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February 5, 2020

Via Email & FedEx

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Notice of Proposed Order Directing the Exchanges and FINRA to Submit a New National Market System Plan Regarding Consolidated Equity Market Data (File No. 4-757)

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE") respectfully submits this comment letter on behalf of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (together, the "NYSE Exchanges") in response to the January 8, 2020 proposed order (the "Proposed Order") from the Securities and Exchange Commission ("SEC" or the "Commission") that would direct the exchanges and FINRA to submit a new National Market System plan (the "New NMS Plan") regarding consolidated equity market data.[1]

Executive Summary

The consolidated tape is a hallmark feature of the U.S. equity markets, providing investors a simple, single mechanism to understand the state of displayed liquidity and recent transactions across many venues. Conceived more than 45 years ago, it has played an important role in making American equity markets accessible, transparent, and resilient.

But over the past 45 years, technology and market structure have changed dramatically. Regional stock exchange floors have been replaced with multiple New Jersey-based data centers. Armies of sales traders looking at prices on screens have been replaced by algorithms consuming "non-displayed" data feeds. And retail investors who once called their broker to ask for a quote are increasingly trading through smartphone apps or digital assistants.

Given the degree of marketplace change, it is more than appropriate to consider whether the securities information processors ("SIPs") need to be modernized.[2] NYSE strongly

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[1] See Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2202 (January 14, 2020) (File No. 4-757) ("Proposed Order").

[2] NYSE's wholly-owned subsidiary, the Securities Industry Automation Corporation ("SIAC"), is the exclusive SIP for the Consolidated Tape Association and Consolidated Quotation System NMS Plans (together, "CTA Plan"), and processes

supports the Commission's efforts to evaluate and improve the SIPs, and urges the Commission and the industry at large to consider SIP technology and policy questions from first principles.

To that end, NYSE recommends that the Commission undertake rulemaking to implement the following:

1. ***Expand SIP Content***
    a. Create products designed for modern use cases, including a SIP product with depth-of-book quotes for institutional traders and a National Best Bid and Offer ("NBBO") only version for retail customers, with fees based on content entitlements (or levels) instead of user type
    b. Publish protected quotes in terms of "shares," not "lots"
    c. Mandate round lot reform and the addition of odd lot quotes to the SIPs
    d. Include auction imbalance information
2. ***Modernize SIP Delivery***
    a. Require consolidation in each major data center (i.e., a "Distributed SIP") to address geographic latency
    b. Replace the requirement in Regulation NMS of a "single" processor, to allow for competing consolidators of SIP data
3. ***Evolve SIP Governance***
    a. Replace current decision requirements (including unanimity) with the structure approved in the NMS plan for the Consolidated Audit Trail ("CAT NMS Plan") (i.e., majority for most decisions, supermajority for plan amendments)
    b. Clarify the standards for fees to be "fair and reasonable"
    c. Revise the Revenue Allocation Rule to remunerate the processors based on subscribership and to incent displayed quotes that result in a trade

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and consolidates all protected bid/ask quotes and trades for NYSE-listed securities (Tape A) and NYSE American-listed, NYSE Arca-listed, and non-Nasdaq exchange-listed securities (Tape B) into a single, easily consumed data feed. The Nasdaq Stock Market LLC is the exclusive SIP for 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 (the "UTP Plan,"), and processes and consolidates all protected bid/ask quotes and trades for Nasdaq-listed securities (Tape C). The same 15 registered exchanges and FINRA are participants of both the CTA and UTP Plans. The members of the Advisory Committees for the CTA and UTP Plans are also identical.

NYSE believes that, presently, the industry as a whole has both the technological expertise and policy motivation to support these substantive changes to the SIPs. However, given the myriad interests that self-regulatory organizations ("SROs") and non-SRO industry members bring to the market data debate, NYSE believes these changes must be established by Commission rulemaking for it to be sustainable and legitimate. Further, as discussed in Part II, we believe that the Commission lacks the statutory authority to require some of the changes contained in the Proposed Order, and that the governance changes in the Proposed Order will not solve the problems the Commission has identified.

