

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-87906; File No. 4-757)

January 8, 2020

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

I. INTRODUCTION

As discussed in more detail in the attached proposed order (“Proposed Order”),¹ certain market developments have given rise to concerns about whether—as currently structured—the existing national market system plans (the “Equity Data Plans”)² that govern the public dissemination of real-time, consolidated equity market data for national market system stocks continue to fulfill their statutory purpose under Section 11A of the Securities Exchange Act of 1934 (“Act”).³ To begin the process of addressing these concerns, and pursuant to Section 11A(a)(3)(B) of the Act,⁴ the Commission is publishing for comment the attached Proposed

¹ See Attachment A.

² 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”). Each of the Equity Data Plans is an NMS plan under Rule 608 of Regulation NMS. 17 CFR 242.608; see also Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (order approving CTA Plan); 15009 (July 28, 1978), 43 FR 34851 (Aug. 7, 1978) (order temporarily approving CQ Plan); 16518 (Jan. 22, 1980), 45 FR 6521 (Jan. 28, 1980) (order permanently approving CQ Plan); and 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (order approving UTP Plan). The Commission notes that the options exchanges are participants in the Limited Liability Company Agreement of Options Price Reporting Authority, LLC (“OPRA Plan”), an NMS plan under Rule 608 of Regulation NMS, which governs the collection, consolidation, processing, and dissemination of last sale and quotation information for listed options. See Securities Exchange Act Release Nos. 17638 (Mar. 18, 1981), 22 S.E.C. Docket 484 (Mar. 31, 1981); 61367 (Jan. 15, 2010), 75 FR 3765 (Jan. 22, 2010). The Commission is proposing to take an incremental approach to addressing governance issues related to NMS plans and is at this time proposing to address only the governance of the Equity Data Plans. The Commission may in the future consider the governance of the OPRA Plan.

³ 15 U.S.C. 78k-1.

⁴ 15 U.S.C. 78k-1(a)(3)(B).

Order, which if ultimately issued by the Commission, would require the participants in the Equity Data Plans⁵ to propose a single, new equity data plan (“New Consolidated Data Plan”).

Based upon input received from a broad range of market participants (including the SROs), the Commission’s Equity Market Structure Advisory Committee, and its own regulatory oversight of the Equity Data Plans, the Commission has set forth in the Proposed Order its concerns regarding the Equity Data Plan’s provision of equity market data,⁶ its views regarding issues arising from the current governance structure of the Equity Data Plans,⁷ and the specific governance provisions that the Commission preliminarily believes would enable the New Consolidated Data Plan to address these concerns and issues.⁸ The Commission seeks public comment on each of these aspects of the Proposed Order.

To the extent that the Participants have additional insights into the concerns and issues discussed in the Proposed Order, or are able to identify and suggest additional or alternative measures to those that the Commission has preliminarily set forth in the Proposed Order, the Commission will consider such information and suggestions, as well as any other comment on the Proposed Order. The Commission requests that any alternatives include a comprehensive explanation as to why the alternative would be effective in addressing the significant issues

⁵ Cboe BYX Exchange, Inc. (“BYX”), Cboe BZX Exchange, Inc. (“BZX”), Cboe EDGA Exchange, Inc. (“EDGA”), Cboe EDGX Exchange, Inc. (“EDGX”), Cboe Exchange, Inc. (“Cboe”), Investors Exchange LLC (“IEX”), Long Term Stock Exchange, Inc. (“LTSE”), Nasdaq BX, Inc. (“BX”), Nasdaq ISE, LLC (“ISE”), Nasdaq PHLX LLC (“PHLX”), Nasdaq Stock Market LLC (“Nasdaq”), New York Stock Exchange LLC (“NYSE”), NYSE American LLC (“NYSE American”), NYSE Arca, Inc. (“NYSE Arca”), NYSE Chicago, Inc. (“NYSE Chicago”), NYSE National, Inc. (“NYSE National”), and Financial Industry Regulatory Authority, Inc. (“FINRA”) (each a “Participant” or a “Self-Regulatory Organization” (“SRO”) and, collectively, the “Participants” or “the SROs”)

⁶ See Attachment A, Section II.A.

⁷ See Attachment A, Section II.B.

⁸ See Attachment A, Sections II.C & II.D.

discussed in the Proposed Order regarding the current governance and operation of the Equity Data Plans.

After considering any comments received on the Proposed Order, the Commission will consider what action to take, including whether to issue a final order requiring the Participants to file a New Consolidated Data Plan. If the Commission issues such a final order, the New Consolidated Data Plan then submitted by the Participants would be published for public comment, and, after considering any comments received on the New Consolidated Data Plan filed by the Participants, the Commission would consider whether to approve the New Consolidated Data Plan, with any changes or subject to such conditions as the Commission may deem necessary or appropriate.⁹ Unless or until a New Consolidated Data Plan has been approved by the Commission, the Equity Data Plans will continue to govern the collection, processing, and dissemination of equity market data.

The Participants have submitted proposed amendments to the existing Equity Data Plans to (a) make mandatory their current disclosure policies with respect to conflicts of interest,¹⁰ and (b) establish a policy regarding the confidential treatment of any data or information generated, accessed, transmitted to, or discussed by the operating committee.¹¹ Contemporaneously with the

⁹ See Rule 608 of Regulation NMS, 17 CFR 242.608.

¹⁰ See Thirtieth Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Second Substantive Amendment to the Restated CQ Plan, dated July 3, 2019, submitted to Vanessa Countryman, Secretary, Commission; Forty-Fourth Amendment to the UTP Plan, dated July 3, 2019, submitted to Vanessa Countryman, Secretary, Commission.

¹¹ See Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Fourth Substantive Amendment to the Restated CQ Plan, dated November 19, 2019, submitted to Vanessa Countryman, Secretary, Commission; Forty-Seventh Amendment to the UTP Plan, dated November 19, 2019, submitted to Vanessa Countryman, Secretary, Commission.

publication of this Notice of Proposed Order, the Commission is publishing for notice and comment these proposed amendments to the Equity Data Plans.¹²

* * *

Interested persons are invited to submit written presentations of views, data, and arguments concerning the Proposed Order, including the Proposed Order's discussion of concerns with the current provision of equity market data by the Equity Data Plans, the Proposed Order's discussion of issues with the current governance structure of the Equity Data Plans, the specific provisions set forth in the Proposed Order to address those concerns and issues, and the likely economic consequences, including those of any proposed alternative provisions.

II. PROCEDURE FOR WRITTEN COMMENTS

All comments should be submitted by [insert date 45 days from publication in the Federal Register]. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to: rule-comments@sec.gov. Please include File Number 4-757 on the subject line.

Paper comments:

- Send paper comments to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

¹² See Securities Exchange Act Release Nos. 87907 (Jan. 8, 2020) (Notice of Filing of the Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Fourth Substantive Amendment to the Restated CQ Plan); 87908 (Jan. 8, 2020) (Notice of Filing of the Forty-Fourth Amendment to the UTP Plan); 87909 (Jan. 8, 2020) (Notice of Filing of the Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Fourth Substantive Amendment to the Restated CQ Plan); and 87910 (Jan. 8, 2020) (Notice of Filing of the Forty-Seventh Amendment to the UTP Plan).

All submissions should refer to File Number 4-757. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web Site (<https://www.sec.gov/rules/sro.shtml>). Copies of the all written statements with respect to the Proposed Order that are filed with the Commission, and all written communications relating to the Proposed Order between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4-757 and should be submitted on or before [insert date 45 days from publication in the Federal Register].

By the Commission.

Vanessa A. Countryman
Secretary

ATTACHMENT A

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-)

[DATE]

ORDER DIRECTING THE EXCHANGES AND THE FINANCIAL INDUSTRY REGULATORY AUTHORITY TO SUBMIT A NEW NATIONAL MARKET SYSTEM PLAN REGARDING CONSOLIDATED EQUITY MARKET DATA

Notice is hereby given that, pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 (“Act”),¹ the Securities and Exchange Commission (“Commission”) orders the Cboe BYX Exchange, Inc. (“BYX”), Cboe BZX Exchange, Inc. (“BZX”), Cboe EDGA Exchange, Inc. (“EDGA”), Cboe EDGX Exchange, Inc. (“EDGX”), Cboe Exchange, Inc. (“Cboe”), Investors Exchange LLC (“IEX”), Long Term Stock Exchange, Inc. (“LTSE”), Nasdaq BX, Inc. (“BX”), Nasdaq ISE, LLC (“ISE”), Nasdaq PHLX LLC (“PHLX”), Nasdaq Stock Market LLC (“Nasdaq”), New York Stock Exchange LLC (“NYSE”), NYSE American LLC (“NYSE American”), NYSE Arca, Inc. (“NYSE Arca”), NYSE Chicago, Inc. (“NYSE Chicago”), NYSE National, Inc. (“NYSE National”), and Financial Industry Regulatory Authority, Inc. (“FINRA”) (each a “Participant” or a “Self-Regulatory Organization” (“SRO”) and, collectively, the “Participants” or “the SROs”) to act jointly in developing and filing with the Commission a proposed new single national market system plan (the “New Consolidated Data Plan”), which will replace the existing national market system plans (the “Equity Data Plans”)² that govern the public dissemination of real-time, consolidated equity market data for national market system

¹ 15 U.S.C. 78k-1(a)(3)(B).

² See infra note 31 and accompanying text.

stocks (“NMS stocks”).³ The New Consolidated Data Plan shall be filed with the Commission pursuant to Rule 608 of Regulation NMS⁴ no later than [90 days after the order is issued].

The public dissemination of consolidated information about quotes and trades in equity securities is a fundamental component of the national market system. In creating the national market system, Congress specifically found that ensuring the availability of this information is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets.⁵ As the Commission has stated, “one of the Commission’s most important responsibilities is to preserve the integrity and affordability of the consolidated data stream.”⁶

In the Commission’s view, changes in the market⁷ 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. Under the current governance structure of the Equity Data Plans, the Participants have exclusive control of the Equity Data Plans. It is the Commission’s belief that the Participants’ conflicts of interest, combined with the concentration within exchange groups of voting power in the Equity Data Plans, create 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.⁸ Addressing these and other issues with the current

³ Generally, NMS stocks include any security, other than an option, for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan. See 17 CFR 242.600(b)(47).

⁴ 17 CFR 242.608.

⁵ 15 U.S.C. 78k-1(a)(1)(C).

⁶ Regulation NMS, Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37560 (June 29, 2005) (“Regulation NMS Release”).

⁷ See infra Section II.A. and Section II.B.

⁸ 15 U.S.C. 78k-1(a)(1)-(2).

governance structure of the Equity Data Plans is a key step in responding to the broader concerns about the consolidated data feeds.⁹

The Commission further believes that the consolidated data feeds can be improved by consolidating the three existing, separate Equity Data Plans into a single New Consolidated Data Plan. A New Consolidated Data Plan should reduce existing redundancies, inefficiencies, and inconsistencies between and among the Equity Data Plans and should simplify plan governance and maintenance. The Commission is therefore ordering the SROs to develop the New Consolidated Data Plan to address the governance issues described in this Order and to consolidate the Equity Data Plans into the single New Consolidated Data Plan. Based upon input received from a broad range of market participants (including the SROs), the Commission's Equity Market Structure Advisory Committee ("EMSAC"), and its own regulatory oversight of the Equity Data Plans, the Commission has set forth below specific governance provisions that the Commission believes would enable the New Consolidated Data Plan to address these issues.

I. BACKGROUND

In 1975, Congress, through the enactment of Section 11A of the Act,¹⁰ directed the Commission to facilitate the establishment of a national market system for the trading of securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Act.¹¹ Among the findings and objectives of Section 11A(a)(1) are that new data processing and communications techniques create the opportunity for more efficient and

⁹ See infra Section II.A.

¹⁰ 15 U.S.C. 78k-1.

¹¹ 15 U.S.C. 78k-1(a)(1).

effective market operations,¹² and that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure the availability of information with respect to quotations for and transactions in securities.¹³

Congress authorized the Commission to prescribe rules 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 In furtherance of these purposes, the Commission has sought through its rules and regulations to help ensure that certain “core data”¹⁵ is widely available for reasonable fees.¹⁶ The Commission has recognized that investors must have this core data “to participate in the U.S. equity markets.”¹⁷

Section 11A of the Act also authorizes the Commission, by rule or order, to authorize or require the SROs to act jointly with respect to matters as to which they share authority under the Act in planning, developing, operating, or regulating a facility of the national market system.¹⁸ Pursuant to this authority, the Commission adopted Regulation NMS.¹⁹ Rule 608 of Regulation NMS authorizes two or more SROs, acting jointly, to file with the Commission a national market

¹² See 15 U.S.C. 78k-1(a)(1)(B). See also H.R. Rep. No. 94-229, 94th Cong., 1st Sess. 93 (1975) (House Report noting that the systems for collecting and distributing consolidated market data would “form the heart of the national market system.”).

¹³ See 15 U.S.C. 78k-1(a)(1)(C).

¹⁴ 15 U.S.C. 78k-1(c)(1)(B).

¹⁵ See *infra* note 27 and accompanying text (defining “core data”).

¹⁶ See 17 CFR 242.603; see also e.g., Regulation NMS Release, *supra* note 6, 70 FR at 37560 (stating that “[i]n the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of consolidated market data.”).

¹⁷ *Id.* at 37560.

¹⁸ See 15 U.S.C. 78k-1(a)(3)(B).

¹⁹ 17 CFR 242.600-612; see also Regulation NMS Release, *supra* note 6, 70 FR at 37560.

system plan (“NMS plan”) or a proposed amendment to an effective NMS plan.²⁰ And Rule 603 of Regulation NMS requires the SROs to act jointly pursuant to NMS plans to “disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks.”²¹ The purpose of the Equity Data Plans, adopted pursuant to Regulation NMS, is to facilitate the collection and dissemination of core data so that the public has ready access to a “comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time during the trading day.”²² Widespread availability of timely market data promotes fair and efficient markets and facilitates the ability of brokers and dealers to provide best execution to their customers.²³

Under Regulation NMS and the Equity Data Plans, the SROs are required to provide certain quotation²⁴ and transaction data²⁵ for each NMS stock to an exclusive securities information processor (“SIP”),²⁶ which consolidates this market data and makes it available to market participants on the consolidated tapes, as described below. For each NMS stock, the Equity Data Plans provide for the dissemination of top-of-book (“TOB”) data, generally defining

²⁰ See 17 CFR 242.608.

²¹ 17 CFR 242.603(b).

²² Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3593, 3600 (Jan. 21, 2010) (“Equity Market Structure Concept Release”).

²³ See In the Matter of the Application of Bloomberg L.P., Securities Exchange Act Release No. 83755 at 3 (July 31, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-83755.pdf> (“Bloomberg Order”); SEC Concept Release: Regulation of Market Information Fees and Revenues, Securities Exchange Act Release No. 44208 (Dec. 9, 1999), 64 FR 70613, 70615 (Dec. 17, 1999) (stating that the distribution of core data “is the principal tool for enhancing the transparency of the buying and selling interest in a security, for addressing the fragmentation of buying and selling interest among different market centers, and for facilitating the best execution of customers’ orders by their broker-dealers”).

²⁴ See 17 CFR 242.602.

²⁵ See 17 CFR 242.601.

²⁶ See 15 U.S.C. 78c(22)(A) (defining securities information processor). Rule 603(b) of Regulation NMS requires that every national securities exchange on which an NMS stock is traded and national securities association act jointly pursuant to one or more effective NMS plans to disseminate consolidated information on quotations for and transactions in NMS stocks, and that such plan or plans provide for the dissemination of all consolidated information for an individual NMS stock through a single SIP. See 17 CFR 242.603(b).

consolidated market information (or “core data”) as consisting of: (1) the price, size, and exchange of the last sale; (2) each exchange’s current highest bid and lowest offer, and the shares available at those prices; and (3) the national best bid and offer (“NBBO”) (i.e., the highest bid and lowest offer currently available on any exchange).²⁷ In addition to disseminating core data, the SIPs collect, calculate, and disseminate certain regulatory data—including information required by the National Market System Plan to Address Extraordinary Market Volatility (“LULD Plan”),²⁸ information relating to regulatory halts and market-wide circuit breakers, and information regarding the short-sale price test pursuant to Rule 201 of Regulation SHO.²⁹ They also collect and disseminate other NMS stock data and disseminate certain administrative messages. Together with core data, the Commission refers to this broader set of data for purposes of this Order as “SIP data.”³⁰

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”).³¹ Pursuant to the Equity Data Plans, three separate

²⁷ See Bloomberg Order, *supra* note 23, at 3; see also Securities Exchange Act Release No. 87193 (Oct. 1, 2019), 84 FR 54794, 54795 (Oct. 11, 2019) (“Effective-Upon-Filing Release”).

²⁸ The LULD Plan is available at <http://www.luldplan.com>.

²⁹ 17 CFR 242.201(b)(3).

³⁰ Broker-dealers rely on SIP data disseminated by the Equity Data Plans to comply with a number of regulatory requirements. See *infra* notes 64–67 and accompanying text.

³¹ Each of the Equity Data Plans is an NMS plan under Rule 608 of Regulation NMS. 17 CFR 242.608; see also Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (order approving CTA Plan); 15009 (July 28, 1978), 43 FR 34851 (Aug. 7, 1978) (order temporarily approving CQ Plan); 16518 (Jan. 22, 1980), 45 FR 6521 (Jan. 28, 1980) (order permanently approving CQ Plan); and 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (order approving UTP Plan).

networks disseminate consolidated data for equity securities: (1) Tape A for securities listed on the NYSE; (2) Tape B for securities listed on exchanges other than NYSE and Nasdaq; and (3) Tape C for securities listed on Nasdaq. The CTA Plan governs the collection, consolidation, processing, and dissemination of last sale information for Tape A and Tape B securities. The CQ Plan governs the collection, consolidation, processing, and dissemination of quotation information for Tape A and Tape B securities. And the UTP Plan governs the collection, consolidation, processing, and dissemination of last sale and quotation information for Tape C securities.

As discussed further below, the structure of the equity markets and the corporate structure of exchanges have changed dramatically since the adoption of Regulation NMS in 2005.³² While a substantial amount of trading in 2005 was conducted on relatively slow manual markets,³³ and was concentrated for any given stock on its listing exchanges,³⁴ nearly all trading now occurs on fast electronic markets (where even small degrees of latency affect trading strategies) and is

³² See *infra* Sections II.A, II.B.1, and II.B.2.

³³ See Equity Market Structure Concept Release, *supra* note 22, 75 FR at 3594 (“NYSE-listed stocks were traded primarily on the floor of the NYSE in a manual fashion until October 2006. At that time, NYSE began to offer fully automated access to its displayed quotations.”). In contrast to NYSE, stocks listed on Nasdaq traded in a highly automated fashion at many different trading centers following the introduction of SuperMontage in 2002. See Securities Exchange Act Release No. 46429 (Aug. 29, 2002), 67 FR 56862 (Sept. 5, 2002). See also Steven Quirk, Senior Vice President, Trader Group, TD Ameritrade, Testimony before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Permanent Subcommittee on Investigations, Hearing on “Conflicts of Interest, Investor Loss of Confidence, and High Speed Trading in U.S. Stock Markets” (June 17, 2014), available at [https://www.hsgac.senate.gov/imo/media/doc/STMT%20-%20Quirk%20-%20TD%20Ameritrade%20\(June%2017%202014\).pdf%20](https://www.hsgac.senate.gov/imo/media/doc/STMT%20-%20Quirk%20-%20TD%20Ameritrade%20(June%2017%202014).pdf%20) (citing statistics that average execution speed has improved by 90% since 2004—from 7 seconds to 0.7 seconds in 2014). Today, trading speed is measured in microseconds and is moving towards nanoseconds. See, e.g., Wall Street Journal, Trading Tech Accelerates Toward Speed of Light (Aug. 8, 2016), available at <https://www.wsj.com/articles/trading-tech-accelerates-toward-speed-of-light-1470559173>; Wall Street Journal, NYSE Aims to Speed Up Trading With Core Tech Upgrade (Aug. 5, 2019), available at <https://www.wsj.com/articles/nyse-aims-to-speed-up-trading-with-core-tech-upgrade-11565002800>.

