

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87908; File No. S7-24-89)

January 8, 2020

Joint Industry Plan; Notice of Filing of the Forty-Fourth Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis

I. Introduction

Pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 608 of Regulation National Market System (“NMS”) thereunder,² notice is hereby given that on July 5, 2019,³ 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 (“Nasdaq/UTP Plan” or “Plan”)⁴ participants (“Participants”)⁵ filed with the Securities and Exchange Commission (“SEC” or

¹ 15 U.S.C. 78k-1.

² 17 CFR 242.608.

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

⁴ The Plan governs the collection, processing, and dissemination on a consolidated basis of quotation information and transaction reports in Eligible Securities for its Participants. This consolidated information informs investors of the current quotation and recent trade prices of Nasdaq securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Eligible Securities. See Securities Exchange Act Release No. 55647 (April 19, 2007), 72 FR 20891 (April 26, 2007).

⁵ The Participants are the national securities association and national securities exchanges that submit trades and quotes to the Plan and include: Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., NYSE Chicago, Inc., Financial Industry Regulatory Authority, Inc., The Investors' Exchange LLC, Long-Term Stock Exchange, Inc., Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, Inc., The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., and NYSE National, Inc. (each

“Commission”) a proposal to amend the Nasdaq/UTP Plan. The amendment represents the 44th amendment to the Nasdaq/UTP Plan (“Amendment”). As described in the Amendment, the Participants propose to make mandatory a conflicts of interest disclosure regime that currently is voluntary. Under the current practice, which the Amendment would make mandatory, the Participants,⁶ the Processor,⁷ the Administrator,⁸ and the members of the Advisory Committee⁹ (collectively, the “Disclosing Parties”)¹⁰ provide responses to a set of questions designed to provide transparency regarding potential conflicts of interest of such parties. Each of the Disclosing Parties’ responses are then made publicly available on the Plan’s website.¹¹ The Participants state that they believe that publicly providing these responses increases transparency and confidence in the governance of the Plan.¹²

a “Participant” and collectively, the “Participants”). Participants are also members of the Plan’s Operating Committee.

⁶ See Id.

⁷ The “Processor” is charged with collecting, processing and preparing for distribution or publication all Plan information. The Processor for the Nasdaq/UTP Plan is Nasdaq Stock Market LLC (“Nasdaq”).

⁸ The “Administrator” is charged with administering the Plans to include data feed approval, customer communications, contract management, and related functions. The Administrator of the Nasdaq/UTP Plan is Nasdaq.

⁹ “Advisory Committee members” are individuals who represent particular types of financial services firms or actors in the securities market, or who were selected by Plan participants to be on the Advisory Committee

¹⁰ Information about the Processor, Administrator, and Advisory Committee members is available at <https://www.utpplan.com/governance>.

¹¹ See <https://www.utpplan.com/governance>.

¹² See Transmittal Letter at 1.

The proposed Amendment has been filed by the Participants pursuant to Rule 608(b)(2) under Regulation NMS.¹³ The Commission is publishing this notice to solicit comments from interested persons on the proposed Amendment.

The Commission notes that, contemporaneously with the issuance of this notice, it has issued a notice of proposed order (“Governance Notice”)¹⁴ soliciting public comment on a proposed order that would direct the national securities exchanges and the Financial Industry Regulatory Authority, Inc. (collectively, “SROs”) to act jointly in developing and filing with the Commission a proposed new single national market system plan, which will replace the existing national market system plans that govern the public dissemination of real-time, consolidated equity market data for national market system stocks (“Equity Data Plans”). The Commission stated in the Governance Notice its view that, among other concerns,

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 of the Equity Data Plans and part of a publicly held company that offers proprietary data products. Moreover, an SRO representative on the operating committee may have direct responsibility for some or all of an exchange’s proprietary data business.¹⁵

The Governance Notice solicits public comment on a proposed order that would direct the SROs to include provisions in the New Data Plan (as defined in the Governance Notice) addressing several issues arising from the current governance structure of the Plan, and the

¹³ 17 CFR 242.608(b)(2).

¹⁴ See Securities Exchange Act Release No. 87906 (January 8, 2020).

¹⁵ Id. at A-66 to A-67 (footnotes omitted).

proposed order discusses the Commission's view that the new data plan should include a comprehensive conflicts of interest policy.