Part I: NYSE's Vision for SIP Reform

1. Expand SIP Content

NYSE suggests three changes to the current SIP content, to allow the SIPs to better serve the needs of today's market participants.

a. Create Three Different SIP Products, Including One with Depth of Book

NYSE recommends that the Commission engage in rulemaking to revise the scope of content that is to be delivered by the SIPs. Instead of the current, one-size-fits-all SIP feed, NYSE recommends that the Commission establish three levels of SIP products, each with different content designed to serve the needs of specific types of investors. As detailed below, *SIP Essential* would be designed for non-professional investors and would be available for displayed use only. *SIP Classic* would be a mid-level product similar to the current SIP feed. And *SIP Premium* would include SIP Classic data, plus three levels of depth-of-book data.[3]

- *SIP Essential* would provide a calculated NBBO, all exchange and TRF trades (excluding market identifiers), and limited regulatory messages (e.g., regulatory halts). SIP Essential's consolidated display of the NBBO could include the aggregated size available at the NBB and NBO across all market centers. SIP Essential would not identify the market centers for quotes or trades,[4] making it unusable by broker-dealers to facilitate high-speed trading, but it would, however, meet the needs of the majority of retail investors, who

[3] NYSE first introduced this recommendation on August 22, 2019. See NYSE Equities Blog, "Stock Quotes and Trade Data: One Size Doesn't Fit All," available here: https://www.nyse.com/equities-insights#20190822.

[4] Because SIP Essential would omit market identifying information for bids and offers, it would not constitute a "consolidated display" as defined by Rule 600(b)(14) of Regulation NMS. As such, under the current Vendor Display Rule (Rule 603(c) of Regulation NMS), securities information processors and broker-dealers would not be able to provide SIP Essential in a context in which a trading or order routing decision can be implemented. NYSE therefore recommends that any Commission rulemaking include amendments to Rule 603(c) to permit SIP Essential to be provided to retail customers.

simply wish to know the last sale price, the best possible quote available across all exchanges, and whether a security is halted or paused. SIP Essential would be intended for displayed use only.

- *SIP Classic* would be designed for active traders, market professionals, and certain automated trading systems. SIP Classic would include the same data as the current SIP product: trades executed, each exchange's best bid and offer quotes, a calculated NBBO, and the full scope of regulatory messages.

- *SIP Premium* would have expanded content as compared to the current SIP feed and would include SIP Classic data plus three levels of depth-of-book data for each exchange. By including this depth-of-book data, SIP Premium would address concerns that the SIP's current content may be insufficient for institutional and active traders. While some market participants would likely continue to choose to use the proprietary data feeds offered by each exchange for additional order-level transparency, NYSE expects that many others would choose SIP Premium for their display terminals and trading systems, particularly if such data is available via a distributed SIP process, described below.

In addition to providing investors with SIP content tailored to their needs, NYSE's recommendation would also reduce the administrative burdens associated with the current SIP. Currently, subscribers of the SIP pay different rates for the same product, based on whether the individual making display use of the data is deemed a "professional" or "non-professional" user. This practice of charging customers based on who they are requires broker-dealers to categorize their customers and report their use to the SIP administrators, who in turn must audit whether those broker-dealers' reports are correct and complete. NYSE agrees with many in the industry that this "professional"/"non-professional" distinction is unwieldy and burdensome for both the customers and the administrators of the SIPs. Under NYSE's recommendation, fees would instead be differentiated based on the *product* a subscriber consumes, not *who* is consuming it. This structure would therefore obviate the current concerns over administrative burdens.

NYSE recommends that SIP Essential be priced no higher than the current fees charged for non-professional use of SIP data across the three tapes. SIP Classic would be offered at a mid-range price point that would be based on the current charges for non-display use of the SIP and device fees for professional users across the three tapes. And, because SIP Premium would be a more expansive product that includes depth-of-book data, it would be priced above SIP Classic.

This fundamental change to the SIP's content can only be accomplished through rulemaking by the Commission. It is the role of the Commission, not the Plan participants, to weigh the policy considerations involved in such a change, and to determine whether the change is in the public interest and consistent with the promotion of efficiency, competition, and capital formation.[5] Just as the

[5] See 15 U.S.C. 78c(f); see also 15 U.S.C. 78k-1(a)(2).