³⁴ See Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74782 (Dec. 9, 2008) (File No. SR-NYSEArca-2006-21) (NYSE’s reported market share of trading in NYSE-listed stocks declined from 79.1% in January 2005 to 30.6% in June 2008.).

dispersed among a wide range of competing market centers.³⁵ Furthermore, most exchanges have converted from entities mutually owned by their members to demutualized entities that are owned by shareholders and that also offer proprietary market data products.³⁶ Finally, “exchange groups” (multiple exchanges operating under one corporate umbrella) have emerged, consolidating much of the voting power and control of the Equity Data Plans.³⁷

In the Commission’s view, these market developments have heightened conflicts of interest between the exchanges’ commercial interests and their regulatory obligations under the Act and the Equity Data Plans to produce and provide core data. The Commission believes that the current governance structure of the Equity Data Plans is inadequate to respond to these changes or to the evolving needs of investors and other market participants. The SIPs have significant market power in the market for core and aggregated market data products and are monopolistic providers of certain market information.³⁸ But the operation of the Equity Data Plans has not kept pace with the efforts of the exchanges to expand the content of—and to employ technology to reduce the latency and increase the throughput of—certain proprietary data

³⁵ See Equity Market Structure Concept Release, supra note 22, 75 FR at 3598 (“The registered exchanges all have adopted highly automated trading systems that can offer extremely high-speed, or ‘low-latency,’ order responses and executions.”).

³⁶ See infra Section II.B.1.

³⁷ See infra Section II.B.2.

³⁸ See, e.g., Bloomberg Order, supra note 23, at 4. Although some proprietary market data products are comparable to core data and could be used by some core data subscribers as substitutes for core data in certain situations, these products are not exact substitutes and are not viable substitutes across all use cases. For example, some third-party data aggregators buy direct depth-of-book feeds from the exchanges and aggregate them to produce products similar to core data; these products, however, do not provide market information that is critical to some subscribers and available only through the SIPs. See Transcript of Day One, Roundtable, at 126:20-129:8 (Oct. 25, 2018) (“Day One Transcript”) (statement of Mark Skalabrin, Redline Trading Solutions), available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>. Additionally, some exchanges offer TOB data feeds, which may be considered by some to be viable substitutes for core data for certain applications, however, broker-dealers typically obtain core data provided by the SIP to fulfill their obligations under Rule 603 of Regulation NMS, which requires a broker-dealer to show a consolidated display of market data in a context in which a trading or order routing decision can be implemented. 17 CFR 242.603; see also infra note 67 and accompanying text.

products. For example, the exchanges have developed depth-of-book (“DOB”) products that provide greater content (e.g., information about orders resting on the order book and order imbalance information for opening and closing auctions) at lower latencies, relative to the SIPs, for one segment of the data market.³⁹ The exchanges have also developed proprietary TOB products that provide data that is generally limited to the highest bid and lowest ask and last sale price information at a lower price for another segment of the data market that is less sensitive to latency.⁴⁰ By contrast, the Participants of the Equity Data Plans have not taken comparable measures to update the SIPs to reflect new innovations in market data in response to evolving markets and the changing needs of investors (e.g., those that use low-latency DOB products versus those that use TOB products).⁴¹

The Commission believes that, under the current governance structure of the Equity Data Plans, improvements to the SIPs to adequately address important product, performance and

³⁹ See, e.g., Nasdaq Global Data Products, available at <http://www.nasdaqtrader.com/Trader.aspx?id=DPSpecs> (last accessed Nov. 16, 2019) (describing low-latency DOB data products); Real-Time - NYSE Proprietary Market Data, available at <https://www.nyse.com/market-data/real-time> (last accessed Nov. 16, 2019) (describing low-latency DOB data products); Cboe Equities Exchanges Market Data Product Offerings, available at https://markets.cboe.com/us/equities/market_data_services/ (last accessed Nov. 16, 2019) (describing low-latency DOB data products). Particularly when aggregated, proprietary DOB market data products provide a consolidated view of the market with greater content and lower latency. See *infra* Section II.A.

⁴⁰ Examples of such proprietary TOB products include NYSE BBO (<https://www.nyse.com/market-data/real-time/bbo>), NASDAQ Basic (<https://business.nasdaq.com/intel/GIS/nasdaq-basic.html>), and CBOE One Feed (https://markets.cboe.com/us/equities/market_data_services/cboe_one). NYSE BBO provides TOB data. Nasdaq Basic and Cboe One’s Summary Feed provide TOB and last sale information. Nasdaq Basic also provides Nasdaq Opening and Closing Prices and other information, including Emergency Market Condition event messages, System Status, and trading halt information. Cboe One, however, also offers a Premium Feed that includes DOB data. Each of these products is sold separately by the relevant exchange group. See Letter from Matthew J. Billings, Managing Director, Market Data Strategy, TD Ameritrade (Oct. 24, 2018), at 5–9, available at <https://www.sec.gov/comments/4-729/4729-4560068-176205.pdf> (“TD Ameritrade Letter”) (stating that the lower cost of exchange TOB products, coupled with costs associated with the process to differentiate between retail professionals and non-professionals imposed by the SIP Plans, and associated audit risk, favors retail broker-dealer use of exchange TOB products).

⁴¹ See *infra* notes 57–62 and accompanying text.

pricing differentials between the SIPs and proprietary data products have not occurred.⁴² Also, the Commission does not believe that having multiple Equity Data Plans, which need to be separately maintained and operated, is necessary or efficient. The Commission believes the Equity Data Plans should be consolidated into a New Consolidated Data Plan. In the Commission’s view, this would streamline operation of the SIP feeds, leading to greater efficiency in meeting the purposes of Section 11A of the Act, including ensuring the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of quotation and transaction information, as well as the fairness and usefulness of the form and content of such data.⁴³ As discussed in more detail below, the Commission believes that the Participants should develop a New Consolidated Data Plan that: (i) operates pursuant to a governance structure that takes into account the evolving nature of business and trading relationships among exchanges, their members, and investors; (ii) is designed to ensure the usefulness of core data to market participants and to ensure that core data is provided on terms that are fair and reasonable, consistent with Section 11A of the Act and the rules thereunder;⁴⁴ and (iii) replaces the three Equity Data Plans to eliminate redundancies, inefficiencies, and duplicative costs. As noted above, the Commission believes that consolidating the Equity Data Plans into a single New Consolidated Data Plan should result in a more efficient governance structure for operation of the SIPs.⁴⁵

⁴² See *infra* notes 84–86, 112 and accompanying text.

⁴³ See 15 U.S.C. 78k-1(c)(1)(B).

⁴⁴ 15 U.S.C. 78k-1; Rules 601–603 of Regulation NMS, 17 CFR 242.601–603.

⁴⁵ See, e.g., Nasdaq Total Markets: A Blueprint for a Better Tomorrow (Apr. 2019), at 17 (“Nasdaq Total Markets Paper”), available at https://www.nasdaq.com/docs/Nasdaq_TotalMarkets_2019_2.pdf (characterizing the three Equity Data Plans as “three bureaucratic, government-mandated monopolies, each with arcane rules and governance, designed in a drastically different time in the evolution of exchanges”).

II. DISCUSSION

In recent years, the Commission has received, and in certain instances, solicited a substantial amount of comment on the current provision of SIP data by the Equity Data Plans and on the governance model of the Equity Data Plans. In 2015, the EMSAC was established and tasked with providing the Commission with diverse perspectives on the structure and operations of the U.S. equities markets, as well as advice and recommendations on matters related to equity market structure.⁴⁶ In 2018, the Commission’s Division of Trading and Markets held a Roundtable on Market Data and Market Access (“Roundtable”) that included panelists representing exchanges, institutional and retail broker-dealers, academics, and other market participants.⁴⁷ The Commission has also received several petitions for rulemaking from market participants concerning the provision of SIP data and the governance structure of the Equity Data Plans.⁴⁸

⁴⁶ See EMSAC Charter (Feb. 9, 2015), available at <https://www.sec.gov/spotlight/emsac/equity-market-structure-advisory-committee-charter.pdf>. Under the EMSAC Charter, committee membership was required to include at least one representative of retail investors, institutional investors, exchanges or other self-regulatory organizations, broker-dealers and other market participants, as well as industry consultants and academics. See *id.* Although not all exchanges were members of the EMSAC, the EMSAC held a number of public meetings at which other parties, including representatives of exchange groups that were not members of the EMSAC, shared their views. See Equity Market Structure Advisory Committee Archives, available at <https://www.sec.gov/spotlight/emsac/emsac-archives.htm> (last accessed Nov. 16, 2019).

⁴⁷ The Roundtable agenda and list of panelists are available on the Commission’s website at <https://www.sec.gov/agendas/agenda-roundtable-market-data-market-access>.

⁴⁸ See, e.g., Petition for Rulemaking Concerning Market Data Fees (Dec. 6, 2017) (SEC 5-716), available at <https://www.sec.gov/rules/petitions/2017/petn4-716.pdf> (petition undersigned by twenty-four firms, including Bloomberg, Citadel, Fidelity Investments, Morgan Stanley, Charles Schwab, Vanguard, and Virtu) (“Patomak Petition”); Petition to Address Conflicts of Interests, Complexity, and Costs Related to Market Data (Jan. 17, 2018) (SEC 4-717), available at <https://www.sec.gov/rules/petitions/2018/petn4-717.pdf> (“Healthy Markets Petition”); Petition for Rulemaking Regarding Market Data Fees and Request for Guidance on Market Data Licensing Practices; Investor Access to Market Data (Aug. 22, 2018) (SEC 4-728), available at <https://www.sec.gov/rules/petitions/2018/petn4-728.pdf> (“MFA Petition”).

Based on this input from a broad range of market participants and its own regulatory experience,⁴⁹ the Commission believes that the current governance structure of the Equity Data Plans no longer adequately serves to ensure that the Equity Data Plans provide for 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.”⁵⁰ As will be discussed next, the Commission believes that the SROs should propose a single New Consolidated Data Plan, with a governance structure that incorporates a broad array of market participant perspectives and reduces administrative and operational inefficiencies and redundancies, to more effectively administer the dissemination of SIP data.

A. The Commission’s Concerns Regarding the Equity Data Plans’ Provision of Equity Market Data

Under the Equity Data Plans, the earliest of which dates from the 1970s,⁵¹ market data for each NMS stock is collected, consolidated, and disseminated to investors and market participants through one of two exclusive SIPs. These SIPs, which collect market data for the NMS stock transmitted from the dispersed SRO data centers, then consolidate the data and distribute the data to end-users.⁵² Several market developments, however, have given rise to proprietary data feeds that are offered—along with connectivity services that enable low-latency transmission—directly by the various exchanges. The emergence of these proprietary products,

⁴⁹ In addition to the Commission’s review of proposed amendments filed by the Equity Data Plans, the Commission staff attends the operating committee and subcommittee meetings, with the exception of discussions protected by attorney-client privilege, and conducts examinations of the Equity Data Plans.

⁵⁰ 15 U.S.C 78k-1(c)(1)(B).

⁵¹ See *supra* note 31.

⁵² NYSE is the administrator of the SIP for the CTA Plan and CQ Plan, which covers Tape A and Tape B and is located in Mahwah, New Jersey. NYSE’s affiliate, Securities Industry Automation Corporation (“SIAC”), serves as the processor for Tapes A and B. Nasdaq is both the administrator and the processor for the UTP Plan, which covers Tape C and is located in Carteret, New Jersey.

along with the core data feeds that are distributed pursuant to the Equity Data Plans, have created a two-tiered market-data environment.

Technological advances, as well as the order routing and trading strategies that have followed, have greatly increased the speed and automation of both markets and trading strategies. These changes, along with the provisions adopted in Regulation NMS that allow for the sale of proprietary data products,⁵³ have created incentives for exchanges to develop enhanced proprietary data products that they sell to the same market participants that are subscribers to core data feeds provided by the SIPs.

Generally, proprietary data feeds that offer DOB data are designed for automated trading systems and are faster and more content rich, as well as more expensive, than the core data distributed by the SIPs. Other proprietary data feeds that offer TOB data are designed largely for the non-automated segment of the market (e.g., retail investors and wealth managers who look at market information on a screen) and are less content rich (but also less expensive) than the core data distributed by the SIPs.⁵⁴ Thus, the exchanges offer proprietary data products in both of these significant segments of the market for data. The exchanges also offer connectivity products and services (e.g., co-location, fiber connectivity, wireless connectivity) that provide low-latency access to these proprietary data products, especially DOB products.⁵⁵ Even though the

⁵³ See infra note 71 and accompanying text.

⁵⁴ See also supra note 40 and accompanying text.

⁵⁵ See supra notes 39–40. Various forms of connectivity are integral to the latency and throughput benefits associated with proprietary market data products, especially DOB products. For example, co-location is a service that enables exchange customers to place their servers in close proximity to an exchange’s matching engine in order to help minimize network and other types of latencies between the matching engine of the exchange and the servers of market participants. Data connections that use fiber optic cable transmit data more slowly than data connections that use wireless microwave transmissions, though microwave connections are susceptible to interruption by weather conditions and are therefore less reliable than fiber connections. Subscribers of wireless data connections need to establish backup connectivity to account for interference from weather conditions. See also infra note 76 and accompanying text.

exchanges' proprietary data products are not exact substitutes for the core data provided by the SIPs,⁵⁶ users of the low-latency access provided by the exchanges for their DOB proprietary data products have a speed advantage over users of the core data because of the higher latency of the SIP data feeds.

Over the past several years, a number of market participants have raised concerns about how the differences between the SIPs and proprietary DOB data feeds affect their ability to use core data to be competitive in today's markets and provide best execution to their customers.⁵⁷ According to certain market participants, the current speed of core data is no longer sufficient for them to trade competitively. One Roundtable panelist stated that broker-dealers do not have the option to forgo buying the proprietary data in meeting their clients' needs because the SIPs are slower and not as expansive.⁵⁸ This panelist stated that, "[i]f our brokers are not aligned in that manner to use the most direct, the fastest, the most robust feeds they can get their hands on, then we will trade with someone else."⁵⁹ Another Roundtable panelist stated that, "broker-dealers are compelled to purchase exchanges' proprietary data feeds, both to provide competitive execution services ... and to meet our best execution obligations due to the content of the information

⁵⁶ See supra note 38.

⁵⁷ See, e.g., Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA (Oct. 24, 2014), at 8, available at <https://www.sec.gov/comments/s7-02-10/s70210-422.pdf> ("SIFMA Letter I"); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA (Mar. 29, 2017), at 11, available at <https://www.sec.gov/comments/265-29/26529-1674696-149276.pdf> ("SIFMA Letter II"); Letter from Melissa MacGregor, Managing Director and Associate General Counsel, Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA (Oct. 24, 2018), at 6, available at <https://www.sec.gov/comments/4-729/4729-4559181-176197.pdf> ("SIFMA Letter III").

⁵⁸ See Day One Transcript, supra note 38, at 65:8-66:10 (statement of Mehmet Kinak, T. Rowe Price). See also Letter from Mehmet Kinak, Vice President - Global Head of Systematic Trading & Market Structure, Jonathan D. Siegel, Vice President – Senior Legal Counsel, T. Rowe Price Associates, Inc. (Jan. 10, 2019), at 2, available at <https://www.sec.gov/comments/4-729/4729-4844471-177204.pdf>.

⁵⁹ Day One Transcript, supra note 38, at 66:7-10 (statement of Mehmet Kinak, T. Rowe Price); see also id. at 136:5-16 (statement of Simon Emrich, Norges Bank Investment Management) (stating that, "the use cases for SIP data over the years [have] ... decreased substantially" and "brokers can't really be ... using the SIP. They need to have the full depth of book.").

contained in the proprietary data fees as well as the latency differences between them....”⁶⁰

Another commenter stated that “most broker-dealers require the faster and deeper information to participate effectively in the market and provide customers with the competitive order routing quality.”⁶¹ This commenter also stated, “While business for proprietary market data innovated, the SIP utilities did not keep pace. Investment in the SIPs lagged, causing material latencies to develop between the top of book and last sale data available from the SIP as compared to the data offered privately by the market centers.”⁶²

Broker-dealer panelists at the Roundtable stated that they are compelled to purchase SIP data for various reasons, including to receive LULD Plan price bands, to perform checks

⁶⁰ Day One Transcript, supra note 38, at 198:24-199:6 (statement of Joseph Wald, Clearpool Group); see also Letter from Joe Wald, Chief Executive Officer, Clearpool Group (Oct. 23, 2018), at 3, available at <https://www.sec.gov/comments/4-729/4729-4555206-176185.pdf>. The Commission recognizes that, as a practical matter, market participants may utilize proprietary market data products to execute orders. However, the Commission has determined that broker-dealers are not required to purchase “non-core” data, such as DOB data, to satisfy their duty of best execution. See In the Matter of the Application of Securities Industry and Financial Markets Association, Securities Exchange Act Release No. 84432 at 33, n.174 (Oct. 16, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-84432.pdf> (“SIFMA Order”). See also Shengwei Ding, John Hanna, and Terrence Hendershott, How Slow Is the NBBO? A Comparison with Direct Exchange Feeds, *The Financial Review*, Issue 49 (2014) (313-332) (comparing the NBBO from the SIP and the NBBO of exchange proprietary data feeds and finding benefits of the faster proprietary data feeds over the SIP), available at http://utpplan.com/latency_chartshttp://faculty.haas.berkeley.edu/hender/NBBO.pdf; Michael Lehr, The Latency Differences Between Depth of Book and BBO Feeds (Aug. 8, 2016) (comparing relative latency of proprietary DOB and TOP data feeds), available at http://maystreet.com/api/files/mst_drive/public/TheLatencyDifferenceBetweenDepthAndBBO-MayStreet.pdf; CTA Latency Charts (providing statistics measuring latency from the inception of the Participant matching engine event (e.g., order execution, top of book update) to the point of dissemination from the CTA SIP), available at <https://www.ctaplan.com/latency-charts> (last accessed Dec. 12, 2019); UTP Realized Latency Charting (providing statistics measuring latency from the inception of the Participant matching engine event (e.g., order execution, top of book update) to the point of dissemination from the UTP SIP), available at http://utpplan.com/latency_charts (last accessed Dec. 12, 2019).

⁶¹ SIFMA Letter III, supra note 57, at 6.

⁶² SIFMA Letter I, supra note 57, at 8; see also Day One Transcript, supra note 38, at 64:4-15 (statement of Brad Katsuyama, IEX) (“Anyone who cares cannot use the SIP from a speed standpoint ... if full information and speed are important, which it is for the majority of large players maintaining their own electronic trading platform, then I would not say the SIP serves much of a purpose for them.”); at 64:4-15 (statement of Douglas A. Cifu, Virtu) (“Anyone who cares, or is ... making machine-level decisions cannot use the SIP just from a speed standpoint. But I do think if you improve the information on the SIP, it can certainly be valuable to a host of people now.... But if full information and speed become important, which it is for a majority of large players maintaining their own electronic trading platform, then I would not say the SIP serves much of a purpose to them.”). See also infra notes 80–82 and accompanying text (describing certain improvements made to aggregation latency in the SIP feeds).

required by Rule 15c3-5 under the Act (the “market access rule”),⁶³ and for redundancy purposes.⁶⁴ Some broker-dealers use SIP data to comply with the requirements of Rule 611 of Regulation NMS⁶⁵ to prevent trade-throughs and to meet their best execution obligations for customer orders. Also, under Rule 603(c) of Regulation NMS,⁶⁶ known as the “Vendor Display Rule,” if a broker-dealer displays any information with respect to quotations for or transactions in an NMS stock in a context in which a trading or order-routing decision can be implemented, it must also provide a consolidated display for that stock. Broker-dealers typically meet this regulatory requirement by using core data and paying the attendant fees.⁶⁷

The differences between the SIP data feeds and proprietary data feeds have the effect of increasing the demand for, and marketability of, proprietary data products to the financial benefit of the exchanges. And the Commission believes that this conflict of interest, combined with the Equity Data Plans’ current governance structure, perpetuates disincentives for the Equity Data Plans to invest in certain improvements to enhance the distribution of core data or the content of the core data itself. In particular, lagging investment in updating and maintaining the operations of the SIPs has resulted in meaningful latency and content differentials between core data and the

⁶³ 17 CFR 240.15c3-5.

