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VIA ELECTRONIC MAIL

February 26, 2024

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 99403 (January 19, 2024), 89 FR 5002 (January 25, 2024) (File No. 4-757)

Dear Ms. Countryman:

The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) appreciates the opportunity to comment on the Proposed National Market System Plan Regarding Consolidated Equity Market Data (“Proposed NMS Plan”).¹

Although Nasdaq supports the consolidation of the current UTP and CTA/CQ Plans into a single plan with a single administrator, the voting structure in the Proposed NMS Plan is fundamentally flawed.² Whereas the Commission had designed voting to reflect the importance of those SROs that “oversee trading activity that generates a significant amount of equity market data,”³ data shows that the means chosen for this goal—allocation of two votes for SROs or SRO

¹ See Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 99403 (January 19, 2024), 89 FR 5002 (January 25, 2024) (File No. 4-757) (“Proposed NMS Plan”).

² As noted in the transmission letter, Nasdaq and other SROs that submitted the Proposed NMS Plan joined in the submission solely to satisfy the requirements of the Amended Order. As noted in the filing, “[n]othing in this submission should be construed as an agreement by any particular SRO with any analysis or conclusions set forth in the Amended Order, the prior Commission orders cited in the Amended Order, or the CT Plan. An SRO may submit public comments regarding the Plan, including comments objecting to the provisions in the Plan, challenging the legality of the Plan, or proposing modifications to the Plan.” See Proposed NMS Plan, n.6.

³ See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 88827, 28714 (May 6, 2020), 85 FR 28702, 28714 (May 13, 2020) (File No. 4-757) (“NMS Plan Order”); see also Securities Exchange Act Release No. 92586 (August 6, 2021), 86 FR 44142 (August 11, 2021) (“Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data”) (explaining that the voting threshold should “reflect[] the significance within the national

Groups above 15 percent market share—is not rationally related to that goal. As such, approval of the voting structure in the current form would be arbitrary and capricious.⁴

Nasdaq recommends that the Commission address this fundamental flaw by adopting the tiered voting structure proposed by Cboe as the most practical alternative approach to consolidating the equity data plans, allowing merger of the plans to move forward expeditiously.⁵

In addition, Nasdaq proposes two technical modifications that will improve plan operations. First, we suggest adjusting the definition of Net Distributable Operating Income to remove an historical payment to the Financial Industry Regulatory Authority (“FINRA”). Second, we propose expanding the restrictions on entities that may become administrator to exclude all entities that sell any consolidated or proprietary data products (“PDPs”) to ensure the administrator’s independence.

Proposed Voting Structure

The Proposed NMS Plan voting structure allocates each SRO Group or Non-Affiliated SRO one vote, unless the “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,” in which case that SRO or SRO Group has two votes.⁶ “Consolidated equity market share” is calculated as the average daily dollar equity trading volume of Eligible Securities of an SRO Group or Non-Affiliated SRO as a percentage of the average daily dollar equity trading volume of all of the SRO Groups and Non-Affiliated SROs, as reported under this Agreement or under the CQ, CTA, and UTP Plans.⁷

Operating Committee action requires “an affirmative vote of not less than (2/3rd) two-thirds of all votes allocated in the manner described”⁸

The Commission set the 15 percent threshold to “signif[y] the importance to the national market system of those exchanges that, in their roles as SROs, therefore oversee trading activity

market system of those exchanges that, in their roles as SROs, oversee trading activity that generates a significant amount of equity market data.”).

⁴ The Nasdaq Stock Market LLC, et al., v. SEC, 38 F.4th 1126, 1135 (DC Cir. 2022) (July 5, 2022) (citing Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (“[T]he Commission is required to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”).

⁵ See Letter from Patrick Sexton, EVP, General Counsel and Corporate Secretary, Cboe Global Markets, Inc., to Vanessa Countryman, Secretary, SEC, re File No. 4-757; Securities Exchange Act Release No. 34-9827 – Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (“Cboe Comment Letter”). <https://www.sec.gov/comments/4-757/4757-417779-985642.pdf>.

⁶ See Proposed NMS Plan, Attachment A, Section 4.3(a), 89 FR 5002, 5011.

