supra note 20, at 23.

738 Governance Order, supra note 8, 85 FR at 28722.

739 See id. at 28723.

competitive value, including, among other things, information about core data usage, the SIPs' customer lists, financial information, and subscriber audit results."[740] Indeed, during the general session of the Equity Data Plan meeting for the third quarter of 2020, a third-party auditor was suggested as an option for addressing a conflict of interest issue raised by the Advisory Committee members regarding the audit practices of the current non-independent Administrators.[741] Furthermore, as it stated in the Governance Order, the Commission understands that the current Administrators to the existing Equity Data Plans have significant latitude with respect to the information they may request during contract approval process for use of SIP market data, some of which may be highly sensitive.[742] The Commission continues to believe, as it stated in the Governance Order, that the "independent Administrator requirement would address concerns regarding the potential use of SIP subscriber audit data to pursue commercial interests outside of the [CT] Plan."[743]

The Commission also continues to believe that 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.[744] Unlike the exchanges that offer for sale their own proprietary equity market data products, an independent Administrator would not have the competing objective of maximizing its own proprietary data products' profitability.[745] The Commission therefore continues to believe that in order to mitigate conflicts of interest associated with the

---

740 Proposed Order, supra note 483, 85 FR at 2185.

741 See Summary of CQ/CTA/UTP General Session, at 3 (Nov. 19, 2020), available at https://www.utpplan.com/DOC/2020-11-19_Summary_CTA-UTP_General_Session.pdf.

742 See Governance Order, supra note 8, 85 FR at 28724.

743 Id. at 28723.

744 See id. at 28722–23.

745 See id. at 28723.

management of consolidated equity market data, the administration of the CT Plan must be separated from proprietary equity market data interests. Regarding the comment concerning past, present, and future business relationships between the Administrator and any of the exchanges or their affiliates,[746] the independent Administrator requirement will address one inherent conflict of interest by removing SROs with proprietary data businesses that compete with the SIP from consideration in the role of the Administrator.[747] Moreover, the Commission believes that the disclosures required under the CT Plan's conflicts of interest policy will raise awareness of potential conflicts of interest between the Administrator and the Members and facilitate public confidence in the CT Plan operations.

As it stated in the Governance Order, the Commission believes that "the independence requirement would separate the independent Administrator from an exchange's commercial interests and allow it to focus on the regulatory objectives of Section 11A of the Act."[748] Additionally, because the relevant conflict of interest for an Administrator would arise from administration of the SIPs while selling overlapping proprietary equity market data products, the Commission continues to believe that the independence requirement for the Administrator must prohibit an entity from serving as Administrator of the CT Plan if it is owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.

Second, commenters opposing the independence requirement state that adopting this requirement would be costly and disruptive to the administration of SIP data.[749] One of these

---

[746] See Schwab Letter II, supra note 30, at 6.

[747] NYSE and Nasdaq currently act as Administrators of the existing Equity Data Plans. Under the independence provision, NYSE and Nasdaq will be excluded from operating as the Administrators of the CT Plan.

[748] Governance Order, supra note 8, 85 FR at 28723.

[749] See NYSE Letter I, supra note 18, at 11; NYSE Letter II, supra note 19, at 4; Cboe Letter, supra note 17, at 5, Appendix B of Nasdaq Letter I, supra note 20, at 54.

commenters states that the costs for SROs and market participant subscribers to switch to an independent administrator "clearly outweighs any benefits."[750] This commenter describes the "decades of experience" the current Administrators bring to the existing Equity Data Plans and asserts that CT Plan would "throw away all of that experience and require the Operating Committee to hire as Administrator a new, unproven, inexperienced entity."[751] This commenter further states that the "new Administrator would be starting from zero, and would have to build entirely new system infrastructure, train new personnel to perform tasks that the existing Administrators already perform, and create and then enter into new agreements with subscribers."[752] Similarly, another commenter argues that identifying a new independent Administrator and transitioning the administrative services provided by the current Administrators to that entity "will take a significant amount of time and resources."[753]

The Commission acknowledges, as it stated in the Governance Order, that the current Administrators have "significant experience and familiarity with the SIPs' practices and systems," and "that there will be a transition period with additional costs to onboard the new Administrator, including system infrastructure (e.g., network connectivity to exchanges, hosting, and database upgrades) and human capital (e.g., contract management, hiring personnel, service support, and consolidating policies)."[754] The Commission believes, however, that the relevant expertise that has been developed by the SROs currently serving as administrators of the existing

---

750 NYSE Letter I, supra note 18, at 11; see also NYSE Letter II, supra note 19, at 4.

751 NYSE Letter I, supra note 18, at 11.

752 Id.

753 Cboe Letter, supra note 17, at 5. This commenter further states that "transitioning these administrative services to a new entity may require significant effort to ensure that the transition is seamless for market participants and does not create new potentially disruptive inefficiencies in the administration of the [CT] Plan." Id.

754 Governance Order, supra note 8, 85 FR at 28723.

Equity Data Plans can be leveraged by the CT Plan, since those SROs will continue to be members of the CT Plan Operating Committee and will be able to advise and facilitate the onboarding process of the new Administrator.[755] Furthermore, as it stated in the Governance Order, the Commission continues to believe that any industry experience loss in the audit process due to the transition to an independent Administrator would be specific to the previous administrative policies and procedures under the existing Equity Data Plans instead of the CT Plan.[756] On balance, the Commission continues to believe that eliminating the substantial conflict of interest presented by having an entity serve as Administrator while directly or indirectly offering for sale its own equity market data products justifies the independent Administrator requirement in the CT Plan.[757]

In response to the comment about search costs for identifying a new independent Administrator,[758] the Commission continues to believe, as it stated in the Governance Order, "that there is a broad range of financial service firms, unaffiliated with an SRO, with specialized capabilities to oversee market data administrative functions of the CT Plan, such as licensing, billing, contract administration and client relationship management, and record keeping."[759]

The Commission also continues to believe that despite the implementation costs of selecting a new independent Administrator, the selection of an independent Administrator is an important step to help ensure that the CT Plan furthers the objectives of Section 11A of the Act.[760] Further, the Commission continues to believe, as it stated in the Governance Order,

---

755 See Paragraph (d)(iv) of the Recitals to the CT Plan.

756 See Governance Order, supra note 8, 85 FR at 28724.

757 See id.

758 See Cboe Letter, supra note 17, at 5.

759 Governance Order, supra note 8, 85 FR at 28724.

760 See id.

"based on its oversight experience and as described by commenters," that "these costs are justified because the inherent conflicts of interest identified by the Commission, whereby an entity acts as a plan administrator while also offering its own competing products to the SIPs, either directly or via a subsidiary, raises significant concerns regarding access to confidential subscriber information."[761] Access to such confidential subscriber information and its use for purposes outside the scope of the CT Plan by an SRO-affiliated Administrator undermines the fair administration of equity market data in the public interest.[762]

Third, commenters opposing the independence requirement ask why this requirement would disqualify current exchange administrators to the Equity Data Plans but not similarly disqualify non-SRO data vendors from filling the Administrator role, when those entities might face conflict of interest concerns similar to those of exchange Administrators.[763] One of the commenters argues that the independence requirement imposes an unfair burden on competition because "it would not prohibit non-SRO data vendors from filling the Administrator role, even though such vendors may separately sell market data and could also theoretically benefit from access to subscriber lists."[764] Regarding this concern, the Commission did not mandate in the Governance Order that non-SRO data vendors serve as the new independent Administrator. Nor are such entities the only viable alternative Administrator. As discussed above, the Commission chose to address one substantial, inherent conflict of interest when it decided that any plan Administrator cannot be owned or controlled by a corporate entity that offers for sale its own

---

761 Id.

762 See id.

763 See NYSE Letter I, supra note 18, at 12; NYSE Letter II, supra note 19, at 4; Appendix B of Nasdaq Letter I, supra note 20, at 54.

764 NYSE Letter I, supra note 18, at 11; see also NYSE Letter II, supra note 19, at 4.

proprietary equity market data products. The CT Plan, under the direction of the Operating Committee, can exercise discretion in selecting the new Administrator.[765] Furthermore, the Commission does not believe that the Operating Committee of the CT Plan would have any incentive to choose as the Administrator a non-SRO entity that would face a financial conflict of interest and act as a direct competitor to the SROs' proprietary data business.

Given the importance of the independent Administrator requirement as described above, the Commission is modifying CT Plan as proposed to relocate from Section 6.3 the language specifying the independent Administrator requirement to a new standalone section in Article VI, Section 6.2. Accordingly, new Section 6.2 of the CT Plan will state that "[t]he Administrator may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP." The Commission believes that this modification will eliminate uncertainty as to the application of the independent Administrator requirement. This modification will specify that the requirement for the Administrator to be independent does not apply only at the time that the Operating Committee selects the Administrator, but is an ongoing requirement of the CT Plan. For the reasons described above, the Commission is approving the independent Administrator requirement, as modified, in renumbered Article VI, Section 6.2 of the CT Plan.

(c) Evaluation of the Administrator

Article VI, Section 6.2 of the CT Plan as proposed sets forth the provisions for the evaluation of an Administrator, which are substantially similar to the provisions relating to the evaluation of the Processors described above.[766] This section specifies that the Administrator's

[765] See Article IV, Section 4.1(a)(ii) of the CT Plan.

[766] See supra Section II.C.6(a).

performance of its functions under the Administrative Services Agreement will be subject to review at any time as determined by an affirmative vote of the Operating Committee pursuant to Section 4.3 of the CT Plan; provided, however, that a review must be conducted at least once every two calendar years but not more frequently than once each calendar year.[767] If the Administrator has materially defaulted in its obligations under the Administrative Services Agreement and that default has not been cured within the applicable cure period pursuant to the Administrative Services Agreement, the CT Plan provides that the review period limitations will not apply.[768] Furthermore, the CT Plan provides that the Operating Committee must appoint a subcommittee or other persons to conduct the review of the Administrator and that the reviewer must provide the Operating Committee with a written report of its findings and recommendations, including with respect to the continuing operation of the Administrator.[769] The CT Plan specifies that the Administrator must assist and participate in the process of the review.[770] The CT Plan provides that the Operating Committee, upon completing a review of the Administrator, must notify the Commission of any recommendations it may approve as a result of the review and supply the Commission with copies of any related reports.[771]

In the Notice, the Commission solicited comment on Article VI, Section 6.2 of the CT Plan as proposed and the proposed frequency of reviews of the Administrator.[772] One commenter states that the proposed review period of every two years is appropriate if there is no

---

767 See Article VI, Section 6.2 of the CT Plan.

768 See id.

769 See id.

770 See id.

771 See id.

772 See Notice, supra note 3, 85 FR at 64572 (Question 42).

performance issue.[773] This commenter also states that more clarity on the Administrator evaluation criteria would "improve the soundness the CT Plan."[774]

The Commission believes that the provisions for the evaluation of the Administrator are reasonably designed to ensure that the Administrator meets its performance obligations under the Administrative Service Agreement. The Commission also believes that the requirement for the Operating Committee to appoint a subcommittee or other persons to conduct the review is a commonly performed practice under the current Equity Data Plans and will promote efficient allocation of the Operating Committee's time and resources. Furthermore, the Commission believes that the requirement that the Operating Committee notify the Commission of any recommendations it may approve as a result of a review of the Administrator and supply the Commission with copies of any related reports will promote transparency and enhance Commission oversight of the Administrator's performance of its obligations to the CT Plan.

The Commission agrees with the comment that the biennial review timeframe is appropriate if there are no Administrator performance issues.[775] As described above, Section 6.2 as proposed provides that the timeframe limitations will not apply if the Administrator has materially defaulted, without cure, in its obligations under the Administrative Services Agreement. The Commission also believes that the biennial review timeframe provides a sufficient sample time period for the Operating Committee to evaluate the performance of the Administrator, without overburdening the Operating Committee with frequent reviews that might produce little additional information. Regarding the comment requesting additional clarity on the

---

773 See Data Boiler Letter I, supra note 31, at 44.

774 Id.

775 See id.

Administrator evaluation criteria,[776] the Commission believes that the CT Plan appropriately assigns the responsibility of evaluating the performance of the Administrator to the Operating Committee, which is responsible for the operation of the CT Plan, and reasonably sets forth the parameters the Operating Committee must use to ensure that the Administrator meets its performance obligations under the Administrative Service Agreement, without prescribing the specific measurements of Administrator performance in a way that would require an amendment of the CT Plan to respond to market developments.[777] Moreover, the commenter did not explain in detail the clarification it was seeking on the evaluation criteria. For the foregoing reasons, the Commission is approving Article VI, Section 6.2, as proposed, but is renumbering it as Section 6.3 of the CT Plan.

(d) Process for Selecting New Administrator

Article VI, Section 6.3 of the CT Plan as proposed sets forth the provisions for the selection of an Administrator, which are similar to the procedures for selecting a new Processor.[778] In particular, Section 6.3 specifies that the Operating Committee shall establish procedures for selecting a new Administrator, by an affirmative vote pursuant to Section 4.3 of the CT Plan (the "Administrator Selection Procedures").[779] Section 6.3 further provides that the Administrator Selection Procedures must set forth, at a minimum: (i) the minimum technical and operational requirements to be fulfilled by the Administrator; (ii) the criteria to be considered in

---

776 See id.

777 See Article IV, Section 4.1(a)(ii) of the CT Plan.

778 See Article V, Section 5.3 of the CT Plan.

779 See Article VI, Section 6.4 of the CT Plan. The CT Plan requires that the Administrator Selection Procedures be established prior to the Operative Date, upon the termination or withdrawal of the Administrator, or upon the expiration of the Administrative Services Agreement. See id. See also paragraph (d)(iv) of the Recitals to the CT Plan, as modified by the Commission (stating that the Operating Committee shall enter into an agreement with the Administrator pursuant to Section 6.3 of the CT Plan within eight months of the Effective Date).

selecting the Administrator; (iii) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Administrator; and (iv) the entity that will: (A) draft the Operating Committee's request for proposal for a new Administrator; (B) assist the Operating Committee in evaluating bids for the new Administrator; and (C) otherwise provide assistance and guidance to the Operating Committee in the selection process.[780] Finally, Section 6.3 provides that the Operating Committee, as part of the process in establishing the Administrator Selection Procedures, is permitted to solicit and consider the timely comment of any entity affected by the operation of the CT Plan.[781]

In the Notice, the Commission solicited comment on Article VI, Section 6.3 of the CT Plan as proposed and whether the Administrator Selection Procedures should set forth additional terms, such as specifying a maximum time period to select a new Administrator.[782] One commenter states that the CT Plan should clarify the protocols to transition to a new Administrator and specify the maximum time period to select a new Administrator.[783] The commenter also states that the Administrator should not "just be any major accounting, law, or consulting firm."[784] Finally, the commenter states that the public should be allowed to comment on the selection of a new Administrator.[785]

In response to the comment regarding transition protocols for a new Administrator, the Commission believes that details regarding transition protocols are reasonably described in

---

780 See Article VI, Section 6.4 of the CT Plan.

781 See id.

782 See Notice, supra note 3, 85 FR at 64572 (Question 43).

783 See Data Boiler Letter I, supra note 31, at 44.

784 Id. at 4, 44.

785 See id. at 44.

paragraph (d)(iv) of the Recitals to the CT Plan, which discusses the transition from the prior administrators under the existing Equity Data Plans to the new independent Administrator.[786] With respect to future changeovers in the Administrator role, the Commission believes that it is appropriate for the Operating Committee to evaluate and determine the specific appropriate transition protocols in close partnership with the new independent Administrator, as transition protocols may be highly detailed and depend on the particular service provider selected as the Administrator. Therefore, the Commission believes that setting forth specific requirements in the CT Plan, at this stage, may unnecessarily hinder the ability of the CT Plan, under the direction of the Operating Committee, and the Administrator to determine the appropriate transition protocols.

With respect to the comment on prescribing a maximum period of time to select a new Administrator,[787] the Commission does not believe that it is necessary for Section 6.3 to set the maximum period of time for the Operating Committee to establish the Administrator Selection Procedures, because the Commission has separately modified the CT Plan to provide deadlines for implementation of the CT Plan, including for selecting, and entering into a contract with, an Administrator.[788] Furthermore, the Commission did not receive any comments on a specific maximum period of time to select a new Administrator.

---

786 See supra Section II.C.1.

787 See Data Boiler Letter I, supra note 31, at 44.

788 Paragraph (d)(iv) of the Recitals of the CT Plan provides that within eight months of the Effective Date, the Operating Committee must have selected and entered into an agreement with an Administrator and such Administrator shall prepare to transition from prior the Administrators under the Equity Data Plans such that, before the Operative Date, it is able to provide services under the Administrative Services Agreement, as determined by the Operating Committee pursuant to Section 4.3, including that (1) new contracts between the CT Plan and Vendors and the CT Plan and Subscribers have been finalized such that all Vendors and Subscribers under the Equity Data Plans are ready to transition to such new contracts, (2) the Administrator has in place a system to administer distributions, and (3) the Administrator has in place a system to administer fees.

With respect to the comment on limiting the type of professional service firms that may serve the role of the independent Administrator,[789] the Commission believes that the CT Plan should not limit the scope of firms based solely on the type or size of the firm, but should instead use the criteria required to be considered in selecting the Administrator pursuant to the Administrator Selection Procedures adopted by the Operating Committee. Finally, regarding the commenter's statement in support of public comment on the selection of a new Administrator,[790] Section 6.3 provides that the Operating Committee may solicit and consider comment as part of the process of establishing the Administrator Selection Procedures, and the Administrator Selection Procedures are required to set forth the entities (other than the Voting Representatives) that are eligible to comment on the selection of the Administrator.[791] The Commission also believes that the inclusion of Non-SRO Voting Representatives as full members of the Operating Committee, together with the Commission's modification of the proposed CT Plan in Section 4.4(g)(i) to prohibit discussions in Executive Session regarding contract negotiations with the Administrator, will help ensure that the Operating Committee considers broad industry viewpoints in the process of establishing the Administrator Selection Procedures. As a result, the Commission believes that the CT Plan, as modified, addresses this issue.

Although the provisions for the establishment of the Administrator Selection Procedures are reasonably designed to ensure that the Operating Committee establishes a process that governs the selection of a new Administrator through a fair, transparent, and competitive process, the Commission is modifying a sentence in Article VI, Section 6.3 of the CT Plan. In particular, Section 6.3 states that the Administrator Selection Procedures shall be established by

---

789 See Data Boiler Letter I, supra note 31, at 4, 44.

790 See id.

791 See Article VI, Section 6.3(d) of the CT Plan.

the Voting Representatives pursuant to Article IV, Section 4.3 of the CT Plan. The Commission is modifying Section 6.3 by replacing the phrase "Voting Representatives" with the phrase "Operating Committee" in order to remove any inconsistency and potential confusion in this section regarding the vote that would be required to establish the Administrator Selection Procedures. As described above, Section 4.3 governs the action of the Operating Committee, which has the specific authority under the CT Plan for selecting, overseeing, and specifying the role and responsibilities of the Administrator.[792] The reference to Voting Representatives is the only instance found in Section 6.3 when discussing the body responsible for establishing the Administrator Selection Procedures, and modifying the provision to instead refer to the Operating Committee will make clear that an augmented majority vote of the Operating Committee is necessary to establish those procedures. Accordingly, for the reasons discussed above, the Commission is approving Article VI, Section 6.3, as modified and renumbered as Section 6.4 of the CT Plan.

8. Regulatory Matters

Article VII of the CT Plan sets forth the provisions governing regulatory matters. Section 7.1 of Article VII addresses regulatory and operational halts. Section 7.1(a) provides that a Member must notify the Processor if it has concerns about its ability to collect and transmit quotes, orders, or last sale prices, or where it has declared an Operational Halt or suspension of trading in one or more Eligible Securities, pursuant to the procedures adopted by the Operating Committee.

Sections 7.1(b)–(f) provide procedures for the initiation of a regulatory halt and the resumption of trading following a regulatory halt. In particular, Section 7.1(d) provides that the

[792] See Article IV, Section 4.1(a)(ii) of the CT Plan.

Primary Listing Market will determine when to resume trading. In making that determination, the Primary Listing Market will make a good-faith determination and consider the totality of information to determine whether resuming trading would promote a fair and orderly market. Section 7.1(d) further provides that the Primary Listing Market retains discretion to delay the resumption of trading if it believes that trading will not resume in a fair and orderly manner.

In the Notice, the Commission sought comment on these provisions.[793] One commenter argues that "good faith" is "too loose of a requirement."[794] The Commission, however, believes that the proposed good-faith standard set forth in Section 7.1 is appropriate because it addresses potential concerns that primary listing markets may be subject to commercial pressures in making decisions to call regulatory halts or resume trading thereafter and also because it is combined with the requirement that the primary listing markets consider the broader interests of the national market system with respect to declaring regulatory trading halts and resuming trading thereafter, thereby promoting the maintenance of fair and orderly markets and enhancing the protection of investors.[795] Section 7.1(b)(ii) of the CT Plan requires the primary listing market to also consider the severity of the issue, its expected duration, and potential impact on market participants. Section 7.1(b)(ii) also requires the primary listing market to consult with, or seek input from, as feasible, the affected trading centers, processors, and others when making any such determinations. Moreover, Section 7.1(c)(iv) and Section 7.1(d)(1) each require the

---

793 See Notice, supra note 3, 85 FR at 64572 (Question 46).

794 Data Boiler Letter I, supra note 31, at 45.

795 For example, Article VIII(a) of the CTA Plan does not prevent "any Participant that is an exchange from halting or suspending trading, or any Participant that is a national securities association from suspending the furnishing of quotation information, in any Eligible Security for any reason it deems adequate. Any Participant which does so halt or suspend trading or the furnishing of quotation information shall immediately advise the Processor of its actions and the reasons therefor, and also advise the Processor when such halt or suspension is terminated." Moreover, Article X of the UTP Plan permits the Listing Market to declare a regulatory halt, "[w]henever, in the exercise of its regulatory functions, the Listing Market for an Eligible Security determines that a Regulatory Halt is appropriate" and to terminate a halt, "[w]henever the Listing Market determines."

primary listing market to consider whether its determination would promote a fair and orderly market. Consequently, the Commission has determined that a good-faith determination, based on the totality of information and focusing on the promotion of fair and orderly markets, is reasonably designed to ensure that trading is halted and resumed in an appropriate manner. Additionally, consistent with its recent approval of the same provisions regarding trading halts in the existing Equity Data Plans, the Commission finds that the provisions of Section 7.1 are reasonably designed "to enhance the resiliency of the national market system by clearly memorializing the coordinated actions to be taken by the Participants during such events so that trading may resume in a fair and orderly manner."[796] Accordingly, the Commission is approving Section 7.1 as proposed.

Section 7.2 of Article VII of the CT Plan governs the hours of operation during which time quotations and Transaction Reports must be entered by Members and will be disseminated by the Processor. The Commission received no comment on Section 7.2. The Commission finds that the requirements of this provision with respect to regulatory halts are consistent with the provisions of the existing Equity Data Plans previously approved by the Commission,[797] and that maintaining the same hours of operation for the CT Plan will avoid the need for market participants to adjust their systems to accept market data at other times, thereby reducing the risk of market disruption. For these reasons, the Commission is approving Section 7.2 as proposed.