Commission weighed these issues in 2005 to create the current system, the Commission should revisit them now and consider creating differentiated SIP products to meet the varied needs of today's investors.

b. Allow Protected Quotes To Be Published in Terms of "Shares," Not "Lots"

The exchanges' proprietary market data feeds publish bids, offers, and trades in terms of shares, not round lots. This practice provides customers full transparency about the liquidity available on the exchanges and the state of the market.

While trades are published on the SIPs in terms of actual shares traded, bids and offers are still published on the SIPs in terms of lots. This means that quotes of 100 shares and of 199 shares are each published as one round lot, despite the fact that they are materially economically different.

In order to reduce the information gap between the proprietary feeds and the SIPs, NYSE recommends that the SIPs modernize their method of displaying quotes to show the actual number of shares quoted, instead of rounding down to the number of round lots.

c. Mandate Round Lot Reform and the Addition of Odd Lot Quotes to the SIPs

In 2019, the SIP Operating Committee[6] created a task force ("Odd Lot Task Force") to examine potential ways of adding odd lot quote information to the SIPs, in response to the recent rise of odd lot quoting. In October 2019, the Odd Lot Task Force published a proposal for adding certain odd lot quotes to the SIPs, seeking comment from the industry about the proposed way forward.

The Odd Lot Task Force received more than a dozen written comments on the proposal, from exchanges, broker-dealers, and other market participants. The common theme across most of these comments was that, while the industry would like to supplement protected quote information with odd lot data, there is intense interest in establishing an alternate definition of a round lot for high-priced securities.

NYSE believes that stock splits for high-priced securities would lead to more efficient trading and would be the most effective way to reduce the economic significance of unprotected odd lot quotes. However, given the limited interest from issuers in stock splits, we believe the Commission should establish a

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[6] The term "SIP Operating Committee" refers to the Operating Committees of both the CTA Plan (available here: https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/CTA_Plan_Composite_as_of_December_6_2019.pdf) and the UTP Plan (available here: http://www.utpplan.com/DOC/Nasdaq-UTPPlan_after_46th_Amendment-Excluding_21st_36th_38th_42nd_44th_45th_Amendments.pdf) (each a "Plan" and jointly the "Plans").

market wide graduated definition of round lot based on each security's share price.

On odd lots, NYSE believes that the industry's concerns would be best addressed by the Commission (1) establishing a common methodology for exchanges to aggregate odd lot top of book quotes to form a protected quote, and (2) requiring each exchange to publish its best bid and offer, irrespective of protected quote status, in addition to its protected bid and offer.

d. Require Primary Markets To Publish Auction Imbalance Information on the SIPs

In addition, NYSE recommends that the primary listing exchanges be required to publish auction imbalance information on the SIPs. The primary listing exchanges have developed a number of different mechanisms to process opening auctions, reopening auctions after a halt or LULD[7] pause, and closing auctions, and all of them publish information about auction imbalances on their proprietary data feeds. NYSE has long advocated, both to the Market Data Roundtable[8] and in meetings of the SIP Operating Committee, that information about these auction imbalances be published on the SIPs to help subscribers fully understand the state of the market. But other exchanges believe that the SIPs should contain only the bare minimum of information required under Regulation NMS. Given the differences in views, this issue should be resolved by Commission rulemaking.

2. Modernize SIP Delivery

NYSE has made and continues to make substantial investments in improving the latency and reliability of the SIP. In 2019 alone, NYSE has invested many millions of dollars on technical improvements to improve the speed and performance of the CTA Plan SIP:

- First, NYSE has built a new, dedicated network for consolidated tape data that will allow exchanges and subscribers to more quickly access CTA Plan SIP data.[9] Once approved by the Commission, this new network will materially reduce end-to-end latency of the CTA Plan SIP feed. NYSE invested $4 million to make this improvement, which will impose no increased costs on the industry.

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7 "LULD" refers to the National Market System Plan to Address Extraordinary Market Volatility, also known as the "Limit Up - Limit Down Plan" or "LULD," available here: http://www.luldplan.com/plans.html.

