February 26, 2024

Submitted electronically

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Securities Exchange Act Release No. 99403 (File No. 4-757) (Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data)

Dear Ms. Countryman:

MEMX LLC ("MEMX") appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission ("Commission") on the above-referenced national market system ("NMS") plan regarding consolidated equity market data (the "Plan").[1] On September 1, 2023 the Commission issued an order (the "Amended Order") directing the self-regulatory organizations ("SROs") that are currently Participants in the Consolidated Tape Association Plan ("CTA Plan"), the Consolidated Quotation Plan ("CQ Plan"), and the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("UTP Plan") (collectively, the "Equity Data Plans") to act jointly in developing and filing a proposed new national market system ("NMS") plan to govern the public

[1] See Securities Exchange Act Release No. 99403 (January 19, 2024), 89 FR 5002 (January 25, 2024) (File No. 4-757).

dissemination of real-time consolidated equity market data for NMS stocks.[2] The Plan was submitted to the Commission on October 23, 2023, as required by the Amended Order. If approved by the Commission, the Plan would take over responsibility for the dissemination of consolidated market data from the Equity Data Plans following a lengthy implementation period.

MEMX has been a leading advocate for market data reform, including the governance reforms that are the subject of the Plan. We support the main components of the Plan, including: (1) the allocation of votes to SRO Groups and Non-Affiliated SROs on the basis of corporate affiliation, thereby reducing concentration of voting authority that is currently held by a minority of Participant organizations that control several votes today and can use those voting blocs to further their own self-interest instead of the public interest; and (2) the selection of an independent Administrator that is not "owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary market data product for NMS stocks."[3] These governance changes, which were recently upheld by the D.C. Circuit in a challenge brought by the three SRO Groups that collectively control the Equity Data Plans,[4] are critical for the proper

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2 See Securities Exchange Act Release No. 98271 (September 1, 2023), 88 FR 61630 (September 7, 2023) (File No. 4-757). The Amended Order follows a similar order issued by the Commission on May 6, 2020 (the "Governance Order"). See Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4–757).

3 See Section 1.1(1) of the Plan.

4 See *Nasdaq v. SEC*, 38 F.4th 1126, 1131 (D.C. Cir. 2022) ("*Nasdaq III*"). The D.C. Circuit vacated the CT Plan Order in its entirety due to difficulty in severing the non-SRO voting provisions it found inconsistent with Section 11A of the Exchange Act. However, the court vacated the Governance Order solely with respect to the inclusion of such non-SRO voting representation. All other challenged elements of the Commission's governance reforms were upheld by the court. See also *Nasdaq v. SEC*, 1 F.4th 34 (D.C. Cir. 2021) ("*Nasdaq I*") (dismissing as premature a prior challenge to the Governance Order); and *Nasdaq v. SEC*, 34 F.4th 1105 (D.C. Cir. 2022) ("*Nasdaq II*") (dismissing a challenge brought by the same three SRO Groups to the substantive reforms included in the infrastructure rule).

administration of the Plan and would promote Congressional objectives for the national market system pursuant to Section 11A of the Securities Exchange Act of 1934 ("Exchange Act").[5]

Nevertheless, we are concerned that the Plan fails to appropriately address two key issues: (1) the timeliness of implementation of the Plan itself, which is subject to a lengthy 30-month implementation period (not including any potential delays); and (2) the timeliness of implementation of the Commission's December 9, 2020 final rule on market data infrastructure ("infrastructure rule"),[6] which is not covered by the Plan and is currently in limbo following the Commission's disapproval of fee amendments submitted by the Equity Data Plans that were found to be inconsistent with the statutory standards of the Exchange Act.[7] We therefore recommend that the Commission approve the Plan pursuant to Rule 608 of Regulation NMS with changes that are necessary and appropriate to ensure the timely implementation of these reforms, including:

1. Allowing one of the Administrators for the existing Equity Data Plans to be appointed as interim Administrator to the Plan to allow the Plan to become operative while the Operating Committee selects and onboards a new independent Administrator;

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5 15 U.S. Code § 78k–1.