In addition, contemporaneously with the publication of notice of the Amendment set forth below, the Commission also is publishing a separate proposed amendment from the Nasdaq/UTP Plan concerning a confidentiality policy.

II. Text of the Amendment

Set forth below is the entirety of the Amendment submission that the Participants prepared and filed with the Commission, which includes a statement of the purpose and summary of the Amendment, along with the information required by Rules 608(a) and 601(a) under the Act.¹⁶

A. Statement of the Purpose of the Amendment

1. Background

With Exchanges permitted to offer both proprietary market data products and also acting as Participants in running the public market data stream, potential conflicts of interest are inherent in the structure developed under Regulation NMS. There may be instances in which representatives from the Participants and Advisory Committee members have responsibilities with respect to both proprietary data and Securities Information Processor ("SIP") data. Drawing on the expertise of persons with such overlapping responsibilities may give rise to potential conflicts of interest, and to address such potential conflicts of interest, the Participants adopted a voluntary conflicts disclosure regime.

¹⁶ See 17 CFR 242.608(a)(4) and (a)(5).

After discussion among the Participants and the Advisory Committee at several meetings of the Plan's Operating Committee, the Participants believe that a disclosure regime is a pragmatic step to address potential conflicts of interest.

As noted below, the Disclosing Parties have voluntarily provided responses to the disclosure regime questions. The responses are available on the Plan's website. The purpose of the Amendment is to make the disclosures a requirement on a going forward basis instead of relying on voluntary disclosures.

Required Disclosures

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

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

- Is the Participant's firm for profit or not-for-profit? If the Participant's firm is for profit, is it publicly or privately owned? If privately owned, list any owner with an interest of 5% or more of the Participant, where to the Participant's knowledge, such owner, or any affiliate controlling, controlled by, or under common control with the owner, subscribes, directly or through a third-party vendor, to SIP and/or exchange Proprietary Market Data products.
- Does the Participant firm offer real-time proprietary equity market data that is filed with the SEC ("Proprietary Market Data")? If yes, does the firm charge a fee for such offerings?

- Provide the names of the representative and any alternative representatives designated by the Participant who are authorized under the Plans to vote on behalf of the Participant. Also provide a narrative description of the representatives' roles within the Participant organization, including the title of each individual as well as any direct responsibilities related to the development, dissemination, sales, or marketing of the Participant's Proprietary Market Data, and the nature of those responsibilities.

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

- Is the Processor an affiliate of or affiliated with any Participant? If yes, disclose the Participant(s)?
- Provide a narrative description of the functions directly performed by the manager employed by the Processor to provide Processor services to the Plans and the staff that reports to that manager (collectively, the "Plan Processor").
- Does the Plan Processor provide any services for any Participant's Proprietary Market Data products or other Plans? If yes, disclose the services the Plan Processor performs and identify which Plans. Does the Plan Processor have any profit or loss responsibility for a Participant's Proprietary Market Data products?
- List the policies and procedures established to safeguard confidential Plan information that is applicable to the Plan Processor.

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

- Is the Administrator an affiliate of or affiliated with any Participant? If yes, which Participant?

- Provide a narrative description of the functions directly performed by administrative services manager and the staff that reports to that manager (collectively, the “Plan Administrator”).
- Does the Plan Administrator provide any services for any Participant’s Proprietary Market Data products? If yes, what services? Does the Plan Administrator have any profit or loss responsibility for a Participant’s Proprietary Market Data products?
- List the policies and procedures established to safeguard confidential Plan information that is applicable to the Plan Administrator.

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

- Provide the Advisor’s title and a brief description of the Advisor’s role within the firm.
- Does the Advisor have responsibilities related to the firm’s use or procurement of market data?
- Does the Advisor have responsibilities related to the firm’s trading or brokerage services?
- Does the Advisor’s firm use the SIP? Does the Advisor’s firm use exchange Proprietary Market Data products?
- Does the Advisor’s firm have an ownership interest of 5% or more in one or more Participants? If yes, list the Participant(s).
- Does the Advisor actively participate in any litigation against the Plans?