8 See "NYSE Group Submission for SEC Roundtable on Market Data and Market Access, October 25-26, 2018," available here: https://www.sec.gov/comments/4-729/4729-4559414-176201.pdf.

9 See Securities Exchange Act Release No. 87927 (January 9, 2020), 85 FR 2468 (January 15, 2020) (SR-NYSE-2019-46).

- Second, NYSE is also in the process of funding and moving the consolidator function of the CTA Plan SIP to the low-latency NYSE Pillar technology platform, aiming to complete the transition in July 2020. Once completed, the anticipated median quote latency will be reduced to under 20 microseconds. NYSE is making this improvement, again, at no incremental cost to the industry.

Even with these improvements, however, NYSE has repeatedly highlighted to the SIP Operating Committee and the Market Data Roundtable[10] that a degree of geographic latency will remain. This geographic latency exists by virtue of the fact that each SIP exists in only one location,[11] while the exchanges' operations are located in three main data centers: Mahwah, Carteret, and Secaucus. No matter where a trade is executed or a quote is generated, the exchange still must send the data to the SIP in Mahwah or Carteret, and each SIP must then consolidate that information and then disseminate the consolidated information from that location.

To address geographic latency, NYSE recommends two significant changes to the way the SIPs operate today.

a. Distributed SIP

First, NYSE proposes that the CTA Plan and UTP Plan SIPs each build and maintain processor functions at each of the three main data centers in Mahwah, Carteret, and Secaucus ("Distributed SIPs"). For example, for the CTA Plan SIP, this would mean building processor functions in Carteret and Secaucus in addition to its existing functions in Mahwah, to create three "instances" of the CTA Plan SIP. Each "instance" would receive the same quote and trade information from the exchanges and FINRA, but would independently consolidate and disseminate data.

In this way, data consolidation would occur locally near data recipients, ensuring a maximum of one "network hop" between the publishing exchange and the recipient. As illustrated in our comment letter to the Market Data Roundtable,[12] the Distributed SIP architecture would reduce the observed latency for a Tape C quote on NYSE Arca consumed in the Mahwah data center by approximately 90%.

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[10] See NYSE's "Comments for Consideration for Panel 4 of the SEC's Roundtable on Market Data and Market Access" (File No. 4-279), available here: https://www.sec.gov/comments/4-729/4729-4559383-176200.pdf ("NYSE Roundtable Comments Panel 4").

[11] The CTA Plan SIP aggregates trades and quotes for Tape A and B securities in Mahwah, New Jersey; the UTP Plan SIP aggregates trades and quotes for Tape C securities in Carteret, New Jersey.

[12] See NYSE Roundtable Comments Panel 4, supra note 10, pages 5-6.

b. Competing Consolidators

Second, NYSE proposes that the Commission permit competition among processors of consolidated data. In 2005, the Commission studied the issue[13] and decided to require, under Rule 603(b) of Regulation NMS,[14] the CTA and UTP Plans to "provide for the dissemination of all consolidated information for an individual NMS stock through a *single* plan processor" (emphasis added). Today, however, market participants are ready to manage the complexity that would be added by allowing multiple processors to compete with each other to disseminate the regulated SIP content simultaneously.[15] NYSE envisions that allowing such competition among processors would provide incentives for continuous technology improvements (e.g., processors collecting exchange trade and quote data locally and transporting it to other data centers via wireless technology), as well as improved redundancy.

Neither of these recommendations can be implemented without the Commission amending Regulation NMS. Moreover, only the Commission can undertake the assessment of public interests, efficiency, competition, and capital formation that must be weighed into a decision to adopt such changes.

3. Refine SIP Governance

Since the October 2018 Market Data Roundtable, the SIP Operating Committee has made substantial improvements to the governance of the SIPs:

- In November 2018, the participants agreed to an "Executive Session Policy" that established limits on the topics that may be discussed in an Executive Session without the participation of members of the Advisory Committee. The policy narrowly limits the use of Executive Sessions to only circumstances where confidential information must be protected. In addition, topics to be discussed in an Executive Session must be disclosed in advance to the members of the Advisory Committee, and the SIP Operating Committee must hold a vote during the General Session meeting and in the presence of the Advisory Committee to approve a topic for discussion at the Executive Session. As a result of these policy changes, two of the quarterly SIP Operating Committee meetings in 2019 did not include an Executive Session meeting.