6 See Securities Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596 (April 9, 2021) (File No. S7-03-20).

7 See Securities Exchange Act Release Nos. 95851 (September 21, 2022), 87 FR 58613 (September 27, 2022) (SR-CTA/CQ-2021-03); 95849 (September 21, 2022), 87 FR 58592 (September 27, 2022) (S7-24-89). The Commission also disapproved the non-fee amendments required under the infrastructure rule. See Securities Exchange Act Release No. 95850 (September 21, 2022), 87 FR 58560 (September 27, 2022) (SR-CTA/CQ-2021-02); 95848 (September 21, 2027), 87 FR 58544 (September 27, 2022) (S7-24-89).

2. Changing the voting threshold to require a simple majority vote for most Plan actions, thereby streamlining the Plan's decision-making process in a manner that would reduce the significant practical risk of the delay in implementing the Plan; and

3. Requiring that the Plan comply with the effective provisions of Regulation NMS, as amended by the infrastructure rule, that define consolidated market data to include certain odd-lot, depth-of-book, and auction information.

I. THE PROPOSED IMPLEMENTATION PERIOD IS TOO LONG

As we have stated numerous times in prior comments, governance reforms are critical given the important role that the securities information processors ("SIPs") play in the distribution of consolidated market data to the public and longstanding concerns about whether the existing Equity Data Plans are appropriately administered for the public benefit. Indeed, events following the Commission's issuance of the Governance Order in May 2020 only further highlight the importance of such reforms. Notably, even though the D.C. has upheld reforms to SIP data content and dissemination mandated by the infrastructure rule,[8] the implementation of those reforms has been needlessly delayed due to the failure of the Operating Committee for the Equity Data Plans to file fees with the Commission that are consistent with the Exchange Act standards. This failure is a direct result of the current governance framework for the SIPs, which allowed only three SRO Groups to overrule the majority of Participant organizations on the Operating Committee in filing with the Commission fees that would have been more expensive than fees charged for their own competing proprietary market data products that offer considerably more granular information – a

[8] See *Nasdaq I*, supra note 4.

facially absurd result but a predictable one given the outsize power that these SRO Groups wield on the Equity Data Plans today.[9] Delays to the implementation of the Plan and related governance reforms would allow these three SRO Groups to continue to exercise their control over the SIPs in a manner that is not consistent with "prompt, accurate, reliable, and fair collection, processing, distribution, and publication"[10] of consolidated market data and the "fairness and usefulness of the form and content of such information"[11] pursuant to Section 11A of the Exchange Act.

The Commission has also recognized the need for these governance changes to be implemented in a timely fashion. In the Amended Order, the Commission directed the SROs to include in the Plan a detailed implementation schedule.[12] Although the Plan does include such a schedule, the implementation timeline leaves much to be desired. As proposed, the Plan contemplates two and a half years (30 months) for the Plan to become operative and take over responsibility for the dissemination of consolidated market data. Exhibit F of the Plan contains additional information about the steps that must be completed before the Plan would become operative, including contingencies between different workstreams.[13] This 30-month implementation period would be automatically shortened if a workstream identified in Exhibit F takes less time than expected.[14] However, the implementation timeline could be lengthened by a vote of the Operating Committee if a workstream takes longer than expected, provided that the

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9 See Letter from Adrian Griffiths, Head of Market Structure, MEMX to Vanessa Countryman, Secretary, Commission dated November 8, 2021 *available at* https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-9403088-262830.pdf.

10 15 U.S. Code § 78k–1(c)(1)(B).