⁶⁴ See, e.g., Day One Transcript, supra note 38, at 138:23-139:3, 169:12-24 (statements of Adam Inzirillo, Bank of America Merrill Lynch); at 184:14-185:2 (statement of Michael Friedman, Trillium).

⁶⁵ 17 CFR 242.611.

⁶⁶ 17 CFR 242.603(c).

⁶⁷ See Patomak Petition, supra note 48, at 1 (“As required by the SEC’s Display Rule, vendors and broker-dealers are required to display consolidated data from all the market centers that trade a stock. In order to comply with the Display Rule, such vendors and broker-dealers must purchase and display consolidated data feeds distributed by securities information processors (“SIPs”), which are owned by the exchanges and operated pursuant to NMS plans. The fees charged by SIPs are distributed as income to each of the participating exchanges.”).

exchanges' proprietary market data products that have become consequential to market participants.⁶⁸

For example, the implementation of decimalization in 2001⁶⁹ reduced the minimum price increment from \$0.0625 (1/16 of a dollar) to \$0.01. Because this significantly increased the number of price points over which trading interest could be expressed, it had the ancillary effect of reducing the TOB liquidity that is displayed and disseminated as part of core data. And commenters on Regulation NMS stated that this reduction of TOB liquidity, in turn, increased the importance of information regarding DOB liquidity to market participants.⁷⁰

In adopting Regulation NMS in 2005, the Commission nonetheless determined not to require that DOB quotations be included in core data, reasoning that investors who needed DOB data would be able to obtain that data from markets or third-party vendors.⁷¹ In making that determination, the Commission stated that this would be “a competition-driven outcome [that] would benefit investors and the markets in general.”⁷² And, after the adoption of Regulation

⁶⁸ For example, and as described further above, many broker-dealers have represented to the Commission that they are effectively compelled to purchase and rely primarily upon the low-latency proprietary data feeds in order to meet their regulatory obligations and to compete in the equity markets. *See supra* notes 59–62 and accompanying text.

⁶⁹ *See* Commission Notice: Decimals Implementation Plan for the Equities and Options Markets (July 24, 2000), available at <https://www.sec.gov/rules/other/decimalp.htm>.

⁷⁰ *See, e.g.*, Regulation NMS Release, *supra* note 6, 70 FR at 37529 (noting a comment from the Consumer Federation of America concerning “complaints that decimal pricing has reduced price transparency because of the relatively thin volume of trading interest displayed at the best bid and offer”). *See also* Letter from Craig S. Tyle, General Counsel, Investment Company Institute (Nov. 20, 2001), available at https://www.ici.org/policy/comments/01_SEC_SUBPENNY_COM (stating in response to the Commission’s Concept Release on the Effects of Decimal Trading in Subpennies in 2001, that “the reduction in quoted market depth as the minimum quoting increment has narrowed to a penny has adversely affected institutional investors’ ability to execute large orders. . . . Preliminary data has shown that, post-decimalization, it has become more difficult for large institutional orders to be filled entirely at the inside.”) (internal citations omitted).

⁷¹ *See* Regulation NMS Release, *supra* note 6, 70 FR at 37567.

⁷² *Id.* at 37530.

NMS in 2005,⁷³ exchanges began to sell their proprietary data products separately from the core data required by Rule 603(b) of Regulation NMS.⁷⁴ But, as the markets have evolved and DOB data has become more important, the exchanges have continued to improve their proprietary data feeds without similar improvements to the SIPs to reflect this market evolution.

Another issue flows from the centralized consolidation model of the Equity Data Plans and the SIPs. The centralized consolidation model has at least three specific sources of latency disadvantage relative to the exchanges' proprietary data feeds: geographic latency, aggregation latency, and transmission latency. Geographic latency, as used herein, refers to the time it takes for data to travel from one physical location to another, which must also take into account that data does not always travel between two locations in a straight line. Aggregation latency, as used herein, refers to the amount of time a SIP takes to aggregate the multiple sources of SRO market data into core data and includes calculation of the NBBO.⁷⁵ And transmission latency, as used herein, refers to the time interval between when data is sent (e.g., from an exchange) and when it is received (e.g., at a SIP and/or at the data center of the subscriber).⁷⁶ The Commission

⁷³ See Regulation NMS Release, *supra* note 6.

⁷⁴ See *supra* notes 39–40 and accompanying text.

⁷⁵ Each SIP must collect data from the dispersed SRO data centers, consolidate the data, and then disseminate the core data from their locations to end-users. See Equity Market Structure Concept Release, *supra* note 22, 75 FR at 3611 (“Given the extra step required for SROs to transmit market data to plan processors, and for plan processors to consolidate the information and distribute it to the public, the information in the individual data feeds of exchanges and ECNs generally reaches market participants faster than the same information in the consolidated data feeds.”). As discussed further in the Order, aggregation latency continues to remain at inferior levels at the CTA/CQ SIP as compared to the UTP SIP. See *infra* notes 81–82 and accompanying text. Furthermore, market participants that use proprietary data feeds for their electronic trading tools and that use certain common order types (e.g., intermarket sweep orders, or “ISOs”) must also aggregate proprietary data feeds to create an NBBO to comply with Rule 611 of Regulation NMS. Thus, aggregation latency can also be a factor for users of proprietary data feeds and is not unique to the SIPs.

⁷⁶ The transmission latency between two fixed points is determined by the transmission communications technology through which the data is conveyed (e.g., fiber optic cables, microwave networks, laser transmission). The modes of transmission for core data are typically slower than the modes of transmission used for proprietary data. In general, the Equity Data Plans rely on fiber optic cables for connectivity. For example, the NYSE, as the operator of the CTA/CQ SIP, requires that access to the CTA/CQ SIP be through the use of
(footnote continued...)

understands that geographic latency is typically the most significant component of the additional latency that core data feeds experience compared to proprietary data feeds.⁷⁷ Because each SIP must collect data from geographically dispersed SRO data centers, consolidate the data, and then disseminate it from its location to end-users, which are often in other locations, this hub-and-spoke form of centralized consolidation creates additional latency. For example, information about quotes and trades on Nasdaq for NYSE-listed securities incurs latency as it travels from Nasdaq's data center in Carteret approximately 34.5 miles to the CTA/CQ SIP in Mahwah, and then back to Carteret.⁷⁸

But these disadvantages are not inherent to the SIPs' role and operation in the markets, nor are they insurmountable. In recent years and in the face of ongoing public criticism,⁷⁹ the SIP

(...footnote continued)

the NYSE's IP local area network. At the same time, NYSE, which owns SIAC, the CTA/CQ SIP, offers non-SIP proprietary data transmission to end-users via faster microwave networks. *See, e.g.*, ICE Global Network: Chicago – New Jersey, available at <https://www.theice.com/market-data/connectivity-and-feeds/wireless/chicago-to-new-jersey> (last accessed Sept. 16, 2019) (describing ICE's microwave route between the Chicago metro trading hub to Nasdaq's data center in Carteret, NJ); ICE Global Network: New Jersey Metro, available at <https://www.theice.com/market-data/connectivity-and-feeds/wireless/new-jersey-metro> (last accessed Sept. 16, 2019) (describing ICE's laser and millimeter wave route between ICE's Mahwah data center and the Carteret and Secaucus data centers).

⁷⁷ *See, e.g.*, Letter from Michael Blaugrund, Head of Transactions, NYSE (Oct. 24, 2018), at 1, available at <https://www.sec.gov/comments/4-729/4729-4559383-176200.pdf> (stating that, as “processing time approaches zero, it is clear that the time required for trade and quote data to travel from Participant datacenter -> SIP datacenter -> Recipient datacenter, or ‘geographic latency,’ is a larger portion of the total latency”).

⁷⁸ *See* Day One Transcript, *supra* note 38, at 127:12-24 (statement of Mark Skalabrin, Redline Trading Solutions) (stating that customers cannot be competitive using SIP data due to geographic latency, explaining “[i]f you're sitting at Secaucus and you get a direct feed tick from BATS, it shows up in a few microseconds from when they publish it. That same tick for the SIP for Nasdaq-listed symbols goes to Carteret, for NYSE-listed symbols they go to Mahwah and they come back again. The real numbers are, for one, about 350 microseconds and the other about close to a millisecond in latency for those to show up for someone using the SIP to get the BATS tick. So this is just an architectural – an obsolete architecture for an automated trading system in today's world... You can't be competitive with those kind of latencies compared to just getting it directly from the exchange.”).

⁷⁹ For example, following the UTP SIP outage on August 22, 2018 that led to a multiple hour, market-wide halt in trading of Nasdaq-listed securities (“UTP SIP Outage”), market participants raised concerns about the adequacy of the SIP infrastructure. *See, e.g.*, USA TODAY, Outage Slams Nasdaq's Reputation (Aug. 22, 2013), available at <https://www.usatoday.com/story/money/markets/2013/08/22/nasdaq-trading-freeze-reputation/2686883/>; Wall Street Journal, Panel to Review Nasdaq Data-Feed Outage (Aug. 28, 2013), available at <https://www.wsj.com/articles/panel-to-review-nasdaq-datafeed-outage-1377715288>; Wall Street Journal, (footnote continued...)

operating committees have made some improvements to aspects of the SIPs and related infrastructure.⁸⁰ For example, from the second quarter of 2016 to the second quarter of 2019, Tapes A and B reduced average quote feed aggregation latency from 490 microseconds to 69 microseconds, and average trade feed aggregation latency from 340 microseconds to 139 microseconds.⁸¹ As another example, Tape C reduced its average quote feed aggregation latency during the same period from 777.8 microseconds to 16.9 microseconds, and its average trade feed aggregation latency from 604.8 microseconds to 17.5 microseconds.⁸² As shown by these latency statistics, however, aggregation latency for the CTA/CQ SIP data continues to be meaningfully greater than that of UTP SIP data, despite these improvements.⁸³

(...footnote continued)

Nasdaq Shutdown Bares Stock Exchange Flaws (Aug. 24, 2013), available at <https://www.wsj.com/articles/nasdaq-shutdown-bares-stock-exchange-flaws-1377382817?tesla=y>.

⁸⁰ Following the UTP SIP Outage—and a meeting between the equities and options exchanges, FINRA, DTCC, and the Options Clearing Corporation and the then-Chair of the Commission—the Equity Data Plans’ operating committees discussed with Commission staff the operating committees’ plans for the SIPs “designed to improve operational resiliency, strengthen interoperability standards and disaster recovery capabilities, enhance governance, accountability, and establish a clear testing framework for the industry.” See Self-Regulatory Organizations Response to SEC for Strengthening Critical Market Infrastructure (Nov. 12, 2013), available at <https://ir.theice.com/press/press-releases/all-categories/2013/11-12-2013>. See also SIP Operating Committee Statement, supra note 75 (“In the last three years, the SIP Operating Committees have invested in the technology that powers them, increasing resiliency and redundancy while reducing latency.”). See also Letter from NYSE at 3 (Oct. 24, 2018), available at <https://www.sec.gov/comments/4-729/4729-4559414-176201.pdf> (“NYSE Group Letter”) (stating that, “exchanges have invested significantly in the operation of the [SIPs], resulting in improved resilience and reduced latency, all while managing increased volumes”).

⁸¹ See Key Operating Metrics of Tape A & B U.S. Equities Securities Information Processor (CTA SIP), available at <https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Q2%202019%20CTA%20SIP-Subscribers%20Metrics%20Report.pdf>.

⁸² See UTP Q3 2019 – July Tape C Quote and Trade Metrics, available at http://www.utplan.com/DOC/UTP_Website_Statistics_Q3-2019-July.pdf. These latencies are perceived to be at or near competitive market standards. See also Day One Transcript, supra note 38, at 106:14-22 (statement of Oliver Albers, Nasdaq) (“There have been vast improvements in SIP data in recent years, even as SIP revenue to exchanges has fallen. The Nasdaq SIP has an average latency of just 16 millionths of a second.... The Nasdaq SIP can also handle 10 billion messages per day, 20 times more than a decade ago, and significant cybersecurity and fraud prevention investments by Nasdaq and other operators have increased the overall market efficiency and resiliency.”).

⁸³ See Nasdaq Total Markets Paper, supra note 45, at 19, n.19 (stating that the CTA SIP “currently operates with over 100 microseconds of latency, which is not up to the standard that investors have come to expect in the modern markets”). The Commission notes that the aggregation latency incurred by market participants that

(footnote continued...)

And as numerous new product offerings have been introduced by individual exchanges to reduce the latency of proprietary data products,⁸⁴ the Equity Data Plans, which are operated jointly by the SROs (including those offering proprietary data products), have not made—or have been slow to make⁸⁵—the investments that are necessary to comprehensively address these concerns.⁸⁶ For example, proprietary data products offered by the exchanges often rely on low-latency wireless connections,⁸⁷ whereas the Equity Data Plans rely on fiber optic cable.⁸⁸ The Commission understands that these fiber networks, which the exchanges use to transmit data from their matching engines to the SIPs, are meaningfully slower than the wireless networks operated by the same exchanges for the transmission of proprietary data over the same routes.

As a potential measure to help the SIPs’ data products better respond to the needs of users, some market participants, including exchanges, have suggested that geographic latency issues could be addressed through a “distributed SIP” model.⁸⁹ Under a distributed SIP model,

(...footnote continued)

consolidate the exchanges’ proprietary data feeds for their own or their customers’ use is not publicly available, making it difficult to compare the aggregation latency of the SIP feeds and the aggregated proprietary feeds.

⁸⁴ See, e.g., Nasdaq Trade Management Services – Wireless Connectivity Suite (last accessed on Nov. 13, 2019), available at <http://n.nasdaq.com/WirelessConnectivitySuite> (describing low-latency wireless network technology to deliver market data); ICE Global Network - Wireless (last accessed on Nov. 13, 2019), available at <https://www.theice.com/market-data/connectivity-and-feeds/wireless> (describing low-latency wireless connectivity options between trading hubs).

⁸⁵ See, e.g., *supra* note 62.

⁸⁶ See, e.g., SIFMA Letter II, *supra* note 57, at 8-9; SIFMA Letter III, *supra* note 57, at 12; Letter from John Ramsay, Chief Market Policy Officer, IEX, at 3 (Sept. 24, 2019) (“IEX Letter”), available at <https://www.sec.gov/comments/4-729/4729-6190352-192448.pdf>.

⁸⁷ Some of these services are solely offered by exchanges within the facility of an exchange (e.g., co-location connectivity at NYSE’s data center in Mahwah and NASDAQ’s co-location at its datacenter in Carteret) and some are offered by both exchanges and other third party providers (e.g., fiber and wireless connectivity between data centers). See, e.g., *supra* note 84.

⁸⁸ See *supra* note 76.

⁸⁹ See Day One Transcript, *supra* note 38, at 99:2-4 (statement of Stacey Cunningham, NYSE) (“There is debate the NYSE brought to the SIP Committee a long time ago to talk about the nature of a distributed SIP and that is something we should explore.”); at 117:7-10 (statement of Michael Blaugrund, NYSE) (recommending that the Commission undertake an analysis of the cost and benefits to the industry of a shift to a distributed SIP model); (footnote continued...)

each exclusive SIP could place an additional processor in other major data centers, which would separately aggregate and disseminate consolidated market data for its respective tape. The SROs would submit their quotations and trade information directly to each SIP location in each data center, and each SIP location would consolidate and disseminate its respective consolidated market data feeds to subscribers at those data centers. As a result, consolidated market data would not have to travel from an exchange at one location to a centralized SIP at a second location for consolidation and dissemination prior to traveling yet again to a subscriber that may be at a third location, significantly reducing geographic latency. But, despite consideration by the dedicated subcommittee established by one of the Equity Data Plans,⁹⁰ none of the Equity Data Plans' operating committees has yet addressed the SIPs' geographic latency disadvantages.

The Commission recognizes that, as discussed above, the SROs have made certain improvements to the SIPs over the past several years, including upgrades that resulted in meaningful reductions in the time required to calculate and consolidate the NBBO. The Participants have also enhanced the content of the SIP feeds, including reports of odd-lot trades.⁹¹ The Participants have also requested comment on a proposal to include odd-lot

(...footnote continued)

at 228:3-9 (statement of Chris Isaacson, Cboe) (“we’re open to discussion about distributed SIPs”); at 231:23 (statement of Vlad Khandros, UBS) (stating that “having a distributed SIP has a lot of merit to solve for the latency differences that are inherent in the current structure.”). See also Nasdaq Total Markets Paper, supra note 45, at 19 (“Distributed SIPs would reduce time spent transmitting quote information between an exchange (and firm) located in one data center and a SIP (and other firms) located in a different center.”); and SIFMA Letter II, supra note 57, at 3. See also NYSE Group Letter, supra note 84.

⁹⁰ The Commission’s understanding that the Distributed SIP subcommittee has considered and continues to consider potential improvements to address geographic latency disadvantages is based on information obtained by the Commission or its staff as part of the Commission’s oversight of the Equity Data Plans.

⁹¹ See, e.g., Securities Exchange Release Nos. 70793 (Oct. 31, 2013), 78 FR 66788 (Nov. 6, 2013) (order approving Amendment No. 30 to the UTP Plan to require odd-lot transactions to be reported to consolidated tape); 70794 (Oct. 31, 2013), 78 FR 66789 (Nov. 6, 2013) (order approving Eighteenth Substantive Amendment to the Second Restatement of the CTA Plan to require odd-lot transactions to be reported to consolidated tape).

quotation information in response to the rise in odd-lot activity in the U.S. equity markets.⁹² In addition, Nasdaq migrated its SIP to a new technology platform in 2016 and stated that the update “significantly improves the efficiency, resiliency, and reliability of the SIP in a meaningful and measurable way.”⁹³ And NYSE has publicly stated that it has undertaken two projects to enhance the SIP: (1) building a new, dedicated network for SIP data to provide faster subscriber access to SIP data, and (2) migrating its SIP data feed engine to the NYSE’s Pillar technology platform to reduce processing time and enhance resilience.⁹⁴

Despite these changes, the SIPs have continued to meaningfully lag behind the proprietary data products and their related infrastructure with respect to content and speed. And while the Equity Data Plans’ operating committees have discussed several ideas that could result in significant improvements to the SIPs both in terms of content and speed—ideas that could further reduce performance gaps when compared with proprietary data and its infrastructure⁹⁵—these potential upgrades have failed to garner the support by Participants necessary for action.⁹⁶ Thus, market participants that choose to pay for some or all of the DOB proprietary data feeds

⁹² See Equity Data Plan Odd Lot Proposal (announced Oct. 2, 2019), available at https://www.ctaplan.com/publicdocs/CTA_Odd_Lots_Proposal.pdf and http://www.utpplan.com/DOC/Odd_Lots_Proposal.pdf. See NYSE Sharing Data-Driven Insights – Stock Quotes and Trade Data: One Size Doesn’t Fit All (Aug. 22, 2019), available at <https://www.nyse.com/equities-insights#20190822> (last accessed Nov. 16, 2019) (“NYSE Insights”).

⁹³ Securities Information Processor (SIP) Migrates to the Nasdaq Financial Framework and INET Technology (Oct. 24, 2016), available at <https://www.globenewswire.com/news-release/2016/10/24/882097/0/en/Securities-Information-Processor-SIP-Migrates-to-the-Nasdaq-Financial-Framework-and-INET-Technology.html> (last accessed on Nov. 18, 2019).

⁹⁴ See NYSE Insights, *supra* note 92.

⁹⁵ See *supra* note 89 and accompanying text.