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[13] See Securities Exchange Act Release No. 51808, 70 FR 37496 at 37559-60 (June 29, 2005) (S7-10-04) ("Regulation NMS Adopting Release").

[14] 17 CFR 242.603(b).

[15] For further information about how competing processors could work, NYSE refers the Commission to SIFMA's suggestions for creating Competing Market Data Aggregators ("CMDAs"), available at https://www.sec.gov/comments/s7-21-16/s72116-1674693-149275.pdf, and SIFMA's "Proposal for the Creation of Competing Market Data Aggregators," which is appended here: https://www.sec.gov/comments/4-729/4729-4559181-176197.pdf.

- In May 2019, the participants agreed to a "Policy Formalizing the Consultative Role of the Advisory Committee," which established, among other things, that the SIP Operating Committee must inform the Commission if a majority of the Advisory Committee opposes any action taken by the SIP Operating Committee that requires a filing submitted to the Commission. In addition, the participants have nearly completed an updated version of this policy, which would additionally guarantee that the Advisory Committee members have opportunities to formally express and place on the record their views about, and register their support or dissent from, SIP Operating Committee actions, including the nomination and selection of new Advisory Committee members.

- In July 2019, the SIP Operating Committee filed with the Commission a proposed Plan amendment setting out its policy on conflicts of interest. The proposal, published January 8, 2020 by the Commission,[16] would make mandatory the current disclosure regime, under which Plan participants, advisors, processors, and administrators must respond to a set of questions designed to provide transparency regarding potential conflicts of interest of such parties. Pending the Commission's approval of this amendment, the participants, advisors, processors, and administrators have voluntarily made these disclosures, which have been posted on the CTA and UTP websites.[17]

- In November 2019, the SIP Operating Committee filed with the Commission a proposed Plan amendment to implement a new confidentiality policy. The proposal, published January 8, 2020 by the Commission,[18] would allow the SIP Operating Committee to disclose confidential information to the Advisory Committee without concern that such information would be shared beyond the Advisory Committee. If approved by the Commission, the proposed amendment would allow the SIP Operating Committee to share more information with the Advisory Committee. For example, the SIP Operating Committee has already approved that, once this Confidentiality Policy is approved and operative, additional plan financial information would be shared with the Advisory Committee, which would further obviate the need for Executive Session meetings.

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16 See Securities Exchange Act Release Nos. 87907 (January 8, 2020), 85 FR 2193 (January 14, 2020) (File No. SR-CTA/CQ-2019-01) and 87908 (January 8, 2020), 85 FR 2202 (January 14, 2020) (File No. S7-24-89) ("SIP Conflict of Interest Policy").

17 Conflicts of interest disclosures forms completed by the participants, advisors, processors, and administrators are available on the CTA Plan website at https://www.ctaplan.com/governance, and on the UTP Plan website at http://www.utpplan.com/governance.

18 See Securities Exchange Act Release Nos. 87909 (January 8, 2020), 85 FR 2207(January 14, 2020) (File No. SR-CTA/CQ-2019-04) and 87910 (January 8, 2020), 85 FR 2212 (January 13, 2020) (File No. S7-24-89) ("SIP Confidentiality Policy").

NYSE believes that taken together, these policies have reduced or eliminated many of the concerns expressed in the Proposed Order about the governance of the Plans, and, in particular, potential conflicts of interest. NYSE further believes that these policies underscore the valued role that the Advisory Committee plays in the governance of the Plans, and give the Advisors significant input into the operation of the Plans.