The Participants will post the responses to these questions on the Plan’s website. If a Disclosing Party has any material changes in its responses, the Disclosing Party must promptly

update its disclosures. Additionally, the Disclosing Parties will update the disclosures on an annual basis to reflect any changes. This annual update must be made before the first quarterly session meeting of each calendar year, which is generally held in mid-February.

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

Each of the Participants has approved the amendments in accordance with Section IV.C of the Nasdaq/UTP Plan. The Participants also received and incorporated feedback from the Advisory Committee in preparing the disclosure requirements.

D. Development and Implementation Phases

The Disclosing Parties have voluntarily completed, and the Participants have posted, responses to the questions outlined above on the Plan's website. The purpose of the amendment, going forward, is to make the disclosures a requirement rather than relying on voluntary disclosures.

E. Analysis of Impact on Competition

The Participants believe that the proposed amendments do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Participants, together with the other Disclosing Parties, have determined to implement the disclosure regime described herein. The Participants believe that adopting this disclosure regime is an important step in addressing the potential conflicts of interest.

The disclosure regime should increase transparency in the governance of the public market data stream, and consequently, increase confidence in the proper functioning of the Operating Committee.

F. Written Understanding or Agreements relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Sponsors in Accordance with Plan

Section IV.C.1 of the Nasdaq/UTP Plan requires the Participants to unanimously approve the amendment proposed herein. They so approved it.

H. Description of Operation of Facility Contemplated by the Proposed Amendment

Not applicable.

I. Terms and Conditions of Access

Not applicable.

J. Method of Determination and Imposition, and Amount of, Fees and Charges

Not applicable.

K. Method and Frequency of Processor Evaluation

Not applicable.

L. Dispute Resolution

Not applicable.

III. Regulation NMS Rule 601(a)

A. Equity Securities for which Transaction Reports Shall be Required by the Plan

Not applicable.

B. Reporting Requirements

Not applicable.

C. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

D. Manner of Consolidation

Not applicable.

E. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable.

F. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

G. Terms of Access to Transaction Reports

Not applicable.

H. Identification of Marketplace of Execution

Not applicable.

IV. Solicitation of Comments

The Commission seeks comments on the Amendment. Interested persons are invited to submit written data, views, and comments concerning the foregoing, including whether the Amendment is consistent with the Act and the rules thereunder. Among other things, the Commission asks commenters to consider whether the Amendment to the current Plan addresses the concerns outlined in the Governance Notice or whether they should be further enhanced regarding conflicts of interest in national market system plan governance. Accordingly, the Commission requests comments on matters including, but not limited to, the following:

Proposed Disclosure

1. The text of the Amendment, set forth above, states that: “With Exchanges permitted to offer both proprietary market data products and also acting as Participants in running the public market data stream, potential conflicts of interest are inherent in the structure developed under Regulation NMS.” The Amendment

further notes that “[t]here may be instances in which representatives from the Participants and Advisory Committee members have responsibilities with respect to both proprietary data and [SIP] data” and that “such overlapping responsibilities may give rise to potential conflicts of interest.” Do commenters believe the proposed Amendment adequately addresses those potential conflicts? Please provide sufficient detail to support your views, including, to the extent available, actual or possible examples.

2. If commenters do not believe that the proposed Amendment adequately addresses the potential conflicts of interest arising from the Plan’s current governance structure, is that because commenters believe the Amendment is inadequate in any particular way? Or is it because commenters believe that the potential conflicts of interest have not been characterized accurately? If so, in what ways do commenters believe the Amendment fails to describe the current environment and potential conflicts of interest?

3. In their filing, the Participants state that the proposed questions in the disclosure document are tailored to elicit information relevant to assess the extent of an individual’s potential conflict of interests with the Plan. Do commenters believe that the questions for Participants, Processors, Administrators, and members of the Advisory Committee are sufficient to elicit information to provide insight into all potential conflicts? Will public availability of the responses increase transparency and confidence in the governance of the Plan? Do commenters believe the proposed disclosures are sufficient or should enhanced disclosures be required? If so, what additional items of disclosure should be required and why? Do commenters believe

that additional disclosures should be required for the representatives and alternative representatives of a Participant, Processor, Administrator, or member of the Advisory Committee?

4. In their filing, the Participants state that a disclosure-based regime is a pragmatic step to address potential conflicts of interests. Do commenters agree or disagree with that statement? Do commenters believe that a disclosure-based regime is sufficient to address the potential conflicts that Participants, Processors, Administrators, and members of the Advisory Committee may face in their roles within the Plan?