11 Id.

12 See Amended Order, supra note 2.

13 See Plan, Exhibit F.

14 See Plan, Section 14.1 (Implementation Timeline).

delay is "due to factors outside the Operating Committee's reasonable control"[15] and the Operating Committee makes a "reasonable determination that the timeline needs to be extended."[16]

MEMX acknowledges that it is important to realistically assess the myriad steps that must be taken by the Operating Committee for the Plan to become operative. At the same time, we remain concerned that a 30-month implementation period is too long, particularly given the fact that this project has already been subject to significant delays in the time since the Commission first issued the Governance Order in May 2020 and may be subject to additional delays in the future. Indeed, assuming the Commission approves the Plan on November 14, 2024, i.e., the deadline imposed pursuant to Rule 608 of Regulation NMS, the Plan is not likely to become operative until May 2027 at the earliest, i.e., seven years after the Commission first ordered the SROs to file a new national market system plan concerning consolidated equity market data. A delay of this length is not consistent with the protection of investors or the public interest.

For the reasons discussed later in this letter, however, simply reducing the timeframe for completing the workstreams identified in Exhibit F may not be sufficient to ensure the timely implementation of the Plan. While we believe those timeframes could be shortened somewhat in an effort to push the Operating Committee to move more expeditiously, merely establishing an earlier deadline does not guarantee that such deadline would be met. In fact, the transmittal letter itself discusses several potential sources of delay *beyond* the projected 30-month implementation period, including due to factors like extended negotiations with the new independent Administrator or repapering customers once the Administrator setup is complete. Thus, even if the Commission

15 Id.

16 Id.

were to establish a shorter deadline for specific steps – e.g., three instead of four months for repapering customers – the practical realities of implementing the Plan may dictate the implementation timeline more than any obligation imposed by the Commission. The Commission should therefore focus its efforts on: (1) robust oversight of the Operating Committee to ensure that the Operating Committee takes all steps necessary to ensure that the Plan is implemented as expeditiously as possible; and (2) structural changes (discussed in the sections that follow) that would streamline the implementation of the Plan notwithstanding potential sources of delay.

II. THE COMMISISON SHOULD ALLOW THE PLAN TO APPOINT ONE OF THE CURRENT ADMINISTRATORS AS INTERIM ADMINISTRATOR UNTIL SUCH TIME AS AN INDEPENDENT ADMINISTRATOR CAN BEGIN OPERATIONS

MEMX supports the requirement that the Administrator selected by the Operating Committee be independent of any corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary data product(s).[17] As the Commission explained when it issued the May 2020 Governance Order, an SRO that sells its own proprietary market data faces an "inherent conflict of interest"[18] when acting as Administrator. Requiring that the Plan select an Administrator that does not face this inherent conflict would facilitate the administration of the Plan in accordance with the protection of investors and the public interest, and ensure that competing commercial interests do not jeopardize the regulatory objectives of the Plan. However, even a cursory review of the proposed implementation schedule shows that the selection and

17 See Plan, Section 6.2.

18 See Governance Order, supra note 2, at 28722.

onboarding of the independent Administrator is responsible for the lion's share of the 30-month implementation period. Consider the following timelines provided in Exhibit F:

Workstream	**Timeframe**
(3) Selection of new Administrator	11 months
(4) Contract negotiations with new Administrator	4 months
(5) Administrator setup	11 months
Total Administrator Selection and Onboarding	**26 months**

This reveals that 26 months of the 30-month implementation period would be spent selecting and onboarding the new Administrator. While there is some overlap between this process and other workstreams required for the Plan to become operative, it's clear that the transition the new Administrator would account for much of the implementation timeline. Selecting and onboarding the new Administrator is also a potential source of delay for the implementation of the Plan as this part of the process is not fully within the control of the Operating Committee, and the transmittal letter cites instances where other request for proposal ("RFP") processes and related negotiation have taken longer than expected. Although the Operating Committee should be encouraged to quickly select and onboard a new independent Administrator, there is no need for the implementation of other governance reforms to be tied to the new Administrator.