In light of this considerable progress, NYSE believes that only a few limited changes to governance of the SIPs should be considered.

a. Eliminate Unanimity Requirement To Amend the Plans

First, NYSE recommends that the Commission propose amendments to the Plans that allow amendments to the Plans to be approved by less than a unanimous vote of Plan participants. Currently, the CTA and UTP Plans both require that Plan amendments be executed by "each" participant and approved by the Commission.[19] NYSE instead recommends that the Commission propose changes to the current Plans to establish a voting system similar to the one used in the CAT NMS Plan.[20] The CAT NMS Plan provides that certain matters may be authorized by the majority vote of members, while other matters, such as plan amendments, must be approved by a supermajority vote of at least two-thirds of members.[21] Adopting such a structure here would eliminate the ability of any single SRO to impose roadblocks to innovation, and would further encourage collaboration among the participants to the Plans.

b. Clarify Standards for Fees To Be "Fair and Reasonable"

Rule 603(a)(1) of Regulation NMS requires the SIPs to distribute consolidated market data "on terms that are fair and reasonable."[22] NYSE believes that the SIP Operating Committee has met that standard in setting fees for the SIPs. In setting such fees, the SIP Operating Committee takes into account that, of the market data the SIPs publish, the SIPs are the exclusive providers only of the regulatory messages. This means that market participants can potentially recreate from the exchanges' proprietary feeds the consolidated quotes and trade information that the SIPs report. The potential for such competition acts as a constraint on the prices that can be charged for SIP data.

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19 See CTA Plan, supra note 6, at Section IV(b)(i); UTP Plan, supra note 6, at Section IV.C.

20 The CAT NMS Plan is available here: https://www.catnmsplan.com/wp-content/uploads/2019/09/CAT-2.0-Consolidated-Audit-Trail-LLC%20Plan-Executed_(175745081)_(1).pdf.

21 See id. at section 4.3.

22 17 CFR 242.603(a)(1).

In the Proposed Order and elsewhere, both the Commission and other market participants have opposed the SIP Operating Committee's pricing proposals, even when the proposals have been supported by the Advisory Committee.

NYSE recommends that the Commission establish through its rules specific requirements for meeting this "fair and reasonable" standard. Absent more clarity from the Commission, neither the SIP Operating Committee that proposes fees for SIP products, nor market participants that pay such fees, have any guidance on the Commission's views regarding the meaning of this statutory standard and disputes over such fees will continue.

c. Amend the Method for Allocating SIP Revenue

Before 2005, the revenue of the SIPs was distributed among the Plan participants solely on the basis of the volume of trades that took place on each exchange. Simultaneous with the Commission's Regulation NMS rulemaking process, the Commission reviewed the revenue allocation provisions in the SIP Plans, analyzed competing suggestions for its improvement, and proposed and adopted changes to the allocation methodology. As adopted by the Commission in 2005, the current methodology distributes 50 percent of the SIP revenue on the basis of an SRO's trading activity and the other 50 percent on the basis of an SRO's quoting activity.[23] The current allocation methodology allows for FINRA to rebate back to broker-dealers and alternative trading systems ("ATSs") the vast majority of SIP revenues for trades that those parties execute on a FINRA Trade Reporting Facility ("TRF"), or approximately 20 percent of all SIP revenue.

NYSE recommends that the Commission revisit the current revenue allocation formula now, with the goal of arriving at a new formula that better rewards displayed liquidity resulting in price discovery. NYSE believes the Commission should revise the formula to incentivize those displayed quotes that result in trades, and reduce incentives to publish quotes that may be less accessible due to delay mechanisms or repricing mechanisms. NYSE believes the formula should also be revised to remunerate the competing consolidators recommended above.[24]

None of these improvements to the SIP revenue allocation methodology will be possible without considered policy analysis by the Commission, and Commission-proposed and approved changes to Regulation NMS.

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[23] See Regulation NMS Adopting Release, supra note 13, at 37561-66.

[24] NYSE refers the Commission to SIFMA's suggestions for allocating revenue between competing processors, contained in its "Proposal for the Creation of Competing Market Data Aggregators," available at: https://www.sec.gov/comments/4-729/4729-4559181-176197.pdf.

Part II: The Proposed Order Exceeds the Commission's Authority and Is Severely Legally Flawed

As described above, NYSE is supportive of significant change to both the content and the delivery of the SIP products. The process by which this change occurs, however, is crucial, and we urge the Commission to pursue its desired policy directly through rulemaking, instead of through an Order directing the exchanges and FINRA to submit a New NMS Plan.