5. Do commenters think any other types of persons should be required to provide disclosures, such as services providers to the Administrator that provide audit, accounting, or other professional services? As an example, if auditing services are outsourced to a Participant's employer or an affiliate that also is offering proprietary data products to SIP customers and/or conducting audits for those products, should that entity also be required to disclose its conflicts and otherwise be subject to the terms of the conflicts of interest policy, even if it is neither the Administrator nor Processor?

6. Do commenters believe that an alternative approach could better identify and address conflicts of interests among Participants, Processors, Administrators, and the Advisory Committee, as well as auditors? For example, should a disclosure regime be supplemented with certain prohibited conduct or procedural requirements, such as a prohibition on a Participant voting when that Participant has direct business responsibilities related to producing, selling, or managing competing data products? If you believe an alternative approach is appropriate, please provide details on any

such alternative approach. Do commenters regard the Plan's ability to identify and protect the confidentiality of competitive information as an important component to the Plan's ability to manage conflicts of interest? If so, how do commenters regard the interaction between this proposed Amendment and the separate proposed Plan amendment to govern treatment of confidential information noted above?

7. Do commenters believe that the proposed disclosure questions for each party are sufficient to identify the specific relationships that may give rise to a conflict under the Plan and related information? Separately, do commenters believe that the proposed questions effectively require all material facts necessary to not only identify the nature of the conflict, but also the effect it may have on the Plan? Should the Amendment require more disclosure of such potential effects or greater details with respect to the disclosures that are made?

8. Do commenters believe that the Plan should require additional public disclosures of any personal, business, or financial interests, and any employment or other commercial relationships that could materially affect the ability of a party to be impartial regarding actions of the Plan?

9. The Participants propose to continue to post the conflicts of interest disclosures for each party on the Plan's website. Do commenters believe that doing so provides sufficient public notice of potential conflicts? If not, in what other manner should the disclosures be made public? For example, should Participants be required to acknowledge potential conflicts when discussing specific matters at Operating Committee meetings or subcommittee meetings that present a conflict? Should a complete set of the disclosures be included in the materials for each Plan meeting? Is

the timing clear with respect to the requirement that a Disclosing Party “promptly” update its disclosures, or should the Amendment be more specific? What do commenters consider sufficiently prompt? Within one week? Within 30 days? Some other timeframe?

10. As proposed, the Amendment states that disclosures will be made and updated annually or upon any material change. Do commenters believe that these intervals are sufficient, or should updates be required more frequently such as in advance of scheduled Plan meetings? What constitutes a “material” change that should require the filing of an amended disclosure? Please explain.

Proposed Disclosure for Participants

1. Do commenters believe that any individual representing a Participant that is directly involved in the management, development, pricing, or sale of proprietary data products offered to SIP customers should participate in discussions and related Plan votes regarding the pricing of SIP data products? If so, how do commenters believe Participants should address the conflicts their representatives may face in their dual role of pricing and developing SIP data products as well as their own proprietary data products?
2. Do commenters believe that a Participant should be recused from voting when it or an affiliate is competing for a contract to serve as a Processor for the Plan? Why or why not? Are there any other scenarios that present conflicts that should result in a Participant being recused from voting?
3. Do commenters believe recusal on certain Plan action when a potential conflict is present is an appropriate mechanism to address conflicts? If so, under what

circumstances? If applicable, do commenters believe that recusal should be mandatory or should it be voluntary? Why or why not?

4. Do commenters believe that Operating Committee members should be permitted to raise the issue of a potential conflict of interest of another Participant for discussion before the Operating Committee, even if the Participant did not itself disclose the potential conflict? Do commenters believe that the Operating Committee should have the ability to take action in response to disclosed or undisclosed conflicts, such as requiring the Participant to recuse itself from a certain discussion or vote on a particular matter? If so, how should the Operating Committee take such action? Should the Participants vote on recusal or should the Participants seek input from the Advisory Committee? Why or why not?