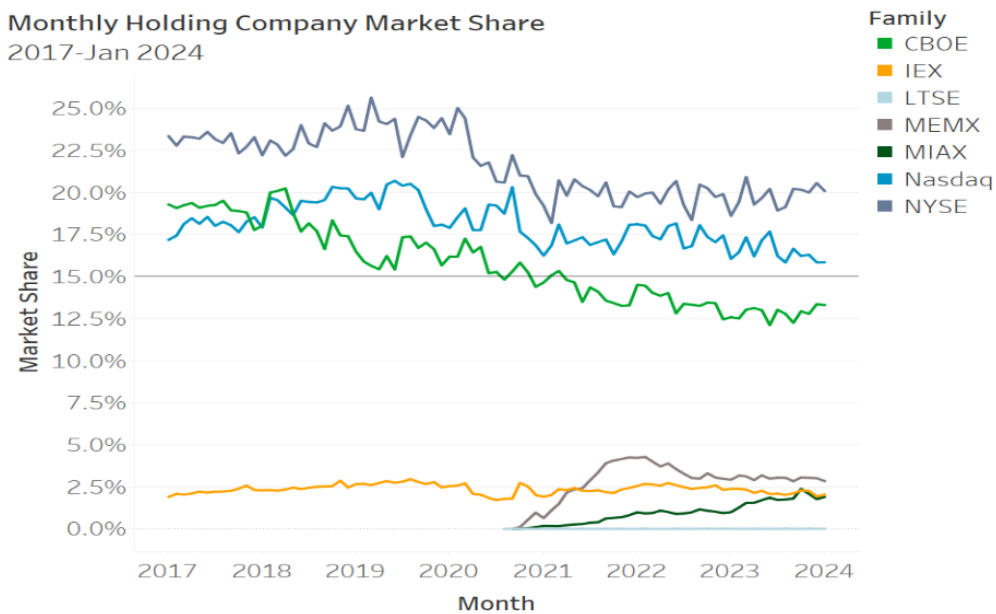
⁷ See *id.*

⁸ See *id.* Section 4.3(b).

that generates a significant amount of equity market data”⁹ The Commission rejected an alternative threshold of 10 percent because it did not believe that “10 percent consolidated equity market share is sufficiently significant to warrant a second vote, particularly given the trend toward exchange consolidation.”¹⁰ The Commission’s analysis was based on the assumption that “[t]he consolidated equity market share of the largest exchange groups is already well above 10 percent and continues to range from 17 percent to 22 percent.”¹¹

The data used by the Commission to set this threshold are outdated and will continue to be outdated as trends are unlikely to reverse. Chart 1 shows market share by equity market participant for the last six years.

Chart 1: Trends in Equity Market Share by Exchange Family



Source: UTP/CTA Plans

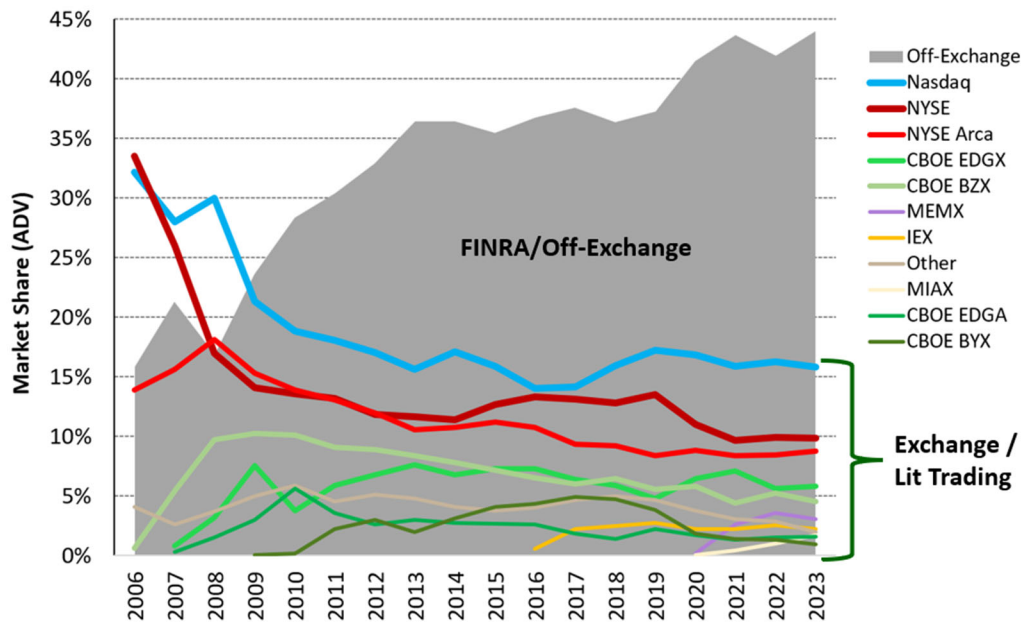
Chart 2 shows the movement away from exchanges to off-exchange venues.