As it stands, while the Plan would become effective on the date that it is approved by the Commission, it would have no responsibility for the dissemination of consolidated market data until each of the thirty independent steps identified in Exhibit F is completed. We see no reason

for the Plan to persist in this state for what is anticipated to be a yearslong process of fully implementing all required Plan features. In fact, if these changes were to be implemented on the existing Equity Data Plans, we expect that the Commission would have ordered that changes be implemented individually, in as expeditious a manner as possible, and not wait for *all* reforms to be ready before *any* could be implemented. This should be no different for the new Plan. MEMX therefore recommends that the Commission amend the Plan to allow the Operating Committee to appoint one of the two current Administrators of the Equity Data Plans as interim Administrator until such time as the Operating Committee selects and onboards a new Administrator that meets the Plans requirements for independence.[19] This would allow the Plan to become operative while the Operating Committee works towards full implementation of all required Plan elements.

III. THE PROPOSED TWO-THIRDS VOTING THRESHOLD IS LIKELY TO CAUSE DELAYS BEYOND THE PROJECTED 30-MONTH IMPLEMENTATION PERIOD & SHOULD BE CHANGED TO REQUIRE A SIMPLE MAJORITY VOTE INSTEAD

As required by the Amended Order, the Plan would impose a two-thirds voting threshold for any action taken by the Operating Committee,[20] replacing the "augmented majority"[21] vote included in the original Governance Order that was struck down by the D.C. Circuit due to the inclusion of non-SRO voting representation on the Operating Committee.[22] Specifically, Section 4.3(b) of the Plan states that "all actions of the Operating Committee will require an affirmative

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19 As discussed, the Operating Committee would still be required to select and onboard a new independent Administrator as expeditiously as possible, notwithstanding the appointment of an interim Administrator acting in a temporary capacity.

20 See Plan, Section 4.3(b).

21 See Governance Order, supra note 2.

22 See supra note 4.

vote of not less than (2/3rd) two-thirds of all votes allocated in the manner described in Section 4.3(a)."[23] In turn, Section 4.3(a) of the Plan allocates one vote to each SRO Group or Non-Affiliated SRO, with an additional vote allocated to "an SRO Group or Non-Affiliated SRO whose combined market center(s) have consolidated equity market share of more than fifteen (15) percent during four of the six calendar months preceding an Operating Committee vote."[24] While MEMX understands that the D.C. Circuit's opinion necessitated a change to the prior augmented majority vote, the specific voting threshold selected by the Commission and included in the Plan may prove unworkable in practice, leading to unnecessary delays in the implementation of the Plan.

Given significant division among the SROs on market data issues, MEMX is concerned that a two-thirds voting threshold may be difficult if not impossible to accomplish on contested Plan matters. Moreover, other provisions of the Plan may further incentivize this result. For example, Section 14.3(a) of the Plan provides that "[u]ntil the Operative Date the Members will continue to operate pursuant to the CQ Plan, CTA Plan, and UTP Plan with respect to the public dissemination of real-time consolidated equity market data."[25] As discussed, the Operative Date is contingent on the completion of all workstreams identified in Exhibit F. If these workstreams are not completed – e.g., due to gridlock in the voting process – the Equity Data Plans would remain responsible for the dissemination of consolidated market data to the public. For many SROs this would be a troubling outcome. However, the three SRO Groups, which together would account for half of all votes on the new Operating Committee, may consider this outcome preferrable as it

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23 See Plan, Section 4.3(b).

24 See Plan, Section 4.3(a). This requirement for allocating votes on the basis of corporate affiliation was upheld by the D.C. Circuit and is therefore unchanged from the original Governance Order. See supra note 4 and associated text.

25 See Plan, Section 14.3(a).

would enable them to continue to operate under the Equity Data Plans where their authority is unchecked, and where they can use that authority to frustrate other Commission initiatives.