Proposed Disclosures for Processors

1. Do commenters believe that the proposed disclosure questions for the Processor are sufficient to identify the specific circumstances in which a Participant is both voting on an Operating Committee and competing to act as Processor for the Plan? Do commenters believe that the disclosure questions are tailored to the role that the Processor performs and the fact that the Processor is present at Plan meetings but do not vote on Plan matters, or should different or additional disclosure be required for the Processor? Separately, do commenters believe that the proposed Processor questions effectively require all material facts necessary to not only identify the nature of the potential conflict, but also the effect it may have on the Plan? Should the Amendment require more disclosure of such potential effects? Should the Amendment elaborate on what “profit or loss responsibility for a Participant’s

Proprietary Market Data products” means in the context of the required disclosures?

Alternatively, do commenters believe that the Plan’s separately-proposed confidentiality proposal would address some of the potential effects of conflicts of interests if approved?

2. Do commenters have concerns about affiliations between a Plan’s Processor and a Participant? If so, do commenters believe the conflicts of interest disclosure is sufficient to address those concerns? Should the Amendment require a description of the nature of the affiliation?

3. Do commenters believe that a Participant or its affiliate that is competing for a contract to serve as a Processor for the Plan should participate in discussions and related Plan votes regarding the selection of the Processor for the Plan? If so, how do commenters believe Participants should address the conflicts they face in their dual role of competing to serve as a Processor while serving as a Participant that participates in the discussion of, and ultimately votes on, selection of the Processor?

Proposed Disclosures for the Administrator

1. Do commenters believe that the proposed disclosure questions for the Administrator are sufficient to identify the specific interests and employment, commercial or other relationships that may give rise to a conflict under the Plan? Separately, do commenters believe that the proposed Administrator questions effectively require all material facts necessary to not only identify the nature of the conflict, but also the effect it may have on the Plan? Should the Amendment require more disclosure of such potential effects or greater details with respect to the disclosures that are made?

2. To the extent that the Administrator enlists assistance from an auditor or any other professional services subcontractor for any of the Plan(s), and the subcontractor is affiliated with an entity that is involved in the development, pricing, or sale of proprietary data products offered to SIP customers, or is subject to any other conflict, should all of the disclosures and conflicts policies referenced above also be applicable to them? Or do commenters believe that concerns arising from potential conflicts of interest would be more appropriately addressed for a subcontractor if the subcontractor could attest that it is sufficiently walled-off from the proprietary data business of its affiliate?

Proposed Disclosures for Members of the Advisory Committee

1. Do commenters believe that the proposed disclosure questions for Advisory Committee members are sufficient to identify the specific interests and employment, commercial, or other relationships that may give rise to a conflict under the Plan? Separately, do commenters believe that the proposed Advisory Committee members' questions effectively require all material facts necessary to not only identify the nature of the conflict, but also the effect it may have on the Plan? Should the Amendment require more disclosure of such potential effects or greater details with respect to the disclosures that are made? Should the Amendment require Members of the Advisory Committee to identify affiliations with any Disclosing Party, and clarify that both direct and indirect ownership interests in a Participant are subject to disclosure? Is it clear what "actively participate in any litigation against the Plans" means, or should the Amendment require additional detail?

2. Do commenters believe that the Plan should require additional public disclosures of any personal, business, commercial, or financial interests, and any employment relationships that could materially affect the ability of the Advisory Committee Member to participate impartially in discussing actions of the Plan?

3. Do commenters believe that Advisory Committee members that purchase SIP data products should participate in discussions regarding the pricing of SIP data products? If so, how do commenters believe Advisory Committee members should address that potential conflict?

Participant Statement Regarding Competition

1. The Participants state in their filing that the Amendment does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Do commenters believe that the Amendment to the Plan imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act? Please explain.

2. What effect might the Amendment have on competition, if any? Please explain. How would any effect on competition from the proposal benefit or harm the national market system and/or various market participants? Please describe and explain how, if at all, aspects of the national market system or different market participants would be affected. Please support any response with data, if possible.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number S7-24-89 on the subject line.

Paper comments:

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

All submissions should refer to File Number File Number S7-24-89. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all written statements with respect to the proposed Amendment that are filed with the Commission, and all written communications relating to the proposed Amendment 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 3:00p.m. Copies of the filing also will be available for website viewing and printing at the principal office of the Plan. 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 S7-24-89 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

By the Commission.

Vanessa A. Countryman
Secretary