⁹ See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 88827, 28714 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4-757).

¹⁰ See *id.*

¹¹ See *id.*

Chart 2: Trends in Equity Market Share by Type of Venue



Source: Rosenblatt Securities

Chart 1 shows that, over the past three years, as new exchanges have entered the market and the trend of liquidity moving toward non-exchange venues has continued, Cboe has fallen below 15 percent, while Nasdaq and NYSE have trended downward. As more exchanges enter the market and the trend of liquidity moving towards non-exchange venues continues, market shares of the other large SRO Groups may fall below 15 percent as well. Chart 2 shows that this is part of a long-term movement away from exchange trading which has persisted for nearly two decades. Whereas the Commission based its analysis on the erroneous assumption that the largest exchange groups would have a market share between 17 and 22 percent—with the 15 percent threshold well below that range—data show that the actual range is approximately 4 points below that, between 13 and 18 percent, with the threshold in the middle of that range, a downward trend that is likely to endure.

The 15 percent threshold is therefore not fit for purpose: it is too high to differentiate between exchanges that “oversee trading activity that generates a significant amount of equity market data”¹² and those that do not.

In its rulemaking, the Commission must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹³ There is no such connection here. The Commission set the threshold to signify the importance of the large SRO groups to plan operations, but the data shows that goal

¹² NMS Plan Order, 85 FR 28702, 28714.

¹³ The Nasdaq Stock Market LLC, et al., v. SEC, 38 F.4th 1126, 1135 (DC Cir. 2022) (July 5, 2022).

will not be accomplished by the proposed voting scheme. Approval of the voting structure under such circumstances would be arbitrary and capricious.

Cboe's Proposed Voting Structure

Nasdaq supports the proposed Cboe voting structure¹⁴ as a viable method of ensuring that voting reflects the importance of SROs that “generate[] a significant amount of equity market data.”¹⁵

Cboe proposes a three-tiered voting framework in which SRO Groups and Non-Affiliated SROs would receive either 1, 2, or 3 votes based on their consolidated equity market share. All SROs would receive 1 vote; SROs with between 5% and 15% consolidated equity market share would receive 2 votes; and those with more than 15% consolidated equity market share would have 3 votes. Committee action would require a 2/3 majority. The calculation of “consolidated equity market share” would be modified by removing 50 percent of the transaction volume reported by the Transaction Reporting Facilities (TRFs) because the TRFs publish trades but not quotes.¹⁶

The Cboe plan is supported by the evidence. Chart 1 shows two simultaneous trends: declining market share for the larger SRO groups and rising market share for the unaffiliated SROs, creating a “middle tier” of SROs. This middle tier is composed of both larger SRO groups, and potentially newer market participants with increasing market share. Cboe's more nuanced structure will be more effective at reflecting the contribution of all firms to the generation of equity market data, including that of the middle tier.

The Cboe proposal also corrects an error in the Proposed NMS Plan that used total equity volume reported by the Transaction Reporting Facilities (“TRFs”) as the basis for calculating consolidated equity market share. As Cboe noted, the TRFs report trades, but not quotes, and therefore are less transparent than the exchanges. Including TRF reporting in the denominator for calculating consolidated equity market share artificially lowers the market share calculation by including venues that do not offer full transparency to the market.

