

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 34-91397 / March 24, 2021

File No. S7-03-20

In the Matter of
Market Data Infrastructure

ORDER DENYING STAY

On December 9, 2020, the Commission issued a final rule entitled Market Data Infrastructure, Release No. 34-90610, File No. S7-03-20. The rule has not yet been published in the Federal Register but will become effective 60 days after publication. On February 5, 2021, the Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc. and Cboe Exchange, Inc. (the “exchanges”) filed with the Commission a motion to stay the effect of the Market Data Infrastructure rule pending final resolution of their petitions for review challenging the Order Directing the Exchanges and FINRA to Submit a New NMS Plan Regarding Consolidated Equity Market Data, Release No. 34-88827 (May 6, 2020) (the “NMS Governance Order”) and Commission approval of the “New Consolidated Data Plan” filed in response to the NMS Governance Order. That same day, the exchanges filed petitions in the U.S. Court of Appeals for the District of Columbia Circuit seeking review of the Market Data Infrastructure rule. *See* Case Nos. 21-1050, 21-1051, 21-1053. The petitions have been consolidated.

Pursuant to Section 25(c)(2) of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 705 of the Administrative Procedure Act, the Commission has discretion to stay the Market Data Infrastructure rule. *See* 15 U.S.C. § 78y(c)(2); 5 U.S.C. § 705. The Commission has determined, however, that the exchanges have not met their burden to demonstrate that a stay of the Market Data Infrastructure rule is appropriate. The exchanges make no attempt to challenge the merits of the rule or of the three-phase, multi-year transition period that the Commission included in the rule to “facilitate an orderly transition, to avoid unnecessary stress on the functioning of the market,” “provide greater clarity to market participants,” and mitigate unnecessary burdens incurred by market participants. Release 414.¹ Nor do the exchanges contest

¹ The transition period sets forth detailed requirements to implement the decentralized consolidation model. *See* Release 410-22. For example, “[t]he first key milestone will be the amendment to the effective national market system plan(s) required under Rule 614(e), which must include the fees proposed by the

that the rule will modernize the national market system in a manner that will benefit investors and promote capital formation, or that those benefits will be delayed if a stay were granted. And they have failed to establish irreparable harm. Under these circumstances, the interests of justice would not be served by a stay.

1. Staying a final agency action pending review is an “extraordinary remedy.” 85 Fed. Reg. 36,921, 36,921 (June 18, 2020) (Commission order denying stay of NMS Governance Order). The Commission has discretion to grant a stay of its rules pending judicial review if it finds that “justice so requires.” 15 U.S.C. § 78y(c)(2); 5 U.S.C. § 705. Traditionally, the Commission uses “the familiar four-factor framework” when considering whether a stay during litigation is appropriate:

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

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

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

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

In re Am. Petroleum Inst., Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012); *see id.* at *2 n.1 (this four-factor analysis provides “a useful framework to guide our consideration” under the justice-so-requires standard).

As the exchanges note, the Commission has on occasion granted a stay while declining to address the challenges a movant offers to the merits of a rule. *See, e.g., In re Rule 610T of Regulation NMS*, Release No. 85447, 2019 WL 1424351 (Mar. 28, 2019); *In re Motion of Business Roundtable and the Chamber of Commerce of the United States of America for Stay of Effect of Commission’s Facilitating Shareholder Director Nominations Rules*, Release No. 9149, 2010 WL 3862548 (Oct. 4, 2010). Here, the exchanges raise no challenge to the merits of the Market Data Infrastructure rule. As a result, the Commission has no opportunity to address whether any challenge to the merits of the rule would support a stay application. And the decisions the exchanges rely on are inapposite. The Commission thus denies the exchanges’ stay request for the following reasons.