⁹⁶ See, e.g., NYSE Insights, *supra* note 92 (proposing to replace the SIP feeds with three tiered levels of service, including certain DOB data, based on the needs of specific types of investors); Nasdaq Total Markets Paper, *supra* note 45, at 22 (discussing a single processor alternative and stating, “Now that all exchanges trade all listed stocks, there no longer exists a bank, brokerage or rational basis for maintaining separate network processors and administrators based on historical listings decisions.”); *supra* note 89 and accompanying text (describing discussions regarding a distributed SIP model.). See also discussion accompanying note 116, *infra* (discussing proposal to add auction data to the SIP feeds).

can consolidate those feeds and receive more comprehensive market data, and can receive it faster, than those who rely on the SIP feeds.⁹⁷ As a result, significant information asymmetries persist between users of core data and users of proprietary DOB data, as well as potential disadvantages for market participants who do not access the additional content included in proprietary data.⁹⁸

As discussed further below, the Commission believes that, under the current governance structure of the Equity Data Plans, improvements to the SIPs to adequately address important product, performance and pricing differentials between the SIPs and proprietary data products have not occurred.⁹⁹ This failure contributes to the divergence in the usefulness of core data provided by the SIPs for some market participants compared to the proprietary data feeds. The Commission also believes that addressing these governance issues is an important first step in responding to concerns about the consolidated data feed.

B. Conflicts of Interest Inherent in the Governance Model and Structure of the Equity Data Plans

The Equity Data Plans provide the regulatory framework for the administration of SIP data. When it adopted Regulation NMS in 2005, the Commission contemplated that exchanges would offer proprietary market data feeds with greater content than the SIP feeds and that market participants might elect to purchase those feeds.¹⁰⁰ However, since the adoption of

⁹⁷ The fees for data and connectivity can be substantial and the fees for proprietary DOB products and connectivity have increased significantly in recent years. See SIFMA Order, supra note 60, at 46-49 (providing examples of exchange proprietary market data fee increases).

⁹⁸ See, e.g., supra notes 80–82 and accompanying text. See, e.g., supra note 89 and accompanying text. A petition for rulemaking submitted to the Commission before the Roundtable emphasized the inherent conflict of interest in the exchanges' proprietary feeds competing with the SIPs, arguing that the greater the latency between the SIPs and the proprietary data feeds, the greater the market value of the exchange's proprietary feeds. See Healthy Markets Petition, supra note 48, at 6.

⁹⁹ See infra notes 110–119 and accompanying text.

¹⁰⁰ See Regulation NMS Release, supra note 6, 70 FR at 37569.

Regulation NMS in 2005,¹⁰¹ the structure of the equity markets and the corporate structure of exchanges have changed dramatically.

In addition to the technological developments already discussed, changes in the ownership structure of exchanges—in particular the demutualization of the exchanges and the rise of “exchange groups”—have created conflicts between the SROs’ business interests and the need to ensure prompt, accurate, reliable, and fair dissemination of core data through the jointly administered Equity Data Plans consistent with their obligations as SROs under the national market system.¹⁰² As noted above, the Commission believes that these changes, combined with the Equity Data Plans’ current governance structure, have exacerbated the exchanges’ lack of incentives to improve the SIPs. And, as described further below, the Commission’s views on the effect of conflicts of interest on the exchanges’ incentives are informed by input received over the course of a number of years from a broad range of market participants—including industry trade associations, broker-dealers (both those with a retail customer base and those with an institutional investor customer base), and the SROs themselves—through their participation in Commission-sponsored forums (i.e., the EMSAC¹⁰³

¹⁰¹ See Regulation NMS Release, *supra* note 6.

¹⁰² See 15 U.S.C. 78k-1(c)(1)(B) (stating that the Commission shall prescribe “rules and regulations as necessary and appropriate in the public interest, for the protection of investors, to assure 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”).

¹⁰³ See *supra* note 46 and *infra* notes 121 and 136.

and the Roundtable¹⁰⁴) and through the submission of comment letters¹⁰⁵ and petitions for rulemaking.¹⁰⁶

1. The Transformation of the Exchanges into Publicly Owned Companies

When the Equity Data Plans were created, U.S. equity exchanges were member owned, not-for-profit organizations. The members that owned the exchanges were registered broker-dealers, and those members had a voice in exchange decisions through their voting power on the governing bodies of the exchanges, including with respect to Equity Data Plan matters.

When the exchanges demutualized, representation on exchange boards of directors broadened to require including non-industry representatives,¹⁰⁷ thereby diluting exchange member representation, and the majority of the exchanges became part of publicly held companies seeking to maximize shareholder value. With this transformation, and following the adoption of Regulation NMS, many of the exchanges began to more actively pursue commercial interests that did not necessarily further the regulatory objective to “preserve the integrity and affordability of the consolidated data stream,”¹⁰⁸ which is necessary to ensure that there is a

¹⁰⁴ See *supra* note 47.

¹⁰⁵ See comments on Roundtable on Market Data and Market Access, [available at https://www.sec.gov/comments/4-729/4-729.htm](https://www.sec.gov/comments/4-729/4-729.htm); comments on EMSAC, [available at https://www.sec.gov/comments/265-29/265-29.shtml](https://www.sec.gov/comments/265-29/265-29.shtml).

¹⁰⁶ See *supra* note 48.

¹⁰⁷ See, e.g., Securities Exchange Act Release Nos. 49098 (Jan. 16, 2004), 69 FR 3974, 3979 (Jan. 27, 2004) (SR-PHLX-2003-73) (approving demutualization of Philadelphia Stock Exchange under by-laws providing for 11 non-industry governors and ten industry governors, of which five would be on-floor governors); 51149 (Feb. 8, 2005), 70 FR 7531, 7534 (Feb. 14, 2005) (SR-CHX-2004-26) (approving demutualization of Chicago Stock Exchange under bylaws that provided that half of the board must be public directors, with the remaining directors to be the exchange’s CEO and participant directors); 53963 (June 8, 2006), 71 FR 34661, 34671 (June 15, 2006) (SR-NSX-2006-03) (approving demutualization of the National Stock Exchange under bylaws that provided for at least 50% independent directors and at least 20% directors representing exchange trading permit holders); and Securities Exchange Act Release No. 58375 (Aug. 18, 2008), 73 FR 49498, 49500 (Aug. 21, 2008) (Application of BATS Exchange, Inc. for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission) (stating that the non-industry directors will exceed the number of industry and member directors and that at least 20% of the directors will be member directors).

¹⁰⁸ Regulation NMS Release, *supra* note 6, 70 FR at 37503.

“comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time during the trading day.”¹⁰⁹

An important example of this divergence of interest has been the development by certain exchanges of proprietary data products with reduced latency and expanded content (i.e., proprietary DOB data products), without the exchanges, in their role as Participants, similarly enhancing the data products offered by the Equity Data Plans. As discussed above, these DOB products have evolved to be considered competitive necessities for many market participants and are offered at significant premiums to SIP products.¹¹⁰ Another example of the divergence between commercial interests and regulatory goals has been the development by certain exchanges of limited TOB data products,¹¹¹ which are offered at a discount compared to the SIP and marketed to a more price-sensitive segment of the market, without corresponding development by the Equity Data Plans of a less expensive SIP product for the price-sensitive segment of the market.¹¹² The exchanges have continued to develop and enhance their proprietary market data businesses—which generate revenues that, unlike Plan data revenues, do not have to be shared with the other SROs—while remaining fully responsible for the governance and operations of the Plans, including content, infrastructure, and pricing, as well as data consolidation and dissemination.

¹⁰⁹ Equity Market Structure Concept Release, supra note 22, 75 FR at 3600.

¹¹⁰ See supra notes 57–62 and accompanying text.

¹¹¹ See supra note 40 and accompanying text (describing examples of exchange TOB products).

¹¹² The use of TOB products has expanded among retail and professional investors, who typically use TOB data via visual displays. However, these feeds do not show the full NBBO and therefore cannot be used to comply with the Vendor Display Rule. The Vendor Display Rule requires vendors and broker-dealers to display consolidated data from all the market centers that trade a stock in a context in which a trading or order routing decision can be implemented. In order to comply with the Vendor Display Rule, vendors and broker-dealers typically purchase and display consolidated data distributed by the SIPs. See 17 CFR 242.603. See supra notes 26, 38.

Many non-SRO Roundtable panelists, commenters, and petitioners identified these circumstances as constituting an inherent conflict of interest in that the exchanges oversee the Equity Data Plans while selling their own proprietary feeds and connectivity services.¹¹³ One commenter stated that the “exchanges maintain tight control of SIP governance to protect their lucrative market data revenue (plus associated SIP connectivity costs)...”¹¹⁴ This commenter also stated that “[g]iven conflicts of interest when a market competitor is also a regulator, it is critical that broker-dealers and asset managers have representation on SIP Operating Committees to ensure accountability and to promote initiatives to better develop market data products.”¹¹⁵ One exchange stated that, in addition to an exchange’s proprietary data products, other circumstances in which an exchange’s conflicts of interest may affect the work of the Equity

¹¹³ See, e.g., Transcript of Day Two, Roundtable (Oct. 26, 2018), available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf> (“Day Two Transcript”), at 117:14-22 (statement of Richard Ketchum, Former CEO of FINRA); at 121:3-17 (statement of Michael Mason, Citigroup); 138:1-4 (statement of Kevin Cronin, Invesco); SIFMA Letter III, *supra* note 57, at 7 (stating that “exchanges offer their own proprietary feeds, some of which are designed to compete with the SIPs, while at the same time the exchanges operate the SIPs and control the SIP operating committees”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA (Sept. 18, 2019), at 3-4, available at <https://www.sec.gov/comments/4-729/4729-6148210-192292.pdf> (“SIFMA Letter IV”) (stating that the current SIP governance structure “impedes the SIP from competing with the exchanges’ proprietary data feeds.”); Letter from CTA/UTP Advisory Committee (Oct. 23, 2018), at 2, available at <https://www.sec.gov/comments/4-729/4729-4553088-176181.pdf> (“CTA/UTP Letter”) (“A perceived conflict is the lack of separation between CTA/UTP and proprietary data interests. An information barrier between CTA/UTP and exchanges’ proprietary offering does not work in practice as the same individuals may represent both CTA/UTP and exchange proprietary data products.”); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association (Oct. 23, 2018), at 11, available at <https://www.sec.gov/comments/4-729/4729-4554022-176182.pdf> (“Healthy Markets Letter”) (“One of the most direct conflicts of interest is that the exchanges effectively control the public market data stream while also competing with it.”); Healthy Markets Petition, *supra* note 48, at 6 (noting that the greater the latency between the SIPs and the proprietary data feeds, the greater the market value of the exchange’s proprietary feeds); IEX Letter, *supra* note 86; Patomak Petition, *supra* note 48, at 1 (“Exchanges exercise complete control over key aspects of NMS plan governance, including setting fees, and this governance structure exacerbates conflicts of interest and allows exchanges to promulgate rules unilaterally to the detriment of broker-dealers and buy-side representatives.”); MFA Petition, *supra* note 48, at 13 (“SIP governance model under Regulation NMS does not effectively mitigate conflicts of interest.”).

¹¹⁴ Letter from Marcy Pike, SVP, Enterprise Infrastructure, Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Oct. 26, 2018), at 4, available at <https://www.sec.gov/comments/4-729/4729-4566044-176136.pdf> (“Fidelity Letter”).

¹¹⁵ *Id.*

Data Plans’ operating committees include consideration of whether auction data should be added to the SIPs and competition among the SROs for the role of processor.¹¹⁶ In contrast, another exchange maintained that selling exchange proprietary market data was contemplated under Regulation NMS and that doing what Regulation NMS contemplates does not itself create a conflict of interest.¹¹⁷

Moreover, the Equity Data Plans are currently administered by two of the exchanges,¹¹⁸ which gives employees of those exchanges access to confidential data subscriber information of potentially significant commercial value, including subscriber audit information. The Commission notes that concerns have been raised about the exchange administrators’ use of market data and associated customer information obtained through their role as Equity Market Data Plan administrators for their proprietary data feed businesses.¹¹⁹

Consequently, the Commission believes that the exchanges’ commercial interests in their proprietary data businesses, as well as the exchange administrators’ access to confidential subscriber information, have created conflicts of interest that could influence decisions as to the Equity Data Plans’ operation and thereby impede their ability to ensure the “prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect

¹¹⁶ See, e.g., Day Two Transcript, *supra* note 113, at 123:14-127:3 (statement of John Ramsay, IEX) (“For over a year I’ve been pushing to try to get auction data added to the SIP that would make it more useful . . . [but] there is at least one or more exchanges that will say, well, it requires unanimity, and therefore it’s not going to happen.”).

¹¹⁷ See NYSE Group Letter, *supra* note 84, at 19.

¹¹⁸ Currently, NYSE operates as the administrator for the CTA Plan and the CQ Plan, while Nasdaq serves as the administrator for the UTP Plan.

¹¹⁹ See, e.g., Letter from Tyler Gellach, Executive Director, Healthy Markets Association (Dec. 12, 2018), available at <https://www.sec.gov/comments/4-729/4729-6413383-198487.pdf>. In addition, commenters have expressed concerns with the burdens imposed by the SIPs’ subscriber audits and have stated that these burdens create an incentive to purchase exchange TOB products. See *infra* notes 164–165 and accompanying text.

to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information.”¹²⁰

2. The Emergence of Exchange Groups

In addition to the demutualization of the exchanges and the rise of proprietary data feeds, another significant change in the SRO landscape has been the emergence of exchange groups. As acknowledged by the EMSAC¹²¹ and echoed by Roundtable participants,¹²² the proliferation of exchange groups has had a significant effect on the allocation and concentration of voting power among certain SROs serving on the Equity Data Plans’ operating committee.

Under the Equity Data Plans, each Participant is entitled to cast one vote, but the exchanges within each exchange group vote as a block. Currently, 14 of the 17 total votes are controlled by three exchange groups: (1) CBOE Holdings, Inc. has five votes (BYX, BZX, Cboe, EDGA, and EDGX); (2) Intercontinental Exchange Group, Inc. (“ICE”) has five votes (NYSE, NYSE American, NYSE Arca, NYSE Chicago, and NYSE National); and (3) Nasdaq, Inc. has four votes (BX, ISE, Nasdaq, and PHLX).¹²³ As a result, the votes of only two exchange groups are sufficient to command a majority of votes and thereby control significant Equity Data Plan actions, including decisions that affect: (a) the capacity of the Equity Data Plans to transmit SIP data,¹²⁴ (b) investments in infrastructure that could in turn affect performance and latency of Plan

¹²⁰ 15 U.S.C. 78k-1(c)(1)(B).

¹²¹ See, e.g., Transcript of EMSAC Meeting (Apr. 26, 2016), at 0106:8-24 (statement of Richard Ketchum, Former CEO of FINRA), available at <https://www.sec.gov/spotlight/emsac/emsac-042616-transcript.txt> (“EMSAC Transcript”).

¹²² See, e.g., Day Two Transcript, supra note 113, at 148:5-18 (statement of Kevin Cronin, Invesco).

¹²³ In addition to these three exchange groups, each of the three unaffiliated SROs (FINRA, IEX, and LTSE) currently has one vote, resulting in a total of 17 Participant votes in Equity Data Plan matters.

¹²⁴ See, e.g., Section IV.(a) and Exhibit A of the CTA Plan.

processors, (c) the fees charged for SIP data,¹²⁵ and (d) the selection of individuals that participate in advisory committees.¹²⁶

The Commission believes that the consolidation of most of the exchange SROs into exchange groups has altered the relative voting power of Equity Data Plan Participants so that exchange groups now have greater voting power with respect to Plan governance matters. Correspondingly, the relative voting power of unaffiliated Equity Data Plans' Participants has been diluted over time. Exchanges that historically had only one vote have now been consolidated into exchange groups under common management that can control blocks of four or five votes.¹²⁷ Consequently, any two exchange groups can now command a majority of votes on the Equity Data Plans' operating committee, while the relative voting power of unaffiliated Equity Data Plan Participants has been diluted over time. Notably, as the primary producers of exchange proprietary data products, these exchange groups' voting power on the Equity Data Plans exacerbates the conflicts between their business interests and their regulatory obligations.¹²⁸ Accordingly, the Commission believes that the current voting structure may not promote the goals of Section 11A of the Act¹²⁹ with respect to equity market data.

¹²⁵ See, e.g., Section IV.(b)(iii) of the CTA Plan.

¹²⁶ See, e.g., Section XII.(b)(iii) of the CTA Plan.

¹²⁷ For example, for years the NYSE held a single exchange license and therefore had only one vote on the Equity Data Plans' operating committees, despite having approximately 80% of the trading volume in NYSE-listed securities. Today, the NYSE group of SROs as a whole has approximately 30% market share of trading in NYSE-listed securities, but because the NYSE group holds five exchange licenses, it has five votes and significantly more influence over Equity Data Plans' decisions than before. See Cboe U.S. Equities Volume Data, available at https://markets.cboe.com/us/equities/market_share/ (last accessed Aug. 11, 2019) (month-to-date volume summary as of Aug. 9, 2019).

¹²⁸ Specifically, the three exchange groups, which represent 14 of the 17 votes on the operating committees of the Equity Data Plans, sell proprietary data products that are significant sources of revenues for these exchanges. Consequently, the Commission believes that they may not be incentivized to adequately improve the latency of the SIPs, as making SIP latency comparable to the proprietary feeds could decrease revenues earned from certain proprietary data products. See, e.g., Clearpool Group Viewpoints Rethinking the Current Market Structure (Sept. 2019), at 7 (stating, "Currently, SIP Plans are governed by SROs that have conflicts of interest in the provision of market data (i.e., the exchanges, excluding FINRA) as they are selling market data products (footnote continued...)

C. The Governance Structure of the New Consolidated Data Plan

As discussed below, the Commission believes that the existing Equity Data Plans should be replaced by a single New Consolidated Data Plan with a modernized governance structure.

1. Exchange Group Voting Power

Several interested parties have suggested various ways to realign Participants' voting power. In response to the Roundtable,¹³⁰ several panelists and commenters recommended that SRO voting rights be limited to one vote per exchange group,¹³¹ which they believe would increase the voting representation of unaffiliated exchanges.¹³² Panelists and one commenter also supported having voting provisions that reflect market size, so that the SROs with greater market share would have increased voting power.¹³³ One commenter recommended capping the voting control permissible for any single exchange group.¹³⁴ One panelist supported maintaining the current voting construct and highlighted the importance of protecting the voting rights of the

(...footnote continued)

that directly compete with the SIPs. These SROs therefore have a disincentive to either invest in the SIPs or to make SIPs competitive products to their proprietary data products, and it is unlikely that they would vote to make needed changes to the SIP Plans.”), available at <https://cdn2.hubspot.net/hubfs/1855665/Clearpool%20Group%20Viewpoints%20-%20September%202019%20FINAL.pdf>. See also IEX Letter, *supra* note 86, at 3 (“SIP governance is still under the control of exchanges that have no reason to want the SIPs to be competitive with their own lucrative feeds. Some exchanges even overtly market their own data as a better alternative to the SIPs. The conflicts of interest are obvious and acute.”).

¹²⁹ 15 U.S.C. 78k-1.

¹³⁰ See <https://www.sec.gov/spotlight/equity-market-structure-roundtables>.

¹³¹ The recommendation of one vote per exchange group was also included in a pre-Roundtable petition for rulemaking that was submitted to the Commission. See Healthy Markets Petition, *supra* note 48, at 6 (supporting “one vote per exchange group”).

¹³² See, e.g., Day Two Transcript, *supra* note 113, at 148:5-12 (statement of Kevin Cronin, Invesco), available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf>; at 150:12-14 (statement of Hubert de Jesus, Blackrock); at 152:23-153:2 (statement of John Ramsay, IEX); Fidelity Letter, *supra* note 114, at 3 (recommending that NMS plan voting rights be limited to one vote per exchange group); Healthy Markets Letter, *supra* note 113, at 40.

¹³³ See, e.g., Day Two Transcript, *supra* note 113, at 150:17-21 (statement of Richard Ketchum, Former CEO of FINRA); at 152:6-10 (statement of Michael Masone, Citigroup); SIFMA Letter IV, *supra* note 113, at 4.

¹³⁴ See SIFMA Letter IV, *supra* note 113, at 4.

unaffiliated SROs that have just one vote on the operating committee.¹³⁵ In addition, the EMSAC recommended that the existing one-vote-per-exchange model should be replaced with an allocation of voting rights at the exchange group level—resulting in one vote per exchange group.¹³⁶ The EMSAC recommended that an exchange group receive two votes, however, when the exchange group has consolidated market share of at least 10% in the particular market relevant to the Equity Data Plan.