Nasdaq believes that this error should be corrected by eliminating TRF volume from the calculation entirely. As shown in Chart 2, the long-term movement away from exchange trading artificially lowers the market share calculation. Nevertheless, Nasdaq also believes that Cboe's proposal to remove 50 percent of the TRF volume is a reasonable compromise and supports it as such.

In addition to the adoption of the revised Cboe voting structure, Nasdaq proposes two technical modifications: (i) adjusting the definition of Net Distributable Operating Income to remove an historical payment to FINRA; and (ii) expanding the restrictions on entities that may

¹⁴ See Cboe Comment Letter, supra n.5.

¹⁵ See supra n.12.

¹⁶ Consolidated equity market share would be calculated as: (Average daily dollar equity trading volume of eligible securities of an SRO Group or non-affiliated SRO)/[(0.50)(TRF) + (Average daily dollar trading volume of all the SRO Groups and nonaffiliated SROs)].

become administrator to exclude all entities that sell any consolidated or proprietary data products.

FINRA Payment

The Proposed NMS Plan should be adjusted to remove a 6.25% set-aside for FINRA.

The Proposed NMS Plan defines “Net Distributable Operating Income” to exclude “6.25% of the revenue received by the Company during such calendar year attributable to the segment of the Data Feeds reflecting the dissemination of information with respect to Network C Securities and FINRA OTC Data . . . which amount shall be paid to FINRA as compensation for the FINRA OTC Data.”¹⁷

This set-aside is inconsistent with the overall scheme of revenue distribution, which bases revenue sharing on the contribution of each participant to market transparency.¹⁸ Rather than measuring FINRA’s contribution to the market, the 6.25% adjustment is little more than an historical artifact. Nasdaq believes that payments to FINRA, like that of all participants, should be based on the principle of contribution to the market, and the 6.25% adjustment should therefore be removed from the calculation of Net Distributable Operating Income. Indeed, Nasdaq believes that OTC data should be removed from this NMS plan entirely and intends to propose that once the new plan commences operations. To preserve the options of the new Operating Committee with respect to the distribution of OTC data, and to ensure that all revenue sharing be based on contribution to market transparency, Nasdaq urges that the 6.25% adjustment be removed from the plan.

Independence of the Plan Administrator

The Proposed NMS Plan should exclude data vendors, as well as SROs, from serving as Plan Administrator.

The proposed plan states that “[t]he Administrator may not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.”¹⁹ The Commission explained that this requirement is based on the need to preserve the independence of the new Administrator:

[B]ecause the relevant conflict of interest for an Administrator would arise from administration of the SIPs while selling overlapping proprietary equity market data products, the Commission continues to believe that the independence requirement for the Administrator must prohibit an entity from serving as

¹⁷ See Proposed NMS Plan, Exhibit D (Distributions), Section (j)(ii), 89 FR 5002, 5026.

¹⁸ See Proposed NMS Plan, Exhibit D (Cost Allocation and Revenue Sharing), 89 FR 5002, 5026.

¹⁹ See Proposed NMS Plan, Attachment A, Section 6.2 (Independence of the Administrator), 89 FR 5002, 5016.

Administrator of the CT Plan if it is owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own PDP.²⁰

Vendors, however, sell PDP data or may consolidate PDP data for sale as their own product. These vendor products may provide an alternative to consolidated equity data, presenting vendors with a conflict of interest. Nasdaq therefore recommends expanding the recusal to include any firm that “offers for sale its own PDP *or that of single or multiple Participants.*” Nasdaq believes that this revised provision will help protect the independence of the Plan Administrator.

* * *

Thank you for the opportunity to comment on the Proposed National Market System Plan Regarding Consolidated Equity Market Data.

Sincerely,

A handwritten signature in black ink that reads "Erika Moore". The signature is written in a cursive, flowing style.

Erika Moore
Vice President and Corporate Secretary

²⁰ See Securities Exchange Act Release No. 92586 (August 6, 2021), 86 FR 44142, 44196 (August 11, 2021) (“Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data”).