2. Given that the exchanges raise no challenge to the merits of the rule, we first consider whether a stay would serve the public interest. We are unconvinced that

plan(s) for data underlying consolidated market data,” which “must be filed with the Commission within 150 days of the effectiveness of Rule 614.” Release 414-15. And the “initial go-live period where competing consolidators can go live on a rolling basis and begin to provide consolidated market data products to subscribers” will begin no sooner than 510 days of the date of effectiveness of Rule 614. Release 418. Rule 614, however, does not become effective until 60 days after the Market Data Infrastructure rule is published in the Federal Register. Release 1. As noted, the rule has yet to be published in the Federal Register.

this would be so. The exchanges do not contest that the Market Data Infrastructure rule serves a strong public interest, including the widespread availability of critical and timely NMS information to market participants so that they can participate effectively in the equities markets. The current national market system for NMS information was developed in the late 1970s. As we previously explained, “[w]hile the exchanges have developed individual proprietary data products to meet the needs of some market participants, the Commission believes that there should be improvement to, and modernization of, the national market system to fulfill the goals of Section 11A of the Exchange Act and to meet the current core data demands of market participants.” Release 16. We are “concerned that the two different methods of data dissemination—SIP data provided pursuant to Regulation NMS and the Equity Data Plans and proprietary data products provided by the exchanges—have contributed to the development of a two-tiered data market that raises fundamental concerns about the ability of the national market system to continue to ensure that the goals of Section 11A of the Exchange Act are being met.” Release 18-19.

The Market Data Infrastructure rule responds to those concerns. As we have previously explained, the rule will modernize the national market system for NMS information for the benefit of investors. For example, the rule updates both the content of “core data” and the manner in which it is provided to investors in the national market system. The Commission has determined that the rule will generally enhance the content, reduce the latency, and improve the dissemination of consolidated market data. As we explained in the release, “[t]his will reduce information asymmetries that exist between market participants who subscribe to proprietary [depth-of-book] and other proprietary products and market participants who only subscribe to SIP data, and may allow some market participants who subscribe to proprietary [depth-of-book] products to replace them with potentially cheaper consolidated market data feeds.” Release 515. “Improvements to the content and latency of consolidated market data from the amendments may also help market participants that currently rely on SIP data to make more informed trading decisions, which will facilitate their ability to trade competitively and improve their execution quality, and will facilitate best execution.” Release 515-16. And the Commission’s changes to the definition of the round lot will result in a narrower national best bid and national best offer in some higher priced stocks, which can improve execution quality. Release 516. Despite the opportunity to do so when arguing in favor of a stay, the exchanges do not explain how delaying such benefits if the Market Data Infrastructure rule were stayed—potentially for many months or even longer—would serve the public interest.

3. The exchanges do not identify any irreparable or even significant harm that would justify delaying the rule’s implementation. Indeed, the exchanges overstate the harm and uncertainty that will result from the denial of their stay motion.

At the outset, the exchanges do not request a stay pending review of the Market Data Infrastructure rule itself. Instead, they tether their stay request to two different events: any Commission approval of the New Consolidated Data Plan and resolution of

their challenge to the NMS Governance Order in the D.C. Circuit. Mot. 12.² As discussed below, however, the implementation of or the benefits sought to be achieved by the Market Data Infrastructure rule do not depend on either of those events. But under the exchanges' view, the Market Data Infrastructure rule should be stayed even if the D.C. Circuit were to reject their challenges to the rule if that rejection occurred before any Commission approval of the New Consolidated Data Plan and the D.C. Circuit resolved the exchanges' challenge to the NMS Governance Order. To justify that extraordinary request, the exchanges state (Mot. 7) that they "are challenging several fundamental components of the NMS Governance Order" in the D.C. Circuit. The Commission has already declined to stay the NMS Governance Order because we found that the exchanges "have not shown a likelihood of success on the merits." 85 Fed. Reg. at 36,922. The exchanges did not subsequently seek a stay of the NMS Governance Order in the D.C. Circuit. And although the exchanges have sought review of the NMS Governance Order in the D.C. Circuit, they do not ask us to revisit the Commission's prior denial of the stay motion of the NMS Governance Order, or explain how granting a stay here would be consistent with the finding that the challenge to the NMS Governance Order is unlikely to succeed on the merits.

Nor do the exchanges argue that without a stay they would suffer imminent injury, or otherwise identify any concrete date by which they would suffer irreparable harm. They request (Mot. 3 n.1) that the Commission act on their stay motion by the date that the Commission files the Market Data Infrastructure rulemaking record in the D.C. Circuit—a date they identify not because of any business significance, but because it is the date on which the D.C. Circuit's jurisdiction to "affirm and enforce or . . . set aside the rule" becomes exclusive.