---

[796] Securities Exchange Act Release Nos. 92070 (May 28, 2021), 86 FR 29849, 29851 (June 3, 2021) (File No. SR-CTA/CQ-2021-01); and 92071 (May 28, 2021), 86 FR 29846, 29848 (June 3, 2021) (File No. S7-24-89).

[797] See Securities Exchange Act Release Nos. 92070 (May 28, 2021), 86 FR 29849, 29851 (June 3, 2021) (File No. SR-CTA/CQ-2021-01); and 92071 (May 28, 2021), 86 FR 29846, 29848 (June 3, 2021) (File No. S7-24-89).

9. Financial Matters

(a) Capital Contributions

Article VIII of the CT Plan sets forth the provisions related to the maintenance of capital accounts for the Members, additional capital contributions to the LLC, and the distribution of revenues of the LLC to the Members. Specifically, Article VIII, Section 8.1 of the CT Plan requires a separate capital account to be established and maintained by the Company for each Member.[798] In addition, the CT Plan specifies the formula for crediting and debiting a Member's capital account.[799] The CT Plan provides that a Member's capital account will be credited for (i) the Member's capital contributions (at fair market value in the case of contributed property),[800] (ii) allocations of Company profits and gain to such Member pursuant to Section 10.2; and (iii) any recaptured tax credits, or portion thereof, to the extent such increase to the tax basis of a Member's interest in the Company may be allowed pursuant to the federal tax code.[801] Furthermore, the CT Plan provides that a Member's capital account will be decreased by (x) the amount of distributions (at fair market value in the case of property distributed in kind) to such Member, (y) allocations of Company losses to such Member and (z) any tax credits as may be required to be charged to the tax basis of a Member's interest pursuant to the federal income tax code.[802]

---

798 See Article VIII, Section 8.1(a) of the CT Plan.

799 See id.

800 The CT Plan specifies that the fair market value of contributed, distributed, or revalued property shall be agreed to by the Operating Committee or, if there is no such agreement, by an appraisal. See Article VIII, Section 8.1(b) of the CT Plan.

801 See Article VIII, Section 8.1(a) of the CT Plan.

802 See id.

Article VIII, Section 8.2 of the proposed CT specifies that no Member will be obligated or permitted to make any additional contribution to the capital of the Company except with the approval of the Operating Committee. The CT Plan specifies that the Members agree to make additional capital contributions from time to time as appropriate in respect of reasonable administrative and other reasonable expenses of the Company.[803]

Article VIII, Section 8.3 of the CT Plan requires the distributions of revenues of the LLC to the Members at the times and in the aggregate amounts set forth in Exhibit D to the CT Plan. The CT Plan provides that distributions to Members may be made in cash or, if determined by the Operating Committee, in-kind.[804] The CT Plan also specifies that the Operating Committee may reserve amounts for anticipated expenses or contingent liabilities of the LLC.[805] Finally, the CT Plan provides that if additional capital contributions are called for, and any Member fails to provide the full amount of such additional capital contributions, any distributions to be made to such defaulting Member shall be reduced by the amount of any required but unpaid capital contribution due from such Member.[806]

The provisions in the CT Plan related to the maintenance of capital accounts for the Members, additional capital contributions to LLC, and the distribution of revenues of the LLC to the Members are reasonable and customary for LLC agreements, and the Commission received no comments addressing Article VIII. The Commission has, however, identified two incorrect cross references in Article VIII, Section 8.1. In particular, Section 8.1(a) twice incorrectly cites to Section 10.2 (Tax Status; Returns) instead of Section 9.2 (Allocation of Profits and Losses) of

---

803 See Article VIII, Section 8.2 of the CT Plan.

804 See Article VIII, Section 8.3 of the CT Plan.

805 See id.

806 See id.

the CT Plan when describing provisions related to allocations of profits and losses. The Commission is therefore modifying Section 8.1(a) to correct these incorrect cross references. For the reasons discussed above, the Commission is approving Article VIII as modified.

(b) Allocations

Article IX of the CT Plan sets forth the provisions related to the allocation of profits and losses of the LLC to Members. Pursuant to Article XI, Section 9.1, the profits and losses of the Company must be determined for each fiscal year in a manner consistent with GAAP. Article XI, Section 9.2 further provides that all profits and losses of the Company must be allocated among the Members in accordance with Exhibit D of the CT Plan. Section 9.2 also specifies the procedures for certain allocation events in accordance with federal tax code regulations.[807]

Exhibit D of the CT Plan outlines the methodology for revenue sharing among Members. Specifically, paragraph (a) of Exhibit D specifies that each Member will receive an annual payment (if any) for each calendar year that is equal to the sum of the Member's Trading Shares (as defined in the CT Plan) and Quoting Shares (as defined in the CT Plan), in each Eligible Security for such calendar year.[808] In the event that total Net Distributable Operating Income (as defined below) is negative for a given calendar year, each Member will receive an annual bill for such calendar year in accordance with the same formula for determining annual payments to the Members.[809] Moreover, the Company will cause the Administrator to provide the Members with written estimates of each Member's percentage of total volume within five business days of the end of each calendar month.[810]

---

807 See Article IX, Section 9.2(b)–(d) of the CT Plan.

808 See Paragraph (a) of Exhibit D of the CT Plan.

809 See id.

810 See id.

Paragraphs (b), (c), and (e) through (i) of Exhibit D set forth the definitions used for determining the revenue sharing among Members, including "Security Income Allocation,"[811] "Voting Percentage,"[812] "Trading Share,"[813] "Trading Rating,"[814] "Quoting Share,"[815] "Quote Rating,"[816] and "Quote Credit."[817]

Paragraph (d) of Exhibit D specifies a cap on the Net Distributable Operating Income of the CT Plan. In particular, if the Initial Allocation of Net Distributable Operating Income equals an amount greater than $4.00 multiplied by the total number of qualified Transaction Reports[818]

---

811 Paragraph (b) of Exhibit D of the CT Plan defines "Security Income Allocation" as "multiplying (i) the Net Distributable Operating Income under [Exhibit D] for the calendar year by (ii) the Volume Percentage for such Eligible Security (the "Initial Allocation"), and then adding or subtracting any amounts specified in the reallocation set forth [in Exhibit D]."

812 Paragraph (c) of Exhibit D of the CT Plan defines "Volume Percentage" as "dividing (A) the square root of the dollar volume of Transaction Reports disseminated by the Processors in such Eligible Security during the calendar year by (B) the sum of the square roots of the dollar volume of Transaction Reports disseminated by the Processors in each Eligible Security during the calendar year."

813 Paragraph (e) of Exhibit D of the CT Plan defines "Trading Share" as "multiplying (i) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (ii) the Member's Trade Rating in the Eligible Security."

814 Paragraph (f) of Exhibit D of the CT Plan defines "Trade Rating" as "taking the average of (A) the Member's percentage of the total dollar volume of Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year, and (B) the Member's percentage of the total number of qualified Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year."

815 Paragraph (g) of Exhibit D of the CT Plan defines "Quoting Share" as "multiplying (A) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (B) the Member's Quote Rating in the Eligible Security."

816 Paragraph (h) of Exhibit D of the CT Plan defines "Quote Rating" as "dividing (A) the sum of the Quote Credits earned by the Member in such Eligible Security during the calendar year by (B) the sum of the Quote Credits earned by all Members in such Eligible Security during the calendar year."

817 Paragraph (i) of Exhibit D of the CT Plan states that a "Member shall earn one 'Quote Credit' for each second of time (with a minimum of one full second) multiplied by dollar value of size that an automated best bid (offer) transmitted by the Member to the Processors during regular trading hours is equal to the price of the National Best Bid and Offer in the Eligible Security and does not lock or cross a previously displayed 'automated quotation' (as defined under Rule 600 of Regulation NMS). The dollar value of size of a quote shall be determined by multiplying the price of a quote by its size."

818 Paragraph (d) of Exhibit D of the CT Plan provides that "[a] Transaction Report with a dollar volume of: (i) $5,000 or more shall constitute one qualified Transaction Report" and that "[a] Transaction Report with a dollar volume of less than $5,000 shall constitute a fraction of a qualified Transaction Report that equals the dollar volume of the Transaction Report divided by $5,000."

in such Eligible Security during the calendar year, the excess amount will be subtracted from the Initial Allocation for such Eligible Security and reallocated among all Eligible Securities in direct proportion to the dollar volume of Transaction Reports disseminated by the Processors in Eligible Securities during the calendar year.[819]

Paragraph (j) of Exhibit D specifies the formula for determining the Net Distributable Operating Income for any calendar year. Generally, the Net Distributable Operating Income is equal to: (1) all cash revenues, funds, and proceeds received by the Company during such calendar year, including all revenues from (A) the CT Feeds and (B) FINRA quotation data and last sale information for securities classified as OTC Equity Securities under FINRA's Rule 6400 Series ("FINRA OTC Data") ((A) and (B) collectively, the "Data Feeds"), and (C) any membership fees; less (2) 6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with respect to Network C Securities and FINRA OTC Data; less (3) reasonable working capital and contingency reserves for such calendar year, as determined by the Operating Committee, and all costs and expenses of the Company during such calendar year.[820]

Paragraph (k) of Exhibit D specifies that once a new Member implements a Processor-approved electronic interface with the Processors, the Member will become eligible to receive revenue.[821] Paragraph (l) of Exhibit D specifies that, generally, all quarterly payments or billings must be made to each eligible Member within 45 days after the end of each calendar quarter in

---

819 See Paragraph (d) of Exhibit D of the CT Plan.

820 See Paragraph (j) of Exhibit D of the CT Plan.

821 See Paragraph (k) of Exhibit D of the CT Plan.

which the Member is eligible to receive revenue.[822] Additionally, the Company will cause the Administrator to provide Members with written estimates of each Member's quarterly Net Distributable Operating Income within 45 calendar days of the end of the quarter, and estimated quarterly payments or billings must be based on such estimates.[823]

Paragraph (m) of Exhibit D specifies that the Company will cause the Administrator to submit to the Members a quarterly itemized statement setting forth the basis upon which Net Distributable Operating Income was calculated.[824] Finally, the Company, subject to the voting requirements pursuant to Article IV, Section 4.3, will cause the Administrator to engage an independent auditor to audit the Administrator's costs or other calculation(s).[825]

In the Notice, the Commission solicited comment on Article IX, including allocations to the Members,[826] and the definition of the term "Net Distributable Operating Income" in paragraph (j) of Exhibit D to the CT Plan.[827] One commenter argues that the provision in paragraph (j) of Exhibit D the CT Plan, which provides that 6.25% of revenue received by the LLC be paid to FINRA as compensation for FINRA OTC Data, is an "antiquated revenue allocation provision" that serves no ongoing purpose and should be removed.[828] In response, one

---

822 Paragraph (l) of Exhibit D also specifies conditions for the quarterly payments or billings to Members and interest accrual procedures.

823 See Paragraph (l) of Exhibit D of the CT Plan.

824 Paragraph (m) of Exhibit D of the CT Plan also specifies that the "Net Distributable Operating Income shall be adjusted annually based solely on the quarterly itemized statement audited pursuant to the annual audit. The Company shall cause the Administrator to pay or bill Members for the audit adjustments within thirty days of completion of the annual audit."

825 See Paragraph (m) of Exhibit D of the CT Plan.

826 See Notice, supra note 3, 85 FR at 64572 (Question 47).

827 See id. at 64573 (Question 54).

828 Nasdaq Letter I, supra note 20, at 31. This commenter also briefly describes a history of the revenue allocation formula and shares its previous proposals for modifying the revenue allocation formula. See id. at 29–30. In particular, the commenter states that it (i) favors revising the revenue allocation formula to reward exchanges

commenter objects to the suggestion that FINRA OTC Data be removed from the CT Plan, arguing that the suggestion is outside the scope of the Commission's proposal and related directive.[829] This commenter further argues that it would be inappropriate to modify the CT Plan to restructure the data covered by the CT Plan or the revenue allocation provisions in response to that suggestion.[830]

While the Commission acknowledges the commenters' concerns with respect to the inclusion in the CT Plan of the 6.25% revenue allocation to FINRA, the Commission believes that the provisions of the Commission's recently adopted Market Data Infrastructure Rule will ultimately resolve this issue.[831] First, new Rule 614 does not include OTC data within the definition of "core data" to be disseminated by the effective NMS plan(s) for equity market data.[832] And second, Rule 614(e) specifically requires the effective NMS plan(s) for equity market data to file an amendment conforming the plan(s) to the new consolidation model under the Market Data Infrastructure Rule.[833] Thus, when the CT Plan becomes the effective NMS plan for dissemination of equity market data under the Market Data Infrastructure Rule, the CT Plan will no longer include OTC data within the definition of "core data," and no revenue allocation of CT Plan revenues for OTC data will be necessary or appropriate. Consequently, because the Commission believes that the other provisions of the CT Plan related to the allocation of profits

---

that display quotes that result in an execution; and (ii) proposes removing the Over-the-Counter Bulletin Board ("OTCBB") data from the Nasdaq SIP to lower costs. See id. at 30.

829 See Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA (Nov. 24, 2020) ("FINRA Letter II"), at 4.

830 See FINRA Letter II, supra note 829, at 4–6 (emphasizing that there are important benefits of including OTC equities data in the data feeds provided under the UTP Plan).

831 See Market Data Infrastructure, Securities Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596 (File No. S7-03-20) (Final Rule).

832 See id. at 18614–15.

833 See id. at 18681.

and losses of the LLC to the Members are similar to the UTP Plan, the Commission does not believe it is necessary at this time to modify the CT Plan's proposed revenue allocation. The Commission has, however, identified five incorrect cross references in Article IX, Section 9.2. In particular, Section 9.2(d) incorrectly cites to Section 10.2 (Tax Status; Returns) instead of Section 9.2 when describing provisions related to allocations. The Commission is therefore modifying Section 9.2(d) to correct these cross references. For the reasons discussed above, the Commission is approving Article IX as modified.

(c) Records and Accounting

Article X of the CT Plan sets forth the LLC's obligations and policies related to accounting and tax matters. Article X, Section 10.1 of the CT Plan specifies that the Operating Committee shall determine all matters concerning accounting procedures of the Company and maintain an accounting system that enables the Company to produce accounting records and information substantially consistent with GAAP.[834] The CT Plan also specifies that the fiscal year of the Company will be the calendar year unless applicable law requires a different fiscal year.[835]

Article X, Section 10.2 of the CT Plan specifies that the Company is intended to be treated as a partnership for federal, state, and local income tax purposes.[836]

Article X, Section 10.3 of the CT Plan sets forth provisions regarding the functions and duties of an entity appointed as the "Partnership Representative" of the Company as required by

---

834 See Article X, Section 10.1(a), (b) of the CT Plan.

835 See Article X, Section 10.1(a) of the CT Plan.

836 See Article X, Section 10.2(a) of the CT Plan. The CT Plan specifies that all tax returns shall be prepared in a manner consistent with the Distributions made in accordance with Exhibit D of the CT Plan. See Article X, Section 10.2(b) of the CT Plan.

the federal tax code.[837] This section requires that all federal, state, and local tax audits and litigation shall be conducted under the direction of the Partnership Representative.[838] The Partnership Representative is required to use reasonable efforts to notify each Member of all significant matters that may come to its attention and to forward to each Member copies of all significant written communications it receives in such capacity.[839] The Partnership Representative must also consult with the Members before taking any material actions with respect to tax matters and must not compromise or settle any tax audit or litigation affecting the Members without the approval of a majority of Members.[840] Any material proposed action, inaction, or election to be taken by the Partnership Representative requires the prior approval of a majority of Members.[841]

The Commission received no comments addressing Article X and notes that these provisions of the CT Plan relating to accounting and tax matters of the LLC are similar to those existing in other NMS plans.[842] Accordingly, the Commission is approving the provisions of Article X as proposed.

10. Dissolution and Termination

(a) Dissolution of the LLC

Article XI, Section 11.1 of the CT Plan specifies the events that would trigger the dissolution of the LLC. In particular, Section 11.1 requires the dissolution of the Company as a

---

837 See Article X, Section 10.3(a) of the CT Plan.

838 See id.

839 See Article X, Section 10.3(b) of the CT Plan.

840 See id.

841 See Article X, Section 10.3(c) of the CT Plan.

842 See Article IX, Sections 9.2, 9.3, and 9.5 of the CAT NMS Plan; Article VIII, Sections 8.1, 8.2, and 8.4 of the OPRA Plan.

result of one of the following events: (i) unanimous written consent of the Members to dissolve the Company; (ii) the sale or other disposition of all or substantially all the Company's assets outside the ordinary course of business; (iii) an event which makes it unlawful or impossible for the Company business to be continued; (iv) the withdrawal of one or more Members such that there is only one remaining Member; or (v) the entry of a decree of judicial dissolution under Section 18-802 of the Delaware Act.

In the Notice, the Commission solicited comment on whether the terms for the dissolution and termination of the LLC should require consideration by or the consent of the Non-SRO Voting Representatives.[843] One commenter states that the dissolution and termination of the LLC should require consideration and consent of the broader industry, beyond just Non-SRO Voting Representatives.[844] Another commenter states that "[t]he existence and operation of the CT Plan is required by the Commission and therefore the dissolution of the CT Plan is only possible if the Commission is approving an alternative plan for the dissemination of information."[845]

With respect to the concern that the dissolution and termination of the LLC should require broader industry consideration and consent, any cessation of the operations of the LLC as the structure through which the SROs fulfill their regulatory obligations with respect to consolidated equity market data typically would require a filing with the Commission pursuant to Rule 608(b)(1) and (2) of Regulation NMS,[846] which would be noticed for public comment before Commission action to approve or disapprove the filing, providing an opportunity for all

---

843 See Notice, supra note 3, 85 FR at 64572 (Question 48).

844 See Data Boiler Letter I, supra note 31, at 45.

845 Nasdaq Letter I, supra note 20, at 12.

846 17 CFR 242.608(b)(1) and (2).

interested market participants to share their views with the Commission. Moreover, the triggering events for the dissolution of the LLC are similar to those existing in other NMS plans, and none of the terms of the existing NMS plans structured as an LLC agreement expressly specify broad industry consideration prior to dissolution and termination.[847] For the reasons discussed above, the Commission is approving Article XI, Section 11.1 of the CT Plan as proposed.

(b) Liquidation and Distribution

Article XI, Section 11.2 of the CT Plan sets forth the procedures for the liquidation and distribution of assets following the dissolution of the LLC. Specifically, in the event of the dissolution of the LLC, Section 11.2 requires the Members to appoint a liquidating trustee to wind up the affairs of the Company by (i) selling its assets in an orderly manner (so as to avoid the loss normally associated with forced sales), and (ii) applying and distributing the proceeds of such sale, together with other funds held by the Company: (a) first, to the payment of all debts and liabilities of the Company; (b) second, to the establishments of any reserves reasonably necessary to provide for any contingent recourse liabilities and obligations; (c) third, to the Members in accordance with Exhibit D (Distributions) of the CT Plan; and (d) fourth, to the Members as determined by a majority of Members.

The procedures for the liquidation and distribution of assets following the dissolution of the LLC are similar to those existing in other NMS plans.[848] The Commission received no comments addressing this provision and is approving Article XI, Section 11.2 of the CT Plan as proposed.

---

[847] See Article X, Section 10.1 of the CAT NMS Plan; Article IX, Section 9.1 of the OPRA Plan.

[848] See Article X, Section 10.2 of the CAT NMS Plan; Article IX, Section 9.2 of the OPRA Plan.

(c) Termination

Article XI, Section 11.3 of the CT Plan sets forth termination procedures following the dissolution of the LLC. Specifically, Section 11.3 provides that each Member will receive a statement prepared by the independent accountants retained on behalf of the Company that sets forth (i) the assets and liabilities of the Company as of the date of the final distribution of Company's assets under Section 10.2 of the CT Plan and (ii) the net profit or net loss for the fiscal period ending on such date. The CT Plan further specifies that, upon compliance with the distribution process set forth in Section 10.2 of the CT Plan, the Members will cease to be such, and the liquidating trustee is required to execute, acknowledge, and file a certificate of cancellation of the Company.[849] Finally, the CT Plan provides that upon completion of the dissolution, winding up, liquidation, and distribution of the liquidation proceeds, the Company will terminate.[850]

The termination procedures following the dissolution of the LLC are similar to those existing in other NMS plans,[851] and the Commission received no comments addressing this provision. The Commission has, however, identified two incorrect cross references in Article XI, Section 11.3. In particular, Section 11.3 incorrectly cites to Section 10.2 (Tax Status; Returns) instead of Section 11.2 (Liquidation and Distribution) of the CT Plan when describing provisions related to the liquidation of the LLC. The Commission is therefore modifying Section 11.3 to correct these incorrect cross references. For the reasons discussed above, the Commission is approving Article XI, Section 11.3 as modified.

---

849 See Article XI, Section 11.3 of the CT Plan.

850 See id.

851 See Article X, Section 10.3 of the CAT NMS Plan; Article IX, Section 9.3 of the OPRA Plan.

11. Exculpation and Indemnification

(a) Exculpation and Indemnification

Article XII, Section 12.1 and Section 12.2 of the CT Plan provide broad liability, exculpation, and indemnification protections for SROs and SRO Voting Representatives. Specifically, Section 12.1 provides that the liability of each Member and each individual currently or formerly serving as an SRO Voting Representative (each, an "Exculpated Party") will be limited to the maximum extent permitted by law "for any loss suffered in connection with a breach of any fiduciary duty, errors in judgment or other acts or omissions by such Exculpated Party." The provision explicitly does not extend to "Non-Exculpated Items"—acts or omissions that involve "gross negligence, willful misconduct or a knowing violation of law" or "losses resulting from such Exculpated Party's Transaction Reports, Quotation Information or other information reported to the Processors by such Exculpated Party." Moreover, Section 12.1(b), among other things, explicitly permits an Exculpated Party, in making decisions authorized to be in its sole discretion, to "consider such interests and factors as it desires (including its own interests)" and asserts that the Exculpated Party "shall have no duty or obligation (fiduciary or otherwise) to give any consideration to any interest of or factors affecting the Company or the Members."

Section 12.2 provides indemnification to SROs and SRO Voting Representatives ("Company Indemnified Party") for losses from being a Party to a Proceeding, so long as the CT Plan is not a claimant against the Company Indemnified Party and the claim does not involve Non-Exculpated Items. Paragraph (c) of Section 12.2 expressly acknowledges that "indemnification provided in this Article XII could involve indemnification for negligence or under theories of strict liability." Paragraph (d) of Section 12.2 makes clear that the CT Plan is

primarily responsible for "advancement of expenses, or for providing insurance" for any Company Indemnified Party's claim for indemnification.

In the Notice, the Commission sought comment on whether the indemnification and exculpation provisions of the CT Plan should also cover Non-SRO Voting Representatives.[852] In response, the Commission received several comments addressing this issue. Most commenters addressing the issue argue that the CT Plan should extend liability protection and indemnification coverage to Non-SRO Voting Representatives acting in their role on the Operating Committee. One commenter recommends that the CT Plan should state that no liability can be imputed to Non-SRO Voting Representatives acting in their role on the Operating Committee and that Non-SRO Voting Representatives would be entitled to indemnification against any claims made against them related to their role on the Operating Committee.[853] Other commenters suggest that the exculpation and indemnification protections under Article XII of the CT Plan be extended to non-SRO representatives.[854] One of these commenters states that it is "customary and widespread in corporate situations to minimize potential personal liability for the directors of a company" and that Non-SRO Voting Representatives "may be equally exposed to the risk of litigation and penalties."[855] Further, this commenter is concerned that without comparable protection from liabilities, "the CT Plan may find it difficult to attract and retain

---

852 See Notice, supra note 3, 85 FR at 64572 (Question 49).

853 See SIFMA Letter I, supra note 30, at 5; SIFMA Letter II, supra note 30, at 2.

854 See BlackRock Letter I, supra note 247, at 3; RBC Letter, supra note 30, at 10; ICI Letter I, supra note 31, at 6 ("these protections are typically provided for the members of any governing body").