Rule 608 of Regulation NMS authorizes the Commission to approve a proposed NMS Plan "with such changes or subject to such conditions as the Commission may deem necessary or appropriate."[26] Rather than approving provisions that would result in further gridlock and inaction, the Commission should exercise its authority to amend the Plan to require a simple majority vote for most Plan actions. Although there are surely many competing considerations that the Commission must weigh when determining the appropriate voting threshold, that selection may prove to be the most important decision that the Commission makes with respect to the Plan.

As the Commission understood when it issued the Amended Order, the implementation timeline is "important because implementation of the [Plan] is critical to reducing existing redundancies, inefficiencies, and inconsistencies in the current Equity Data Plans and to modernizing plan governance."[27] While the Commission was discussing the overall need to prescribe a specific timeline for the implementation of the Plan, it is equally important that the Commission ensure the *practicability* of meeting that timeline. A two-thirds voting threshold for all actions of the Operating Committee is likely to frustrate the goals of the Amended Order as the likely practical result of this requirement is deadlock that will cause implementation to grind to a halt. Because the Plan cannot be implemented without the SROs achieving consensus on contested matters subject to a vote, the voting threshold is central to the timely implementation of the Plan.

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26 17 CFR § 242.608(b)(2).

27 See Amended Order, supra note 2, at 61633.

Although MEMX cannot predict how each SRO Group of Non-Affiliated SRO will ultimately vote on any particular issue, our experience with the Equity Data Plans suggests a high likelihood that the Plan will not be implemented in a timely manner if the voting requirement is not adjusted. To be sure, modifying the Plan to require a simple majority instead of a two-thirds vote is not a panacea, and there will undoubtedly be difficult votes regardless of the threshold selected by the Commission. However, requiring a simple majority vote is a necessary if not sufficient change to ensure there is any chance that the Plan will be successfully implemented.

MEMX further notes that the Commission's decision here is not black and white. In addition to choosing between a two-thirds and simple majority vote, the Commission could choose to require different voting thresholds depending on the kind of decision that is up for a vote. In fact, this is how the Equity Data Plans are structured today. Under the Equity Data Plans, most actions of the operating committee are subject to a majority vote.[28] However, more stringent voting requirements are imposed for plan amendments, with fee amendments subject to a two-thirds vote,[29] and a unanimous vote required for all other amendments (other than ministerial amendments for which no vote is required).[30] While MEMX strongly encourages the Commission to reduce the voting threshold for most actions of the Operating Committee – including actions required by Exhibit F, such as selection of the independent Administrator, or filing required fee amendments – we would not be opposed to the Commission choosing to require a two-thirds supermajority for more significant Plan amendments that are subject to a unanimous vote today.

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28 See CTA Plan, Section IV(a); CQ Plan, Section IV(a); and UTP Plan, Section IV(C)(3).

29 See CTA Plan, Section XII(b)(iii); CQ Plan, Section IX(b)(iii); UTP Plan, Section IV(C)(2).

30 See CTA Plan, Section IV(b); CQ Plan, Section IV(c); UTP Plan, Section IV(C)(1)(a).

IV. THE COMMISSION HAS THE AUTHORITY TO AMEND THE TWO-THIRDS VOTING THRESHOLD IT INCLUDED IN THE AMENDED ORDER

When the D.C. Circuit issued its decision in *Nasdaq III*, the court discussed its reasoning for vacating the CT Plan Order in its entirety instead of simply severing the provisions of the order that it found to be inconsistent with the Exchange Act – namely, difficulty in resolving conflicting voting provisions in light of the court's finding that non-SRO voting representation was inconsistent with Section 11A. Specifically, the court noted that the CT Plan called for an augmented majority vote that included both two-thirds of all votes, i.e., SRO and non-SRO votes, and a majority of SRO votes alone. After removing non-SRO voting representation, the court explained that the CT Plan would "simultaneously requir[e] both a two-thirds *and* a simple majority vote of approval by the SROs alone."[31] The D.C. Circuit therefore vacated the CT Plan Order in its entirety, leaving it to the Commission to make this substantive policy choice. And in the Amended Order, the Commission resolves this conflict by requiring a two-thirds vote of the SROs. However, this decision, like similar decisions that led up to the issuance of the prior Governance Order does not "mark the consummation of the agency's decision making process."[32]