To support their request, the exchanges cite Commission justifications for prior stays to "avoid[] potentially unnecessary costs, regulatory uncertainty, and disruption that could occur if the rules were to become effective during the pendency of a challenge to their validity." *Business Roundtable*, 2019 WL 1424351, at *1; *see also In re Rule 610T of Regulation NMS*, 2019 WL 1424351, at *1. Although the Commission has previously justified a stay based on potential cost, uncertainty, and disruption specific to the facts and circumstances of a particular rule, the exchanges have failed to demonstrate that these considerations support their stay request here. To the extent the exchanges argue that those factors always establish that a stay of a rule is appropriate, the Commission has never made such a determination. Federal courts are in agreement. *See, e.g., California Ass'n of Private Postsecondary Sch. v. DeVos*, 344 F. Supp. 3d 158, 170 (D.D.C. 2018) ("it proves too much to suggest that 'irreparable' injury exists, as a matter of course, whenever a regulated party seeks preliminarily to enjoin the implementation of a new regulatory burden"); *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("ordinary compliance costs are typically insufficient to constitute irreparable harm"). Although cost, uncertainty, and disruption might in particular circumstances warrant a

² The exchanges have filed a proposed new plan with the Commission. *See* 85 Fed. Reg. 64,565 (Oct. 13, 2020). The Commission has instituted proceedings "to determine whether to disapprove the CT Plan or to approve the plan with any changes or subject to any conditions the Commission deems necessary or appropriate." 86 Fed. Reg. 4,142, 4,142 (Jan. 15, 2021). The exchanges' challenge to the NMS Governance Order is pending before the D.C. Circuit (Nos. 20-1181, 1192, 1231 (consolidated)).

stay, the exchanges provide no example of the Commission granting a stay based on alleged harm from a *different*—albeit complementary—final agency action.

Even if alleged harm from a different final agency action could in some circumstances justify a stay, the exchanges fail to demonstrate how any alleged harm from the NMS Governance Order and proposed New Consolidated Plan would be alleviated by delaying implementation of the Market Data Infrastructure rule. The Commission has already carefully addressed the relationship between the Governance and Market Data Infrastructure initiatives, explaining that implementation of the Market Data Infrastructure rule does not require Commission action on the proposed New Consolidated Data Plan or resolution of pending litigation challenging the NMS Governance Order. For example, the transition period in the Market Data Infrastructure Adopting Release establishes the timing of the implementation of the decentralized consolidation model and the expansion of NMS information, neither of which requires Commission approval of the proposed New Consolidated Data Plan. *See* Release 410-22. Conversely, the Commission has not linked the implementation of the proposed New Consolidated Data Plan to the Market Data Infrastructure rule.

The Commission has explained that the NMS Governance Order and Market Data Infrastructure initiatives “work together to address specific, significant, separate but overlapping, issues in the national market system and are aimed at improving discrete areas in the national market system.” Release 21. The NMS Governance Order “addresses the governance structure of the Equity Data Plans and particularly concerns about certain conflicts of interest and the allocation of voting power with respect to these Plans,” while the Market Data Infrastructure rule “address[es] the content of NMS information and the manner in which it is collected, consolidated, and disseminated under the rules of the national market system.” Release 345. Neither initiative depends on the other initiative being implemented before it may take effect.

The exchanges claim (Mot. 5) that the Market Data Infrastructure rule has created uncertainty among regulated parties “as to whether a single NMS plan—the New Consolidated Data Plan currently under consideration by the Commission—or the three existing equity data plans will be responsible for submitting the proposed plan amendments, including the proposed fee schedule for the data underlying the new expanded content of consolidated data, to the Commission.” But the Market Data Infrastructure rule reflects current defined terms and obligations in Regulation NMS and also accommodates any future changes in the national market system. *See* 17 C.F.R. § 242.600(22) (defining “[e]ffective national market system plan”); *id.* § 242.603(b) (contemplating one or more effective national market system plans to disseminate consolidated information for NMS stocks). And the use of the word “Plan(s)” throughout the Market Data Infrastructure Adopting Release reflects at least two different potential factual scenarios: (1) where the Equity Data Plans are the effective national market system plans at the time when the amendment under Rule 614(e) is due to be filed; or (2) where the New Consolidated Data Plan is an effective national market system plan at the time when the amendment under Rule 614(e) is due to be filed. If the New Consolidated Data Plan is not an effective national market system plan by the time the fee proposal is due, the Equity Data Plans will submit the proposal.