855 BlackRock Letter I, supra note 247, at 3–4.

qualified representatives, decreasing the pool of interested candidates,"[856] and Non-SRO Voting Representatives may potentially be hindered from freely providing input on CT Plan matters.[857]

One commenter states that, since Non-SRO Voting Representatives are individuals, their ability to shoulder liability is of concern.[858] This commenter also does not believe that the rights and responsibilities of an Exculpated Party under Article XII, Section 12.1(b) are consistent with the SROs' obligations with respect to the operation of an NMS plan.[859]

One commenter states that the liability carve-out for SROs is too broad and supports a limitation on liability for SROs carrying out "quintessentially regulatory functions" of the CT Plan.[860] This commenter argues that it is neither appropriate nor warranted for SROs to have a "blanket limitation on liability for non-regulatory activities."[861] This commenter contends that the vast majority of activities carried out by the SROs—from technology services, to operations, to maintenance—would not involve "quintessentially regulatory functions" and SRO liability should not be limited for those functions.[862] Another commenter argues that the SROs should be precluded from receiving any special liability protections.[863] One commenter states the Plan "incentivizes the SROs to run the Plan and the LLC poorly to the extent they believe it is in their

---

856 Id. at 4.

857 See id.

858 See Data Boiler Letter I, supra note 31, at 5, 46.

859 See id. at 46, 49.

860 Virtu Letter, supra note 30, at 3.

861 Id.

862 Id.

863 See RBC Letter, supra note 30, at 9.

self-interest" and there is "no downside for an SRO to act in its self-interest contrary to the Plan as they are exculpated in taking any such action."[864]

Other commenters support the proposed provisions, arguing that the limitation of liability provisions are standard protections for members in LLC agreements.[865] One of these commenters cites the OPRA and CAT LLC Plans as precedent for extending liability protection and indemnification coverage only to the SROs that created the LLC.[866] These commenters argue that Non-SRO Voting Representatives do not need the same liability protections because they are not Members of the LLC.[867]

For several reasons, the Commission disagrees with the argument that Non-SRO Voting Representatives do not need the liability, exculpation, and indemnification protections that the CT Plan provides solely to SROs.[868] First, the Commission believes that the Non-SRO Voting Representatives could have liability exposure arising from their service as voting members of the Operating Committee, for example, in the case of a third-party civil action for damages against the CT Plan, which might, among other things, require Non-SRO Voting Representatives to engage the services of counsel. Thus, the Commission does not agree that liability exposure inures to the SROs solely as a result of their status as Members of the LLC. Instead, the Commission believes that the risk of liability also arises from the actions taken by the Operating Committee in its governance of the CT Plan and would, therefore, potentially affect both the SROs and the Non-SRO Voting Representatives of the Operating Committee.

---

[864] MFA Letter, supra note 30, at 3.

[865] See Nasdaq Letter I, supra note 20, at 15–16; NYSE Letter I, supra note 18, at 37–38.

[866] See NYSE Letter I, supra note 18, at 37–38.

[867] See id. at 38.

[868] See Nasdaq Letter I, supra note 20, at 15–16; NYSE Letter I, supra note 18, at 37–38.

Second, the Commission believes that the commenter's reliance on the OPRA Plan and the CAT NMS Plan as precedent for extending liability protection and indemnification coverage only to the SROs that created the LLC is misplaced.[869] While the OPRA Plan and the CAT NMS Plan do, in fact, provide such protection only to the SROs as Members of the LLC, the comparison is inapt because neither of those NMS plans has any non-SRO voting members of its operating committee. Therefore, neither the OPRA Plan nor the CAT NMS Plan has had to address the issue in question.

Third, the Commission shares the commenter's view that it is customary to provide such protection to members of governing boards.[870] More importantly, the Commission agrees that the failure to provide liability, exculpation, and indemnification protections to the Non-SRO Voting Representatives could make it more difficult to attract qualified individuals to serve in the capacity of voting members of the Operating Committee and, further, could hinder such individuals' meaningful participation, for example by hindering their ability to freely share ideas if they choose to serve. The Commission believes that this potential result would be inconsistent with the objectives of the Governance Order to broaden participation in Plan governance to addressing the core problem described above.[871] Moreover, Delaware law permits non-Members of an LLC agreement to receive such protections. Specifically, Section 18-108 of the Delaware Act provides that subject to the standards and restrictions, if any, set forth in its LLC agreement, "a limited liability company may, and shall have the power to, indemnify and hold harmless any member or manager or other person from and against any and all claims and demands whatsoever." (Emphasis added.) Consequently, Section 18-108 of the Delaware Act provides

---

869 See NYSE Letter I, supra note 18, at 37–38.

870 See BlackRock Letter I, supra note 247, at 3–4.

871 See Governance Order, supra note 8, 85 FR at 28714–20.

flexibility to the contracting parties to specify the rights and obligations with respect to indemnification provisions in an LLC agreement.

Accordingly, the Commission believes that, to promote the objectives of the Governance Order to broaden participation in Plan governance,[872] the CT Plan should explicitly provide the same protections to Non-SRO Voting Representatives that Article XII, Section 12.1 and Section 12.2 of the CT Plan currently provide only to SROs as Members of the LLC. To that end, the Commission is modifying several proposed definitions to explicitly include Non-SRO Voting Representatives. First, the Commission is modifying Article I, Section 1.1(k) of the CT Plan to include Non-SRO Voting Representatives in the definition of "Company Indemnified Party." Next, the Commission is modifying Article XII, Section 12.1 of the CT Plan to include Non-SRO Voting Representatives in the definition of "Exculpated Party." In addition, the Commission is modifying Section 1.1(eee) of Article I of the CT Plan to include Non-SRO Voting Representatives in the definition of the term, "Party to a Proceeding." The Commission finds that each of these modifications is appropriate to provide Non-SRO Voting Representatives with the same indemnification protections that are available to SRO Voting Representatives, because the modifications will remove a significant disincentive for persons to serve as Non-SRO Voting Representatives, thereby helping to support participation on the Operating Committee of a broad array of market participants. For these reasons, the Commission is approving Article I, Section 1.1(k), as modified; Article I, Section 1.1(eee), as modified; and Article XII, Section 12.1, as modified.

Finally, with respect to paragraph (b) of Section 12.1, which (1) explicitly permits an Exculpated Party, in making decisions authorized to be in its sole discretion, to consider its own

---

[872] See id.

interests and (2) asserts that the Exculpated Party has "no duty or obligation (fiduciary or otherwise) to give any consideration to any interest of or factors affecting the Company or the Members," the Commission reiterates its view, expressed above and added by the Commission to the Recitals of the CT Plan, that "no provision of this Agreement shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder."[873]

Because the modified definition of "Company Indemnified Party" in Section 1.1(k) of the CT Plan expands the indemnification provisions of Section 12.2 to include Non-SRO Voting Representatives,[874] no further modification to Section 12.2 is necessary, and the Commission is approving Section 12.2 of the CT Plan as proposed.

(b) Advance Payment

Article XII, Section 12.3 of the CT Plan provides for the payment of reasonable expenses incurred by a Company Indemnified Party who is a named defendant or respondent to a Proceeding, except that such Company Indemnified Party must repay such amount if it is ultimately determined that he or she is not entitled to indemnification. The Commission received no comment on this provision. As discussed above, the Commission is modifying Article I, Section 1.1(k) of the CT Plan to define the term, "Company Indemnified Person," to include Non-SRO Voting Representatives. This provision is approved as proposed.

(c) Appearance as a Witnesses

Article XII, Section 12.4 of the CT Plan provides for the payment or reimbursement of reasonable out-of-pocket expenses incurred by a Company Indemnified Party in connection with

873 See supra Section II.C.1(b) (discussing paragraph (g) of the Recitals of the CT Plan).

874 See supra discussion in Section II.C.2.

appearance as a witness or other participation in a Proceeding at a time when the Company Indemnified Party is not a named defendant or respondent in the Proceeding. The Commission received no comment on this provision. As the Commission is modifying Article I, Section 1.1(k) of the CT Plan to define the term, "Company Indemnified Person," to include Non-SRO Voting Representatives, as discussed above, Section 12.4 is approved as proposed.

(d) Nonexclusivity of Rights

Article XII, Section 12.5 of the CT Plan provides that the right to indemnification and the advancement and payment of expenses conferred in Article XII shall not be exclusive of any other right a Company Indemnified Person may have or hereafter acquire. The Commission received no comment on this Section 12.5. As the Commission is modifying the CT Plan to define the term, "Company Indemnified Person," to include Non-SRO Voting Representatives, as discussed above, this provision is approved as proposed.

12. Miscellaneous Provisions

(a) Expenses

Article XIII, Section 13.1 of the CT Plan governs the payment of expenses by the CT Plan and requires that all such expenses must be paid before any allocations may be made to the Members. Section 13.1 further provides that Members will be responsible for reserves for contingent liabilities and that each Member shall be responsible for the costs of any technical enhancements "made at its request and solely for its use," unless another Member subsequently makes use of the enhancement. The Commission received no comment on Section 13.1 and is approving the provision as proposed.

(b) Entire Agreement.

Article XIII, Section 13.2 of the CT plan provides that the CT Plan will supersede the existing Equity Data Plans and all other prior agreements with respect to consolidated equity

market data. The Commission received no comment on Section 13.2 and, because the provision is consistent with the requirements of the Commission's Governance Order[875], is approving the provision as proposed.

(c) Notices and Addresses

Article XIII, Section 13.3 of the CT Plan provides that all communications must be written and sets forth the permissible methods of delivery. The Commission received no comment on Section 13.3 and is approving the provision as proposed.

(d) Governing Law

Article XIII, Section 13.4 of the CT Plan provides that Delaware law will be the governing law for the CT Plan. Specifically, the CT Plan states that the Agreement will be "governed by and construed in accordance with the Delaware Act and internal laws and decisions of the State of Delaware, without regard to the conflicts of laws principles thereof" but will also be subject to "any applicable provisions of the Act and any rules and regulations promulgated thereunder." Section 13.4 further states that, "[f]or the avoidance of doubt, nothing in this Agreement waives any protection or limitation of liability afforded any of the Members or any of their Affiliates by common law, including the doctrines of self-regulatory organization immunity and federal preemption."

In the Notice, the Commission sought comment on this provision.[876] The Commission received one comment on Section 13.4. The commenter asks whether the language regarding the

---

875 See Governance Order, supra note 8, 85 FR at 28729 ("The New Consolidated Data Plan shall provide for the orderly transition of functions and responsibilities from the three existing Equity Data Plans and shall provide that dissemination of, and fees for, SIP data will continue to be governed by the provisions of the Equity Data Plans until the New Consolidated Data Plan is ready to assume responsibility for the dissemination of SIP data and fees of the New Consolidated Data Plan have become effective.").

876 See Notice, supra note 3, 85 FR at 64573 (Question 51).

limitation of liability may be inconsistent with the exculpation and indemnification provisions of Article XII.[877] The Commission does not believe that the provisions of Section 13.4 are inconsistent either with the provisions of Article XII or with federal securities law. Article XII of the CT Plan speaks to the agreed exculpation and indemnification provisions of the LLC Agreement, but, as the Commission has discussed above, the provisions of the CT Plan cannot limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder.[878] Similarly, the general reference in Section 13.4 to the common law, including what the CT Plan describes as the "doctrines of self-regulatory organization immunity and federal preemption," cannot enlarge or otherwise modify any case law that defines the scope of SRO liability.[879] For the reasons discussed above, the Commission is approving this provision, as proposed.

(e) Amendments

Article XIII, Section 13.5 of the CT Plans governs amendments to the CT Plan. Paragraph (a) of Section 13.5 states that the CT Plan may be modified when authorized by the Operating Committee pursuant to Section 4.3, subject to the requirements of Section 11A of the

---

877 See Data Boiler Letter I, supra note 31, at 5, 46.

878 See supra Section II.C.1(b).

879 With respect to the judicial doctrine of regulatory immunity, the Commission has taken the position that immunity from suit "is properly afforded to the exchanges when engaged in their traditional self-regulatory functions—where the exchanges act as regulators of their members," including "the core adjudicatory and prosecutorial functions that have traditionally been accorded absolute immunity, as well as other functions that materially relate to the exchanges' regulation of their members," but should not "extend to functions performed by an exchange itself in the operation of its own market, or to the sale of products and services arising out of those functions." Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, Securities Exchange Act Release No. 88008 (Jan. 21, 2020), 85 FR 4726, 4735 (Jan. 27, 2020) (File No. SR-BatsBZX-2017-34) (citing Brief of the Securities and Exchange Commission, Amicus Curiae, No. 15-3057, City of Providence v. Bats Global Markets, Inc. (2d Cir. 2016), at 22). The Court of Appeals for the Second Circuit recently reached a similar conclusion. See City of Providence v. Bats Global Markets, Inc., 878 F.3d 36, 48 (2d Cir. 2017) ("When an exchange engages in conduct to operate its own market that is distinct from its oversight role, it is acting as a regulated entity—not a regulator. Although the latter warrants immunity, the former does not.").

Act and Rule 608 of Regulation NMS. Paragraph (b) of Section 13.5 carves out an exception to the general rule set forth in the preceding paragraph, stating, "[n]otwithstanding Section 13.5(a), Articles IX, X, XI, and XII may be modified upon approval by a majority of Members; provided, however, that Operating Committee approval pursuant to Section 4.3 will be required for modifications to the allocation." (Emphasis in original.) Paragraph (c) of Section 13.5 sets forth the process for Ministerial Amendments, in which the Chair of the Operating Committee may modify the CT Plan by filing an amendment with the Commission unilaterally, so long as 48-hours advance notice is provided to the Operating Committee. Paragraph (d) of Section 13.5 defines the term, "Ministerial Amendment."

In the Notice, the Commission sought comment on whether amendments to Articles IX through XII of the CT Plan should be subject to the approval only of SROs, as provided for in Article XIII, Section 13.5(b), rather than the full Operating Committee.[880] The Commission received several comments in response. One commenter opposes this provision, stating that amendments to Articles IX (Allocations), X (Records and Accounting; Reports), XI (Dissolution and Termination), and XII (Exculpation and Indemnification) should not be subject to the approval only of SROs.[881]

Another commenter agrees, expressing the concern that the CT Plan gives "nearly unfettered discretion" to the SROs to determine what decisions are appropriate for the Operating Committee and requests that the Commission require more detail in the Plan on the activities that will be solely decided by SROs.[882] This commenter states, as an example, that decisions related

---

880 See Notice, supra note 3, 85 FR at 64573 (Question 52).

881 See Data Boiler Letter I, supra note 31, at 47.

882 Virtu Letter, supra note 30, at 2.

to indemnification and the selection of Officers are "highly material" to the operation of the CT Plan and as proposed require only a simple majority vote of the SRO representatives.[883] This commenter further argues that the CT Plan lacks sufficient detail regarding the nature and scope of decisions that are ministerial versus material.[884] Consequently, this commenter argues that more detail needs to be provided on the types of decisions that would fall under "the operation of the CT Plan as an LLC" and "modifications to the LLC-related provisions of the CT Plan" in order to ensure that non-SRO representatives have an opportunity to participate in any material decisions related to the regulatory operations of the CT Plan.[885] This commenter supports a requirement for the Operating Committee to adopt policies and procedures distinguishing operational interpretations of the CT Plan from amendments required to be submitted to the Commission under Rule 608 of Regulation NMS.[886]

On the other hand, one commenter states that the amendment rights provided to the Members by this Section are limited to provisions of this Agreement that affect only the economic interests of the Members (Articles IX and X), the protections of the Members as among themselves (Article XII), and the ongoing existence of the CT Plan (Article XI).[887] This commenter argues that the provisions relating to the economic interests of the Members, exculpations and indemnification, and the ongoing operation of the CT Plan do not affect the dissemination of public information.[888]

---

883 Id.

884 See id.

885 See id. at 5.

886 See id. at 3–4.

887 See Nasdaq Letter I, supra note 20, at 11.

888 See id. at 11–12.

The Commission disagrees with the view that the amendments covered by Section 13.5(b) do not affect the dissemination of public information and thus may be appropriately decided by the SROs alone, without Non-SRO Voting Representative participation through Operating Committee consideration. Rather, the Commission believes that several of the provisions that the SROs propose should be subject to amendment without a filing with the Commission materially affect the Non-SRO Voting Representatives that the Commission believes must be full members of the CT Plan's Operating Committee. For example, for the reasons set forth above, the Commission finds that the exculpation and indemnification provisions of Article XII must be extended not only to the SROs, but to the Non-SRO Voting Representatives on the Operating Committee as well. As another example, Article X, Section 10.1 of the CT Plan sets forth the Operating Committee's responsibilities with respect to the accounting procedures and records of the CT Plan, and the Commission believes that it is appropriate for the Operating Committee, including the Non-SRO Voting Representatives, to consider any proposed changes to those responsibilities.

More generally, the Commission believes that, to help ensure that all amendments to the CT Plan are consistent with its goals and purposes, as well as with the objectives of the Commission's Governance Order,[889] the entire Operating Committee, rather than the SROs alone, should share in decision making relating to amendment of the CT Plan. And the Commission notes that all amendments to an NMS plan must be filed with the Commission pursuant to Rule 608 of Regulation NMS.[890]

---

889 See Governance Order, supra note 8, 85 FR at 28714–20.

890 17 CFR 242.608. In fact, neither the CAT NMS Plan nor the OPRA Plan contains a provision permitting the SROs to amend the LLC agreement for the plan outside of the Rule 608 process.

Accordingly, the Commission is modifying the CT Plan by deleting proposed paragraph (b) of Section 13.5 to remove the ability of the SRO members of the LLC to make amendments to certain provisions of the CT Plan without an augmented majority vote of the Operating Committee and to reiterate that all amendments to the CT Plan must be filed with the Commission under Rule 608 of Regulation NMS. To be consistent, the Commission is also modifying subparagraph (v) of renumbered Section 13.5(c) to delete the language that reads, "or upon approval by a majority of the Members pursuant to Section 13.5(b), as applicable." The Commission finds that these modifications to Article XIII, Section 13.5 of the CT Plan are appropriate because they will help to ensure that the Operating Committee, as a whole, participates in all aspects of the governance of the CT Plan and that all amendments to the CT Plan are filed with the Commission as required by Rule 608 of Regulation NMS.

Finally, the Commission believes that the advance notice provided to the Operating Committee relating to any Ministerial Amendments filed with the Commission by the Chair of the Operating Committee pursuant to paragraph (c) of Section 13.5 should be provided in writing. Written notification should help to ensure that all members of the Operating Committee of the CT Plan are adequately informed in a timely manner regarding even ministerial actions taken on behalf of the Operating Committee. Consequently, the Commission is modifying the text of renumbered Section 13.5(b) of Article XIII to require that advance notice to the Operating Committee be in writing, and finds that this modification is appropriate because it will help to ensure informed governance of the CT Plan. For the reasons above, the Commission is approving Section 13.5, as modified.

(f) Successors

Article XIII, Section 13.6 of the CT Plan provides that the CT Plan shall bind and inure "to the benefit of the Members and their respective legal representatives and successors." The Commission received no comment on Section 13.6, and is approving the provision as proposed.

(g) Limitation on Rights of Others

Article XIII, Section 13.7 of the CT Plan provides that the CT Plan shall not be enforceable by any creditor of the CT Plan and shall not create any legal rights, remedies, or claims. The Commission received no comment on Section 13.7, and is approving the provision as proposed.

(h) Counterparts

Article XIII, Section 13.8 of the CT Plan provides that the Members to the CT Plan may execute the CT Plan individually in "any number of counterparts." The Commission received no comment on Section 13.8 and, because this is the manner in which NMS plans are typically executed, the Commission is approving the provision as proposed.

(i) Headings

Article XIII, Section 13.9 of the CT Plan provides that CT Plan headings are for "reference purposes only and shall not be deemed to be a part of this Agreement or to affect the meaning or interpretation of any provisions of this Agreement." The Commission received no comment on Section 13.9 and is approving the provision as proposed.

(j) Validity and Severability

Article XIII, Section 13.10 of the CT Plan provides that any determination that any provision of the CT Plan is invalid or unenforceable shall not affect the validity or enforceability of any other provisions of the CT Plan, all of which shall remain in full force and effect. The Commission received no comment on Section 13.10, and is approving the provision as proposed.

(k) Statutory References

Article XIII, Section 13.11 of the CT Plan provides that the references in the CT Plan to a particular statute or regulation, or a provision thereof, "shall be deemed to refer to such statute or regulation, or provision thereof, or to any similar or superseding statute or regulation, or provision thereof, as is from time to time in effect." The Commission received no comment on Section 13.11, and is approving the provision as proposed.

(l) Modifications to be in Writing

Article XIII, Section 13.12 of the CT Plan provides that any amendment, modification, or alteration of the CT Plan must in writing and must be adopted in accordance with the provisions of Section 13.5. The Commission received no comment on Section 13.12 and is approving the provision as proposed.

III. CONCLUSION

For the reasons discussed above, the Commission finds that the CT Plan, as modified, is consistent with the requirements of Section 11A of the Act,[891] and Rule 608 thereunder,[892] that the provisions of an NMS plan be 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 mechanism of, a national market system, or otherwise in furtherance of the purposes of the Act.

[891] 15 U.S.C. 78k-1.

[892] 17 CFR 242.608.

IT IS THEREFORE ORDERED, that pursuant to Section 11A of the Act,[893] and the rules and regulations thereunder, that the CT Plan (File No. 4-757), as modified, be and it hereby is approved and declared effective, and the Participants are authorized to act jointly to implement the CT Plan as a means of facilitating a national market system.

By the Commission.

J. Matthew DeLesDernier
Assistant Secretary

[893] 15 U.S.C. 78k-1.

ATTACHMENT A

LIMITED LIABILITY COMPANY AGREEMENT

OF

CT PLAN LLC

a Delaware limited liability company

(As modified by the Commission; additions are underlined; deletions are [bracketed].)

This LIMITED LIABILITY COMPANY AGREEMENT (this "Agreement") dated as of the [●] day of [●], [●] is made and entered into by and among the parties identified in Exhibit A, as Exhibit A may be amended from time to time (the "Members"), which are the members of CT Plan LLC, a Delaware limited liability company (the "Company"). The Members shall constitute the "members" (as that term is defined in the Delaware Act) of the Company.

RECITALS

(a) On May 6, 2020, the Commission ordered the Members to act jointly in developing and filing with the Commission by August 11, 2020, a proposed new single national market system ("NMS") plan to govern the public dissemination of real-time consolidated equity market data for NMS stocks. See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4-757) (the "Order"). This Agreement is being filed with the Commission, as directed in the Order.