NYSE and Nasdaq objected to the EMSAC recommendation to reallocate votes among Equity Data Plan Participants by exchange group.¹³⁷ In particular, Nasdaq argued that it would be inconsistent for the Commission not to provide each SRO with a vote when, in Nasdaq’s view, the Commission has consistently held that each SRO is individually approved by the Commission and must have its own systems, rules, operations, and members.¹³⁸

The Commission believes that the New Consolidated Data Plan should modify the current voting allocation structure to address the issues described above.¹³⁹ Consistent with the EMSAC recommendation, the Commission believes that voting rights in the New Consolidated

¹³⁵ See, e.g., Day Two Transcript, *supra* note 113, at 149:1-13 (statement of Emily Kasparov, Chicago Stock Exchange, Inc. (n/k/a NYSE Chicago)).

¹³⁶ See EMSAC Recommendations Regarding Enhanced Industry Participation in Certain SRO Regulatory Matters (“EMSAC Governance Recommendations”), July 8, 2016, [available at https://www.sec.gov/spotlight/emsac/recommendations-enhanced-industry-participation-sro-reg-matters.pdf](https://www.sec.gov/spotlight/emsac/recommendations-enhanced-industry-participation-sro-reg-matters.pdf); EMSAC Recommendations Relating to Trading Venues Regulation, April 12, 2016, [available at https://www.sec.gov/spotlight/emsac/emsac-trading-venues-subcommittee-recommendations-041916.pdf](https://www.sec.gov/spotlight/emsac/emsac-trading-venues-subcommittee-recommendations-041916.pdf).

¹³⁷ See Letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE (May 13, 2016), [available at https://www.sec.gov/comments/265-29/26529-66.pdf](https://www.sec.gov/comments/265-29/26529-66.pdf) (“NYSE Letter”); and Letter from Joan Conley, Senior Vice President and Corporate Secretary, Nasdaq (May 24, 2016), [available at https://www.sec.gov/comments/265-29/26529-71.pdf](https://www.sec.gov/comments/265-29/26529-71.pdf) (“Nasdaq Letter”).

¹³⁸ See Nasdaq Letter, *supra* note 137, at 7. Nasdaq also argued that the Commission has prevented exchange operating companies from offering “cross-SRO” products that bundle products from multiple exchanges, and Nasdaq believes that consolidating voting rights for purposes of the Equity Data Plans would contradict this past treatment of exchange groups by the Commission. See *id.* For the Commission’s response to Nasdaq’s argument, see *infra* notes 148–151 and accompanying text.

¹³⁹ See *supra* notes 127–130 and accompanying text. The Commission notes that the one-vote-per-exchange governance model for NMS plans is not compelled by statute or regulation.

Data Plan should be allocated so that each unaffiliated SRO¹⁴⁰ and exchange group has one vote on the operating committee—with a second vote provided if the exchange group or unaffiliated SRO has a market center or centers that trade more than a designated percentage of consolidated equity market share.¹⁴¹

However, the Commission believes that the threshold percentage should be 15%, rather than the 10% threshold recommended by the EMSAC. The EMSAC’s recommendation to the Commission concedes that there was no “magic” in selecting 10% as its suggested threshold amount,¹⁴² and, based on the current size of the exchange groups in terms of both exchange licenses and trading volume, the Commission believes that using the 10% threshold recommended by the EMSAC for obtaining a second vote on New Consolidated Data Plan matters would suggest that a third vote would be appropriate at 20% of consolidated equity market share. Given that the existing consolidated market share of the largest exchange groups generally ranges from 17% to 23%¹⁴³—as of December 4, 2019, the figures for the CBOE, Nasdaq, and NYSE exchange groups were 17.03%, 19.58%, and 23.05%, respectively¹⁴⁴—

¹⁴⁰ For purposes of this Order, an unaffiliated SRO means an SRO that is not part of the same corporate ownership group as other SROs. The currently unaffiliated SROs are FINRA, IEX, and LTSE.

¹⁴¹ For purposes of this Order, the Commission considers “consolidated equity market share” to mean the average daily dollar equity trading volume of an exchange group or unaffiliated SRO as a percentage of the average daily dollar equity trading volume of all of the SROs, as reported by the Equity Data Plans.

¹⁴² See, e.g., EMSAC Transcript, supra note 121, at 0106:25-0107:1 (statement of Richard Ketchum, Former CEO of FINRA).

¹⁴³ See Cboe U.S. Equities Volume Data, available at https://markets.cboe.com/us/equities/market_share/ (last accessed Dec. 4, 2019). The consolidated market share of these three exchange groups has remained roughly comparable over the past three years, remaining above 15% and below 25%. As of August 16, 2016, the NYSE exchange group had approximately 23% consolidated market share, the Nasdaq exchange group had approximately 16%, and the Cboe exchange group had approximately 21%. As of August 15, 2017, the NYSE exchange group had approximately 23% consolidated market share, the Nasdaq exchange group had approximately 18%, and the Cboe exchange group had approximately 20%. As of August 16, 2018, the NYSE exchange group had approximately 23% consolidated market share, the Nasdaq exchange group had approximately 19%, and the Cboe exchange group had approximately 18%. See Cboe U.S. Equities Volume Data, available at https://markets.cboe.com/us/equities/market_share/ (last accessed Aug. 16, 2019).

¹⁴⁴ Id.

setting the threshold for additional votes at 10% intervals would create the reasonable likelihood that exchange groups might receive a third vote, which would lead to a continuing concentration of voting power.

Accordingly, the Commission believes that setting the threshold for a second vote at 15%, and limiting the total votes available to an exchange group or unaffiliated exchange to two votes, would provide greater relative voting power for the three exchange groups that currently have the highest trading volumes—the CBOE, Nasdaq, and NYSE exchange groups would each get two votes. The Commission believes that a 15% threshold for a second vote on the operating committee would thus provide an exchange group or unaffiliated exchange with extra voting power in recognition of its responsibility as an SRO for the operations of a trading platform that generates a greater share of equity market data. Under this approach, FINRA would not be eligible for a second vote on the operating committee, because, despite facilitating a significant proportion of trade reporting, it does not produce quotations or operate a market center.¹⁴⁵

The Commission further believes that an exchange group or an unaffiliated exchange should be granted a second vote only if it has maintained consolidated equity market share of at least 15% for at least four of the six calendar months preceding a vote of the operating committee. While exchange group market share has remained relatively steady over the past several years,¹⁴⁶ competition for order flow among the exchanges and the registration of new national securities exchanges that trade equities may lead to more significant changes in market share. The Commission believes that using a look-back period of at least four of the six calendar

¹⁴⁵ The Commission notes, however, that while the voting allocation contemplated herein would not give a second vote to FINRA, it would effectively increase FINRA's voting power in that FINRA's vote on all matters would constitute approximately 11.1% of the SRO vote, and 7.4% of all votes on the operating committee, rather than its current 5.9% of all votes on the operating committees of the Equity Data Plans.

¹⁴⁶ See supra note 143.

months preceding a vote of the operating committee for determining whether an exchange group or an unaffiliated exchange has met the threshold for a second vote would allow the voting structure of the New Consolidated Data Plan to adapt over time to changing trading volume among exchanges while avoiding frequent changes in vote allocations as a result of short-term changes in activity.¹⁴⁷

As noted above, Nasdaq has argued that an approach that limits exchange groups to only one vote would be inconsistent with the Commission’s prior action to prevent exchange operating companies from offering “‘cross-SRO’ products that bundle products from multiple exchanges.”¹⁴⁸ The Commission believes, however, that a meaningful distinction exists between, on one hand, examining whether an exchange’s proposed rule change unfairly discriminates between market participants and, on the other hand, regulating the actions of multiple SROs in collectively operating critical market systems.¹⁴⁹ Under Section 6 of the Act,¹⁵⁰ the Commission oversees individual exchanges, not exchange groups, regarding, among other things, their obligations to not engage in disparate treatment of their members. In contrast, Section 11A and Rule 608 address the joint responsibilities of multiple SROs to the national market system as a whole, including operating a central utility for market data that has a broader class of

¹⁴⁷ The Commission notes that it adopted a similar look-back period in the adoption of Regulation ATS for determining whether an alternative trading system (“ATS”) has reached trading volume thresholds that trigger certain requirements. See Rule 301 of Regulation ATS, 17 CFR 242.301(b)(3), (providing that, “[a]n alternative trading system shall comply with the requirements set forth in paragraph (b)(3)(ii) of this section, with respect to any NMS stock in which the alternative trading system ... [d]uring at least 4 of the preceding 6 calendar months, had an average daily trading volume of 5 percent or more of the aggregate average daily share volume for such NMS stock as reported by an effective transaction reporting plan.”). See also Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 1998) (Regulation of Exchanges and Alternative Trading Systems).

¹⁴⁸ Nasdaq Letter, supra note 137. See also supra note 138 and accompanying text.

¹⁴⁹ See, e.g., Securities Exchange Act Release No. 73639 (Nov. 19, 2014), 79 FR 72251, 72271–72 (Dec. 5, 2014) (Regulation Systems Compliance and Integrity adopting release) (designating the SIPs as “critical SCI systems” because “consolidated market data is central to the functioning of the securities markets.”).

¹⁵⁰ 15 U.S.C. 78f.

stakeholders. Moreover, as discussed above, the Commission believes that, given the current structure of the market for NMS securities, allocating votes on the operating committees for critical market systems simply on an exchange-by-exchange basis—and thereby permitting exchanges under common ownership to collectively vote the interests of their corporate parent and to therefore command a majority of votes on the operating committees—does not facilitate representation of the interests of all stakeholders and no longer supports the integrity and affordability of SIP data.¹⁵¹

Finally, to ensure that only those SROs that are contributing to the generation or collection of the core data disseminated by the New Consolidated Data Plan have a vote on New Consolidated Data Plan decisions, the Commission believes that the New Consolidated Data Plan should provide that if an exchange ceases operation as an equity trading venue, or has yet to commence operation as an equity trading venue, that exchange should not have a vote on Plan matters.¹⁵²

2. Non-SRO Participation

In 2005, when the Commission adopted Regulation NMS,¹⁵³ it amended the Equity Data Plans to establish non-voting advisory committees to give interested parties an opportunity to express their views on Equity Data Plan business before any decision by the operating

¹⁵¹ See supra notes 130–141 and accompanying text. The Commission notes that the one–vote-per-exchange voting model precedes the demutualization of the exchanges and the emergence of exchange groups. See, e.g., Order temporarily approving CQ Plan, supra note 31, 43 FR at 34852.

¹⁵² Both ISE and Cboe have been inactive as equities exchanges for several years but continue to retain full voting rights on the Equity Data Plans. ISE ceased trading equities on December 23, 2008. See Securities Exchange Act Release No. 80873 (June 4, 2017), 82 FR 27094 (June 13, 2017). Cboe stopped trading equities on April 30, 2014. See Securities Exchange Act Release No. 71880 (Apr. 4, 2014), 79 FR 19950 (Apr. 10, 2014).

¹⁵³ See Regulation NMS Release, supra note 6.

committees.¹⁵⁴ Those advisory committees are made up of at least one representative from each of the following categories: (1) a broker-dealer with a substantial retail investor customer base, (2) a broker-dealer with a substantial institutional investor customer base, (3) an ATS, (4) a data vendor, and (5) an investor. As the Commission explained, the creation of the advisory committees was “a useful first step toward improving the responsiveness of Plan participants and the efficiency of Plan operations.” And the Commission said that it would “continue to monitor and evaluate Plan developments to determine whether any further action is warranted.”¹⁵⁵ After monitoring the activities of the Equity Data Plans over many years, the Commission believes that non-SROs are important stakeholders in the operation of the Equity Data Plans. The Commission now believes that the governance structure of the New Consolidated Data Plan should provide for non-SROs to participate as full members of the operating committee, rather than in an advisory capacity.

Under the current governance structure of the Equity Data Plans, the SROs retain substantial influence over the advisory committees. Members of the advisory committees are selected by the majority vote of the SROs,¹⁵⁶ and each SRO has the right to select an additional member of the advisory committee.¹⁵⁷ Members of the Equity Data Plans’ advisory committees

¹⁵⁴ See Regulation NMS Release, supra note 6, 70 FR at 37561 (“Expanding the participation of interested parties other than SROs in Plan governance should increase the transparency of Plan business, as well as provide an established mechanism for alternative views to be heard by the Plans and the Commission. Earlier and more broadly based participation could contribute to the ability of the Plans to achieve consensus on disputed issues.... The Commission particularly believes that the Plans should give full consideration to the views of industry participants on steps that would streamline the administrative procedures and burdens of the three Plans. Enhanced participation of advisory committee members in Plan affairs should help further this process.”).

¹⁵⁵ See Regulation NMS Release, supra note 6, 70 FR at 37561.

¹⁵⁶ See, e.g., Day Two Transcript, supra note 113, at 91:13-19, 136:17-19, 137:8-12 (statements of Hubert de Jesus, Blackrock) (stating that advisors should be selected in an independent fashion to avoid Participants potentially choosing not to renew an advisor, or removing an advisor who does not support SRO interests).

¹⁵⁷ See Regulation NMS Release, supra note 6, 70 FR at 37610 (Text of amendments to the Equity Data Plans, Governance Amendment (b)(2)).

are currently permitted to attend Plan meetings, receive certain information distributed to the operating committee relating to Plan matters, and submit their views prior to Plan decisions.¹⁵⁸ Members of the Equity Data Plan advisory committees, however, may not vote on Equity Data Plan matters; can be excluded from substantive discussions, including, for example, discussions about potential amendments to the Equity Data Plans (e.g., discussions in “executive sessions”); and can be denied access to critical information, such as cost and detailed revenue information.¹⁵⁹ Thus, under the Equity Data Plans’ current governance structure, the operating committees, which make decisions regarding Equity Data Plans’ actions, such as expenditures for technology upgrades and programming updates (including those to address latency issues), changes to fees, and amendments, are controlled exclusively by SRO representatives, and no other market constituency has voting rights.

Although advisory committee representatives currently have no voting power in the Equity Data Plans and have limited access to non-public information on Equity Data Plan matters,¹⁶⁰ they have substantial interests at stake in the Equity Data Plans’ decision-making

¹⁵⁸ See, e.g., Section III(e)(iii) of the CTA Plan, *supra* note 31 (“Members of the Advisory Committee shall have the right to submit their views to CTA on Plan matters, prior to a decision by CTA on such matters. Such matters shall include, but not be limited to, any new or modified product, fee, contract, or pilot program that is offered or used pursuant to the Plan.”); Section III(e)(iv) of the CTA Plan (“Members of the Advisory Committee shall have the right to attend all meetings of CTA and to receive any information concerning Plan matters that is distributed to CTA; provided, however, that CTA may meet in executive session if, by affirmative vote of a majority of the Participants entitled to vote, CTA determines that an item of Plan business requires confidential treatment.”).

¹⁵⁹ See *id.*

¹⁶⁰ Advisory Committee members may have access to non-public drafts of amendments to the Equity Data Plans and public statements; however, they do not have access to plan cost and detailed revenue information. See Patomak Petition, *supra* note 48, at 4–5 (“Currently, however, exchanges’ disclosures related to their equity market data fees and expenses are inadequate, making it difficult for market participants to make informed comments and the Commission to make reasoned findings. Although exchanges recently have begun to modestly enhance their disclosures related to market data fees, they remain inadequate.”). The Commission notes that the CTA/CQ Plans and the Nasdaq/UTP Plan currently publicly disclose, on a quarterly basis (with a 60-day lag), the percentage of revenue earned by fee type. See, e.g., Q4 2018 CTA Quarterly Revenue Disclosure, available at <https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Q4%202018%20CTA%20Quarterly%20Revenue%20Disclosure.pdf>; Q4 2018 UTP Quarterly Revenue Disclosure, available at <https://www.utp.com/~/media/UTP/2018/04/2018-UTP-Quarterly-Revenue-Disclosure.pdf>.

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process. Market participants who use SIP data—including investors, broker-dealers, data vendors, and others—are required to pay the fees charged by the Equity Data Plans. Retail investors that access core data through their broker-dealers can also be affected by data fees in that the fees charged to their broker-dealers can impact investors’ ready access through their broker-dealers to full NBBO market information.¹⁶¹ The Commission has previously stated that investors must have core data to participate in the U.S. equity markets.¹⁶² And many market participants, including all broker-dealers, must have access to SIP data to meet their regulatory obligations.¹⁶³

Roundtable panelists also stated that there are substantial burdens associated with the Equity Data Plans’ audits of their firms’ subscriber data usage and fee payment.¹⁶⁴ A retail

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Disclosure, available at http://www.utpplan.com/DOC/UTP_Revenue_Disclosure_Q42018.pdf. The fee types currently identified in the public disclosures are: professional subscribers, non-professional subscribers, non-display, quote query, and “other.” Although the current disclosures break down the revenue earned for certain fee types, the current disclosures are not broken down by each line item in the Equity Data Plans’ fee schedule. For example, both the CTA/CQ Plans and the Nasdaq/UTP Plan group certain fee types under the general “other” category. The “other” category for the CTA/CQ Plans includes data feed access fees, redistribution fees, and TV ticker fees. The “other” category for the Nasdaq/UTP Plan includes data feed access fees, annual administrative fees, redistributor fees, voice port fees, and cable TV ticker fees. As another example, the CTA/CQ Plans and the Nasdaq/UTP Plan have more than one type of non-display fees and access fees, which are not separately identified in the current revenue disclosures. In addition, the current disclosures by the CTA/CQ Plans and Nasdaq/UTP Plan do not include the revenue recovered from audits or any other methods of recovery.

¹⁶¹ Some broker-dealers provide customers with market information from exchange proprietary TOB data feeds as substitutes for core data in certain applications. This proprietary TOB data may be cheaper than core data, but may contain information from only one exchange or one exchange group. *See* Effective-Upon-Filing Release, *supra* note 27, 84 FR at 54798 n.39.

¹⁶² *See* Bloomberg Order, *supra* note 23, at 4.

¹⁶³ *See* Effective-Upon-Filing Release, *supra* note 27, 84 FR at 54798.

¹⁶⁴ *See, e.g.,* Day One Transcript, *supra* note 38, at 112:21-24 and 114:2-9 (statements of Matt Billings, TD Ameritrade) (“The plans regularly audit brokers for compliance with their overly complex rules, which are not harmonized across the CTA and UTP Plans, and are a cause for misinterpretation. ... The question ultimately becomes, at what point does a retail broker move away from the NMS plans ... to avoid ... the audit risk liability that currently exists under the plans.”); Day Two Transcript, *supra* note 113, at 196:20-197:7 (statement of Marcy Pike, Fidelity Investments) (“Most large brokerage firms or asset managers that are consuming this data have significant staffs that are counting and reporting the usage of this data.... There is a whole group of folks that have entered into the industry to help facilitate audits for the exchanges....”).

broker-dealer, for example, has stated that compliance with the requirement to differentiate between the professional and non-professional status of their customers can be costly for a retail broker in terms of both time and manpower needed to complete the audit, and that these burdens are a factor favoring broker-dealer use of the exchanges' proprietary TOB products.¹⁶⁵ Exchanges have also acknowledged the administrative burden associated with determining the professional and non-professional status of broker-dealers' customers.¹⁶⁶

During the Roundtable, many panelists expressed support for expanding the role of advisory committees in the governance of Equity Data Plans and for providing the advisory committees with the right to a formal vote on the operating committees.¹⁶⁷ One panelist stated

¹⁶⁵ See TD Ameritrade Letter, *supra* note 40, at 5-8 (stating that the lower cost of proprietary TOB products, coupled with costs associated with the process to differentiate between retail professionals and non-professionals imposed by the Equity Data Plans, and associated audit risk, favors retail broker-dealer use of proprietary TOB products). See also Fidelity Letter, *supra* note 114, at 9 (“Exchanges spend considerable resources auditing broker-dealers to ensure that subscriber status categories are correctly applied. Why? Because it is in their commercial interest to do so – Professional subscriber market data rates are significantly higher than Non-professional subscriber rates. We question whether exchange resources used to audit member firms might be better deployed to reduce SIP costs.”). Under their respective policies, the Equity Data Plans deem data recipients to be professionals unless demonstrated to be a non-professional (a non-professional being a natural person who receives market data solely for his/her personal, non-business use, and who further does not fall into certain other categories). See, e.g., CTA Plan Nonprofessional Subscriber Policy, available at <https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Policy%20-%20Non-Professional%20Subscribers%20-%20CTA.pdf> (last accessed Nov. 9, 2019); UTP Plan, Exhibit 2 (Fees for UTP Services), Section (b)(2), available at http://www.utpplan.com/DOC/Nasdaq-UTPPlan_after_43rd_Amendment-Excluding_21st_36th_38th_42nd_Amendments.pdf (last accessed Nov. 9, 2019).