Although the D.C. Circuit's ruling effectively left it up to the Commission to determine the appropriate SRO voting threshold – and the Commission has made *a* choice – the court's opinion in challenges to both the CT Plan Order and the prior Governance Order make clear that the Commission retains authority to make a *different* choice following its review of comments. Importantly, the D.C. Circuit dismissed the challenge to the Governance Order brought in *Nasdaq*

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31 See *Nasdaq III*, supra note 4.

32 See *Nasdaq I*, supra note 4 (citing *Bennett v. Spear*, 520 U.S. 154, 177–78)

I on the basis that the Governance Order did not constitute final agency action as the Commission made clear that "it has yet to make up its mind about any of the challenged provisions and that they all remain subject to notice, comment, and final resolution by the Commission."[33] That is, "at every critical turn, the Commission made clear that its decision making regarding the three challenged features remained unconsummated. Or in the words of *Bennett*, the Governance Order did not 'mark the consummation of the agency's decision-making process.'"[34] Then, in *Nasdaq III*, the court reaffirmed this statement, characterizing the Governance Order as "no more than a call for a proposal that would then be subject to further notice, comment, and revision."[35]

Thus, as the D.C. Circuit held in *Nasdaq I* and reaffirmed in *Nasdaq III*, the Commission retains the authority to substantively modify its stated policy choice based on feedback received from commenters. This authority is not contingent on whether or not the plan features in question are mandated by the Amended Order, which like the prior Governance Order is "no more than a call for a proposal that [is] subject to further notice, comment, and revision."[36] Only after the Commission approves the Plan, with or without modification, would the agency's decision making process be considered "consummat[ed]"[37] and therefore not subject to necessary or appropriate modifications. For the reasons previously discussed, the Commission should exercise its authority to make a different policy choice and require a majority vote for most Plan actions. Failure to do so may doom this project even before the work of implementing the Plan begins in earnest.

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33 See *Nasdaq I*, supra note 4.

34 Id.

35 See *Nasdaq III*, supra note 4.

36 Id.

37 See supra note 32.

V. THE COMMISISON MUST AMEND THE PLAN TO COMPLY WITH THE DEFINITION OF CORE DATA IN REGULATION NMS, WHICH INCLUDES NEW DATA CONTENT REQUIRED UNDER THE INFRASTRUCTURE RULE

The Commission issued the infrastructure rule on December 9, 2020 – more than three years ago – "to modernize the national market system for the collection, consolidation, and dissemination of information with respect to quotations for and transactions in [NMS] stocks."[38] In furtherance of this goal, it amended Regulation NMS to: (1) expand the data content required to be disseminated over the SIPs to include certain odd lot, depth-of-book, and auction information; (2) replace the current exclusive SIP model for dissemination of consolidated market data with competing consolidators and self-aggregators; and (3) reduce the applicable round lot size in high-priced securities that currently trade with artificially wide spreads. MEMX supports each of these important changes and has written in support of them on many occasions.

As the first "key milestone"[39] towards implementation of the infrastructure rule, the Commission further required that "[t]he participants to the effective national market system plan(s) for NMS stocks shall file with the Commission… an amendment that includes,"[40] among other provisions, "[c]onforming the effective national market system plan(s) for NMS stocks to reflect provision of information with respect to quotations for and transactions in NMS stocks that is necessary to generate consolidated market data… to competing consolidators and self-aggregators."[41] Importantly, the required NMS plan amendments are required to address fees

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38 See infrastructure rule, supra note 6.

39 Id at 18699.

40 17 CFR § 242.614(e).

41 17 CFR § 242.614(e)(1).

charged to competing consolidators and self-aggregators that would take the place of the existing exclusive SIPs and are therefore a prerequisite for the implementation of the infrastructure rule.