(b) This Agreement will become effective [after the last of the following has occurred (the "Effective Date"):

(i) this Agreement is approved by the Commission pursuant to Rule 608 of Regulation NMS] as an NMS plan governing the public dissemination of real-time consolidated market data for Eligible Securities (the "Effective Date") on the date that it is approved by the Commission pursuant to Rule 608 of Regulation NMS. Within ten (10) business days of the Effective Date, [; and

(ii)]the Members [have]shall form[ed] the Company as a limited liability company pursuant to the Delaware Act by filing a certificate of formation (the "Certificate") with the Delaware Secretary of State.

(c) [Following the Effective Date, t]This Agreement will become operative as an NMS Plan that governs the public dissemination of real-time consolidated equity market data for

Eligible Securities [on the first day of the month that is at least 90 days after the last of the following have occurred]within twelve months of the Effective Date (the "Operative Date").[:]

(d) In support of ensuring that the CT Plan is fully operational by the Operative Date, the following actions shall be completed within the specified periods:

(i) Within two months of the Effective Date, the SRO Voting Representatives and Non-SRO Voting Representatives of the Operating Committee shall be[have been] determined pursuant to Section 4.2 of the Agreement;

(ii) [Fees have been established by]Within four months of the Effective Date, the Operating Committee[, are effective] shall file with the Commission proposed fees with respect to the existing exclusive SIP model as an amendment to this Agreement pursuant to Rule 608 of Regulation NMS[, and are ready to be implemented on the Operative Date];

(iii) Within eight months of the Effective Date, the Operating Committee shall enter[Company has entered] into an agreement with the Processors currently performing under the CQ Plan, CTA Plan, and UTP Plan;

(iv) Within eight months of the Effective Date, the Operating Committee shall enter[Company has entered] into an agreement with an Administrator selected pursuant to Section 6.[3]4 of this Agreement and such Administrator [has completed the]shall prepare to transition from prior Administrators under the CQ Plan, CTA Plan, and UTP Plan such that, before the Operative Date, it is able to provide services under the Administrative Services Agreement, as determined by the Operating Committee pursuant to Section 4.3 of this Agreement, including that (1) new contracts between the Company and Vendors and the Company and Subscribers have been finalized such that all Vendors and Subscribers under the CQ Plan, CTA Plan, and UTP Plan are ready to transition to such new contracts[by the Operative Date], (2) the Administrator has in place a system to administer Distributions, and (3) the Administrator has in place a system to administer Fees; [and]

(v) Before the Operative Date, the Operating Committee [and, if applicable, the Commission, have approved all]will be required to ensure that the Administrator and the Processors have developed, implemented, and suitably tested the systems necessary with respect to the existing exclusive SIP model—including dissemination systems, billing and audit systems, and appropriate contracts with Vendors and Subscribers—and, if applicable, the Operating Committee has expeditiously filed any necessary policies and procedures [that are necessary or appropriate for the operation of the Company]with the Commission; and

(vi) Beginning three months after the Effective Date, and continuing every three months thereafter until the Operative Date, the Operating Committee shall provide a written report to the Commission, and shall make that report publicly available, on the

actions undertaken and progress made toward completing each of the actions listed above in this subsection (d).

[(d)](e) Until the Operative Date, the Members will continue to operate pursuant to the CQ Plan, CTA Plan, and UTP Plan with respect to the public dissemination of real-time consolidated equity market data for Eligible Securities rather than this Agreement.

[(e)](f) As of the Operative Date, the Members shall conduct, through the Company, the Processor and Administrator functions related to the public dissemination of real-time consolidated equity market data for Eligible Securities required by the Commission to be performed by the Members under the Exchange Act.

[(f)](g) It is understood and agreed that, in performing their obligations and duties under this Agreement, the Members are performing and discharging functions and responsibilities related to the operation of the national market system for and on behalf of the Members in their capacities as self-regulatory organizations, as required under the Section 11A of the Exchange Act, and pursuant to Rule 603(b) of Regulation NMS thereunder. It is further understood and agreed that this Agreement and the operations of the Company shall be subject to ongoing oversight by the Commission. No provision of this Agreement shall be construed to limit or diminish the obligations and duties of the Members as self-regulatory organizations under the federal securities laws and the regulations thereunder.

Article I.
DEFINITIONS

Section 1.1 Definitions.

As used throughout this Agreement and the Exhibits:

(a) "Administrator" means the Person selected by the Company to perform the administrative functions described in this Agreement pursuant to the Administrative Services Agreement.

(b) "Advisory Committee Member" means an individual selected pursuant to Section III(e)(ii)(A) of the CTA Plan and Section IV(E)(b)(i) of the UTP Plan to be a member of the Advisory Committees of the CTA Plan and UTP Plan.

(c) "Affiliate" means, as to any Person, any other Person that, directly or indirectly, Controls, is Controlled by, or is under common Control with such Person. Affiliate or Affiliated, when used as an adjective, shall have a correlative meaning.

(d) "Agent" means, for purposes of Exhibit C, agents of the Operating Committee, a Member, the Administrator, and the Processors, including, but not limited to, attorneys, auditors, advisors, accountants, contractors or subcontractors.

(e) "Applicable Law" means all applicable provisions of (a) constitutions, treaties, statutes, laws (including the common law), rules, regulations, decrees, ordinances, codes, proclamations, declarations or orders of any Governmental Authority; (b) any consents or approvals of any Governmental Authority; and (c) any orders, decisions, advisory or interpretative opinions, injunctions, judgments, awards, decrees of, or agreements with, any Governmental Authority.

(f) "Best Bid and Offer" has the meaning ascribed to the term "best bid and best offer" by Rule 600(b)(8) of Regulation NMS.

(g) "Capital Contributions" means any cash, cash equivalents, or other property that a Member contributes to the Company with respect to its Membership Interest.

(h) "Chair" shall mean the individual elected pursuant to Section 4.4(e).

(i) "Code" means the Internal Revenue Code of 1986, as amended.

(j) "Commission" or "SEC" means the U.S. Securities and Exchange Commission.

(k) "Company Indemnified Party" means a Person, and any other Person of whom such Person is the legal representative, that is or was a Member[or], an SRO Voting Representative, or a Non-SRO Voting Representative.

(l) "Confidential Information" means, except to the extent covered by the definitions for Restricted Information, Highly Confidential Information, or Public Information: (i) any non-public data or information designated as Confidential by the Operating Committee pursuant to Section 4.3; (ii) any document generated by a Member or Non-SRO Voting Representative and designated by that Member or Non-SRO Voting Representative as Confidential; and (iii) the individual views and statements of Covered Persons and SEC staff disclosed during a meeting of the Operating Committee or any subcommittees thereunder.

(m) "Control" means, with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities (or other ownership interest), by contract or otherwise.

(n) "Covered Persons" means representatives of the Members (including the SRO Voting Representative, alternate SRO Voting Representative, and Member Observers), the Non-SRO Voting Representatives, SRO Applicants, SRO Applicant Observers, the Administrator, and the Processors; A[a]ffiliates, employees, and Agents of the Operating Committee, a Member, the Administrator, and the Processors; and any third parties invited to attend meetings of the Operating Committee or subcommittees[; and the employers of Non-SRO Voting Representatives]. Covered Persons do not include staff of the SEC.

(o) "CQ Plan" means the Restated CQ Plan.

(p) "CT Feeds" means the CT Quote Data Feed(s) and the CT Trade Data Feed(s).

(q) "CT Quote Data Feed(s)" means the service(s) that provides Vendors and Subscribers with (i) National Best Bids and Offers and their sizes and the Members' identifiers providing the National Best Bids and Offers; (ii) each Member's Best Bids and Offers and their sizes and the Member's identifier; and (iii) in the case of FINRA, the identifier of the FINRA Participant(s) that constitute(s) FINRA's Best Bids and Offers, in each case for Eligible Securities.

(r) "CT Trade Data Feed(s)" means the service(s) that provides Vendors and Subscribers with Transaction Reports for Eligible Securities.

(s) "CTA Plan" means the Second Restatement of the CTA Plan.

(t) "Current" means, with respect to Transaction Reports or Quotation Information, such Transaction Reports or Quotation Information during the fifteen (15) minute period immediately following the initial transmission thereof by the Processors.

(u) "Delaware Act" means the Delaware Limited Liability Company Act, Title 6, Chapter 18, §§ 18-101, et seq., and any successor statute, as amended.

(v) "Distribution" means a distribution to the Members of revenues of the Company under this Agreement pursuant to Section 8.3 and Exhibit D of the Agreement.

(w) "Eligible Security" means (i) any equity security, as defined in Section 3(a)(11) of the Exchange Act, or (ii) a security that trades like an equity security, in each case that is listed on a national securities exchange.

(x) "ET" means Eastern Time.

(y) "Exchange Act" means the Securities Exchange Act of 1934, as amended.

(z) "Executive Session" means a meeting of the Operating Committee pursuant to Section 4.4(g), which includes SRO Voting Representatives, Member Observers, SEC Staff, and other persons as deemed appropriate by majority vote of the SRO Voting Representatives.

(aa) "Extraordinary Market Activity" means a disruption or malfunction of any electronic quotation, communication, reporting, or execution system operated by, or linked to, the Processors or a Trading Center or a member of such Trading Center that has a severe and continuing negative impact, on a market-wide basis, on quoting, order, or trading activity or on the availability of market information necessary to maintain a fair and orderly market. For purposes of this definition, a severe and continuing negative impact on quoting, order, or trading activity includes (i) a series of quotes, orders, or transactions at prices substantially unrelated to the current market for the security or securities; (ii) duplicative or erroneous quoting, order, trade reporting, or other related message traffic between one or more Trading Centers or their

members; or (iii) the unavailability of quoting, order, transaction information, or regulatory messages for a sustained period.

(bb) "Fees" means fees charged to Vendors and Subscribers for Transaction Reports and Quotation Information in Eligible Securities.

(cc) "Final Decision of the Operating Committee" means an action or inaction of the Operating Committee as a result of the vote of the Operating Committee, but will not include the individual votes of a Voting Representative.

(dd) "FINRA" means the Financial Industry Regulatory Authority, Inc.

(ee) "FINRA Participant" means a FINRA member that utilizes the facilities of FINRA pursuant to applicable FINRA rules.

(ff) "Fiscal Year" means the fiscal year of the Company adopted pursuant to Section 10.1(a) of this Agreement.

(gg) "GAAP" means United States generally accepted accounting principles in effect from time to time, consistently applied.

(hh) "Governmental Authority" means (a) the U.S. federal government or government of any state of the U.S., (b) any instrumentality or agency of any such government, (c) any other individual, entity or organization authorized by law to perform any executive, legislative, judicial, regulatory, administrative, military or police functions of any such government, or (d) any intergovernmental organization of U.S. entities, but "Governmental Authority" excludes any self-regulatory organization registered with the Commission.

(ii) "Highly Confidential Information" means any highly sensitive Member-specific, customer-specific, individual-specific, or otherwise sensitive information relating to the Operating Committee, Members, Vendors, Subscribers, or customers that is not otherwise Restricted Information. Highly Confidential Information includes: the Company's contract negotiations with the Processors or Administrator; personnel matters that affect the employees of SROs or the Company; information concerning the intellectual property of Members or customers; and any document subject to the Attorney-Client Privilege or Work Product Doctrine.

(jj) "Limit Up Limit Down" means the Plan to Address Extraordinary Market Volatility pursuant to Rule 608 of Regulation NMS under the Exchange Act.

(kk) "Losses" means losses, judgments, penalties (including excise and similar taxes and punitive damages), fines, settlements, and reasonable expenses (including reasonable attorneys' fees) actually incurred by such Company Indemnified Party as a Party to a Proceeding.

(ll) "Market" means (i) in respect of FINRA or a national securities association, the facilities through which FINRA Participants display quotations and report transactions in Eligible Securities to FINRA and (ii) in respect of each national securities exchange, the marketplace for Eligible Securities that such exchange operates.

(mm) "Market-Wide Circuit Breaker" means a halt in trading in all stocks in all Markets under the rules of a Primary Listing Market.

(nn) "Material SIP Latency" means a delay of quotation or last sale price information in one or more securities between the time data is received by the Processors and the time the Processors disseminate the data, which delay the Primary Listing Market determines, in consultation with, and in accordance with, publicly disclosed guidelines established by the Operating Committee, to be (a) material and (b) unlikely to be resolved in the near future.

(oo) "Member Observer" means any [individual,]employee of a Member (other than a Voting Representative), or any attorney to a Member, that a Member[, in its sole discretion,] determines is necessary in connection with such Member's compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings, provided that the designation of the Member Observer is consistent with the prohibition in Section 4.10(b)(i).

(pp) "Membership Fee" means the fee to be paid by a new Member pursuant to Section 3.2.

(qq) "Membership Interest" means an interest in the Company owned by a Member.

(rr) "Nasdaq" means The Nasdaq Stock Market LLC.

(ss) "National Best Bid and Offer" has the meaning ascribed to the term "national best bid and national best offer" by Rule 600(b)(43) of Regulation NMS.

(tt) "National securities association" means a securities association that is registered under Section 15A of the Exchange Act.

(uu) "National securities exchange" means a securities exchange that is registered under Section 6 of the Exchange Act.

(vv) "Network A Security" means an Eligible Security for which NYSE is the Primary Listing Market.

(ww) "Network B Security" means an Eligible Security for which a national securities exchange other than NYSE or Nasdaq is the Primary Listing Market.

(xx) "Network C Security" means an Eligible Security for which Nasdaq is the Primary Listing Market.

(yy) "Non-Affiliated SRO" means a Member that is not affiliated with any other Member.

(zz) "Non-SRO Voting Representative" means an individual selected pursuant to Section 4.2(b) to serve on the Operating Committee.

(aaa) "NYSE" means the New York Stock Exchange LLC.

(bbb) "Officer" means each individual designated as an officer of the Company pursuant to Section 4.8.

(ccc) "Operating Committee" means the committee established under Article IV of this Agreement, each member of which shall be deemed a "manager" (as defined in the Delaware Act) and shall be referred to herein as a Voting Representative.

(ddd) "Operational Halt" means a halt in trading in one or more securities only on a Member's Market declared by such Member and is not a Regulatory Halt.

(eee) "Party to a Proceeding" means a Company Indemnified Party that is, was, or is threatened to be made, a party to a Proceeding, or is involved in a Proceeding, by reason of the fact that such Company Indemnified Party is or was a Member[and/or], an SRO Voting Representative, or a Non-SRO Voting Representative.

(fff) "PDP" means a Member or non-Member's proprietary market data product that includes Transaction Reports and Quotation Information data in Eligible Securities from a Member's Market or a Trading Center, and if from a Member, is filed with the Commission.

(ggg) "Person" means an individual, corporation, partnership, joint venture, limited liability company, Governmental Authority, unincorporated organization, trust, association, or other entity.

(hhh) "Primary Listing Market" means the national securities exchange on which an Eligible Security is listed. If an Eligible Security is listed on more than one national securities exchange, Primary Listing Market means the exchange on which the security has been listed the longest.

(iii) "Proceeding" means any threatened, pending or completed suit, proceeding, or other action, whether civil, criminal, administrative, or arbitrative, or any appeal in such action or any inquiry or investigation that could lead to such an action.

(jjj) "Processor(s)" means the entity(ies) selected by the Company to perform the processing functions described in this Agreement and pursuant to the Processor Services Agreement(s), including the operation of the System.

(kkk) "Public Information" means: (i) any information that is not either Restricted Information or Highly Confidential Information or that has not been designated as Confidential Information; (ii) any Confidential Information that has been approved by the Operating Committee for release to the public; (iii) the duly approved minutes of the Operating Committee with detail sufficient to inform the public on matters under discussion and the views expressed thereon (without attribution); (iv) Vendor, Subscriber and performance metrics; (v) Processor transmission metrics; and (vi) any information that is otherwise publicly available, except for information made public as a result of a violation of the Company's Confidentiality Policy or Applicable Law. Public Information includes, but is not limited to, any topic discussed during a meeting of the Operating Committee, an outcome of a topic discussed, or a Final Decision of the Operating Committee.

(lll) "Regulatory Halt" means a halt declared by the Primary Listing Market in trading in one or more securities on all Trading Centers for regulatory purposes, including for the dissemination of material news, news pending, suspensions, or where otherwise necessary to maintain a fair and orderly market. A Regulatory Halt includes a trading pause triggered by Limit Up Limit Down, a halt based on Extraordinary Market Activity, a trading halt triggered by a Market-Wide Circuit Breaker, and a SIP Halt.

(mmm)"Restricted Information" means highly sensitive customer-specific financial information, customer-specific audit information, other customer financial information, and personal identifiable information.

(nnn) "Quotation Information" means all bids, offers, displayed quotation sizes, market center identifiers and, in the case of FINRA, the identifier of the FINRA Participant that entered the quotation, all withdrawals, and all other information pertaining to quotations in Eligible Securities required to be collected and made available to the Processors pursuant to this Agreement.

(ooo) "Regular Trading Hours" has the meaning provided in Rule 600(b)(68) of Regulation NMS. Regular Trading Hours can end earlier than 4:00 p.m. ET in the case of an early scheduled close.

(ppp) "Retail Representative" means an individual who (1) represents the interests of retail investors, (2) has experience working with or on behalf of retail investors, (3) has the requisite background and professional experience to understand the interests of retail investors, the work of the Operating Committee of the Company, and the role of market data in the U.S. equity market, and (4) is not affiliated with a Member or broker-dealer.

(qqq) "Self-regulatory organization" or "SRO" has the meaning provided in Section 3(a)(26) of the Exchange Act.

(rrr) "SIP Halt" means a Regulatory Halt to trading in one or more securities that a Primary Listing Market declares in the event of a SIP Outage or Material SIP Latency.

(sss) "SIP Halt Resume Time" means the time that the Primary Listing Market determines as the end of a SIP Halt.

(ttt) "SIP Outage" means a situation in which a Processor has ceased, or anticipates being unable, to provide updated and/or accurate quotation or last sale price information in one or more securities for a material period that exceeds the time thresholds for an orderly failover to backup facilities established by mutual agreement among the Processors, the Primary Listing Market for the affected securities, and the Operating Committee unless the Primary Listing Market, in consultation with the affected Processor and the Operating Committee, determines that resumption of accurate data is expected in the near future.

(uuu) "SRO Applicant" means (1) any Person that is not a Member and for which the Commission has published a Form 1 to be registered as a national securities exchange or national securities association to operate a Market, or (2) a national securities exchange that is not a Member and for which the Commission has published a proposed rules change to operate a Market.

(vvv) "SRO Group" means a group of Members that are Affiliates.

(www) "SRO Voting Representative" means an individual designated by each SRO Group and each Non-Affiliated SRO pursuant to Section 4.2(a) to vote on behalf of such SRO Group or such Non-Affiliated SRO.

(xxx) "Subscriber" means a Person that receives Current Transaction Reports or Quotation Information from the Processors or a Vendor and that itself is not a Vendor.

(yyy) "System" means all data processing equipment, software, communications facilities, and other technology and facilities, utilized by the Company or the Processors in connection with the collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and other information concerning Eligible Securities.

(zzz) "Taxes" means taxes, levies, imposts, charges, and duties (including withholding tax, stamp, and transaction duties) imposed by any taxing authority together with any related interest, penalties, fines, and expenses in connection with them.

(aaaa) "Trading Center" has the same meaning as that term is defined in Rule 600(b)(82) of Regulation NMS.

(bbbb) "Transaction Reports" means reports required to be collected and made available pursuant to this Agreement containing the stock symbol, price, and size of the transaction executed, the Market in which the transaction was executed, and related information, including a buy/sell/cross indicator, trade modifiers, and any other required information reflecting completed transactions in Eligible Securities.

(cccc) "Transfer" means to directly sell, transfer, assign, pledge, encumber, hypothecate, or similarly dispose of, either voluntarily or involuntarily, by operation of law or otherwise, or to enter into any contract, option, or other arrangement or understanding with respect to the sale, transfer, assignment, pledge, encumbrance, hypothecation, or similar disposition of any Membership Interests owned by a Person or any interest (including a beneficial interest) in any Membership Interests owned by a Person. "Transfer" when used as a noun shall have a correlative meaning.

(dddd) "UTP Plan" means 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.

(eeee) "Vendor" means a Person that the Administrator has approved to re-distribute Current Transaction Reports or Quotation Information to the Person's employees or to others.

(ffff) "Voting Representative" means an SRO Voting Representative or a Non-SRO Voting Representative.

Section 1.2 Interpretation.

For purposes of this Agreement: (a) the words "include," "includes," and "including" shall be deemed to be followed by the words "without limitation"; (b) the word "or" is not exclusive; and (c) the words "herein," "hereof," "hereby," "hereto," and "hereunder" refer to this Agreement as a whole. The definitions given for any defined terms in this Agreement shall apply equally to both the singular and plural forms of the terms defined. Whenever the context may require, any pronoun shall include the corresponding masculine, feminine, and neuter forms. Unless the context otherwise requires, references herein: (x) to Articles, Sections, and Exhibits mean the Articles and Sections of, and Exhibits attached to, this Agreement; (y) to an agreement, instrument, or other document mean such agreement, instrument, or other document as amended, supplemented, and modified from time to time to the extent permitted by the provisions thereof; and (z) to a statute mean such statute as amended from time to time and includes any successor legislation thereto and any rules and regulations promulgated thereunder. This Agreement shall be construed without regard to any presumption or rule requiring construction or interpretation against the party drafting an instrument or causing any instrument to be drafted. The Exhibits referred to herein shall be construed with, and as an integral part of, this Agreement to the same extent as if they were set forth verbatim herein.

Article II.
ORGANIZATION

Section 2.1 Formation.

(a) The Members formed the Company as a limited liability company on [●], [●] pursuant to the Delaware Act by filing a certificate of formation (the "Certificate") with the Delaware Secretary of State.

(b) This Agreement shall constitute the "limited liability company agreement" (as that term is used in the Delaware Act) of the Company. The rights, powers, duties, obligations, and liabilities of the Members shall be determined pursuant to the Delaware Act and this Agreement. To the extent that the rights, powers, duties, obligations, and liabilities of any Member are different by reason of any provision of this Agreement than they would be under the Delaware Act in the absence of such provision, this Agreement shall, to the extent permitted by the Delaware Act, control.

Section 2.2 Name.

The name of the Company is "CT Plan LLC" and all Company business shall be conducted in that name or such other name or names as the Operating Committee may designate; provided, that the name shall always contain the words "Limited Liability Company" or the abbreviation "L.L.C." or the designation "LLC."

Section 2.3 Registered Office; Registered Agent; Principal Office; Other Offices.

(a) The registered office of the Company required by the Delaware Act to be maintained in the State of Delaware shall be the office of the initial registered agent named in the Certificate or such other office (which need not be a place of business of the Company) as the Operating Committee may designate from time to time in the manner provided by the Delaware Act and Applicable Law.

(b) The registered agent for service of process of the Company in the State of Delaware shall be the initial registered agent named in the Certificate or such other Person or Persons as the Operating Committee may designate from time to time in the manner provided by the Delaware Act and Applicable Law.

(c) The principal office of the Company shall be located at such place as the Operating Committee may designate from time to time, which need not be in the State of Delaware, and the Company shall maintain its books and records there. The Company shall give prompt notice to each of the Members of any change to the principal office of the Company.

(d) The Company may have such other offices as the Operating Committee may designate from time to time.

Section 2.4 Purpose; Powers.