¹⁶⁶ See, e.g., NYSE Insights, *supra* note 92 (“Subscribers pay different rates for the product based on whether the individual viewing the data is deemed a ‘professional’ or ‘non-professional’ user. This is a policy that has provided steep discounts for Main Street investors, but has created complex administrative burdens for brokers.”); Nasdaq Total Markets Paper, *supra* note 45, at 4 (stating that the distinctions between “professional” and “non-professional” users “have become arbitrary and more complex than is necessary and create undue administrative burden to manage. We should modernize the user definitions to achieve the same general goals while streamlining the administrative burden.”). See also Day Two Transcript, *supra* note 113, at 258:19-25 (statement of Kevin Carrai, Cboe) (highlighting a compliance tool developed by the CTA Plan to determine whether an individual should be charged professional or non-professional rates for the receipt and use of the plan’s market data).

¹⁶⁷ See, e.g., Day Two Transcript, *supra* note 113, at 91:13-19, 136:17-19, 137:8-12 (statements of Hubert de Jesus, Blackrock) (advocating for advisory committee members to have equitable voting representation—a 50:50 balanced voting representation—and that advisors should be selected in an independent fashion to avoid Participants potentially choosing not to renew an advisor, or removing an advisor who does not support SRO interests); at 87:17-20, 118:14-20, 133:2-14 (statements of Richard Ketchum, Former CEO of FINRA)

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that current members of the advisory committees could initially serve as the pool of candidates from which to draw non-SRO representatives with voting power and that once the non-SRO representatives are appropriately constituted, they may be able to select among themselves their successors.¹⁶⁸ Exchange panelists were not unified in their views during the Roundtable, however. One exchange panelist expressed support for full voting representation by brokers, traders, and investors on the operating committees of the Equity Data Plans.¹⁶⁹ Several exchange panelists suggested a willingness to add an additional non-SRO vote, but only after consideration of the obligations attached to the voting right.¹⁷⁰ Another exchange, NYSE, argued in its comment letter that, before providing advisory committee members with a vote, the Commission would need to take into consideration their conflicts of interest and to place obligations on the advisory committee members similar to those placed on the exchanges.¹⁷¹

Many Roundtable commenters expressed support for permitting the Equity Data Plans' advisory committee members to have votes.¹⁷² In particular, one commenter suggested that the

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(supported advisory committee votes, but stressed that having a fiduciary responsibility tied to enforceable accountability for both Participants and advisors is important and could benefit from Commission action); at 122:17-20, 129:16-19 (statements of Michael Masone, Citigroup) (recommended a minimum of two additional advisory committee votes—specifically an asset manager and a broker-dealer—to be represented on the NMS plans); at 127:23-128:6 (statement of John Ramsay, IEX).

¹⁶⁸ See, e.g., Day Two Transcript, supra note 113, at 128:7-16 (statement of John Ramsay, IEX).

¹⁶⁹ See, e.g., Day Two Transcript, supra note 113, at 128:17-23 (statement of John Ramsay, IEX).

¹⁷⁰ See, e.g., Day Two Transcript, supra note 113, at 134:21-135:8 (statement of Emily Kasparov, Chicago Stock Exchange, Inc. (n/k/a NYSE Chicago)); at 136:4-16 (statement of Bryan Harkins, Cboe); at 251:16-25 (statement of Jeff Davis, Nasdaq).

¹⁷¹ See NYSE Group Letter, supra note 116, at 19 (stating that “absent the same regulatory obligations as the exchanges, Advisory Committee members would not have an incentive to cast votes consistent with the terms of the [Equity Data Plans]”). See also NYSE Letter, supra note 137, at 9 (stating that “broker-dealers and other industry participants are free to and do act entirely in their own commercial interests unfettered by statutory or public interest concerns”).

¹⁷² See, e.g., SIFMA Letter III, supra note 57, at 7 (“SIP governance (and that of all other NMS Plans) should include voting representation by both broker-dealers and asset managers.”); SIFMA Letter IV, supra note 113, at 4 (stating that the SIP operating committees should provide equal voting rights to industry representatives from: (1) institutional broker-dealers; (2) retail broker-dealers; (3) buy-side firms; (4) data vendors; (5) ATSS;

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governance structure should call for a board and operating committees with equal non-SRO voting membership, including user, vendor, and public investor participation.¹⁷³ One commenter asserted that giving voting representation on the operating committee to broker-dealers and asset managers would mitigate potential conflicts of interest.¹⁷⁴ One commenter supported equal voting power between the SROs and industry representatives on the Equity Data Plans and replacing those representatives every two to four years.¹⁷⁵ Another commenter stated that meaningful governance of the Equity Data Plans cannot be accomplished unless user and vendor representatives have a voice in their operations.¹⁷⁶

In one of its comment letters on the Roundtable, Nasdaq recommended expanding the authority and responsibilities of the advisory committees, particularly on fees and policy-related matters, and supported providing the general investing public a voice on the advisory committees.¹⁷⁷ Nasdaq further stated that increased authority for the advisory committees should be coupled with “a fair and transparent mechanism” to address conflicts of interest among

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and (6) an individual with significant and reputable regulatory expertise); Fidelity Letter, supra note 114, at 3 (recommending that the Commission improve SIP governance by providing broker-dealers and asset managers a vote on all matters before the operating committees to provide alternative views, and to promote initiatives to better develop core data).

¹⁷³ See CTA/UTP Letter, supra note 113, at 2.

¹⁷⁴ See SIFMA Letter III, supra note 57, at 7.

¹⁷⁵ See SIFMA Letter IV, supra note 113, at 4-5.

¹⁷⁶ See TD Ameritrade Letter, supra note 40, at 9 (“TD Ameritrade also believes that meaningful governance of the Equity Data Plans cannot be accomplished unless user and vendor representatives have a true voice in their operation. The governance structure should allow for fair and equitable voting rights for exchanges and for members of the CTA/UTP Advisory Committee.”). Similarly, another commenter supported equitable voting representation from investment advisers, broker-dealers, and data vendors. See Healthy Markets Letter, supra note 113, at 40.

¹⁷⁷ See Letter from Thomas Wittman, Executive Vice President, Head of Global Trading and Market Services, and CEO, Nasdaq (Oct. 25, 2018), at 12, available at <https://www.sec.gov/comments/4-729/4729-4562784-176135.pdf> (“Nasdaq 2018 Letter”).

advisory committee members.¹⁷⁸ In addition, Nasdaq has expressed support for establishing a partnership between the exchanges and industry participants for Equity Data Plans’ governance, specifically suggesting that industry participants have two votes on the plans’ operating committees, to be split among the six members of the Equity Data Plans’ advisory committee members.¹⁷⁹ Nasdaq further supported requiring non-SRO voting members to “adhere to existing conflicts of interest and confidentiality policies, such as those that require exchanges and their affiliates to recuse themselves when they might receive a unique benefit not shared with other exchanges.”¹⁸⁰

The Commission also received petitions for rulemaking that requested that the Commission improve the Equity Data Plans’ governance by including voting representation from investment advisers and broker-dealers,¹⁸¹ and that the Commission conduct a review of the equity market data fee structure¹⁸² and study the governance of the U.S. equity market data regulatory framework with respect to proprietary market data and the consolidated data processor model.¹⁸³ The EMSAC also recommended that the advisory committee have the right to a formal vote to express its views before consideration of any matter on which the operating committee votes.¹⁸⁴

¹⁷⁸ Id. See also Nasdaq Letter, supra note 137, at 7 (stating that, “other than ensuring their own compliance with the securities laws and rules of SROs, broker-dealers must be expected to act in their own commercial interests.”).

¹⁷⁹ See Nasdaq Total Markets Paper, supra note 45, at 22–23.

¹⁸⁰ See id. at 23.

¹⁸¹ See Healthy Markets Petition, supra note 48, at 6.

¹⁸² See Patomak Petition, supra note 48, at 8–9 (“Based on this review, the SEC should consider whether any additional regulatory changes related to market data are warranted, potentially including ... reforming NMS plan governance to allow voting representation from stakeholders such as broker-dealers and buy-side representatives.”).

¹⁸³ See MFA Petition, supra 48, at 13.

¹⁸⁴ See EMSAC Governance Recommendations, supra note 136, at 2. The EMSAC also recommended that, if the operating committee approves any action that was opposed by a majority of the advisory committee, the

(footnote continued...)

NYSE and Nasdaq, however, expressed concern with enhancing advisory committee involvement in Equity Data Plan governance.¹⁸⁵ NYSE argued in its comment letter that the current non-voting advisory committee structure is “working as intended” and that Section 11A of the Act and Rule 608 of Regulation NMS enable only SROs to become official voting members or participants of the Equity Data Plans, consistent with the SROs’ regulatory obligations.¹⁸⁶ In particular, NYSE stated that, “[i]f the advisors of the NMS Plans were allowed effectively to interfere with the actions of the operating committees of the Plans, the advisors might be able to block or slow down changes the SROs felt were necessary to discharge their statutory obligations.”¹⁸⁷ Nasdaq similarly asserted that non-SROs have a “strong voice in the operation of NMS Plans through the significant participation of advisory committees” and expressed concern that enhanced industry participation in the Equity Data Plans could frustrate the regulatory obligations that attach to the SROs as Participants.¹⁸⁸ Nasdaq also stated that expanding the role of advisory committees to include voting rights “would need to be accomplished through an amendment to Rule 608 of Regulation NMS and to the NMS plans to ensure proper and consistent application.”¹⁸⁹

Since the Commission took the step of establishing non-voting advisory committees in Regulation NMS, the equity markets have seen a number of important changes, which as

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operating committee should explain and document its reasons for proceeding contrary to advisory committee input and that, in the event that the matter is the subject of a rule filing, the operating committee should also summarize and explain the results of the operating committee and advisory committee votes in the filing submitted to the Commission. See id.

¹⁸⁵ See supra note 137 and accompanying text.

¹⁸⁶ NYSE Letter, supra note 137, at 9.

¹⁸⁷ Id. at 9.

¹⁸⁸ Nasdaq Letter, supra note 137, at 7.

¹⁸⁹ Id. at 22.

discussed above include the demutualization of exchanges—and the resulting divergence of the interests of the exchanges and their members—and the conflicts of interests that have emerged as exchanges have developed a variety of proprietary data products and marketed them to the subscribers of core data disseminated by the SIPs. Moreover, while non-SROs bear significant burdens from subscriber audits, those market participants have no role in selecting or overseeing the plan administrator that is responsible for the audit process. Thus, in light of the critical importance of disseminating SIP data to a broad range of market participants, the important role that the Equity Data Plans play in the national market system, and the financial¹⁹⁰ and operational burdens¹⁹¹ that the Equity Data Plans’ decisions frequently place on non-SRO market participants—as well as the comments the Commission has received supporting voting rights for non-SROs on the Equity Data Plans’ operating committees.¹⁹² The Commission believes that, to help ensure that the New Consolidated Data Plan addresses the needs of all market participants, broader participation in the governance of the New Consolidated Data Plan would be beneficial.¹⁹³ Consequently, the Commission believes that the New Consolidated Data Plan should include provisions that permit non-SRO representatives reflecting a diverse range of affected market participants to participate as voting members of the New Consolidated Data Plan operating committee.¹⁹⁴

¹⁹⁰ The total revenues derived from Equity Data Plans’ fees are substantial. For example, total revenue for the three Equity Data Plans totaled more than \$430 million in 2017, based on their audited financial statements. Moreover, while non-SROs bear significant burdens from subscriber audits, see supra notes 164–165 and accompanying text, those market participants have no role in selecting or overseeing the plan administrator that is responsible for the audit process.

¹⁹¹ Any changes in the data feeds, connectivity options, and policies and procedures of the Equity Data Plans often require responsive technology changes by each subscriber.

¹⁹² See supra notes 172–176 and accompanying text.

¹⁹³ See supra note 159 and accompanying text.

¹⁹⁴ The Commission understands that previous efforts to amend the Equity Data Plans to provide votes on the operating committees to non-SROs have not been successful due, in part, to the significant hurdle of satisfying (footnote continued...)

Broader participation in the governance of the New Consolidated Data Plan should be beneficial in providing more meaningful inclusion of key stakeholders' views in New Consolidated Data Plan decision making, and the Commission believes that the New Consolidated Data Plan should provide for separate voting member representatives of an institutional investor (e.g., an asset management firm), a broker-dealer with a predominantly retail investor customer base, a broker-dealer with a predominantly institutional investor customer base, a securities market data vendor, an issuer of NMS stock, and a retail investor. The representatives on the New Consolidated Data Plan would, therefore, closely mirror the categories of representatives on the advisory committees of the Equity Data Plans. However, because the Commission believes that ATs and institutional broker-dealers serve similar roles in the markets, as they both operate as over-the-counter trading venues, the Commission believes that the New Consolidated Data Plan operating committee should not include a designated ATS representative.¹⁹⁵ To further ensure that non-SRO members reflect a diversity of perspectives, the Commission believes that the New Consolidated Data Plan should not permit a person affiliated with an SRO or a broker-dealer to serve as the representative of an "issuer," a "retail investor," or a "market data vendor."

(...footnote continued)

the plans' unanimity requirements before an amendment to any of the plans may be proposed. See Letter from Eric Swanson, General Counsel, Bats Global Markets, Inc. (Aug. 17, 2016), available at <https://www.sec.gov/comments/265-29/26529-83.pdf> ("In early 2015, Bats submitted proposals to the UTP and CTA/CQ Plans' Operating Committees to allow one broker-dealer and one investment advisor representative as full voting members. These proposals were not designed to be a final recommendation; but to rather act as a strawman to facilitate further discussions on how to increase participation by industry participants in the governance of the UTP and CTA/CQ Plans. Bats was unable to obtain sufficient support from the Operating Committee to move that initiative forward...").

¹⁹⁵ As noted above, the advisory committees of the Equity Data Plans currently have representatives from the following categories: (1) a broker-dealer with a substantial retail investor customer base; (2) a broker-dealer with a substantial institutional investor customer base; (3) an ATS; (4) a data vendor; and (5) an investor. The Commission notes that the individual representing an ATS on the Equity Data Plans advisory committee has, for several years, been from a large institutional broker.

The Commission also believes that the extent of the SROs' current involvement in the Equity Data Plans' advisory committees—from selection of the members to selection of their own representatives on the advisory committees—limits the ability of the advisory committee members to be fully independent and to provide alternative views to be heard by the Equity Data Plans and the Commission, as contemplated when the advisory committees were created.¹⁹⁶ Therefore, the Commission believes that the SROs should not be permitted to select the non-SRO members of the New Consolidated Data Plan operating committee. The Commission believes that the operating committee should provide for a process to publicly solicit, and make available for public comment, nominations for non-SRO members.

Further, the Commission believes that the initial non-SRO operating committee members should be selected by the current members of the Equity Data Plans' advisory committees, excluding advisory committee members who were selected by a Participant to be its representative, and subsequent non-SRO members should be selected solely by the then-serving non-SRO members of the New Consolidated Data Plan operating committee.¹⁹⁷ Additionally, the Commission believes that, to enhance the ability of non-SRO members to obtain sufficient experience with the operation of the New Consolidated Data Plan, and to make informed contributions as members of the operating committee, the New Consolidated Data Plan should provide that non-SRO members serve for a term of two years, which is the current term of advisory committee members of the Equity Data Plans.¹⁹⁸ The Commission further believes that

¹⁹⁶ See Regulation NMS Release, *supra* note 6, 70 FR at 37561 (“Expanding the participation of interested parties other than SROs in Plan governance should increase the transparency of Plan business, as well as provide an established mechanism for alternative views to be heard by the Plans and the Commission.”).

¹⁹⁷ A list of current members of the CTA Plan advisory committee is available at <https://www.ctaplan.com/advisory-committee> (last accessed on Nov. 13, 2019). The Equity Data Plans all share the same advisory committee members. See also *supra* notes 156 and 168.

¹⁹⁸ Section III.(e)(2) of the CTA Plan; Section IV.E.(b) of the UTP Plan.

to ensure that a diversity of viewpoints are reflected among the non-SRO members of the operating committee, the New Consolidated Data Plan should provide for reasonable term limits for non-SRO members.¹⁹⁹

The Commission further believes that the current membership of the Equity Data Plans' advisory committees, excluding exchange representatives, should, to the extent possible, be maintained through the transition to the New Consolidated Data Plan to facilitate continuity. The Commission believes that the current advisory committee members' experience with, and expertise in, the operation of the Equity Data Plans will be valuable in selecting the initial non-SRO operating members (as discussed in more detail below) and will thus support the stable transition of operations from the Equity Data Plans to the New Consolidated Data Plan. Therefore, until the initial non-SRO members have been selected, the Commission believes that the Participants should renew the expiring terms of all members of the Equity Data Plans' advisory committees (other than those selected to represent a Participant) who remain willing to serve in that role.

As noted above, certain exchanges have expressed concerns regarding extending voting rights on the Equity Data Plans to non-SROs.²⁰⁰ The Commission recognizes that the SROs have special legal obligations and responsibilities under the Act, including with regard to operating the Equity Data Plans.²⁰¹ However, neither the Act nor the applicable rules thereunder, including Rule 608 of Regulation NMS, prohibit non-SROs from participating in the governance of any NMS plan or from having voting rights in the administration of NMS plans. Therefore, the

¹⁹⁹ For example, one commenter recommended that non-SRO members should nominate individuals to replace then-serving non-SRO members every two to four years. See supra note 175.

²⁰⁰ See supra notes 170–171, 185–189 and accompanying text.

²⁰¹ 15 U.S.C. 78k-1(a)(3)(B).

Commission believes that it is not necessary to amend Rule 608 of Regulation NMS in order for the New Consolidated Data Plan to include voting rights for non-SROs. The Commission believes that providing non-SROs with voting rights in the New Consolidated Data Plan should help to further ensure that SIP data is available for the benefit of the public interest, by incorporating input from a range of stakeholders, consistent with the findings and goals of Section 11A of the Act.²⁰² Moreover, the Commission believes that votes can be provided to non-SROs in a manner that results in the SROs retaining the voting power necessary to act jointly on behalf of the plan pursuant to the requirements of Section 11A of the Act²⁰³ and Rule 608 of Regulation NMS.²⁰⁴

Specifically, the Commission believes that the New Consolidated Data Plan should provide the SROs in 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. To ensure that the SROs retain primary control of the New Consolidated Data Plan, the Commission believes that this ratio should be maintained at all times, including when a member of the operating committee is not present or unable to vote for any reason. In addition, the relative value of non-SRO votes should be adjusted as necessary to account for new exchange registrations and consolidations to continually ensure that the ratio between aggregate SRO voting power and aggregate non-SRO voting power remains the same.

Thus, under the provisions that the Commission believes should be part of the New Consolidated Data Plan regarding the allocation of votes among the SROs and non-SROs, as

²⁰² 15 U.S.C. 78k-1(a)(1).

²⁰³ 15 U.S.C. 78k-1

²⁰⁴ 17 CFR 242.608.

applied to the current number and ownership structure of the SROs, there would be nine aggregate SRO votes²⁰⁵ (two-thirds) and four and one-half aggregate non-SRO votes (one-third) on the New Consolidated Data Plan operating committee. Because there would be six non-SRO operating committee members eligible to vote in the New Consolidated Data Plan, but only four and one-half non-SRO votes in the aggregate, each non-SRO member's vote would be worth three-quarters of one vote ($4.5 \div 6 = 3/4$).