On November 19, 2021, the Equity Data Plans filed proposed amendments with the Commission. These amendments were not supported by the majority of Participant organizations. However, the three SRO Groups that collectively control the Equity Data Plans were able to submit their preferred amendments to the Commission notwithstanding the lack of support from Non-Affiliated SROs. Unsurprisingly, the amendments were ultimately disapproved by the Commission as inconsistent with the Exchange Act. Following the Commission's disapproval, the implementation of the infrastructure rule has been in limbo, and the Commission has proposed to accelerate certain provisions, i.e., odd lot and round lot changes, on the exclusive SIPs.[42]

During the Commission's review of the amendments filed by the Equity Data Plans, MEMX recommended that the Commission consider whether the CT Plan – i.e., the predecessor of the current Plan – would be "a more appropriate body for setting fees for consolidated market data."[43] Indeed, as the divided vote on the amendments shows, the failure of the Equity Data Plans to produce a workable fee structure for the infrastructure rule is largely a failure of governance. We were therefore surprised that the Amended Order did not even mention the infrastructure rule.

Moreover, the Amended Order and the infrastructure rule appear to *require* that the Plan include provisions that are consistent with the revised definition of "core data" in Rule 600(b)(21)

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42 See Securities Exchange Act Release No. 96494 (December 14, 2022), 87 FR 80266 (December 29, 2022) (S7-30-22) (Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders).

43 See Letter from Adrian Griffiths, Head of Market Structure, MEMX to Vanessa Countryman, Secretary, Commission dated November 8, 2021 *available at* https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-9403088-262830.pdf.

of Regulation NMS.[44] For example, the Amender Order provides that the Plan's operating committee is responsible for "[d]eveloping and maintaining fair and reasonable fees and consistent terms for the distribution, transmission, and aggregation of *core data*."[45] (Emphasis added) In turn, the current definition of core data under Rule 600(b)(21) of Regulation NMS, as amended by the infrastructure rule, unambiguously requires the dissemination of the additional data elements previously discussed, including odd lot, depth-of-book, and auction information.[46] By contrast, Section 4.1 of the Plan replaces the broad reference to "core data" in the Amended Order with a significantly narrower reference to the operating committee's responsibility for "[d]eveloping and maintaining fair and reasonable Fees and consistent terms for the distribution, transmission, and aggregation" of "*Transaction Reports* and *Quotation Information* in Eligible Securities."[47] (Emphasis added) These terms are defined in the Plan in a manner that correlates to the data currently disseminated pursuant to the Equity Data Plans – i.e., trades, the best bid and offer for each exchange, and the national best bid and offer ("NBBO") – and exclude other important

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44 17 CFR § 242.600(b)(21).

45 See Amended Order, supra note 2, at 61640.

46 "Core data" means "[t]he following information with respect to quotations for, and transactions in NMS stocks: (A) Quotation sizes; (B) Aggregate quotation sizes; (C) Best bid and best offer; (D) National best bid and national best offer; (E) Protected bid and protected offer; (F) Transaction reports; (G) Last sale data; (H) Odd-lot information; (I) Depth of book data; and (J) Auction information. 17 CFR § 242.600(b)(21).

47 See Plan, Section 4.1(f)(iii) [sic]. "Transaction Reports" means "reports required to be collected and made available pursuant to this Agreement containing the stock symbol, price, and size of the transaction executed, the Market in which the transaction was executed, and related information, including a buy/sell/cross indicator, trade modifiers, and any other required information reflecting completed transactions in Eligible Securities." See Plan, Section 1.1(78). "Quotation Information" means "all bids, offers, displayed quotation sizes, market center identifiers and, in the case of FINRA, the identifier of the FINRA Participant that entered the quotation, all withdrawals, and all other information pertaining to quotations in Eligible Securities required to be collected and made available to the Processors pursuant to this Agreement." See Plan, Section 1.1(65).

elements of "core data" as defined in Rule 600(b)(21). Thus, the data required to be disseminated under this new Plan is flatly inconsistent with the Amended Order and the infrastructure rule. Neither the Plan nor the Amended Order even attempt to address this obvious inconsistency.