(a) The purposes of the Company are to engage in the following activities on behalf of the Members:

(i) the collection, consolidation, and dissemination of Transaction Reports, Quotation Information, and such other information concerning Eligible Securities as the Members shall agree as provided herein;

(ii) contracting for the distribution of such information;

(iii) contracting for and maintaining facilities to support any activities permitted in this Agreement and guidelines adopted hereunder, including the operation and administration of the System;

(iv) providing for those other matters set forth in this Agreement and in all guidelines adopted hereunder;

(v) operating the System to comply with Applicable Laws; and

(vi) engaging in any other business or activity that now or hereafter may be necessary, incidental, proper, advisable, or convenient to accomplish any of the foregoing purposes and that is not prohibited by the Delaware Act, the Exchange Act, or other Applicable Law.

(b) The Company shall have all the powers necessary or convenient to carry out the purposes for which it is formed, including the powers granted by the Delaware Act.

(c) It is expressly understood that each Member shall be responsible for the collection of Transaction Reports and Quotation Information within its Market and that nothing in this Agreement shall be deemed to govern or apply to the manner in which each Member does so.

Section 2.5 Term.

The term of the Company commenced as of the date the Certificate was filed with the Secretary of State of the State of Delaware, and shall continue in existence perpetually until the Company is dissolved in accordance with the provisions of the Certificate or this Agreement. Notwithstanding the foregoing, this Agreement shall not become effective until the Effective Date.

Section 2.6 No State-Law Partnership.

The Members intend that the Company not be a partnership (including a limited partnership) or joint venture, and that no Member be a partner or joint venturer of any other Member by virtue of this Agreement for any purposes other than as set forth in Sections 10.2 and

10.3, and neither this Agreement nor any other document entered into by the Company or any Member relating to the subject matter of this Agreement shall be construed to suggest otherwise.

Article III.
MEMBERSHIP

Section 3.1 Members.

The Members of the Company shall consist of the Persons identified in Exhibit A, as updated from time to time to reflect the admission of new Members pursuant to this Agreement.

Section 3.2 New Members.

(a) Any national securities association or national securities exchange whose market, facilities, or members, as applicable, trades Eligible Securities may become a Member by (i) providing written notice to the Company, (ii) executing a joinder to this Agreement, at which time Exhibit A shall be amended to reflect the addition of such association or exchange as a Member, (iii) paying a Membership Fee to the Company as determined pursuant to Section 3.2(b), and (iv) executing a joinder to any other agreements to which all of the other Members have been made party in connection with being a Member. Membership Fees paid shall be added to the general revenues of the Company.

(b) The Membership Fee shall be based upon the following factors:

(i) the portion of costs previously paid by the Company (or by the Members prior to the formation of the Company) for the development, expansion, and maintenance of the System which, under GAAP, would have been treated as capital expenditures and would have been amortized over the five years preceding the admission of the new Member (and for this purpose all such capital expenditures shall be deemed to have a five-year amortizable life); and

(ii) an assessment of costs incurred and to be incurred by the Company for modifying the System or any part thereof to accommodate the new Member, which are not otherwise required to be paid or reimbursed by the new Member.

[(a)](c) Participants of the CQ Plan, CTA Plan, and UTP Plan are not be required to pay the Membership Fee.

Section 3.3 Transfer of Membership Interests.

Except as set forth in Section 3.4, a Member shall not have the right to Transfer (whether in whole or in part) its Membership Interest in the Company.

Section 3.4 Withdrawal from Membership.

(a) Any Member may voluntarily withdraw from the Company at any time on not less than 30 days' prior written notice (the "Withdrawal Date"), by (i) providing such notice of such withdrawal to the Company, (ii) causing the Company to file with the Commission an amendment to effectuate the withdrawal and (iii) Transferring such Member's Membership Interest to the Company.

(b) A Member shall automatically be withdrawn from the Company upon such Member no longer being a registered national securities association or registered national securities exchange. Such Member's Membership Interest will automatically transfer to the Company. The Company shall file with the Commission an amendment to effectuate the withdrawal.

(c) A withdrawal of a Member shall not be effective until approved by the Commission after filing an amendment to the Agreement in accordance with Section 13.5.

(d) From and after the Withdrawal Date of such Member:

(iii) Such Member shall remain liable for any obligations under this Agreement of such Member (including indemnification obligations) arising prior to the Withdrawal Date (but such Member shall have no further obligations under this Agreement or to any of the other Members arising after the Withdrawal Date);

(iv) Such Member shall be entitled to receive a portion of the Net Distributable Operating Income (if any) in accordance with Exhibit D attributable to the period prior to the Withdrawal Date of such Member;

(v) Such Member shall cease to have the right to have its Transaction Reports, Quotation Information, or other information disseminated over the System; and

(vi) Profits and losses of the Company shall cease to be allocated to the Capital Account of such Member.

Section 3.5 Member Bankruptcy.

In the event a Member becomes subject to one or more of the events of bankruptcy enumerated in Section 18-304 of the Delaware Act, that event by itself shall not cause a withdrawal of such Member from the Company so long as such Member continues to be a national securities association or national securities exchange.

Section 3.6 Undertaking by All Members.

Following the Operative Date, each Member shall be required, pursuant to Rule 608(c) of Regulation NMS, to comply with the provisions hereof and enforce compliance by its members with the provisions hereof.

Section 3.7 Obligations and Liability of Members.

(a) Except as otherwise provided in this Agreement or Applicable Law, no Member shall be obligated to contribute capital or make loans to the Company.

(b) Except as provided in this Agreement or Applicable Law, no Member shall have any liability whatsoever in its capacity as a Member, whether to the Company, to any of the Members, to the creditors of the Company or to any other Person, for the debts, liabilities, commitments or any other obligations of the Company or for any losses of the Company. Notwithstanding the foregoing, to the extent that amounts have not been paid to the Processors or Administrator under the terms of the Processor Services Agreements and Administrative Services Agreement, respectively, or this Agreement, as and when due, (i) each Member shall be obligated to return to the Company its pro rata share of any moneys distributed to such Member in the one year period prior to such default in payment (such pro rata share to be based upon such Member's proportionate receipt of the aggregate distributions made to all Members in such one year period) until an aggregate amount equal to the amount of any such defaulted payments has been re-contributed to the Company and (ii) the Company shall promptly pay such amount to the Processors or Administrator, as applicable.

(c) In accordance with the Delaware Act, a member of a limited liability company may, under certain circumstances, be required to return amounts previously distributed to such member. It is the intent of the Members that no distribution to any Member pursuant to this Agreement shall be deemed a return of money or other property paid or distributed in violation of the Delaware Act. The payment of any such money or distribution of any such property to a Member shall be deemed to be a compromise within the meaning of the Delaware Act, and the Member receiving any such money or property shall not be required to return any such money or property to any Person; provided, however, that a Member shall be required to return to the Company any money or property distributed to it in clear and manifest accounting or similar error or as otherwise provided in Section 3.7(b). However, if any court of competent jurisdiction holds that, notwithstanding the provisions of this Agreement, any Member is obligated to make any such payment, such obligation shall be the obligation of such Member and not of the Operating Committee.

(d) No Member (unless duly authorized by the Operating Committee) has the authority or power to represent, act for, sign for or bind the Company or to make any expenditure on behalf of the Company; provided, however, that the Tax Matters Partner may represent, act for, sign for or bind the Company as permitted under Sections 10.2 and 10.3 of this Agreement.

(c) To the fullest extent permitted by law, no Member shall, in its capacity as a Member, owe any duty (fiduciary or otherwise) to the Company or to any other Member other than the duties expressly set forth in this Agreement.

Article IV.
MANAGEMENT OF THE COMPANY

Section 4.1 Operating Committee.

(a) Except for situations in which the approval of the Members is required by this Agreement, the Company shall be managed by the Operating Committee. Unless otherwise expressly provided to the contrary in this Agreement, no Member shall have authority to act for, or to assume any obligation or responsibility on behalf of, the Company, without the prior approval of the Operating Committee. Without limiting the generality of the foregoing and except as otherwise expressly provided in this Agreement, the Operating Committee shall have full and complete discretion to manage and control the business and affairs of the Company, to make all decisions affecting the business and affairs of the Company, and to take all such actions as it deems necessary or appropriate to accomplish the purposes of the Company, including the following:

(i) proposing amendments to this Agreement or implementing other policies and procedures as necessary to ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to Transaction Reports and Quotation Information in Eligible Securities and the fairness and usefulness of the form and content of that information;

(ii) selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of, the Administrator, the Processors, an auditor, and other professional service providers, provided that any expenditures for professional services that are paid for from the Company's revenues must be for activities consistent with the terms of this Agreement and must be authorized by the Operating Committee;

(iii) developing and maintaining fair and reasonable Fees and consistent terms for the distribution, transmission, and aggregation of core data;

(iv) reviewing the performance of the Processors and ensuring the public reporting of Processors' performance and other metrics and information about the Processors;

(v) assessing the marketplace for equity market data products and ensuring that the CT Feeds are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of CT Feeds data to investors and market participants;

(vi) designing a fair and reasonable revenue allocation formula for allocating plan revenues to be applied by the Administrator, and overseeing, reviewing, and revising that formula as needed;

(vii) interpreting the Agreement and its provisions; and

(viii) carrying out such other specific responsibilities as provided under this Agreement.

(b) The Operating Committee may delegate all or part of its administrative functions under this Agreement, excluding those administrative functions to be performed by the Administrator pursuant to Section 6.1, to a subcommittee, to one or more of the Members, to one or more Non-SRO Voting Representatives, or to other Persons (including the Administrator), and any Person to which administrative functions are so delegated shall perform the same as agent for the Company, in the name of the Company. For the avoidance of doubt, no delegation to a subcommittee shall contravene Section 4.3 and no subcommittee shall take actions requiring approval of the Operating Committee pursuant to Section 4.3 unless such approval shall have been obtained. Any authority delegated hereunder is subject to the provisions of Section 4.3 hereof.

(c) It is expressly agreed and understood that neither the Company nor the Operating Committee shall have authority in any respect of any Member's proprietary systems. Neither the Company nor the Operating Committee shall have any authority over the collection and dissemination of quotation or transaction information in Eligible Securities in any Member's Market, or, in the case of FINRA, from FINRA Participants.

Section 4.2 Composition and Selection of Operating Committee.

(a) SRO Voting Representatives. The Operating Committee shall include one SRO Voting Representative designated by each SRO Group and each Non-Affiliated SRO to vote on behalf of such SRO Group or such Non-Affiliated SRO. Each SRO Group and each Non-Affiliated SRO may designate an alternate individual or individuals who shall be authorized to vote on behalf of such SRO Group or such Non-Affiliated SRO, respectively, in the absence of the designated SRO Voting Representative.

(b) Non-SRO Voting Representatives. The Operating Committee shall include one Non-SRO Voting Representative from each of the following categories: (A) an institutional investor; (B) a broker-dealer with a predominantly retail investor customer base; (C) a broker-dealer with a predominantly institutional investor customer base; (D) a securities market data vendor that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; (E) an issuer of NMS stock that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; and (F) a Retail Representative. Non-SRO Voting Representatives shall serve [for]no more than two consecutive three-year terms[for a maximum of two terms total, whether consecutive or non-consecutive],

but shall be eligible after a period of three years of non-service to serve additional terms, subject to the same term limit requirements. Non-SRO Voting Representatives will be selected pursuant to the following procedures:

(i) The initial Non-SRO Voting Representative for each category shall be selected by a majority vote of the Advisory Committee Members. The Advisory Committee Members shall follow the procedure set forth in subparagraph (b)(v) below, except that in addition to nominating others, Advisory Committee Members may nominate themselves, regardless of the length of their service on the Advisory Committees.

(ii) Although the Non-SRO Voting Representatives will be selected at the same time, the Non-SRO Voting Representatives' terms will be staggered to allow for continuity of representation. The Non-SRO Voting Representatives' terms will begin in accordance with the following timeline after the Effective Date of the Agreement:

(A) Issuer Representative: First Quarterly Operating Committee Meeting after Effective Date;

(B) Retail Representative: First Quarterly Operating Committee Meeting after Effective Date;

(C) Institutional investor: First Quarterly Operating Committee Meeting after Effective Date;

(D) Securities market data vendor: Third Quarterly Operating Committee Meeting after Effective Date;

(E) Broker-dealer with a predominantly retail investor customer base: Third Quarterly Operating Committee Meeting after Effective Date; and

(F) Broker-dealer with a predominantly institutional investor customer base: Third Quarterly Operating Committee Meeting Effective Date.

(iii) Although certain Non-SRO Voting Representatives' official, [two]three-year terms will not begin until the Third Quarterly Operating Committee Meeting after the Effective Date, such Non-SRO Voting Representatives will temporarily serve as a Non-SRO Voting Representative as of their selection. Such Non-SRO Voting Representatives may still be selected for another [two]three-year term.

(iv) After the expiration of a Non-SRO Voting Representative's term, an individual will be selected by a majority of the then-serving Non-SRO Voting Representatives to fill the position.

(v) Procedure for Nominating and Electing Non-SRO Voting Representatives.

(A) At least two months prior to the expiring term of a Non-SRO Voting Representative, the Operating Committee shall post a notice on its website requesting nominations from the public for the upcoming open position. [Members]Each SRO Voting Representative and Non-SRO Voting Representative may submit the names of individuals for consideration during the nomination process, and the Non-SRO Voting Representative may nominate themselves as long as they [have not served the maximum number of terms]are not then completing a second consecutive term.

(B) At least one month prior to the expiring term of a Non-SRO Voting Representative, the Non-SRO Voting Representatives shall review the nominated individuals to confirm, by a majority vote, the nominated individuals that meet the requirements of the category up for election.

(C) Within a week of the Non-SRO Voting Representatives finalizing the list of eligible individuals, the Operating Committee shall post a notice on the Company website listing the individuals nominated for the open position and requesting comment from the public. After the Non-SRO Voting Representatives screen comments for appropriateness, the public comments will be posted on the Company's website. Prior to electing an individual from the list of nominations, the Non-SRO Voting Representatives will consider and discuss the public comments.

(D) The Non-SRO Voting Representatives whose terms are expiring may vote in the election for an open position; provided, however, that a Non-SRO Voting Representative may not vote in the election for an open position for which they are nominated.

(E) In the event that no nominated individual receives a majority of votes, the individual(s) with the lowest number of votes will be eliminated from consideration. The Non-SRO Voting Representatives will repeat this process until an individual receives a majority of votes. In the event two candidates remain, the Person receiving the most votes will be elected.

(vi) A Non-SRO Voting Representative may resign from the Operating Committee by tendering their resignation to the Chair of the Operating Committee. In the event a Non-SRO Voting Representative leaves his or her employment or changes his or her duties within the firm to a position unrelated to the category he or she represents before the expiration of his or her term, the Non-SRO Voting Representative shall tender his or her resignation to the Chair of the Operating Committee or be removed upon an affirmative vote of the Operating Committee pursuant to Section 4.3.

(vii) In the event a Non-SRO Voting Representative resigns or is removed from the Operating Committee, the Operating Committee shall, as soon as practicable, follow

the procedure set forth in subparagraph (b)(v). The individual selected shall serve out the remaining term of the resigning Non-SRO Voting Representative and, if the remaining term after selection is less than one year, such individual will automatically serve an additional [two]three-year term. If the remaining term after selection is greater than one year, the Operating Committee shall follow the procedure set forth in subparagraph (b)(v) at the end of the term. Under either circumstance, such individual may be elected for one additional [two]three-year term before reaching the term limit.

(viii) Each Non-SRO Voting Representative will agree in writing to comply with the requirements of Section 4.10 and Exhibit B thereto and the Confidentiality Policy set forth in Exhibit C.

(c) An SRO Applicant will be permitted to appoint one individual to attend (subject to Section 4.4(i)) regularly scheduled Operating Committee meetings in the capacity of a non-voting observer (each, an "SRO Applicant Observer"). Each SRO Applicant may designate an alternate individual or individuals who shall be authorized to act as the SRO Applicant Observer on behalf of the SRO Applicant in the absence of the designated SRO Applicant Observer. If the SRO Applicant's Form 1 petition or Section 19(b)(1) filing is withdrawn, returned, or is otherwise not actively pending with the Commission for any reason, then the SRO Applicant will no longer be eligible to have an SRO Applicant Observer attend Operating Committee meetings.

(d) Notwithstanding anything to the contrary herein, (i) a national securities exchange that has ceased operations as a Market (or has yet to commence operation as a Market) and that is a Non-Affiliated SRO will not be permitted to designate an SRO Voting Representative and (ii) an SRO Group in which all national securities exchanges have ceased operations as a Market (or have yet to commence operation as a Market) will not be permitted to designate an SRO Voting Representative. Such SRO Group or Non-Affiliated SRO may attend the Operating Committee as an observer but may not attend the Executive Session of the Operating Committee. In the event such an SRO Group or Non-Affiliated SRO does not commence operation as a Market for six months after first attending an Operating Committee meeting, such SRO Group or Non-Affiliated SRO may no longer attend the Operating Committee until it commences/re-commences operation as a Market.

Section 4.3 Action of Operating Committee.

(a) The SRO Voting Representatives and Non-SRO Voting Representatives shall be allocated votes as follows:

(i) Each SRO Voting Representative shall be authorized to cast one vote on behalf of the SRO Group or Non-Affiliated SRO that he or she represents, provided, however, that each SRO Voting Representative representing an SRO Group or Non-Affiliated SRO whose combined market center(s) have consolidated equity market share of more than fifteen (15) percent during four of the six calendar months preceding an Operating Committee vote shall be authorized to cast two votes. For purposes of this Section 4.3(a)(i),

"consolidated equity market share" means the average daily dollar equity trading volume of Eligible Securities of an SRO Group or Non-Affiliated SRO as a percentage of the average daily dollar equity trading volume of all of the SRO Groups and Non-Affiliated SROs, as reported under this Agreement. For the avoidance of doubt, FINRA shall not be considered to operate a market center within the meaning of this Section 4.3(a)(i) solely by virtue of facilitating trade reporting of Eligible Securities through the FINRA/Nasdaq Trade Reporting Facility Carteret, the FINRA/Nasdaq Trade Reporting Facility Chicago, the FINRA/NYSE Trade Reporting Facility, or any other trade reporting facility that FINRA may operate from time to time in affiliation with a registered national securities exchange to provide a mechanism for FINRA Participants to report transactions in Eligible Securities effected otherwise than on an exchange.

(ii) With respect to any action on which the Non-SRO Voting Representatives may vote, the aggregate number of votes attributed to the Non-SRO Voting Representatives eligible to vote on such action shall at all times equal one half of the aggregate number of votes attributed to the votes of the SRO Voting Representatives who are eligible to vote on such action, and the number of Non-SRO Voting Representative votes shall increase or decrease as necessary to maintain the ratio between votes attributed to the SRO Voting Representatives and votes attributed to the Non-SRO Voting Representatives. Votes attributed to Non-SRO Voting Representatives will be allocated equally among Non-SRO Voting Representatives eligible to vote, in fractional shares if necessary.

(b) All actions of the Operating Committee will require an augmented majority vote consisting of the affirmative vote of not less than (2/3rd) two-thirds of all votes allocated in the manner described in Section 4.3(a) to Voting Representatives who are eligible to vote on such action, combined with a majority (greater than (50) fifty percent of the votes) of all votes allocated in the manner described in Section 4.3(a) to SRO Voting Representatives who are eligible to vote on such action.

(c) Notwithstanding Section 4.3(b), the following actions will not require an augmented majority vote of the Operating Committee:

(i) the selection of Non-SRO Voting Representatives pursuant to Section 4.2(b);

(ii) the decision to enter Executive Session pursuant to Section 4.4(g)[;], except for matters considered pursuant to Section 4.4(g)(i)(E); and

(iii) decisions concerning the operation of the Company as an LLC as specified in Section 10.3 and Section 11.2[;

(iv) modifications to LLC-related provisions of the Agreement pursuant to Section 13.5(b); and

(v) the selection of Officers of the Company, other than the Chair, pursuant to Section 4.8].

Section 4.4 Meetings of the Operating Committee.

(a) Subject to Section 4.4(g), meetings of the Operating Committee may be attended by each Voting Representative, Member Observers, SRO Applicant Observers, SEC staff, and other persons as deemed appropriate by the Operating Committee. Meetings shall be held at such times and locations as shall from time to time be determined by the Operating Committee. Member Observers shall be entitled to [receive notice of all meetings of the Company and to] attend and participate in any discussion at any such meeting, unless attendance or participation would be inconsistent with the provisions of Section 4.10(b), but shall not be entitled to vote on any matter.

(b) Special meetings of the Operating Committee may be called by the Chair on at least 24 hours' notice to each Voting Representative and all persons eligible to attend Operating Committee meetings.

(c) Any action requiring a vote can be taken at a meeting only if a quorum of all Voting Representatives is present. A quorum is equal to the minimum votes necessary to obtain approval under Section 4.3(b), i.e., Voting Representatives reflecting 2/3rd of Operating Committee votes eligible to vote on such action and SRO Voting Representatives reflecting 50% of SRO Voting Representative votes eligible to vote on such action.

(i) Any Voting Representative recused from voting on a particular action (i) mandatorily pursuant to Section 4.10(b) or (ii) upon a Voting Representative's voluntary recusal, shall not be considered in the numerator or denominator of the calculations in paragraph (c) for determining whether a quorum is present.

(ii) A Voting Representative is considered present at a meeting only if such Voting Representative is either in physical attendance at the meeting or participating by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.

(d) A summary of any action sought to be resolved at a meeting shall be sent to each Voting Representative entitled to vote on such matter at least one week prior to the meeting via electronic mail, portal notification, or regular U.S. or private mail (or if one week is not practicable, then with as much time as may be reasonably practicable under the circumstances); provided, however, that this requirement to provide a summary of any action prior to a meeting may be waived by the vote of the percentage of the Committee required to vote on any particular matter, under Section 4.3 above.

(e) Beginning with the first quarterly meeting of the Operating Committee following the Operative Date, the Chair of the Operating Committee shall be elected for a one-year term

from the constituent SRO Voting Representatives (and an election for the Chair shall be held every year). Subject to the requirements of Section 4.3 hereof, the Chair shall have the authority to enter into contracts on behalf of the Company and otherwise bind the Company, but only as directed by the Operating Committee. The Chair shall designate a Person to act as Secretary to record the minutes of each meeting. The location of meetings shall be in a location capable of holding the number of attendees of such meetings, or such other locations as may from time to time be determined by the Operating Committee.

(i) To elect a Chair, the Operating Committee will elicit nominations for those individuals to be considered for Chair.

(ii) In the event that no nominated Person is elected by an affirmative vote of the Operating Committee pursuant to Section 4.3, the Person(s) with the lowest number of votes will be eliminated from consideration. The Operating Committee will repeat this process until a Person is elected by affirmative vote of the Operating Committee pursuant to Section 4.3. In the event two candidates remain and neither is elected by an affirmative vote of the Operating Committee pursuant to Section 4.3, the Person receiving the most votes from SRO Voting Representatives will be elected.

(f) Meetings may be held by conference telephone or other electronic means that enables each Voting Representative to hear and be heard by all others present at the meeting.