Further, the Commission believes that action by the operating committee of the New Consolidated Data Plan should require an "augmented majority vote," meaning a two-thirds majority of all votes on the operating committee, provided that this vote also includes a majority of the SRO votes, which will ensure that the SROs have sufficient voting power to act jointly on behalf of the plan pursuant to the requirements of Section 11A of the Act²⁰⁶ and Rule 608 of Regulation NMS.²⁰⁷ For example, under the current number and ownership structure of the SROs, there would be nine SRO votes and four and one-half non-SROs votes. For an "augmented majority vote," nine votes of the operating committee would be required for a two-thirds majority, and five SRO votes would be required for an SRO majority vote. Five SRO votes would be necessary to obtain a majority of SRO votes as well as a two-thirds majority vote of the operating committee. There would not be a situation in which a two-thirds majority would not also include a majority of the SRO votes. However, the number of the SROs may not remain static. If in the future another SRO joined the New Consolidated Data Plan, there would then be ten SRO votes, and the non-SRO operating committee members would then have five votes.

²⁰⁵ The NYSE exchange group would have two votes; the Nasdaq exchange group would have two votes; the Cboe exchange group would have two votes; and IEX, FINRA, and LTSE would each have one vote—totaling nine votes.

²⁰⁶ 15 U.S.C. 78k-1.

²⁰⁷ 17 CFR 242.608.

Under those circumstances, a two-thirds majority could be obtained without a majority of the SRO votes—in other words, if five SROs and five non-SROs vote in favor of a motion, and five SROs vote against the motion, two-thirds of the operating committee voted in favor, but a majority of SROs did not. Therefore, this would not constitute an augmented majority vote and the motion would fail.

Finally, the Commission believes that the New Consolidated Data Plan should include provisions to address circumstances in which a member is unable to attend an operating committee meeting or to cast a vote.

3. Voting Requirements for Changes to the New Consolidated Data Plan

Under the current governance model, certain actions by the Equity Data Plans' operating committees require the unanimous vote of all Participants.²⁰⁸ While the majority of actions under the Equity Data Plans require only a majority vote, unanimity is required, for example, to propose amendments to the provisions of the Plans,²⁰⁹ to amend contracts between the Equity Data Plans' processor and vendors,²¹⁰ and to terminate a Plan processor.²¹¹ The EMSAC, however, recommended that unanimity not be required for NMS plan votes, stating that limiting the use of unanimity requirements would “prevent undue friction or delay in Plan voting matters.”²¹²

The Commission believes that, because unanimous voting provides each exchange, despite the conflicts of interest it may face, with an effective veto over certain significant Equity

²⁰⁸ See Section IV.(b) of the CTA Plan; Section IV.(c) of the CQ Plan; Section IV.C.1 of the UTP Plan.

²⁰⁹ See Section IV.(b)(i) of the CTA Plan; Section IV.(c)(i) of the CQ Plan; Sections IV.C.1.a. and XVI of the UTP Plan.

²¹⁰ See, e.g., Section IV.C.1(b) of the UTP Plan.

²¹¹ See, e.g., Section IV.C.1(c) of the UTP Plan.

²¹² See EMSAC Governance Recommendations, supra note 136.

Data Plans’ matters, the requirement for unanimous voting can enable a single exchange to obstruct improvements to the collection (e.g., connectivity), processing (e.g., aggregation or consolidation), and distribution (e.g., transmission) of SIP data that the other SROs support. To address the concerns that arise from the Equity Data Plans’ requirement for unanimous voting, the Commission believes that the submission of amendments to the New Consolidated Data Plan to the Commission, like other actions by the operating committee as described above,²¹³ should be approved by an augmented majority vote, defined above, rather than a unanimous vote. As noted above, the Commission believes that requiring an augmented majority vote for changes to the New Consolidated Data Plan would provide non-SRO members with a voice in New Consolidated Data Plan governance, while also ensuring that the SROs have sufficient voting power to act jointly on behalf of the New Consolidated Data Plan.

One Roundtable panelist and one commenter raised the concern that eliminating the current Equity Data Plans’ requirements regarding unanimous voting would reduce the influence of FINRA and the unaffiliated exchanges.²¹⁴ The Commission, however, believes that the voting allocation described above for the New Consolidated Data Plan—coupled with the existing requirement that NMS plan amendments (except those put into effect upon filing)²¹⁵ must be published for comment and subject to approval by the Commission to become effective—should help to address this concern.²¹⁶ Actions by the Equity Data Plans would no longer be subject to

²¹³ See supra Section II.C.2.

²¹⁴ See, e.g., Day Two Transcript, supra note 113, at 113:24-114:9, 149:1-13, 24 (statements of Emily Kasparov, Chicago Stock Exchange, Inc. (n/k/a NYSE Chicago)); Healthy Markets Letter, supra note 113, at 10 (“In recent years, the CTA Plan has modified its procedures to permit votes by less than unanimity. This severely limits the ability of FINRA or an independent exchange to block CTA Plan actions, arguably granting much greater power to the dominant exchange operators.”).

²¹⁵ See 17 CFR 242.608(b)(3).

²¹⁶ See also supra note 145 (noting FINRA’s proportional voting power would increase under the provisions of the New Consolidated Data Plan as contemplated by this Order).

veto by a single SRO or exchange group, and substantive New Consolidated Data Plan amendments would continue to be subject to review by the Commission and public notice and comment, and would not become effective unless the Commission finds them to be consistent with the Act.

In addition, unanimous voting is not a requirement for NMS plans. In fact, the most-recently approved NMS plan, which governs the facility for a consolidated audit trail (“CAT”), requires the affirmative vote of a two-thirds supermajority of all members of the operating committee for plan amendments.²¹⁷ In the adopting release for Rule 613 under the Act,²¹⁸ which required the creation of the CAT Plan, the Commission stated that “an alternate approach” to voting involving “the possibility of a governance requirement other than unanimity, or even super-majority approval, for all but the most important decisions” should be considered, as it “may be appropriate to avoid a situation where a significant majority of plan sponsors—or even all but one plan sponsor—supports an initiative but, due to a unanimous voting requirement, action cannot be undertaken.”²¹⁹

The Commission believes that the proposed reallocation of voting rights among the SROs—combined with the provision of formal voting power to non-SROs, the provision of a two-thirds majority of votes allocated to the SROs, and the provision of an augmented majority vote rather than unanimous vote for amendments to the New Consolidated Data Plan—would

²¹⁷ See Limited Liability Company Agreement of CAT NMS, LLC (effective Jan. 10, 2018), available at <https://www.catnmsplan.com/wp-content/uploads/2018/01/CAT-NMS-Plan-Current-as-of-1.10.18.pdf>; Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (Order Approving the National Market System Plan Governing the CAT or “CAT Plan”). See also Section 12.3 of the CAT Plan.

²¹⁸ 17 CFR 242.613.

²¹⁹ See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45787 (Aug. 1, 2012).

further the objectives of Section 11A of the Act.²²⁰ Together, these provisions would promote the prompt, accurate, reliable, and fair dissemination of core data²²¹ by providing for meaningful input from a broad range of stakeholders while also ensuring that the SROs retain sufficient voting power to act jointly on behalf of the plan pursuant to the requirements of Section 11A of the Act and Rule 608 of Regulation NMS.²²² The Commission also believes that broader representation on the New Consolidated Data Plan operating committee would help to ensure that decisions relating to New Consolidated Data Plan operations support the prompt, accurate, reliable, and fair dissemination of core data.²²³

4. Consolidating the Three Equity Data Plans into a Single New Consolidated Data Plan

Although the Equity Data Plans are structured as three separate NMS plans—which reflects the less integrated equity markets at the time the Equity Data Plans were organized and approved—the three Equity Data Plans now have identical operating committees that hold joint meetings to oversee the collection, processing, and distribution of SIP data in today’s tightly integrated equity markets. Additionally, the three Equity Data Plans have the same advisory committee members, who function as one advisory committee for all three Equity Data Plans. The three Equity Data Plans also have overlapping administrative and regulatory functions and share the same revenue distribution formula, legal representation, and other professional services. The Commission believes that maintaining three separate Equity Data Plans is inefficient and creates redundant efforts on the part of the operating and advisory committee members that unnecessarily burden ongoing improvements to the SIPs and that contribute to

²²⁰ 15 U.S.C. 78k-1.

²²¹ See *supra* note 102.

²²² 15 U.S.C. 78k-1 and 17 CFR 242.608.

²²³ See 15 U.S.C 78k-1(c)(1)(B).

certain duplicative costs. These redundant efforts include, among other things, maintaining accounting for three sets of legal and auditor fees, maintaining books and records for the Equity Data Plans' businesses, filing separate amendments regarding some aspects of the Equity Data Plans with the Commission, and devoting personnel resources to coordinate and facilitate three separate Equity Data Plans.

The Commission therefore believes that there should be one New Consolidated Data Plan to promote the application of consistent policies, procedures, terms, fees, and conditions that would be more transparent and easily understood across all data products offered and that reflect the provisions that are the subject of this Order. The Commission also believes that replacing the three existing Equity Data Plans with a single New Consolidated Data Plan with the governance structure discussed above would simplify the process of making future enhancements to the Equity Data Plans' operations so that core data meets on a continuing basis the needs of market participants and furthers the objectives of Section 11A of the Act.²²⁴

Finally, the Commission believes that the terms of the New Consolidated Data Plan should provide for the orderly transition of functions and responsibilities from the three Equity Data Plans to the New Consolidated Data Plan. The Commission believes that the Participants, because of their significant experience in the operations of NMS plans, are well positioned to propose an efficient and orderly transition as part of the New Consolidated Data Plan they file with the Commission.

²²⁴ 15 U.S.C. 78k-1. The Commission notes that, recently, as part of a comprehensive recommendation on reforming the U.S. equity markets, Nasdaq recommended consideration of consolidating the NMS plans for disseminating equity market data. See Nasdaq Total Markets Paper, supra note 45, at 21.

D. The Operation of the New Consolidated Data Plan

Given the importance of core data to the national market system, as recognized by both Congress and the Commission, and consistent with Rule 608 of Regulation NMS,²²⁵ the Commission believes that the terms, policies, and procedures of the New Consolidated Data Plan should promote the joint work of the SRO members (i.e., members that represent an exchange group or an unaffiliated SRO) and non-SRO members of the operating committee to ensure the prompt, accurate, reliable, and fair dissemination of core data.²²⁶ The Commission has set forth below certain governance provisions that the Commission believes would enable the New Consolidated Data Plan to address these issues.

1. The Role and Responsibilities of the Operating Committee

The Commission believes that the New Consolidated Data Plan should set forth the role and responsibilities of the operating committee. The Commission believes that the duties of the operating committee should include, at a minimum, the provisions described below.

The New Consolidated Data Plan should state that the operating committee should be responsible for proposing amendments to the New Consolidated Data Plan or implementing other policies and procedures, as necessary, 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, consistent with the goals of Section 11A of the Act.²²⁷ While each of the Equity Data Plans includes a general provision stating that the operating committees will propose changes to the Equity Data Plans through amendments, the Commission believes that the New

²²⁵ 17 CFR 242.608.

²²⁶ See supra note 102.

²²⁷ 15 U.S.C. 78k-1; see supra note 102.

Consolidated Data Plan should specifically provide that the responsibilities of the operating committee include proposing amendments to ensure that SIP data is distributed consistent with these statutory goals. The Commission believes that such a provision would encourage the operating committee to actively examine New Consolidated Data Plan operations and propose to change provisions of the New Consolidated Data Plan (or policies and procedures thereunder) that are no longer effective in carrying out the objectives of the Act.

The Commission believes that the New Consolidated Data Plan operating committee's role should also include selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of, an independent plan administrator,²²⁸ plan processors, a firm to examine and assess data usage reports and fee payments by subscribers (“auditor”),²²⁹ and other professional service providers. While the Equity Data Plans provide that the performance of the processor must be reviewed,²³⁰ the Commission believes that this obligation should be expanded to cover other professional service providers that have a significant role in the operations of the New Consolidated Data Plan to ensure that the non-SRO members of the New Consolidated Data Plan operating committee have a voice in these matters.

With respect to reviewing the performance of the New Consolidated Data Plan's processor(s), the Commission believes that the operating committee's role should include ensuring the public reporting of the performance of the processor(s) and other metrics and information about the processor(s). The CTA Plan requires the operating committee to periodically review whether “the Processor has failed to perform its functions in a reasonably acceptable manner in accordance with the provisions of [the] CQ Plan,” whether “its

²²⁸ See *infra* note 234 and accompanying text.

²²⁹ See *supra* note 164 and accompanying text.

²³⁰ See Section V.(d) of the CTA Plan; Section V.(d) of the CQ Plan; Section V.A. of the UTP Plan.

reimbursable expenses have become excessive and are not justified on a cost basis,” and whether “the Processor should continue in such capacity or should be replaced.”²³¹ The CTA Plan also states that, in reviewing the performance of the processor, the operating committee shall consider factors such as “experience, technological capability, quality and reliability of service, relative costs, back-up facilities, and regulatory considerations.”²³²

The Commission believes that the provisions in the New Consolidated Data Plan regarding the review of the processor(s) should also include a requirement that the results of the performance evaluation be made public, along with the metrics used to evaluate the processor(s) and other pertinent information about the processor(s). The Commission believes that 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 participants to provide meaningful input to the operating committee and to the Commission. Further, the Commission believes that, if performance metrics are made public, the operating committee of the New Consolidated Data Plan would have enhanced incentives to ensure that the processor is functioning well and that the New Consolidated Data Plan is providing prompt, accurate, and reliable publication of information with respect to quotations for and transactions in NMS stocks.²³³

The Commission further believes that the administrator of the New Consolidated Data Plan should be independent, meaning that the administrator should not be owned or controlled by a corporate entity that separately offers for sale a market data product, either directly or via another subsidiary. As discussed above, the Commission believes that an entity that acts as the

²³¹ Section V.(d) of the CTA Plan.

²³² Id.

²³³ See 15 U.S.C. 78k-1(c)(1)(B).

administrator while also offering its own proprietary data products faces a substantial, inherent conflict of interest, because it would have access to sensitive customer information.²³⁴ While conflict-of-interest and confidentiality provisions of the New Consolidated Data Plan, or of the administrator, may serve to mitigate conflicts to some extent, the Commission believes the conflicts of interest faced by a non-independent administrator are so great that these conflicts cannot be sufficiently alleviated through policies and procedures.

The Commission also believes that a requirement that the New Consolidated Data Plan administrator be independent would address concerns that have been raised about the burdens imposed by the current audit process for the Equity Data Plans.²³⁵ Specifically, the Commission believes that the oversight of an independent plan administrator would help to ensure that the burdens imposed by the audit process are fair, that they are reasonably related to ensuring that data subscribers pay the amounts properly due for their data usage, and that they are not designed in a manner that affects the decision making of subscribers when determining whether to purchase proprietary TOB data feeds.

Additionally, the Commission believes that the New Consolidated Data Plan should provide that any expenditures for professional services—including for example, legal counsel, public relations, and accounting services—that are paid for using New Consolidated Data Plan

²³⁴ As noted above, NYSE and Nasdaq currently act as administrators of the Equity Data Plans, which provides certain employees of these exchanges, through the subscriber audit process, with access to confidential data subscriber information. *See supra* note 52. Under the independence provision discussed above, NYSE and Nasdaq would be excluded from operating as plan administrators, although they would not be excluded from continuing to act as SIPs. There is precedent in other NMS plans for the roles of administrator and processor to be performed by different entities. As an example, for the NMS plan that governs the collection, consolidation, processing, and dissemination of last sale and quotation information for listed options—the Limited Liability Company Agreement of Options Price Reporting Authority, LLC Plan—Cboe Exchange, Inc. serves as the plan administrator and SIAC serves as the processor. The Commission notes that there would be some loss of revenue to the exchange groups currently acting as administrators to the Equity Data Plans if they are excluded from acting as plan administrator for the New Consolidated Data Plan.

²³⁵ *See supra* notes 164–165 and accompanying text.

revenues must be for activities consistent with the terms of the New Consolidated Data Plan and must be authorized by an augmented majority of the operating committee. Because the New Consolidated Data Plan’s governance structure would be designed to represent the interests of a broad range of market participants—who may at times hold diverging views about how the New Consolidated Data Plan should operate—the Commission believes that requiring that professional services engaged by the New Consolidated Data Plan be consistent with the terms of the New Consolidated Data Plan and be authorized by an augmented majority vote would help ensure that New Consolidated Data Plan resources are expended in furtherance of the purposes of the New Consolidated Data Plan and that both SRO and non-SRO members of the operating committee have input into this important aspect of New Consolidated Data Plan operations.

Further, the Commission believes that the New Consolidated Data Plan should include provisions to ensure that the operating committee is responsible for assessing the marketplace for equity market data products and ensuring that SIP data offerings are priced in a manner that is fair and reasonable and are designed to ensure the widespread availability of SIP data²³⁶ that is useful to a broad range of investors and other market participants.²³⁷ Imposing a direct responsibility on the operating committee of the New Consolidated Data Plan 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.²³⁸

²³⁶ See *supra* note 16.

²³⁷ See 15 U.S. C. 78k-1(c)(1)(C) (providing that the Commission shall assure the usefulness of the form and content of information with respect to quotations for and transactions in securities).

²³⁸ 15 U.S.C. 78k-1.

Finally, the Commission believes that the New Consolidated Data Plan operating committee’s role should include designing and maintaining a fair and reasonable revenue allocation formula for distributing plan revenues to be applied by the independent plan administrator, and overseeing, reviewing and revising that formula as needed. Over the past several years, market participants have suggested updating the market data revenue allocation.²³⁹ For example, during the Roundtable, one panelist recommended that the Commission undertake rulemaking to simplify the revenue allocation formula.²⁴⁰ Another panelist highlighted work done to increase transparency on the revenue allocation formula, including publishing a “plain-language version of the revenue allocation formula” on the Equity Data Plans’ websites.²⁴¹ In addition, Nasdaq has stated that the revenue allocation formula needs improvement as certain exchanges have “skewed the expected allocation of revenue by attracting displayed quotations without executing a commensurate number of trades.”²⁴² Nasdaq has expressed support for modifying the revenue allocation formula to reward displayed quotes where investors receive an execution.²⁴³ The Commission believes that the operating committee of the New Consolidated

²³⁹ See, e.g., Transcript of EMSAC Meeting (Apr. 5, 2017), at 0037:5-11 (statement of Adam Nunes, Hudson River Trading), available at <https://www.sec.gov/spotlight/equity-market-structure/emsac-transcript-040517.txt> (“We had people splitting all their trades up into hundred-share lots to maximize their revenue share. And now, we look today with ... quote-sharing where ... you see a massive disparity between exchanges’ quote share and their market share. So, I do think that that’s something that should be addressed.”); Letter from David M. Weisberger, President, Exquam LLC (Mar. 24, 2017), at 4-5, available at <https://www.sec.gov/comments/265-29/26529-1666811-148978.pdf> (stating that the “quote based calculation in the rule is ... flawed” and recommending that the allocation formula be based “on the value of trades in each stock resulting from interaction with a displayed quote.”).

²⁴⁰ See Day One Transcript, *supra* note 38, at 117:1-2 (statement of Michael Blaugrund, NYSE) (recommending that the Commission undertake rulemaking to simplify the revenue allocation formula).

²⁴¹ Day Two Transcript, *supra* note 113, at 90:13-16 and 97:16-22 (statements of Emily Kasparov, Chicago Stock Exchange, Inc. (n/k/a NYSE Chicago)).

²⁴² See Nasdaq Total Markets Paper, *supra* note 45, at 22. See also Day Two Transcript, *supra* note 113, at 174:25-175:10 (statement of John Yetter, Nasdaq); Nasdaq 2018 Letter, *supra* note 177, at 5.

²⁴³ See *id.* (“If the goal of consolidated data is to improve market quality, the revenue allocation formula should aim to improve the quality of quotes on public exchanges, where available liquidity is always on display and an execution can be accomplished.”).