Of course, the Plan had not been filed – and therefore was not responsible for the dissemination of consolidated market data in NMS stocks – at the time the Commission adopted the infrastructure rule. However, we know of no circumstance where Commission rules have been interpreted to apply only to those organizations that existed at the time the rule was issued. Not only would such an interpretation strain credulity it would have a vast, unquantifiable impact on the Commission's regulatory reach not only in this case but also in other cases where the Commission has sought to apply exiting rules to new corporate entities or new *kinds* of securities markets and market participants. Without any sort of explanation for why this case is special, or why the SROs should be able to evade effective Commission rules, the only reasonable result is for the Commission to enforce its rules as written and apply the current definition of core data in Rule 600(b)(21) of Regulation NMS to the Plan. Any other decision would open the proverbial floodgates for regulated parties to claim that existing Commission rules do not apply to them.

The fact that the infrastructure rule has yet to be fully implemented does not change this analysis. By its terms, the infrastructure rule, including the new definition of "core data," became effective on June 8, 2021.[48] Although the Plan was not effective at that time, it indisputably *will* become an "effective national market system plan(s)"[49] if and when approved by the Commission. The requirement to amend the effective national market system plan(s), which marks the first step

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48 See infrastructure rule, supra note 6.

49 17 CFR § 242.614(e).

towards implementation of the infrastructure rule, cannot rationally be predicated on the prior implementation of the rule. And, following the implementation timeline discussed in Exhibit F, the Plan will become the *only* "effective national market system plan(s)."[50] Simply put, if the Plan will not be responsible for the public dissemination of consolidated market data, including all elements thereof, then *no* NMS plan will be responsible for the dissemination of this information. This result is clearly not consistent with the protection of investors or the public interest.

Nor can this glaring hole by traced back to the Commission's presumably unplanned decision to disapprove the fees submitted by the Equity Data Plans. Had the Equity Data Plans submitted fees that were consistent with the Exchange Act – fees that the Commission would then have been able to approve – the Commission would still have to determine the responsibilities of the new Plan under the infrastructure rule once the Equity Data Plans ceased operations as planned. Would the Commission then have determined that the new Plan has no responsibilities for the dissemination of new data content, effectively reversing its own rulemaking? And, if not, why would the current situation be any different just because the Equity Data Plans submitted fee amendments that the Commission correctly determined were inconsistent with the Exchange Act?

As the Commission explained when it adopted the Governance Order, its governance and infrastructure reforms were "each… undertaken in furtherance of the same, broader goal."[51] Having undertaken multiple contemporaneous efforts to improve the SIPs for the benefit of investors, the Commission surely could not have intended for these two related initiatives to counteract each other. Any interpretation of the infrastructure rule that produces such an absurd,

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50 Id.

51 See Governance Order, supra note 2, at 28709.

illogical result must be dismissed out of hand. The Commission should therefore amend the Plan to include requirements for the Plan to take over responsibility for *all* core data, as defined in Rule 600(b)(21) of Regulation NMS, not only the subset of core data that is currently made available by the Equity Data Plans pursuant to Commission rules that are no longer effective.

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MEMX appreciates the opportunity to provide our comments on the Plan. While the governance reforms included in the Plan are critical to the proper administration of the SIPs, we are concerned that various features of the Plan may cause additional delays in implementation. We are also concerned that approval of the Plan as written would allow the SROs – with the implicit backing of the Commission – to skirt the requirements of the infrastructure rule as it relates to the dissemination of odd-lot, depth-of-book, and auction information not contemplated by the Plan. The Commission can and should address each of these issues in any order approving the Plan.

Sincerely,

/s/ Adrian Griffiths

Adrian Griffiths
Head of Market Structure