(g) [Notwithstanding any other provision of this Agreement,]SRO Voting Representatives, Member Observers, SEC Staff, and other persons as deemed appropriate by a majority vote of the SRO Voting Representatives may meet in Executive Session of the Operating Committee to discuss an item of business that falls within the topics identified in subsection (i) below and for which it is appropriate to exclude Non-SRO Voting Representatives. A request to create an Executive Session must be included on the written agenda for an Operating Committee meeting, along with the clearly stated rationale as to why such item to be discussed would be appropriate for Executive Session. The creation of an Executive Session will be by a majority vote of SRO Voting Representatives with votes allocated pursuant to Section 4.3(a)(1). The Executive Session shall only discuss the topic for which it was created and shall be disbanded upon fully discussing the topic.

(i) Items for discussion within an Executive Session [should]shall be limited to [such]the following topics[as]:

(A) Any topic that requires discussion of Highly Confidential Information, except for discussions regarding contract negotiations with the Processors or the Administrator;

(B) Vendor or Subscriber Audit Findings;[and]

(C) Litigation matters[.];

(D) Responses to regulators with respect to inquiries, examinations, or findings; and

(E) Other discrete matters approved by the Operating Committee.

(ii) [The list provided in subparagraph (i) is not dispositive of all matters that may by their nature require discussion in an Executive Session.]The mere fact that a topic is controversial or a matter of dispute does not, by itself, make a topic appropriate for Executive Session. The minutes for an Executive Session shall include the reason for including any item in Executive Session.

(iii) Requests to discuss a topic in Executive Session must be included on the written agenda for the Operating Committee meeting, along with the clearly stated rationale for each topic as to why such discussion is appropriate for Executive Session. Such rationale may be that the topic to be discussed falls within the list provided in subparagraph (g)(i).

(iv) Any action that requires a vote in Executive Session will require a majority of the votes allocated in the manner described in Section 4.3(a) to SRO Voting Representatives eligible to vote on such action.

Section 4.5 Certain Transactions.

The fact that a Member or any of its Affiliates is directly or indirectly interested in or connected with any Person employed by the Company to render or perform a service, or from which or to whom the Company may buy or sell any property, shall not prohibit the Company from employing or dealing with such Person.

Section 4.6 Company Opportunities.

(a) Each Member, its Affiliates, and each of their respective equity holders, controlling persons and employees may have business interests and engage in business activities in addition to those relating to the Company. Neither the Company nor any Member shall have any rights by virtue of this Agreement in any business ventures of any such Person.

(b) Each Member expressly acknowledges that (i) the other Members are permitted to have, and may presently or in the future have, investments or other business relationships with Persons engaged in the business of the Company other than through the Company (an "Other Business"), (ii) the other Members have and may develop strategic relationships with businesses that are and may be competitive or complementary with the Company, (iii) the other Members shall not be obligated to recommend or take any action that prefers the interests of the Company or any Member over its own interests, (iv) none of the other Members will be prohibited by virtue of their ownership of equity in the Company or service on the Operating Committee (or body performing similar duties) from pursuing and engaging in any such activities, (v) none of the other Members will be obligated to inform or present to the Company any such opportunity,

relationship, or investment, (vi) such Member will not acquire or be entitled to any interest or participation in any Other Business as a result of the participation therein of any of the other Members, and (vii) the involvement of another Member in any Other Business in and of itself will not constitute a conflict of interest by such Person with respect to the Company or any of the Members.

Section 4.7 Subcommittees.

(a) Subject to Section 4.1, the Operating Committee shall have the power and right, but not the obligation, to create and disband subcommittees of the Operating Committee and to determine the duties, responsibilities, powers, and composition of such subcommittees. Subcommittee chairs will be selected by [the Chair of]the Operating Committee from SRO Voting Representatives or [Member Observers with input from the Operating Committee]Non-SRO Voting Representatives.

(b) SRO Voting Representatives, Non-SRO Voting Representatives, Member Observers, SEC Staff, and other persons as deemed appropriate by the Operating Committee may attend meetings of any subcommittees.

(c) Notwithstanding paragraph (b), SRO Voting Representatives, Member Observers, and other persons as deemed appropriate by majority vote of the SRO Voting Representatives may meet in a subcommittee to discuss an item [subject to the attorney-client privilege of the Company or that is attorney work product of the Company]that exclusively affects the Members with respect to: (1) litigation matters or responses to regulators with respect to inquiries, examinations, or findings; and (2) other discrete legal matters approved by the Operating Committee.

(d) All subcommittees shall prepare minutes of all meetings and make those minutes available to all members of the Operating Committee. In the case of the legal subcommittee, those minutes shall include (i) attendance at the meeting; (ii) the subject matter of each item discussed; (iii) the rationale for referring the matter to the legal subcommittee; (iv) the privilege or privileges claimed with respect to that item; and (v) for each matter, if applicable, the basis on which the matter was determined to exclusively affect the SROs.

Section 4.8 Officers.

(a) [In addition to the Chair and Secretary, the Members]Except as provided in Section 4.4(e), the Operating Committee may (but need not), from time to time, designate and appoint one or more persons as an Officer of the Company[by a majority vote of the Members]. Other than the Chair, no Officer need be a Voting Representative. Any Officers so designated shall have such authority and perform such duties as the [Members]Operating Committee may, from time to time, delegate to them. Any such delegation may be revoked at any time by [a majority vote of the Members in their sole discretion. The Members]the Operating Committee. The Operating Committee may assign titles to particular Officers. Each Officer shall hold office

until such Officer's successor shall be duly designated or until such Officer's death, resignation, or removal as provided in this Agreement. Any number of offices may be held by the same individual. Officers shall not be entitled to receive salary or other compensation, unless approved by the [Members by a majority vote]Operating Committee.

(b) Any Officer may resign at any time. Such resignation shall be made in writing and shall take effect at the time specified in the notice, or if no time be specified, at the time of its receipt by the [Members]Operating Committee. The acceptance of a resignation shall not be necessary to make it effective.

(c) Any Officer may be removed at any time [upon the majority vote of the Members]by the Operating Committee.

Section 4.9 Commission Access to Information and Records.

Nothing in this Agreement shall be interpreted to limit or impede the rights of the Commission to access information and records of the Company or any of the Members (including their employees) pursuant to U.S. federal securities laws and the rules and regulations promulgated thereunder.

Section 4.10 Disclosure of Potential Conflicts of Interest; Recusal.

(a) Disclosure Requirements. The Members (including any Member Observers), the Processors, the Administrator, the Non-SRO Voting Representatives, and each service provider or subcontractor engaged in Company business (including the audit of Subscribers' data usage) that has access to Restricted or Highly Confidential information (for purposes of this section, "Disclosing Parties") shall complete the applicable questionnaire to provide the required disclosures set forth in subsection (c) below to disclose all material facts necessary to identify potential conflicts of interest. The Operating Committee, a Member, Processors, or Administrator may not use a service provider or subcontractor on Company 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.

(i) 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.

(ii) Updates to Disclosures. Following a material change in the information disclosed pursuant to Section 4.10(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.

(iii) 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 Company's website.

(iv) The Company will arrange for Disclosing Parties that are not Members or Non-SRO Voting Representatives to comply with the required disclosures and recusals under this Section 4.10 and Exhibit B in their respective agreements with either the Company, a Member, the Administrator, or the Processors.

(b) Recusal.

(i) A Disclosing Party <u>that is a Member</u> may not appoint as its Voting Representative<u>, alternate SRO Voting Representative, or Member Observer,</u> a person that is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of<u>,</u> PDP offered to customers of the CT Feeds if the person has a financial interest (including compensation) that is tied directly to the Disclosing Party's market data business or the procurement of market data and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.

(ii) A Disclosing Party (including its representative(s), employees, and agents) will be recused from participating in Company 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.

(iii) 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) is seeking a position or contract with the Company or (ii) have a position or contract with the Company and whose performance is being evaluated by the Company.

(iv) All recusals, including a person's determination of whether to voluntarily recuse himself or herself, shall be reflected in the meeting minutes.

(c) Required Disclosures. As part of the disclosure regime, the Members, the Processors, the Administrator, Non-SRO Voting Representatives, and service providers and subcontractors must respond to questions that are tailored to elicit responses that disclose the potential conflicts of interest as set forth in Exhibit B.

[(d) If the Commission's approval order of the conflicts of interest policies filed by the CQ Plan, CTA Plan, or UTP Plan is stayed or overturned by a Governmental Authority, the requirements of this Section 4.10 and Exhibit B shall not apply.]

Section 4.11 Confidentiality Policy.

[(a) The Members and Non-SRO Voting Representatives]All Covered Persons are subject to the Confidentiality Policy set forth in Exhibit C to the Plan. The Company will arrange for Covered Persons that are not [Members]SRO Voting Representatives, Member Observers, or Non-SRO Voting Representatives to comply with the Confidentiality Policy under their respective agreements with either the Company, a Member, the Administrator, or the Processors.

[(b) If the Commission's approval order of the confidentiality policy filed by the CQ Plan, CTA Plan, or UTP Plan is stayed or overturned by a Governmental Authority, the requirements of this Section 4.11 and Exhibit C shall not apply.]

Article V.
THE PROCESSORS; INFORMATION; INDEMNIFICATION

Section 5.1 General Functions of the Processors.

Subject to the general direction of the Operating Committee, as more fully set forth in the agreement to be entered into between the Company and the Processors (the "Processor Services Agreements"), the Company shall require the Processors to perform certain processing functions on behalf of the Company. Among other things, the Company shall require the Processors to collect from the Members, and consolidate and disseminate to Vendors and Subscribers, Transaction Reports and Quotation Information in Eligible Securities in a manner designed to assure the prompt, accurate, and reliable collection, processing, and dissemination of information with respect to all Eligible Securities in a fair and non-discriminatory manner.

Section 5.2 Evaluation of the Processors.

The Processors' performance of their functions under the Processor Services Agreements shall be subject to review at any time as determined by a vote of the Operating Committee pursuant to Section 4.3; provided, however, that a review shall be conducted at least once every two calendar years but not more frequently than once each calendar year (unless the Processors have materially defaulted in their obligations under the Processor Services Agreements and such default has not been cured within the applicable cure period set forth in the Processor Services Agreements, in which event such limitation shall not apply). The Operating Committee may review the Processors at staggered intervals.

Section 5.3 Process for Selecting New Processors.

(a) No later than upon the termination or withdrawal of a Processor or the expiration of a Processor Services Agreement with a Processor, the Operating Committee shall establish procedures for selecting a new Processor (the "Processor Selection Procedures"). The Operating Committee, as part of the process of establishing Processor Selection Procedures, may solicit and consider the timely comment of any entity affected by the operation of this Agreement.

(b) The Processor Selection Procedures shall be established by the affirmative vote of the Operating Committee pursuant to Section 4.3, and shall set forth, at a minimum:

(i) the entity that will:

(A) draft the Operating Committee's request for proposal for bids on a new Processor;

(B) assist the Operating Committee in evaluating bids for the new Processor; and

(C) otherwise provide assistance and guidance to the Operating Committee in the selection process;

(ii) the minimum technical and operational requirements to be fulfilled by the Processor;

(iii) the criteria to be considered in selecting the Processor; and

(iv) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Processor.

Section 5.4 Transmission of Information to Processors by Members.

(a) Quotation Information.

(i) Each Member shall, during the time it is open for trading, be responsible for promptly collecting and transmitting to the Processors accurate Quotation Information in Eligible Securities through any means set forth in the Processor Services Agreements to ensure that the Company complies with its obligations under the Processor Services Agreements.

(ii) Quotation Information shall include:

(A) identification of the Eligible Security, using the Listing Market's symbol;

(B) the price bid and offered, together with size;

(C) for FINRA, the FINRA Participant along with the FINRA Participant's market participant identification or Member from which the quotation emanates;

(D) appropriate timestamps;

(E) identification of quotations that are not firm; and

(F) through appropriate codes and messages, withdrawals and similar matters.

(iii) In addition, Quotation Information shall include:

(A) in the case of a national securities exchange, the reporting Participant's matching engine publication timestamp; or

(B) in the case of FINRA, the quotation publication timestamp that FINRA's bidding or offering member reports to FINRA's quotation facility in accordance with FINRA rules. In addition, if FINRA's quotation facility provides a proprietary feed of its quotation information, then the quotation facility shall also furnish the Processors with the time of the quotation as published on the quotation facility's proprietary feed. FINRA shall convert any quotation times reported to it to nanoseconds and shall furnish such times to the Processors in nanoseconds since Epoch.

(b) Transaction Reports.

(i) Each Member shall, during the time it is open for trading, be responsible for promptly transmitting to the Processor Transaction Reports in Eligible Securities executed in its Market by means set forth in the Processor Services Agreements.

(ii) Transaction Reports shall include:

(A) identification of the Eligible Security, using the Listing Market's symbol;

(B) the number of shares in the transaction;

(C) the price at which the shares were purchased or sold;

(D) the buy/sell/cross indicator;

(E) appropriate timestamps;

(F) the Market of execution; and

(G) through appropriate codes and messages, late or out-of-sequence trades, corrections, and similar matters.

(iii) In addition, Transaction Reports shall include the time of the transaction as identified in the Participant's matching engine publication timestamp. However, in the case of FINRA, the time of the transaction shall be the time of execution that a FINRA member reports to a FINRA trade reporting facility in accordance with FINRA rules. In addition, if the FINRA trade reporting facility provides a proprietary feed of trades reported by the trade reporting facility to the Processor, then the FINRA trade reporting facility shall also furnish the Processors with the time of the transmission as published on the facility's proprietary feed. The FINRA trade reporting facility shall convert times that its members report to it to nanoseconds and shall furnish such times to the Processors in nanoseconds since Epoch.

(iv) Each Member shall (a) transmit all Transaction Reports in Eligible Securities to the Processors as soon as practicable, but not later than 10 seconds, after the time of execution, (b) establish and maintain collection and reporting procedures and facilities reasonably designed to comply with this requirement, and (c) designate as "late" any last sale price not collected and reported in accordance with the above-referenced procedures or as to which the Member has knowledge that the time interval after the time of execution is significantly greater than the time period referred to above. The Members shall seek to reduce the time period for reporting last sale prices to the Processors as conditions warrant.

(v) The following types of transactions are not required to be reported to the Processors pursuant to this Agreement:

(A) transactions that are part of a primary distribution by an issuer or of a registered secondary distribution or of an unregistered secondary distribution;

(B) transactions made in reliance on Section 4(a)(2) of the Securities Act of 1933;

(C) transactions in which the buyer and the seller have agreed to trade at a price unrelated to the current market for the security (e.g., to enable the seller to make a gift);

(D) the acquisition of securities by a broker-dealer as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange;

(E) purchases of securities pursuant to a tender offer;

(F) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market; and

(G) transfers of securities that are expressly excluded from trade reporting under FINRA rules.

(c) The following symbols shall be used to denote the applicable Member:

CODE	MEMBER
A	NYSE American LLC
Z	Cboe BZX Exchange, Inc.
Y	Cboe BYX Exchange, Inc.
B	Nasdaq BX, Inc.
W	Cboe Exchange, Inc.
M	NYSE Chicago, Inc.
J	Cboe EDGA Exchange, Inc.
K	Cboe EDGX Exchange, Inc.
I	Nasdaq ISE, LLC
V	Investors' Exchange LLC
D	Financial Industry Regulatory Authority, Inc.
Q	The Nasdaq Stock Market LLC
C	NYSE National, Inc.
N	New York Stock Exchange LLC
P	NYSE Arca, Inc.
X	Nasdaq PHLX LLC
L	Long-Term Stock Exchange Inc.
U	MEMX LLC

(d) Indemnification.

(i) Each Member agrees, severally and not jointly, to indemnify and hold harmless and defend the Company, each other Member, the Processors, the Administrator, the Operating Committee, and each of their respective directors, officers, employees, agents, and Affiliates (each, an "Member Indemnified Party") from and against any and all loss, liability, claim, damage, and expense whatsoever incurred or threatened against such Member Indemnified Party as a result of a system error or disruption at such Member's Market affecting any Transaction Reports, Quotation Information, or other information reported to the Processors by such Member and disseminated by the Processors to Vendors and Subscribers. This indemnity shall be in addition to any liability that the indemnifying Member may otherwise have.

(ii) Promptly after receipt by a Member Indemnified Party of notice of the commencement of any action, such Member Indemnified Party will, if it intends to make a claim in respect thereof against an indemnifying Member, notify the indemnifying

Member in writing of the commencement thereof; provided, however, that the failure to so notify the indemnifying Member will only relieve the indemnifying Member from any liability which it may have to any Member Indemnified Party to the extent such indemnifying Member is actually prejudiced by such failure. In case any such action is brought against any Member Indemnified Party and it promptly notifies an indemnifying Member of the commencement thereof, the indemnifying Member will be entitled to participate in, and, to the extent that it elects (jointly with any other indemnifying Member similarly notified), to assume and control the defense thereof with counsel chosen by it. After notice from the indemnifying Member of its election to assume the defense thereof, the indemnifying Member will not be liable to such Indemnified Party for any legal or other expenses subsequently incurred by such Member Indemnified Party in connection with the defense thereof but the Member Indemnified Party may, at its own expense, participate in such defense by counsel chosen by it without, however, impairing the indemnifying Member's control of the defense. If the indemnifying Member has assumed the defense in accordance with the terms hereof, the indemnifying Member may enter into a settlement or consent to any judgment without the prior written consent of the Member Indemnified Party if (i) such settlement or judgment involves monetary damages only, all of which will be fully paid by the indemnifying Member and without admission of fault or culpability on behalf of any Member Indemnified Party, and (ii) a term of the settlement or judgment is that the Person or Persons asserting such claim unconditionally and irrevocably release all Member Indemnified Parties from all liability with respect to such claim; otherwise, the consent of the Member Indemnified Party shall be required in order to enter into any settlement of, or consent to the entry of a judgment with respect to, any claim (which consent shall not be unreasonably withheld, delayed, or conditioned).

Section 5.5 Operational Issues.

(a) Each Member shall be responsible for collecting and validating quotes and last sale reports within its own system prior to transmitting this data to the Processors.

(b) Each Member may utilize a dedicated Member line into the Processors to transmit Transaction Reports and Quotation Information to the Processors.

(c) Whenever a Member determines that a level of trading activity or other unusual market conditions prevent it from collecting and transmitting Transaction Reports or Quotation Information to the Processor, or where a trading halt or suspension in an Eligible Security is in effect in its Market, the Member shall promptly notify the Processors of such condition or event and shall resume collecting and transmitting Transaction Reports and Quotation Information to it as soon as the condition or event is terminated. In the event of a system malfunction resulting in the inability of a Member or its members to transmit Transaction Reports or Quotation Information to the Processors, the Member shall promptly notify the Processors of such event or condition. Upon receiving such notification, the Processors shall take appropriate action, including either closing the quotation or purging the system of the affected quotations.

Article VI.
THE ADMINISTRATOR

Section 6.1 General Functions of the Administrator.

Subject to the general direction of the Operating Committee, as more fully set forth in the agreement entered into between the Company and the Administrator (the "Administrative Services Agreement"), the Administrator shall perform administrative functions on behalf of the Company including recordkeeping; administering Vendor and Subscriber contracts; administering Fees, including billing, collection, and auditing of Vendors and Subscribers; administering Distributions; tax functions of the Company; and the preparation of the Company's audited financial reports.

Section 6.2 Independence of the Administrator.

The Administrator may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.

Section 6.[2]3 Evaluation of the Administrator.

The Administrator's performance of its functions under the Administrative Services Agreement shall be subject to review at any time as determined by an affirmative vote of the Operating Committee pursuant to Section 4.3; provided, however, that a review shall be conducted at least once every two calendar years but not more frequently than once each calendar year (unless the Administrator has materially defaulted in its obligations under the Administrative Services Agreement and such default has not been cured within the applicable cure period set forth in the Administrative Services Agreement, in which event such limitation shall not apply). The Operating Committee shall appoint a subcommittee or other Persons to conduct the review. The Company shall require the reviewer to provide the Operating Committee with a written report of its findings and to make recommendations (if necessary), including with respect to the continuing operation of the Administrator. The Administrator shall be required to assist and participate in such review. The Operating Committee shall notify the Commission of any recommendations it may approve as a result of the review of the Administrator and shall supply the Commission with a copy of any reports that may be prepared in connection therewith.

Section 6.[3]4 Process for Selecting New Administrator.

Prior to the Operative Date, upon the termination or withdrawal of the Administrator, or upon the expiration of the Administrative Services Agreement, the Operating Committee shall establish procedures for selecting a new Administrator (the "Administrator Selection Procedures").[The Administrator selected by the Operating Committee may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.] The Operating Committee, as part of the process of establishing Administrator Selection Procedures, may solicit and consider the timely comment of any entity affected by the operation of this Agreement. The Administrator Selection Procedures shall be established by the

[Voting Representatives]Operating Committee pursuant to Section 4.3, and shall set forth, at a minimum:

(a) the entity that will:

(i) draft the Operating Committee's request for proposal for bids on a new Administrator;

(ii) assist the Operating Committee in evaluating bids for the new Administrator; and

(iii) otherwise provide assistance and guidance to the Operating Committee in the selection process.

(b) the minimum technical and operational requirements to be fulfilled by the Administrator;

(c) the criteria to be considered in selecting the Administrator; and

(d) the entities (other than Voting Representatives) that are eligible to comment on the selection of the Administrator.

Article VII.
REGULATORY MATTERS

Section 7.1 Regulatory and Operational Halts.

(a) Operational Halts. A Member shall notify the Processors if it has concerns about its ability to collect and transmit quotes, orders, or last sale prices, or where it has declared an Operational Halt or suspension of trading in one or more Eligible Securities, pursuant to the procedures adopted by the Operating Committee.

(b) Regulatory Halts.

(i) The Primary Listing Market may declare a Regulatory Halt in trading for any security for which it is the Primary Listing Market:

(A) as provided for in the rules of the Primary Listing Market;

(B) if it determines there is a SIP Outage, Material SIP Latency, or Extraordinary Market Activity; or

(C) in the event of national, regional, or localized disruption that necessitates a Regulatory Halt to maintain a fair and orderly market.

(ii) In making a determination to declare a Regulatory Halt under subparagraph (b)(i), the Primary Listing Market will consider the totality of information available concerning the severity of the issue, its likely duration, and potential impact on Member Firms and other market participants and will make a good-faith determination that the criteria of subparagraph (b)(i) have been satisfied and that a Regulatory Halt is appropriate. The Primary Listing Market will consult, if feasible, with the affected Trading Center(s), the other Members, or the Processors, as applicable, regarding the scope of the issue and what steps are being taken to address the issue. Once a Regulatory Halt under subparagraph (b)(i) has been declared, the Primary Listing Market will continue to evaluate the circumstances to determine when trading may resume in accordance with the rules of the Primary Listing Market.

(c) Initiating a Regulatory Halt.

(i) The start time of a Regulatory Halt is when the Primary Listing Market declares the halt, regardless of whether an issue with communications impacts the dissemination of the notice.

(ii) If a Processor is unable to disseminate notice of a Regulatory Halt or the Primary Listing Market is not open for trading, the Primary Listing Market will take reasonable steps to provide notice of a Regulatory Halt, which shall include both the type and start time of the Regulatory Halt, by dissemination through:

(A) PDP;

(B) posting on a publicly-available Member website; or

(C) system status messages.

(iii) Except in exigent circumstances, the Primary Listing Market will not declare a Regulatory Halt retroactive to a time earlier than the notice of such halt.

(iv) Resumption of Trading After Regulatory Halts Other Than SIP Halts. The Primary Listing Market will declare a resumption of trading when it makes a good-faith determination that trading may resume in a fair and orderly manner and in accordance with its rules.