Data Plan, with the broader representation of market participants contemplated by this Order, would be well situated to address issues such as these regarding Equity Data Plans' revenue allocation.

2. Executive Session Policy

In response to requests for improving the transparency of the use of executive session (i.e., meetings from which members of the advisory committee are excluded),²⁴⁴ the Equity Data Plans have implemented an executive session policy under which the following topics are appropriate for consideration or action in executive session: fees that require discussion of non-public financial information; subscriber audit findings; discussions requiring the disclosure of material non-public information; financial reports containing non-public financial information; the portion of a discussion or evaluation of administrator and processor performance that includes confidential information; contract negotiations, awards, and revocations that contain confidential information; advisory committee member selection; litigation matters; and confidential, non-public discussions with the Commission and its staff.²⁴⁵ While the Commission believes that the New Consolidated Data Plan would have no need to provide for an advisory committee,²⁴⁶ the Commission expects that the SROs will continue to hold executive sessions that will exclude non-SRO members of the operating committee. Thus, the Commission believes the New Consolidated Data Plan should include an executive session policy.

²⁴⁴ See, e.g., EMSAC Governance Recommendations, supra note 136, at 2.

²⁴⁵ The Commission's understanding of the executive session policies of the Equity Data Plans is based on information obtained by the Commission or its staff as part of the Commission's oversight of the Equity Data Plans.

²⁴⁶ See infra note 253.

During the Roundtable, exchanges pointed to progress on limiting the use of executive sessions by the SROs.²⁴⁷ One exchange commenter highlighted recent improvements in transparency that have resulted from shifting more discussions about SIP operations from executive sessions to the general sessions.²⁴⁸ Another exchange commenter expressed a willingness to increase public transparency of SIP operations and limit time spent in executive sessions.²⁴⁹ Other panelists, however, raised continuing concerns.²⁵⁰ For example, one industry panelist stated there should be a “litmus test” for determining if a matter deserved executive session consideration.²⁵¹

The Commission believes that, by permitting the SROs to hold discussions and make decisions in executive session without the advisory committee members present, the Equity Data Plans have limited the ability of advisory committee members to influence the operation of the Equity Data Plans.²⁵² While the Commission recognizes there may be circumstances in which

²⁴⁷ Day Two Transcript, supra note 113, at 141:3-18 (statement of Emily Kasparov, Chicago Stock Exchange, Inc. (n/k/a NYSE Chicago)). One exchange commenter highlighted meeting minutes that showed SIP Participants spending little time in executive sessions. See Nasdaq 2018 Letter, supra note 177, at 21 (“The executive session minutes reveal that the SIP Participants spend very little time in executive session, as little as 12 minutes in the last meeting.”). This commenter also stated that “[g]overnance of the SIPs is substantially more transparent than it once was” and that advisory committee members “enjoy access to information that is nearly coextensive with that of the SIP Participants.”

²⁴⁸ See NYSE Letter, supra note 137, at 19 (“Among other things, the Operating Committees have shifted most discussions about SIP operations from its Executive Sessions, which are not attended by the Advisory Committee, to the General Sessions, which are. The Operating Committee also provides transparency into why an agenda item is confidential and should be included in the Executive Session and requires a vote by the Plan participants before an agenda item is moved to the Executive Session.”).

²⁴⁹ See Letter from Oliver Albers, SVP, Head of Global Partnerships, Nasdaq (Oct. 24, 2018), at 9, available at <https://www.sec.gov/comments/4-729/4729-4560081-176209.pdf>.

²⁵⁰ Day Two Transcript, supra note 113, at 143:16-21 (statement of John Ramsay, IEX) (“I have witnessed cases where matters end up in executive session because they’re sensitive, in the sense that the committee members might come under criticism from folks in the industry, rather than it’s really so much a direct conflict of the type that really should require executive session.”); id. at 144:8-19 (statement of Hubert de Jesus, Blackrock) (expressing concern for the carve-outs permitting use of executive session).

²⁵¹ See Day Two Transcript, supra note 113, at 145:11-15 (statement of Kevin Cronin, Invesco).

²⁵² See Fidelity Letter, supra note 114, at 4 (“SIP Operating Committees typically meet in an executive session for formal votes. SIP Advisory Committee members act in a consultative role on select issues that the Operating
(footnote continued...)”)

deliberation by the SROs alone may be appropriate, any overuse of executive session limits transparency on Equity Data Plans' governance and has the potential to impede the advisory committee's ability to exercise its voice in key decisions.

The Commission acknowledges that the current Equity Data Plans' executive session policies provide some specificity regarding the subject matters eligible for executive session. The Commission believes, however, that the list of eligible items for executive session under the New Consolidated Data Plan should be more limited, particularly given that, as contemplated by this Order, the membership of the New Consolidated Data Plan operating committee would include non-SRO members.²⁵³ Therefore, the Commission believes that the New Consolidated Data Plan should include an executive session policy that permits the SROs to hold executive sessions only in circumstances when it is appropriate to exclude non-SRO members of the operating committee, such as, for example, discussions regarding matters that exclusively affect the SROs with respect to the Commission's oversight of the New Consolidated Data Plan (including attorney-client communications relating to such matters). The Commission also believes that, in furtherance of greater transparency, the New Consolidated Data Plan should require that a request to enter into an executive session be included on the written agenda along with a clearly stated rationale for each matter to be discussed and be approved by a majority vote of the SRO members of the operating committee.

(...footnote continued)

Committees choose to bring to them, and Advisory Committee members are not invited to, nor do they have a vote on, matters discussed in the Operating Committees.”); SIFMA, Proposal for the Creation of Competing Market Data Aggregators, at 13 (attached to SIFMA Letter III, supra note 57) (“Advisory committee members are given no substantive voice in the operation of the SIPs, and the SROs conduct all of the meaningful business of the SIPs in executive session, from which advisory committee members are excluded.”).

²⁵³ As noted above, the Commission believes that non-SRO members should have voting rights on the New Consolidated Data Plan operating committee, and therefore the New Consolidated Data Plan would not need to provide for an advisory committee. See supra note 155 and accompanying text.

3. Conflicts of Interest Policy

Several Roundtable panelists discussed imposing a disclosure-based policy to address conflicts of interest concerns,²⁵⁴ including one exchange that supported greater disclosure—for both the SROs and advisory committee members.²⁵⁵ Another exchange stated that the operating committees of the Equity Data Plans should not have exchange representatives who have a “direct-line responsibility for proprietary data.”²⁵⁶ Other commenters and one panelist observed that the advisory committee members are not immune to conflicts of interest²⁵⁷ and recommended that the Equity Data Plans establish a conflict-of-interest identification and management provision, as well as enforcement mechanisms, for both the SROs and advisory committee members.²⁵⁸

The Commission believes that the New Consolidated Data Plan should include a comprehensive conflicts of interest policy. As discussed above, in the Commission’s view, conflicts of interest are inherent to the Equity Data Plans’ current governance structure because some exchange Participants have a dual role as both an SRO jointly responsible for the operation

²⁵⁴ See, e.g., Day Two Transcript, supra note 113, at 117:24-118:7 (statement of Richard Ketchum, Former CEO of FINRA).

²⁵⁵ See Day Two Transcript, supra note 113, at 108:3-20 (statement of Bryan Harkins, Cboe).

²⁵⁶ Day Two Transcript, supra note 113, at 125:15-18 (statement of John Ramsay, IEX).

²⁵⁷ See, e.g., Day Two Transcript, supra note 113, at 117:22-23 (statement of Richard Ketchum, Former CEO of FINRA) (“Industry members obviously have conflicts in a variety of ways.”).

²⁵⁸ See Healthy Markets Letter, supra note 113, at 16 (“These ‘appointed’ members may dominate the committee’s membership and may also have loyalties and business interests that may conflict with sound governance practices. This concern may be exacerbated if Advisory Committee members remain on the committee for extended periods of time, or if the leadership of the committee does not rotate.”); id. at 40 (recommending that the Commission “[e]stablish clear conflicts of interest identification and management provisions and enforcement mechanisms for both Operating Committee and Advisory Committee members”); Nasdaq 2018 Letter, supra note 177, at 20 (“Expanding the authority of the advisory committees magnifies potential conflicts of interest that must be acknowledged, controlled, and coupled with increased obligations to promote public transparency. For example, market participants that operate their own ‘dark pools’ are simultaneously SIP customers, SIP revenue recipients, and SRO competitors.”); NYSE Group Letter, supra note 116, at 19 (“[A]bsent the same regulatory obligations of exchanges, Advisory Committee members would not have an incentive to cast their votes consistent with the terms of the Plan.”).

of the Equity Data Plans and part of a publicly held company that offers proprietary data products.²⁵⁹ Moreover, an SRO representative on the operating committee may have direct responsibility for some or all of an exchange's proprietary data business. Recognizing that non-SRO representatives in the New Consolidated Data Plan may also have dual roles as voting members of the operating committee and employees of businesses that utilize core data or proprietary data feeds, the Commission believes that the New Consolidated Data Plan should include comprehensive conflict-of-interest provisions for both SRO and non-SRO representatives of the operating committee.²⁶⁰

4. Confidentiality Policy

In the operation of the Equity Data Plans, Participants and Participant representatives have been privy to confidential and proprietary information of substantial commercial or competitive value, including, among other things, information about core data usage, the SIPs' customer lists, financial information, and subscriber audit results.²⁶¹ However, the terms of the Equity Data Plans do not address commercial use of confidential or proprietary information by the Participants. The Commission therefore believes that the New Consolidated Data Plan should include provisions regarding the treatment of confidential information.

5. Other Provisions of the New Consolidated Data Plan

Because SIP data plays a critical role in the operation of the national market system, the Commission believes that the prompt, accurate, reliable, and fair collection, processing,

²⁵⁹ As discussed above, the Commission has observed that advisory committee members currently have limited ability to participate in the decision making of the Equity Data Plans, and the interests of many shareholders of the exchanges may not be aligned with members' interests or the interests of other interested parties. See supra Section II.B.1.

²⁶⁰ See Day Two Transcript, supra note 113, at 92:16-20 (statement of Hubert de Jesus, Blackrock) (stating that the conflicts of interest policy should address the core conflict between SIP and proprietary data feed interests and establish procedures to manage these conflicts among representatives).

²⁶¹ See supra note 118–119 and accompanying text.

distribution, and publication of SIP data must be maintained through the transition from the existing Equity Data Plans to the New Consolidated Data Plan. Therefore, the Commission believes that the New Consolidated Data Plan's terms should provide for the orderly and predictable transition of functions and responsibilities from the three existing Equity Data Plans to the New Consolidated Data Plan. The Commission believes that this transition should contemplate a period of time during which the Equity Data Plans continue to have responsibility for the collection, processing, and dissemination of SIP data, and for determining, collecting, and allocating data fees, while the New Consolidated Data Plan commences operations and prepares to assume responsibility for SIP data.

The Commission believes that this transition period should provide that, before the New Consolidated Data Plan assumes responsibility for the dissemination of SIP data, the members of the New Consolidated Data Plan operating committee will be selected and the New Consolidated Data Plan operating committee will have a reasonable period of time to launch its formal operations. For example, before commencing operations, the operating committee of the New Consolidated Data Plan would need to, among other things, select plan processors²⁶² and an independent plan administrator, and adopt a fee schedule. In particular, as part of this transition, the Commission believes that until the New Consolidated Data Plan has become operational, fees for data products disseminated by the SIPs should continue to be governed by the provisions of the existing Equity Data Plans. As discussed above,²⁶³ the Commission believes that the SROs face inherent conflicts of interest with respect to the operation of the Equity Data Plans, and the Commission therefore believes that a schedule of fees for data products offered by the New

²⁶² The role of the operating committee of the New Consolidated Data Plan would include selecting plan processors.

²⁶³ See supra Section II.A.

Consolidated Data Plan should be filed by the New Consolidated Data Plan operating committee, which would reflect broader representation of market participants. The Commission believes that this should help to mitigate the conflicts of interest faced by the exchanges and should help to ensure that decisions relating to New Consolidated Data Plan operations support the prompt, accurate, reliable, and fair dissemination of core data.²⁶⁴

Finally, the Commission recognizes that the Equity Data Plans govern the operations of separate and distinct SIPs, each of which contains unique features, and that the Equity Data Plans therefore contain distinct operational and technical provisions relating to these SIPs. In addition, the Equity Data Plans contain a number of provisions relating to other areas, including provisions specifically addressing governance, administrative, financial, and other miscellaneous matters. Under the New Consolidated Data Plan, there would be one NMS plan, along with one independent plan administrator, responsible for the governance and operation of multiple SIPs. The Commission believes, therefore, that the New Consolidated Data Plan submitted by the SROs under this Order should propose to adopt and include all other provisions of the Equity Data Plans necessary for the operation and oversight of the SIPs under the New Consolidated Data Plan, provided that these additional provisions are in furtherance of the purposes of the New Consolidated Data Plan as expressed in this Order and are not inconsistent with any regulatory requirements. Further, the New Consolidated Data Plan should, where possible, attempt to harmonize inconsistencies among, and combine duplicate provisions in, the Equity Data Plans that do not unavoidably arise from the existence of separate and distinct SIPs. Finally, as discussed above, existing fee schedules should continue to remain in effect under the Equity Data Plans until a fee schedule for the New Consolidated Data Plan, authorized by the new

²⁶⁴ See 15 U.S.C 78k-1(c)(1)(B).

operating committee of the New Consolidated Data Plan after it is constituted, becomes effective.

* * * * *

As noted above, Section 11A(a)(2) of the Act²⁶⁵ directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to facilitate the establishment of a national market system for securities. Section 11A(a)(3)(B) provides the Commission the authority to require the SROs, by order, “to act jointly ... in planning, developing, operating, or regulating a national market system (or a subsystem thereof).”²⁶⁶

For the reasons discussed above, the Commission believes that it is in the public interest to require the Participants in the Equity Data Plans to jointly develop and file with the Commission a New Consolidated Data Plan as an NMS plan pursuant to Rule 608(a) of Regulation NMS.²⁶⁷

III. THE NEW CONSOLIDATED DATA PLAN

The Commission hereby orders the Participants in the Equity Data Plans to jointly develop and file with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,²⁶⁸ a single New Consolidated Data Plan that consolidates the three current Equity Data Plans and that includes, at a minimum, the following terms and conditions:

²⁶⁵ 15 U.S.C. 78k-1(a)(2).

²⁶⁶ 15 U.S.C. 78k-1(a)(3)(B).

²⁶⁷ 17 CFR 242.608(a).

²⁶⁸ 17 CFR 242.608(a). The New Consolidated Data Plan, or any amendment thereto, must comply with the requirements of Rule 608 of Regulation NMS, including the requirement in Rule 608(a) to include an analysis of the impact on competition. 17 CFR 242.608(a).

- 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 been approved.
- The New Consolidated Data Plan shall provide that each exchange group and unaffiliated SRO will be entitled to name a member of the operating committee (SRO member), who will be authorized to cast one vote on all operating committee matters pertaining to the operation and administration of the New Consolidated Data Plan, provided that an SRO member representing an exchange group or an unaffiliated SRO whose market center(s) have consolidated equity market share of more than 15% during four of the six calendar months preceding a vote of the operating committee will be authorized to cast two votes, and provided that an SRO member representing an exchange that has ceased operations as an equity trading venue, or has yet to commence operation as an equity trading venue, will not be permitted to cast a vote on New Consolidated Data Plan matters.
- The New Consolidated Data Plan shall provide that the operating committee will include, for a term of two years, and for a maximum term to be set forth in the New Consolidated Data Plan, individuals representing each of the following categories: an institutional investor (e.g., an asset management firm), a broker-dealer with a predominantly retail investor customer base, a broker-dealer with a predominantly institutional investor customer base, a securities market data vendor, an issuer of NMS stock, and a retail investor (i.e., Non-SRO Members), provided that the representatives of the securities

market data vendor, the issuer, and the retail investor, respectively, may not be affiliated with an SRO, a broker-dealer, or an institutional investor.

- The New Consolidated Data Plan shall provide that the initial Non-SRO Members will be selected by a majority vote of those current members of the Equity Data Plans' advisory committees, excluding advisory committee members who were selected by a Participant to be its representative, and, further, that until the initial Non-SRO Members have been selected, the Participants shall renew the expiring terms of all members of the Equity Data Plans' advisory committee (other than those selected to represent a Participant) who remain willing to serve in that role.
- The New Consolidated Data Plan shall provide for a fair and transparent nomination process for Non-SRO Members.
- The New Consolidated Data Plan shall provide that the aggregate number of votes provided to Non-SRO Members will, at all times, be one half of the aggregate number of SRO member votes and the number of Non-SRO Member votes will increase or decrease as necessary to ensure that the ratio between the number of SRO member votes and the number of Non-SRO Member votes is maintained, with Non-SRO Member votes equally allocated, by fractional shares of a vote as necessary, among the Non-SRO Members authorized and eligible to vote.
- The New Consolidated Data Plan shall include provisions to address circumstances in which a member is unable to attend an operating committee meeting or to cast a vote on a matter.
- The New Consolidated Data Plan shall provide that all actions under the terms of the New Consolidated Data Plan, except for the selection of Non-SRO Members and

decisions to enter into an SRO-only executive session, will be required to be authorized by an augmented majority vote.

- The New Consolidated Data Plan shall provide that the responsibilities of the operating committee will include:
 - proposing amendments to the New Consolidated Data Plan 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 quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information;
 - selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of, an independent plan administrator, plan processors, an auditor, and other professional service providers, provided that any expenditures for professional services that are paid for from New Consolidated Data Plan revenues must be for activities consistent with the terms of the New Consolidated Data Plan and must be authorized by an augmented majority of the operating committee;
 - developing and maintaining fair, reasonable, and consistent terms and fees for the distribution, transmission, and aggregation of core data;
 - reviewing the performance of the plan processors; and ensuring the public reporting of plan processors' performance and other metrics and information about the plan processors;
 - assessing the marketplace for equity market data products and ensuring that SIP data offerings are priced in a manner that is fair and reasonable, and designed to

ensure the widespread availability of SIP data to investors and market participants; and

- designing a fair and reasonable revenue allocation formula for allocating plan revenues to be applied by the independent plan administrator, and overseeing, reviewing and revising that formula as needed.
- The New Consolidated Data Plan shall provide that the independent plan administrator will not be owned or controlled by a corporate entity that offers for sale its own proprietary market data product, either directly or via another subsidiary.
- The New Consolidated Data Plan shall include provisions designed to address the conflicts of interest of SRO Members and Non-SRO Members.
- The New Consolidated Data Plan shall include provisions designed to protect confidential and proprietary information from misuse.
- The New Consolidated Data Plan shall provide that the use of executive session of SRO members will be confined to circumstances in which it is appropriate to exclude Non-SRO Members, such as, for example, discussions regarding matters that exclusively affect the SROs with respect to the Commission's oversight of the New Consolidated Data Plan (including attorney-client communications relating to such matters).
- The New Consolidated Data Plan shall provide that requests to enter into an executive session of SRO members will be required to be included on a written agenda, along with a clearly stated rationale for each matter to be discussed and must be approved by a majority vote of the SRO members of the operating committee.
- To the extent that those provisions are in furtherance of the purposes of the New Consolidated Data Plan as expressed in this Order and not inconsistent with any other

regulatory requirements, the New Consolidated Data Plan shall adopt and include all other provisions of the Equity Data Plans necessary for the operation and oversight of the SIPs under the New Consolidated Data Plan, and the New Consolidated Data Plan should, to the extent possible, attempt to harmonize and combine existing provisions in the Equity Data Plans that relate to the Equity Data Plans' separate processors.

* * * * *

IT IS HEREBY ORDERED, pursuant to Section 11A(a)(3)(B) of the Act,²⁶⁹ that the Participants act jointly in developing and filing with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,²⁷⁰ a New Consolidated Data Plan, as described above. The Participants are ordered to file the New Consolidated Data Plan with the Commission no later than [90 days after the order is issued].

By the Commission.

Vanessa Countryman
Secretary

²⁶⁹ 15 U.S.C. 78k-1(a)(3)(B).

²⁷⁰ 17 CFR 242.608(a).