Even if the identity of the plan or plans responsible for submitting the amendment under Rule 614(e) may be different based on the Commission's approval of the New Consolidated Data Plan, there is no ambiguity as to the plan(s)' responsibilities under the Market Data Infrastructure rule. *See, e.g.*, Release 869 (new Rule 614(e), which provides that "[t]he participants to the effective national market system plan(s) for NMS stocks shall file with the Commission, pursuant to § 242.608, an amendment that includes the following provisions within 150 calendar days from the effective date of §242.614"). Moreover, if the Commission approves the proposed New Consolidated Data Plan "after the equity data plans have submitted their proposed fee schedule, but before those proposed fees have been approved," Mot. 8, or after those fees have been approved, *see id.*, the Commission will have the opportunity to review the fees and decide the most appropriate manner in which to ensure that the fee schedule that is approved meets all applicable statutory and regulatory requirements. The Commission's approach minimizes any uncertainty or confusion about the responsibilities of plans and plan participants under these factual scenarios, preventing a gap between the operation of the Equity Data Plans and the New Consolidated Data Plan.

Nor are the exchanges correct (Mot. 8) that the operating committee of the New Consolidated Data Plan "would be required to start over from scratch" if the operating committees of the Equity Data Plans had already proposed a fee schedule. Any New Consolidated Data Plan operating committee would determine, when designing its proposed fees, whether and to what extent it should use any fee-setting work done by the operating committees of the three existing plans when designing its own fee proposal. By doing so, the New Consolidated Data Plan operating committee may have the ability to minimize any duplicative costs if the Equity Data Plans were to first file a proposed fee schedule.

The exchanges state (Mot. 9) that "a stay would ensure that the fees for the expanded version of consolidated data are established by a new operating committee that, in the Commission's view, is more representative and less conflicted than the operating committees of the equity data plans." Absent a stay, the first fees under the Market Data Infrastructure rule will be filed either by an approved New Consolidated Data Plan or by the Equity Data Plans. The Commission believes that plan operating committees should have more diverse viewpoints and fewer conflicts of interest, and it is possible that a stay could minimize the likelihood of the Equity Data Plans filing proposed fees under the New Consolidated Data Plan. But the mere possibility that the fees that govern under the Market Data Infrastructure rule may, for a short period, be filed by the Equity Data Plans instead of by the approved New Consolidated Data Plan does not justify staying the rule that, as discussed above, the Commission has already concluded would provide significant benefits to the public interest. Any fees cannot become effective until the Commission has found, after considering public comment, that they are fair and reasonable and not unfairly discriminatory. *See* 15 U.S.C. § 78k-1(c)(1)(C)-(D); 17 C.F.R. § 242.603(a), .608(a)-(b). Further, the Commission was aware of these potential factual scenarios and extended the date by which the fee proposal must be submitted. *See* Release 343, 414-15, 869. At this point, the likelihood that the fees that would govern the New Consolidated Data Plan would be filed by the Equity Data Plans is speculative. Had we intended to link the implementation of the Governance and Market Data

Infrastructure initiatives, we would have done so expressly. But we did not; we included no requirement or expectation in the transition period discussion of the Market Data Infrastructure Adopting Release that any action on the proposed New Consolidated Data Plan must occur before the Market Data Infrastructure rule takes effect, and we decline to effectively transpose such a requirement onto the transition period now. *See* Release 410-22.

Finally, although we recognize the “challenges posed by the ongoing pandemic,” Mot. 11, n.2, we conclude that, especially in view of the transition period under the rule, those challenges do not justify a stay.

Accordingly, it is ORDERED, pursuant to Exchange Act Section 25(c)(2) and Section 705 of the Administrative Procedure Act that the motion for a stay be denied.³

By the Commission.

Vanessa A. Countryman
Secretary

³ The exchanges have filed their stay motion pursuant to the Administrative Procedure Act, 5 U.S.C. § 705, and Section 25(c)(2) of the Securities Exchange Act of 1934, 15 U.S.C. § 78y(c)(2). Those provisions contemplate requests to stay final agency actions that are subject to judicial review, but the Market Data Infrastructure rule has not yet been published in the Federal Register. Because the Commission is denying the stay request on the merits, we need not address the circumstances in which a party may seek a stay under those provisions before a Commission rule is published in the Federal Register.