(v) For a Regulatory Halt that is initiated by another Member that is a Primary Listing Market, a Member may resume trading after the Member receives notification from the Primary Listing Market that the Regulatory Halt has been terminated.

(d) Resumption of Trading After SIP Halt.

(i) The Primary Listing Market will determine the SIP Halt Resume Time. In making such determination, the Primary Listing Market will make a good-faith determination

and consider the totality of information to determine whether resuming trading would promote a fair and orderly market, including input from the Processors, the other Members, or the operator of the system in question (as well as any Trading Center(s) to which such system is linked), regarding operational readiness to resume trading. The Primary Listing Market retains discretion to delay the SIP Halt Resume Time if it believes trading will not resume in a fair and orderly manner.

(ii) The Primary Listing Market will terminate a SIP Halt with a notification that specifies a SIP Halt Resume Time. The Primary Listing Market shall provide a minimum notice of a SIP Halt Resume Time, as specified by the rules of the Primary Listing Market, during which period market participants may enter quotes and orders in the affected securities. During Regular Trading Hours, the last SIP Halt Resume Time before the end of Regular Trading Hours shall be an amount of time as specified by the rules of the Primary Listing Market. The Primary Listing Market may stagger the SIP Halt Resume Times for multiple symbols in order to reopen in a fair and orderly manner.

(iii) During Regular Trading Hours, if the Primary Listing Market does not open a security within the amount of time as specified by the rules of the Primary Listing Market after the SIP Halt Resume Time, a Member may resume trading in that security. Outside Regular Trading Hours, a Member may resume trading immediately after the SIP Halt Resume Time.

(e) Member to Halt Trading During Regulatory Halt. A Member will halt trading for any security traded on its Market if the Primary Listing Market declares a Regulatory Halt for the security.

(f) Communications. Whenever, in the exercise of its regulatory functions, the Primary Listing Market for an Eligible Security determines it is appropriate to initiate a Regulatory Halt, the Primary Listing Market will notify all other Members and the affected Processors of such Regulatory Halt as well as provide notice that a Regulatory Halt has been lifted using such protocols and other emergency procedures as may be mutually agreed to between the Members and the Primary Listing Market. The affected Processors shall disseminate to Members notice of the Regulatory Halt (as well as notice of the lifting of a Regulatory Halt) (i) through the CT Feeds or (ii) any other means the affected Processors, in its sole discretion, considers appropriate. Each Member shall be required to continuously monitor these communication protocols established by the Operating Committee and the Processors during market hours, and the failure of a Member to do so shall not prevent the Primary Listing Market from initiating a Regulatory Halt in accordance with the procedures specified herein.

Section 7.2 Hours of Operation of the System.

(a) Quotation Information shall be entered, as applicable, by Members as to all Eligible Securities in which they make a market during Regular Trading Hours on all days the Processors are in operation. Transaction Reports shall be entered between 9:30 a.m. and 4:00:10

p.m. ET by Members as to all Eligible Securities in which they execute transactions during Regular Trading Hours on all days the Processors are in operation.

(b) Members that execute transactions in Eligible Securities outside of Regular Trading Hours, shall report such transactions as follows:

(i) transactions in Eligible Securities executed between 4:00 a.m. and 9:29:59 a.m. ET and between 4:00:01 p.m. and 8:00 p.m. ET, shall be designated with an appropriate indicator to denote their execution outside normal market hours;

(ii) transactions in Eligible Securities executed after 8:00 p.m. and before 12:00 a.m. (midnight) shall be reported to the Processors between the hours of 4:00 a.m. and 8:00 p.m. ET on the next business day (T+1), and shall be designated "as/of" trades to denote their execution on a prior day, and be accompanied by the time of execution;

(iii) transactions in Eligible Securities executed between 12:00 a.m. (midnight) and 4:00 a.m. ET shall be transmitted to the Processors between 4:00 a.m. and 9:30 a.m. ET, on trade date, shall be designated with an appropriate indicator to denote their execution outside normal market hours, and shall be accompanied by the time of execution; and

(iv) transactions reported pursuant to this Section 7.3 shall be included in the calculation of total trade volume for purposes of determining Net Distributable Operating Revenue, but shall not be included in the calculation of the daily high, low, or last sale.

(c) Late trades shall be reported in accordance with the rules of the Member in whose Market the transaction occurred and can be reported between the hours of 4:00 a.m. and 8:00 p.m. ET.

(d) The Processors shall collect, process and disseminate Quotation Information in Eligible Securities at other times between 4:00 a.m. and 9:30 a.m. ET, and after 4:00 p.m. ET, when any Member or FINRA Participant is open for trading, until 8:00 p.m. ET (the "Additional Period"); provided, however, that the National Best Bid and Offer quotation will not be disseminated before 4:00 a.m. or after 8:00 p.m. ET. Members that enter Quotation Information or submit Transaction Reports to the Processors during the Additional Period shall do so for all Eligible Securities in which they enter quotations.

Article VIII.
CAPITAL CONTRIBUTIONS; CAPITAL ACCOUNTS

Section 8.1 Capital Accounts.

(a) A separate capital account ("Capital Account") shall be established and maintained by the Company for each Member in accordance with section 704(b) of the Code and

Treasury Regulation section 1.704-1 (b)(2)(iv). There shall be credited to each Member's Capital Account (i) the Capital Contributions (at fair market value in the case of contributed property) made by such Member (which shall be deemed to be zero for the initial Members), (ii) allocations of Company profits and gain (or items thereof) to such Member pursuant to Section [10]9.2 and (iii) any recaptured tax credits, or portion thereof, to the extent such increase to the tax basis of a Member's interest in the Company may be allowed pursuant to the Code. Each Member's Capital Account shall be decreased by (x) the amount of distributions (at fair market value in the case of property distributed in kind) to such Member, (y) allocations of Company losses to such Member (including expenditures which can neither by capitalized nor deducted for tax purposes, organization and syndication expenses not subject to amortization and loss on sale or disposition of the Company's assets, whether or not disallowed under sections 267 or 707 of the Code) pursuant to Section [10]9.2 and (z) any tax credits, or portion thereof, as may be required to be charged to the tax basis of a Membership Interest pursuant to the Code. Capital Accounts shall not be adjusted to reflect a Member's share of liabilities under section 752 of the Code.

(b) The fair market value of contributed, distributed, or revalued property shall be agreed to by the Operating Committee or, if there is no such agreement, by an appraisal.

(c) The foregoing provisions and the other provisions of this Agreement relating to the maintenance of Capital Accounts are intended to comply with Treasury Regulation section 1.704-1(b) promulgated under section 704(b) of the Code, and shall be interpreted and applied in a manner consistent with such Treasury Regulations.

Section 8.2 Additional Capital Contributions.

Except with the approval of the Operating Committee or as otherwise provided in this Section 8.2, no Member shall be obligated or permitted to make any additional contribution to the capital of the Company. The Members agree to make additional Capital Contributions from time to time as appropriate in respect of reasonable administrative and other reasonable expenses of the Company.

Section 8.3 Distributions.

Except as set forth in this Section 8.3 and Section 11.2, and subject to the provisions of Section 13.1, Distributions shall be made to the Members at the times and in the aggregate amounts set forth in Exhibit D. Notwithstanding any provisions to the contrary contained in this Agreement, the Company shall not make a Distribution to a Member on account of its interest in the Company if such Distribution would violate Section 18-607 of the Delaware Act or other Applicable Law. Distributions may be made in cash or, if determined by the Operating Committee, in-kind. The Operating Committee may reserve amounts for anticipated expenses or contingent liabilities of the Company. In the event that additional Capital Contributions are called for, and any Member fails to provide the full amount of such additional Capital Contributions as set forth in the relevant resolution of the Operating Committee, any

Distributions to be made to such defaulting Member shall be reduced by the amount of any required but unpaid Capital Contribution due from such Member.

Article IX.
ALLOCATIONS

Section 9.1 Calculation of Profits and Losses.

To the fullest extent permitted by Applicable Law, the profits and losses of the Company shall be determined for each fiscal year in a manner consistent with GAAP.

Section 9.2 Allocation of Profits and Losses.

(a) Except as otherwise set forth in this Section 9.2, for Capital Account purposes, all items of income, gain, loss, and deduction shall be allocated among the Members in accordance with Exhibit D.

(b) For federal, state and local income tax purposes, items of income, gain, loss, deduction, and credit shall be allocated to the Members in accordance with the allocations of the corresponding items for Capital Account purposes under this Section 9.2, except that items with respect to which there is a difference between tax and book basis will be allocated in accordance with Section 704(c) of the Code, the Treasury Regulations thereunder and Treasury Regulations Section 1.704-1(b)(4)(i).

(c) Notwithstanding any provision set forth in this Section 9.2, no item of deduction or loss shall be allocated to a Member to the extent the allocation would cause a negative balance in such Member's Capital Account (after taking into account the adjustments, allocations and distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6)) that exceeds the amount that such Member would be required to reimburse the Company pursuant to this Agreement or Applicable Law.

(d) In the event any Member unexpectedly receives any adjustments, allocations, or distributions described in Treasury Regulations Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6), items of the Company's income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate as quickly as possible any deficit balance in its Capital Account created by such adjustments, allocations or distributions in excess of that permitted under Section [10]9.2(c). Any special allocations of items of income or gain pursuant to this Section [10]9.2(d) shall be taken into account in computing subsequent allocations pursuant to this Section [10]9.2 so that the net amount of any items so allocated and all other items allocated to each Member pursuant to this Section [10]9.2 shall, to the extent possible, be equal to the net amount that would have been allocated to each such Member pursuant to the provisions of this Section [10]9.2 if such unexpected adjustments, allocations or distributions had not occurred.

Article X.
RECORDS AND ACCOUNTING; REPORTS

Section 10.1 Accounting.

(a) The Operating Committee shall maintain a system of accounting which enables the Company to produce accounting records and information substantially consistent with GAAP. The Fiscal Year of the Company shall be the calendar year unless Applicable Law requires a different Fiscal Year.

(b) All matters concerning accounting procedures shall be determined by the Operating Committee.

Section 10.2 Tax Status; Returns.

(a) It is the intent of this Company and the Members that this Company shall be treated as a partnership for federal, state and local income tax purposes. Neither the Company nor any Member shall make an election for the Company to be classified as other than a partnership pursuant to Treasury Regulations Section 301.7701-3 or otherwise.

(b) The Company shall cause federal, state, and local income tax returns for the Company to be prepared and timely filed with the appropriate authorities and shall arrange for the timely delivery to the Members of such information as is necessary for such Members to prepare their federal, state and local tax returns. All tax returns shall be prepared in a manner consistent with the Distributions made in accordance with Exhibit D.

Section 10.3 Partnership Representative.

(a) The Operating Committee shall appoint an entity as the "Partnership Representative" of the Company for purposes of Section 6223 of the Code and the Treasury Regulations promulgated thereunder, and all federal, state, and local Tax audits and litigation shall be conducted under the direction of the Partnership Representative.

(b) The Partnership Representative shall use reasonable efforts to inform each Member of all significant matters that may come to its attention by giving notice thereof and to forward to each Member copies of all significant written communications it may receive in such capacity. The Partnership Representative shall consult with the Members before taking any material actions with respect to tax matters, including actions relating to (i) an IRS examination of the Company commenced under Section 6231(a) of the Code, (ii) a request for administrative adjustment filed by the Company under Section 6227 of the Code, (iii) the filing of a petition for readjustment under Section 6234 of the Code with respect to a final notice of partnership adjustment, (iv) the appeal of an adverse judicial decision, and (v) the compromise, settlement, or dismissal of any such proceedings.

(c) The Partnership Representative shall not compromise or settle any tax audit or litigation affecting the Members without the approval of a majority of Members. Any material proposed action, inaction, or election to be taken by the Partnership Representative, including the election under Section 6226(a)(1) of the Code, shall require the prior approval of a majority of Members.

Article XI.
DISSOLUTION AND TERMINATION

Section 11.1 Dissolution of Company.

The Company shall dissolve, and its assets and business shall be wound up, upon the occurrence of any of the following events:

(a) Unanimous written consent of the Members to dissolve the Company;

(b) The sale or other disposition of all or substantially all the Company's assets outside the ordinary course of business;

(c) An event which makes it unlawful or impossible for the Company business to be continued;

(d) The withdrawal of one or more Members such that there is only one remaining Member; or

(e) The entry of a decree of judicial dissolution under § 18-802 of the Delaware Act.

Section 11.2 Liquidation and Distribution.

Following the occurrence of an event described in Section 11.1, the Members shall appoint a liquidating trustee who shall wind up the affairs of the Company by (i) selling its assets in an orderly manner (so as to avoid the loss normally associated with forced sales), and (ii) applying and distributing the proceeds of such sale, together with other funds held by the Company: (a) first, to the payment of all debts and liabilities of the Company; (b) second, to the establishments of any reserves reasonably necessary to provide for any contingent recourse liabilities and obligations; (c) third, to the Members in accordance with Exhibit D; and (d) fourth, to the Members as determined by a majority of Members.

Section 11.3 Termination.

Each of the Members shall be furnished with a statement prepared by the independent accountants retained on behalf of the Company, which shall set forth the assets and liabilities of the Company as of the date of the final distribution of Company's assets under Section [10]11.2 and the net profit or net loss for the fiscal period ending on such date. Upon compliance with the distribution plan set forth in Section [10]11.2, the Members shall cease to be such, and the

liquidating trustee shall execute, acknowledge, and cause to be filed a certificate of cancellation of the Company. Upon completion of the dissolution, winding up, liquidation, and distribution of the liquidation proceeds, the Company shall terminate.

Article XII.
EXCULPATION AND INDEMNIFICATION

Section 12.1 Exculpation.

Each Member, by and for itself, each of its Affiliates and each of its and their respective equity holders, directors, officers, controlling persons, partners, employees, successors and assigns, hereby acknowledges and agrees that it is the intent of the Company and each Member that the liability of each Member and each individual currently or formerly serving as an SRO Voting Representative or Non-SRO Voting Representative (each, an "Exculpated Party") be limited to the maximum extent permitted by Applicable Law or as otherwise expressly provided herein. In accordance with the foregoing, the Members hereby acknowledge and agree that:

(a) To the maximum extent permitted by Applicable Law or as otherwise expressly provided herein, no present or former Exculpated Party or any of such Exculpated Party's Affiliates, heirs, successors, assigns, agents or representatives shall be liable to the Company or any Member for any loss suffered in connection with a breach of any fiduciary duty, errors in judgment or other acts or omissions by such Exculpated Party; provided, however, that this provision shall not eliminate or limit the liability of such Exculpated Party for (i) acts or omissions which involve gross negligence, willful misconduct or a knowing violation of law, or (ii) as provided in Section 5.4(d) hereof, losses resulting from such Exculpated Party's Transaction Reports, Quotation Information or other information reported to the Processors by such Exculpated Party (collectively "Non-Exculpated Items"). Any Exculpated Party may consult with counsel and accountants in respect of Company affairs, and provided such Person acts in good faith reliance upon the advice or opinion of such counsel or accountants, such Person shall not be liable for any loss suffered in reliance thereon.

(b) Notwithstanding anything to the contrary contained herein, whenever in this Agreement or any other agreement contemplated herein or otherwise, an Exculpated Party is permitted or required to take any action or to make a decision in its "sole discretion" or "discretion" or that it deems "necessary," or "necessary or appropriate" or under a grant of similar authority or latitude, the Exculpated Party may, insofar as Applicable Law permits, make such decision in its sole discretion (regardless of whether there is a reference to "sole discretion" or "discretion"). The Exculpated Party (i) shall be entitled to consider such interests and factors as it desires (including its own interests), (ii) shall have no duty or obligation (fiduciary or otherwise) to give any consideration to any interest of or factors affecting the Company or the Members, and (iii) shall not be subject to any other or different standards imposed by this Agreement, or any other agreement contemplated hereby, under any Applicable Law or in equity.

Section 12.2 Right to Indemnification.

(a) Subject to the limitations and conditions provided in this Article XII and to the fullest extent permitted by Applicable Law, the Company shall indemnify each Company Indemnified Party for Losses as a result of the Company Indemnified Party being a Party to a Proceeding. Notwithstanding the foregoing, no such indemnification shall be available in the event the Company is a claimant against the Company Indemnified Party.

(b) Indemnification under this Article XII shall continue as to a Company Indemnified Party who has ceased to serve in the capacity that initially entitled such Company Indemnified Party to indemnity hereunder; provided, however, that the Company shall not be obligated to indemnify a Company Indemnified Party for the Company Indemnified Party's Non-Exculpated Items.

(c) The rights granted pursuant to this Article XII shall be deemed contract rights, and no amendment, modification, or repeal of this Article XII shall have the effect of limiting or denying any such rights with respect to actions taken or Proceedings arising prior to any amendment, modification, or repeal. It is expressly acknowledged that the indemnification provided in this Article XII could involve indemnification for negligence or under theories of strict liability.

(d) The Company shall be the primary obligor in respect of any Company Indemnified Party's claim for indemnification, for advancement of expenses, or for providing insurance, subject to this Article XII. The obligation, if any, of any Member or its Affiliates to indemnify, to advance expenses to, or provide insurance for any Company Indemnified Party shall be secondary to the obligations of the Company under this Article XII (and the Company's insurance providers shall have no right to contribution or subrogation with respect to the insurance plans of such Member or its Affiliates).

Section 12.3 Advance Payment.

Reasonable expenses incurred by a Company Indemnified Party who is a named defendant or respondent to a Proceeding shall be paid by the Company in advance of the final disposition of the Proceeding upon receipt of an undertaking by or on behalf of such Company Indemnified Party to repay such amount if it shall ultimately be determined that he or she is not entitled to be indemnified by the Company.

Section 12.4 Appearance as a Witness.

Notwithstanding any other provision of this Article XII, the Company shall pay or reimburse reasonable out-of-pocket expenses incurred by a Company Indemnified Party in connection with his appearance as a witness or other participation in a Proceeding at a time when he is not a named defendant or respondent in the Proceeding.

Section 12.5 Nonexclusivity of Rights.

The right to indemnification and the advancement and payment of expenses conferred in this Article XII shall not be exclusive of any other right which any Company Indemnified Person may have or hereafter acquire under any law (common or statutory), provision of the Certificate or this Agreement or otherwise.

Article XIII.
MISCELLANEOUS

Section 13.1 Expenses.

The Company shall pay all current expenses, including any Taxes payable by the Company, whether for its own account or otherwise required by law (including any costs of complying with applicable tax obligations), third-party service provider fees, and all administrative and processing expenses and fees, as well as any other amounts owing to the Processors under the Processor Services Agreements, to the Administrator under the Administrative Services Agreement, or to the Processors, Administrator, or FINRA under Exhibit D to this Agreement, before any allocations may be made to the Members. Appropriate reserves, as unanimously determined by the Members, may be charged to the Capital Account of the Members for (i) contingent liabilities, if any, as of the date any such contingent liabilities become known to the Operating Committee, or (ii) amounts needed to pay the Company's operating expenses, including administrative and processing expenses and fees, before any allocations are made to the Member. Each Member shall bear the cost of implementation of any technical enhancements to the System made at its request and solely for its use, subject to reapportionment should any other Member subsequently make use of the enhancement, or the development thereof.

Section 13.2 Entire Agreement.

Upon the Operative Date, this Agreement supersedes the CQ Plan, the CTA Plan, and the UTP Plan and all other prior agreements among the Members with respect to the subject matter hereof. This instrument contains the entire agreement with respect to such subject matter.

Section 13.3 Notices and Addresses.

Unless otherwise specified herein, all notices, consents, approvals, reports, designations, requests, waivers, elections, and other communications (collectively, "Notices") authorized or required to be given pursuant to this Agreement shall be in writing and may be delivered by certified or registered mail, postage prepaid, by hand, by any private overnight courier service, or notification through the Company's web portal. Such Notices shall be mailed or delivered to the Members at the addresses set forth on Exhibit A or such other address as a Member may notify the other Members of in writing. Any Notices to be sent to the Company shall be delivered to the principal place of business of the Company or at such other address as the Operating Committee may specify in a notice sent to all of the Members. Notices shall be

effective (i) if mailed, on the date three days after the date of mailing, (ii) if hand delivered or delivered by private courier, on the date of delivery, or (iii) if sent by through the Company's web portal, on the date sent; provided, however, that notices of a change of address shall be effective only upon receipt.

Section 13.4 Governing Law.

This Agreement shall be governed by and construed in accordance with the Delaware Act and internal laws and decisions of the State of Delaware, without regard to the conflicts of laws principles thereof; provided, however, that the rights and obligations of the Members, the Processors and the Administrator, and of Vendors, Subscribers, and other Persons contracting with the Company in respect of the matters covered by this Agreement, shall at all times also be subject to any applicable provisions of the Exchange Act and any rules and regulations promulgated thereunder. For the avoidance of doubt, nothing in this Agreement waives any protection or limitation of liability afforded any of the Members or any of their Affiliates by common law, including the doctrines of self-regulatory organization immunity and federal preemption.

Section 13.5 Amendments.

(a) Except as this Agreement otherwise provides, this Agreement may be modified from time to time when authorized by the Operating Committee pursuant to Section 4.3, subject to the approval of the Commission or when such modification otherwise becomes effective pursuant to Section 11A of the Exchange Act and Rule 608 of Regulation NMS.

(b) [Notwithstanding Section 13.5(a), Articles IX, X, XI, and XII may be modified upon approval by a majority of Members; provided, however, that Operating Committee approval pursuant to Section 4.3 will be required for modifications to the allocation of all items of income, gain, loss, and deduction in accordance with Exhibit D.

(c)]In the case of a Ministerial Amendment, the Chair of the Company's Operating Committee may modify this Agreement by submitting to the Commission an appropriate amendment that sets forth the modification; provided, however, that 48-hours advance notice of the amendment to the Operating Committee <u>in writing</u> is required. Such an amendment shall become effective upon filing with the Commission in accordance with Section 11A of the Exchange Act and Rule 608 of Regulation NMS.

[(d)]<u>(c)</u>"Ministerial Amendment" means an amendment to this Agreement that pertains solely to any one or more of the following:

(i) admitting a new Member to the Company;

(ii) changing the name or address of a Member;

(iii) incorporating a change that the Commission has implemented by rule and that requires no conforming language to the text of this Agreement;

(iv) incorporating a change (A) that the Commission has implemented by rule, (B) that requires conforming language to the text of this Agreement, and (C) whose conforming language to the text of this Agreement has been approved by the affirmative vote of the Operating Committee pursuant to Section 4.3;

(v) incorporating a change (A) that a Governmental Authority requires relating to the governance or operation of an LLC, (B) that requires conforming language to the text of this Agreement, and (C) whose conforming language to the text of this Agreement has been approved by the affirmative vote of the Operating Committee pursuant to Section 4.3[or upon approval by a majority of Members pursuant to Section 13.5(b), as applicable]; or

(vi) incorporating a purely technical change, such as correcting an error or an inaccurate reference to a statutory provision, or removing language that has become obsolete.

Section 13.6 Successors.

This Agreement shall be binding upon and inure to the benefit of the Members and their respective legal representatives and successors.

Section 13.7 Limitation on Rights of Others.

None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Company. Furthermore, except as provided in Section 3.7(b), the Members shall not have any duty or obligation to any creditor of the Company to make any contribution to the Company or to issue any call for capital pursuant to this Agreement. Nothing in this Agreement shall be deemed to create any legal or equitable right, remedy or claim in any Person not a party hereto (other than any Person indemnified under Article XII).

Section 13.8 Counterparts.

This Agreement may be executed by the Members in any number of counterparts, no one of which need contain the signature of all Members. As many such counterparts as shall together contain all such signatures shall constitute one and the same instrument.

Section 13.9 Headings.

The section and other headings contained in this Agreement are for reference purposes only and shall not be deemed to be a part of this Agreement or to affect the meaning or interpretation of any provisions of this Agreement.

Section 13.10 Validity and Severability.

If any provision of this Agreement shall be held invalid or unenforceable, that shall not affect the validity or enforceability of any other provisions of this Agreement, all of which shall remain in full force and effect.

Section 13.11 Statutory References.

Each reference in this Agreement to a particular statute or regulation, or a provision thereof, shall be deemed to refer to such statute or regulation, or provision thereof, or to any similar or superseding statute or regulation, or provision thereof, as is from time to time in effect.

Section 13.12 Modifications to be in Writing.

This Agreement constitutes the entire understanding of the parties hereto with respect to the subject matter hereof, and no amendment, modification or alteration shall be binding unless the same is in writing and adopted in accordance with the provisions of Section 13.5.

[Signature Pages Follow]

IN WITNESS WHEREOF, the undersigned Members have executed this Agreement as of the day and year first above written.

EXHIBIT A

Members of CT Plan LLC

Member Name and Address
Cboe BYX Exchange, Inc. 400 South LaSalle Street Chicago, Illinois 60605
Cboe BZX Exchange, Inc. 400 South LaSalle Street Chicago, Illinois 60605
Cboe EDGA Exchange, Inc. 400 South LaSalle Street Chicago, Illinois 60605
Cboe EDGX Exchange, Inc. 400 South LaSalle Street Chicago, Illinois 60605
Cboe Exchange, Inc. 400 South LaSalle Street Chicago, Illinois 60605
Financial Industry Regulatory Authority, Inc. 1735 K Street, N.W. Washington, D.C. 20006
Investors' Exchange LLC 3 World Trade Center 58th Floor New York, New York 10007
Long-Term Stock Exchange, Inc. 300 Montgomery St., Ste 790 San Francisco, CA 94104
MEMX LLC 111 Town Square Place, Suite 520 Jersey City, New Jersey 07310
Nasdaq BX, Inc. One Liberty Plaza 165 Broadway New York, New York 10006

Member Name and Address
Nasdaq ISE, LLC One Liberty Plaza 165 Broadway New York, New York 10006
Nasdaq PHLX LLC FMC Tower, Level 8 2929 Walnut Street Philadelphia, Pennsylvania 19104
The Nasdaq Stock Market LLC One Liberty Plaza 165 Broadway New York, NY 10006
New York Stock Exchange LLC 11 Wall Street New York, New York 10005
NYSE American LLC 11 Wall Street New York, New York 10005
NYSE Arca, Inc. 11 Wall Street New York, New York 10005
NYSE Chicago, Inc. 11 Wall Street New York, New York 10005
NYSE National, Inc. 11 Wall Street New York, NY 10005

EXHIBIT B

Disclosures

(a) The Members must respond to the following questions and instructions:

(i) Is the Member for profit or not-for-profit? If the Member is for profit, is it publicly or privately owned? If privately owned, list any owner with an interest of 5% or more of the Member, where to the Member'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 CT Feeds and/or Member PDP.

(ii) Does the Member offer PDP? If yes, list each product, describe its content, and provide a link to where fees for each product are disclosed.

(iii) Provide the names of the Voting Representative[and], any alternate Voting Representatives, and any Member Observers designated by the Member. Also provide a narrative description of such [representatives]persons' roles within the Member organization, including the title of each individual as well as any direct responsibilities related to the development, dissemination, sales, or marketing of the Member's PDP, 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 operation of the Company. If such [representatives]persons work in or with the Member's PDP business, describe such [representatives]persons' roles and describe how that business and such [representatives]persons' Company responsibilities impacts their compensation. In addition, describe how such [representatives]persons' responsibilities with the PDP business may present a conflict of interest with their responsibilities to the Company.

(iv) Does the Member, its Voting Representative, [or]its alternate Voting Representative, its Member Observers, 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 Company? 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 Company.

(b) The Processors must respond to the following questions and instructions:

(i) Is the Processor an affiliate of or affiliated with any Member? If yes, disclose the Member(s) and describe the nature of the affiliation. Include an entity-level organizational chart depicting the Processor and its affiliates.

(ii) Provide a narrative description of the functions directly performed by senior staff, the manager employed by the Processor to provide Processor services to the Company, and the staff that reports to that manager.

(iii) Does the Processor provide any services for any Member's PDP, other NMS Plans, or creation of consolidated equity data information for its own use? If Yes, disclose the services the Processor performs and identify which NMS Plans. Does the Processor have any profit or loss responsibility for a Member's PDP or any other professional involvement with persons the Processor knows are engaged in a Member's PDP business? If so, describe.

(iv) List the policies and procedures established to safeguard Restricted Information, Highly Confidential Information, and Confidential Information that is applicable to the Processor.

(v) 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 Company? 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 Company.

(c) The Administrator must respond to the following questions and instructions:

(i) Provide a narrative description of the functions directly performed by senior staff, the administrative services manager, and the staff that reports to that manager.

(ii) Does the Administrator provide any services for any Member's PDP? If yes, what services? Does the Administrator have any profit or loss responsibility, or licensing responsibility, for a Member's PDP or any other professional involvement with persons the Administrator knows are engaged in the Member's PDP business? If so, describe.

(iii) List the policies and procedures established to safeguard Restricted Information, Highly Confidential Information, and Confidential Information that is applicable to the Administrator.

(iv) 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 Company? 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 Company.

(d) The Non-SRO Voting Representatives must respond to the following questions and instructions:

(i) Provide the Non-SRO Voting Representative's title and a brief description of the Non-SRO Voting Representative's role within the firm as well as any direct responsibilities related to the procurement of PDP or CT Feeds or the development, dissemination, sales, or marketing of PDP, 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 operation of the Company. If such representatives work in or with their employer's market data business, describe such Non-SRO Voting Representative's roles and describe how that business impacts their compensation. In addition, describe how such representatives' responsibilities with the market data business may present a conflict of interest with their responsibilities to the Company.

(ii) Does the Non-SRO Voting Representative have responsibilities related to the firm's use or procurement of market data?

(iii) Does the Non-SRO Voting Representative have responsibilities related to the firm's trading or brokerage services?

(iv) Does the Non-SRO Voting Representative's firm use the CT Feeds? Does the Non-SRO Voting Representative's firm use a Member's PDP?

(v) Does the Non-SRO Voting Representative's firm offer PDP? If yes, list each product, described its content, and provide information about the fees for each product.

(vi) Does the Non-SRO Voting Representative's firm have an ownership interest of 5% or more in one or more Members? If yes, list the Member(s).

(vii) Does the Non-SRO Voting Representative actively participate in any litigation against the CQ Plan, CTA Plan, UTP Plan, or the Company?

(viii) Does the Non-SRO Voting Representative or the Non-SRO Voting Representative'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 Company. 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 Company.

(e) Each service provider or subcontractor that has agreed in writing to provide required disclosures and be treated as a Disclosing Party shall respond to the following questions and instructions:

(i) Is the service provider or subcontractor affiliated with a Member, Processor, Administrator, or employer of a Non-SRO Voting Representative? If yes, disclose with whom the person is affiliated and describe the nature of the affiliation.

(ii) 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 Company.

(iii) 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.

(iv) 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 Company? 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 Company.

(f) The responses to these questions will be posted on the Company'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 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.

EXHIBIT C

Confidentiality Policy

(a) Purpose and Scope.

(i) The purpose of this Confidentiality Policy is to provide guidance to the Operating Committee, and all subcommittees thereof, regarding the confidentiality of any data or information (in physical or electronic form) generated by, accessed by, or transmitted to the Operating Committee or any subcommittee, as well as discussions occurring at a meeting of the Operating Committee or any subcommittee.

(ii) This Policy applies to all Covered Persons. All Covered Persons must adhere to the principles set out in this Policy and all Covered Persons that are natural persons may not receive Company data and information until they affirm in writing that they have read this Policy and undertake to abide by its terms.

(iii) Covered Persons may not disclose Restricted, Highly Confidential, or Confidential information except as consistent with this Policy and directed by the Operating Committee.

(iv) The Administrator and Processors will establish written confidential information policies that provide for the protection of information under their control and the control of their Agents, including policies and procedures that provide systemic controls for classifying, declassifying, redacting, aggregating, anonymizing, and safeguarding information, that is in addition to, and not less than, the protection afforded herein. Such policies will be reviewed and approved by the Operating Committee pursuant to Section 4.3, publicly posted, and made available to the Operating Committee for review and approval every two years thereafter or when changes are made, whichever is sooner.

(v) Information will be classified solely based on its content.

(b) Procedures.

(i) General

(A) The Administrator and Processors will be the custodians of all documents discussed by the Operating Committee and will be responsible for maintaining the classification of such documents pursuant to this Policy.

(B) The Administrator may, under delegated authority, designate documents as Restricted, Highly Confidential, or Confidential, which will be determinative unless altered by an affirmative vote of the Operating Committee pursuant to Section 4.3.

(C) The Administrator will ensure that all Restricted, Highly Confidential, or Confidential documents are properly labeled and, if applicable, electronically safeguarded.

(D) All contracts between the Company and its Agents shall require Company information to be treated as Confidential Information that may not be disclosed to third parties, except as necessary to effect the terms of the contract or as required by law, and shall incorporate the terms of this Policy, or terms that are substantially equivalent or more restrictive, into the contract.

(ii) Procedures Concerning Restricted Information. Except as provided below, Covered Persons in possession of Restricted Information are prohibited from disclosing it to others, including Agents. This prohibition does not apply to disclosures to the staff of the SEC or as otherwise required by Applicable Law, or to other Covered Persons as expressly provided for by this Policy. Restricted Information will be kept in confidence by the Administrator and Processors and will not be disclosed to the Operating Committee or any subcommittee thereof, or during Executive Session, except as follows:

(A) If the Administrator determines that it is appropriate to share a customer's financial information with the Operating Committee or a subcommittee thereof, the Administrator will first anonymize the information by redacting the customer's name and any other information that may lead to the identification of the customer.

(B) The Administrator may disclose the identity of a customer that is the subject of Restricted Information in Executive Session only if the Administrator determines in good faith that it is necessary to disclose the customer's identity in order to obtain input or feedback from the Operating Committee or a subcommittee thereof about a matter of importance to the Company. In such an event, the Administrator will change the designation of the information at issue from "Restricted Information" to "Highly Confidential Information," and its use will be governed by the procedures for Highly Confidential Information in subparagraph (iii) below.

(C) If it determines that doing so is in furtherance of the interests of the Plan, the Operating Committee may authorize the disclosure of specified Restricted Information to specific Covered Persons or third parties. Covered Persons and third parties authorized by the Operating Committee that receive or have access to Restricted Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of this policy. Authorization shall be on a case-by-case basis, unless the Operating Committee grants standing approval to disclose specified recurring information to specific Covered Persons.

(iii) Procedures Concerning Highly Confidential Information

(A) Disclosure of Highly Confidential Information:

(1) Highly Confidential Information may be disclosed in Executive Session of the Operating Committee or to the subcommittee established pursuant to Section 4.7(c). Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents, except [to other Covered Persons who need the Highly Confidential Information to fulfill their responsibilities to the Company]as provided below. This prohibition does not apply to disclosures to the staff of the SEC[or as otherwise required by law (such as those required to receive the information to ensure the Member complies with its regulatory obligations), or to other Covered Persons authorized to receive it].

(2) Highly Confidential Information may be disclosed, as required by Applicable Law.

(3) Highly Confidential Information may be disclosed to the staff of the SEC, unless it is protected by the Attorney-Client Privilege or the Work Product Doctrine. Any disclosure of Highly Confidential Information to the staff of the SEC will be accompanied by a FOIA Confidential Treatment request.

(4) SRO Voting Representatives may share the following types of Highly Confidential Information with officers of their Member SRO who have direct or supervisory responsibility for the SRO's participation in the Company—or with Agents for that Member—provided that such information may not be used in the development, modeling, pricing, licensing, or sale of PDP: information regarding the Company's contract negotiations with the Processor(s) or Administrator; communications with, and work-product of, counsel to the Company; and information concerning personnel matters that affect the employees of the SRO or of the Company. Each SRO Voting Representative that shares Highly Confidential Information pursuant to this subparagraph (4) shall maintain a log reflecting each instance of such sharing, including the information shared, the persons receiving the information, and the date the information was shared. Covered Persons who receive or have access to Highly Confidential Information pursuant to this subparagraph (4) must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of this policy.

(5) The Operating Committee may authorize the disclosure of specified Highly Confidential Information to specific third parties acting

as Agents of the Company. Third parties authorized by the Operating Committee that receive or have access to Highly Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the goals of this policy. Authorization shall be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific third parties.

[(3)](6) Apart from the foregoing, the Operating Committee has no power to authorize any other disclosure of Highly Confidential Information.

(B) In the event that a Covered Person is determined by an affirmative vote of the Operating Committee pursuant to this Policy to have disclosed Highly Confidential Information, the Operating Committee will determine the appropriate remedy for the breach based on the facts and circumstances of the event. For an SRO Voting Representative or Member Observer, remedies include a letter of complaint submitted to the SEC, which may be made public by the Operating Committee. For a Non-SRO Voting Representative, remedies include removal of that Non-SRO Voting Representative.

(iv) Procedures Concerning Confidential Information

(A) Confidential Information may be disclosed during a meeting of the Operating Committee or any subcommittee thereof. Additionally, a Covered Person may disclose Confidential Information only to other persons who need to [allow such other persons]receive such information to fulfill their responsibilities to the [Company]Plan, including oversight of the Plan. The recipient must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of this policy. A Covered Person also may disclose Confidential Information to the staff of the SEC, as authorized by the Operating Committee as described below, or as may be otherwise required by law.

(B) The Operating Committee may authorize the disclosure of Confidential Information by an affirmative vote of the Operating Committee pursuant to Section 4.3. Authorization shall be on a case-by-case basis, unless the Operating Committee grants standing approval to allow disclosure of specified recurring information to specific Covered Persons. Notwithstanding the foregoing, the Operating Committee will not authorize the disclosure of Confidential Information that is generated by a Member or Non-SRO Voting Representative and designated by such Member or Non-SRO Voting Representative as Confidential, unless such Member or Non-SRO Voting Representative consents to the disclosure.

(C) Non-SRO Voting Representatives may be authorized by the Operating Committee to disclose particular Confidential Information only in furtherance of the interests of the Company, to enable them to consult with industry representatives or technical experts, provided that the Non-SRO Voting Representatives take any steps requested by the Operating Committee to prevent further dissemination of that Confidential Information, including providing the individual(s) consulted with a copy of this Policy and requesting that person to maintain the confidentiality of such information in a manner consistent with this policy.

(D) A Covered Person that is a representative of a Member may be authorized by the Operating Committee to disclose particular Confidential Information to other employees or agents of the Member or its affiliates only in furtherance of the interests of the Company as needed for such Covered Person to perform his or her function on behalf of the Company. A copy of this Policy will be made available to recipients of such information who are employees or agents of a Member or its affiliates that are not Covered Persons, who will be required to abide by this Confidentiality Policy.

(E) A Covered Person may disclose their own individual views and statements that may otherwise be considered Confidential Information without obtaining authorization of the Operating Committee, provided that in so disclosing, the Covered Person is not disclosing the views or statements of any other Covered Person or Member that are considered Confidential Information.

(F) A person that has reason to believe that Confidential Information has been disclosed by another without the authorization of the Operating Committee or otherwise in a manner inconsistent with this Policy may report such potential unauthorized disclosure to the Chair of the Operating Committee. In addition, a Covered Person that discloses Confidential Information without the authorization of the Operating Committee will report such disclosure to the Chair of the Operating Committee. Such self-reported unauthorized disclosure of Confidential Information will be recorded in the minutes of the meeting of the Operating Committee and will contain: (a) the name(s) of the person(s) who disclosed such Confidential Information, and (b) a description of the Confidential Information disclosed. The name(s) of the person(s) who disclosed such Confidential Information will also be recorded in any publicly available summaries of Operating Committee minutes.

EXHIBIT D

Distributions

Cost Allocation and Revenue Sharing

(a) **Payments**. In accordance with Paragraph (l) of this Exhibit D, each Member will receive an annual payment (if any) for each calendar year that is equal to the sum of the Member's Trading Shares and Quoting Shares (each as defined below), in each Eligible Security for such calendar year. In the event that total Net Distributable Operating Income (as defined below) is negative for a given calendar year, each Member will receive an annual bill for such calendar year to be determined according to the same formula (described in this paragraph) for determining annual payments to the Members. Unless otherwise stated in this agreement, a year shall run from January 1st to December 31st and quarters shall end on March 31st, June 30th, September 30th, and December 31st. The Company shall cause the Administrator to provide the Members with written estimates of each Member's percentage of total volume within five business days of the end of each calendar month.

(b) **Security Income Allocation**. The "Security Income Allocation" for an Eligible Security shall be determined by multiplying (i) the Net Distributable Operating Income under this Agreement for the calendar year by (ii) the Volume Percentage for such Eligible Security (the "Initial Allocation"), and then adding or subtracting any amounts specified in the reallocation set forth below.

(c) **Volume Percentage**. The "Volume Percentage" for an Eligible Security shall be determined by dividing (A) the square root of the dollar volume of Transaction Reports disseminated by the Processors in such Eligible Security during the calendar year by (B) the sum of the square roots of the dollar volume of Transaction Reports disseminated by the Processors in each Eligible Security during the calendar year.

(d) **Cap on Net Distributable Operating Income**. If the Initial Allocation of Net Distributable Operating Income in accordance with the Volume Percentage of an Eligible Security equals an amount greater than $4.00 multiplied by the total number of qualified Transaction Reports in such Eligible Security during the calendar year, the excess amount shall be subtracted from the Initial Allocation for such Eligible Security and reallocated among all Eligible Securities in direct proportion to the dollar volume of Transaction Reports disseminated by the Processors in Eligible Securities during the calendar year. A Transaction Report with a dollar volume of $5,000 or more shall constitute one qualified Transaction Report. A Transaction Report with a dollar volume of less than $5,000 shall constitute a fraction of a qualified Transaction Report that equals the dollar volume of the Transaction Report divided by $5,000.

(e) **Trading Share**. The "Trading Share" of a Member in an Eligible Security shall be determined by multiplying (i) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (ii) the Member's Trade Rating in the Eligible Security.

(f) **Trade Rating**. A Member's "Trade Rating" in an Eligible Security shall be determined by taking the average of (A) the Member's percentage of the total dollar volume of

Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year, and (B) the Member's percentage of the total number of qualified Transaction Reports disseminated by the Processors in the Eligible Security during the calendar year.

(g) **Quoting Share**. The "Quoting Share" of a Member in an Eligible Security shall be determined by multiplying (A) an amount equal to fifty percent of the Security Income Allocation for the Eligible Security by (B) the Member's Quote Rating in the Eligible Security.

(h) **Quote Rating**. A Member's "Quote Rating" in an Eligible Security shall be determined by dividing (A) the sum of the Quote Credits earned by the Member in such Eligible Security during the calendar year by (B) the sum of the Quote Credits earned by all Members in such Eligible Security during the calendar year.

(i) **Quote Credits**. A Member shall earn one "Quote Credit" for each second of time (with a minimum of one full second) multiplied by dollar value of size that an automated best bid (offer) transmitted by the Member to the Processors during regular trading hours is equal to the price of the National Best Bid and Offer in the Eligible Security and does not lock or cross a previously displayed "automated quotation" (as defined under Rule 600 of Regulation NMS). The dollar value of size of a quote shall be determined by multiplying the price of a quote by its size.

(j) **Net Distributable Operating Income**. The "Net Distributable Operating Income" for any particular calendar year shall mean:

(i) all cash revenues, funds and proceeds received by the Company during such calendar year (other than Capital Contributions by the Members or amounts paid pursuant to Section 3.7(b) of this Agreement), including all revenues from (A) the CT Feeds, which includes the dissemination of information with respect to Eligible Securities to foreign marketplaces, and (B) FINRA quotation data and last sale information for securities classified as OTC Equity Securities under FINRA's Rule 6400 Series (the "FINRA OTC Data") ((A) and (B) collectively, the "Data Feeds"), and (C) any Membership Fees; less

(ii) 6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with respect to Network C Securities and FINRA OTC Data (but, for the avoidance of doubt, not including revenue attributable to the segment of the Data Feeds reflecting the dissemination of information with respect to Network A Securities and Network B Securities), which amount shall be paid to FINRA as compensation for the FINRA OTC Data;[1] less

[1] All costs associated with collecting, consolidating, validating, generating, and disseminating the FINRA OTC Data are borne directly by FINRA and not the Company and the Members.

(iii) reasonable working capital reserves and reasonable reserves for contingencies for such calendar year, as determined by the Operating Committee, and all costs and expenses of the Company during such calendar year, including:

(A) all amounts payable during such calendar year to the Administrator pursuant to the Administrative Services Agreement or this Agreement;

(B) all amounts payable during such calendar year to the Processors pursuant to the Processor Services Agreements or this Agreement; and

(C) all amounts payable during such calendar year to third-party service providers engaged by or on behalf of the Company.

(k) **Initial Eligibility**. At the time a Member implements a Processor-approved electronic interface with the Processors, the Member will become eligible to receive revenue.

(l) **Quarterly Distributions**. The Company shall cause the Administrator to provide Members with written estimates of each Member's quarterly Net Distributable Operating Income within 45 calendar days of the end of the quarter, and estimated quarterly payments or billings shall be made on the basis of such estimates. All quarterly payments or billings shall be made to each eligible Member within 45 days following the end of each calendar quarter in which the Member is eligible to receive revenue; provided, that each quarterly payment or billing shall be reconciled against a Member's cumulative year-to-date payment or billing received to date and adjusted accordingly; further, provided, that the total of such estimated payments or billings shall be reconciled at the end of each calendar year and, if necessary, adjusted by March 31st of the following year. Interest shall be included in quarterly payments and in adjusted payments made on March 31st of the following year. Such interest shall accrue monthly during the period in which revenue was earned and not yet paid and will be based on the 90-day Treasury bill rate in effect at the end of the quarter in which the payment is made. Monthly interest shall start accruing 45 days following the month in which it is earned and accrue until the date on which the payment is made.

(m) **Itemized Statements**. In conjunction with calculating estimated quarterly and reconciled annual payments under this Exhibit D, the Company shall cause the Administrator to submit to the Members a quarterly itemized statement setting forth the basis upon which Net Distributable Operating Income was calculated. Such Net Distributable Operating Income shall be adjusted annually based solely on the quarterly itemized statement audited pursuant to the annual audit. The Company shall cause the Administrator to pay or bill Members for the audit adjustments within thirty days of completion of the annual audit. Upon the affirmative vote of Voting Representatives pursuant to Section 4.3, the Company shall cause the Administrator to engage an independent auditor to audit the Administrator's costs or other calculation(s).

EXHIBIT E

Fees

To be determined by the Operating Committee under this Agreement