If adopted as proposed, NYSE believes the Proposed Order would be inconsistent with the Commission's obligations under the Administrative Procedure Act ("APA") for the following reasons:

- **The Commission lacks statutory authority to implement the Proposed Order.** The Commission does not have statutory authority either to require SROs to act jointly with non-SROs or to provide non-SROs with voting authority in NMS plans. The Commission incorrectly asserts that it has such authority under Section 11A of the Exchange Act. Section 11A grants the Commission the limited authority to order that SROs coordinate with each other—*not with non-SROs*—to facilitate NMS plans, and to grant SROs—*not non-SROs*—authority over NMS plans. The Commission's attempt to require SROs to provide non-SROs authority over the proposed New NMS Plan therefore exceeds the Commission's authority under Section 11A.

- **The Proposed Order is not reasonably calculated to address the problem it was designed to address.** The Commission asserts that the governance reforms prescribed by the Proposed Order for inclusion in the New NMS Plan are necessary because, in the Commission's view, SROs have neglected to improve SIP functionality in favor of their own proprietary data feeds. However, the Commission fails to explain how providing non-SROs voting authority in the New NMS Plan will remedy this issue. Given that non-SROs do not have any obligation under the Exchange Act or Regulation NMS to ensure fair and orderly markets, they would be free to use their proposed power over the SIPs to advance their economic self-interest without regard to whether their actions frustrate the orderly operation of the SIPs. Rather than improving the SIPs, the Proposed Order will instead undermine the SROs' ability to efficiently improve them for the benefit of investors and the market. Because the Commission's approach is not reasonably calculated to address the disparate data feed problem identified by the Commission, it is arbitrary and capricious.

- **The Proposed Order's changes to participant vote allocations lack a reasoned basis.** The Commission provides no adequate support to justify capping the number of votes that affiliated SROs would be granted under the New NMS Plan. Each SRO would have independent obligations with respect to the Plan, and the Commission provides no rationale for curtailing the independence of affiliated SROs by, in effect, requiring that they vote as a bloc. Each independent SRO should be permitted to vote based on its own obligations, with corresponding equal voting power in the Plan. The Commission's decision to limit the voting power of separate SROs on the basis of corporate affiliations is arbitrary and capricious.

- **The Commission has not reasonably considered whether the Proposed Order would cause more harm than good.** The Commission fails to weigh meaningfully the costs and benefits of the Proposed Order, and thus lacks a reasoned basis for concluding that the Proposed Order will do more good than harm. In various respects, the Commission makes unsubstantiated assumptions about supposed benefits of the Proposed Order that will not in fact occur, while overlooking significant costs that the Proposed Order is certain to impose. For example:

    - *Consolidated NMS Plan*. The Commission fails to demonstrate how the benefits of the New NMS Plan would exceed its costs. In the Proposed Order, the Commission incorrectly assumes a consolidated New NMS Plan will reduce costs as compared to administration costs of the three current NMS Plans, while failing to consider the significant development and implementation costs of a New NMS Plan.

    - *Unaffiliated Plan Administrator*. The Commission does not justify requiring the Administrator to be unaffiliated with any exchange. The NYSE SIP Administrator already faces restrictions to prevent conflicts of interest and the Commission did not identify any issues with the current framework, nor does the Commission acknowledge the increased costs customers would face due to the implementation of a new Administrator.

Because the Commission fails to meet its statutory burden to evaluate these and other economic effects, the Proposed Order is arbitrary and capricious.

1. The Commission Lacks Statutory Authority To Implement the Proposed Order

The Commission does not have statutory authority either to require that SROs design an NMS plan that requires SROs to act jointly with non-SROs or to give non-SROs voting rights in such an NMS plan. It is blackletter law that an agency may not issue regulations that exceed or violate the scope or substance of its statutory mandate.[25] The Commission incorrectly asserts that it has statutory authority to implement the Proposed Order under Section 11A of the Exchange Act; as discussed further below, the Proposed Order is contrary to, and finds no support in, Section 11A.

The plain language of Section 11A demonstrates that Congress did not intend for non-SROs to develop and maintain NMS plans. It is a core principle of statutory construction that "Congress expresses its intent through the ordinary meaning of its language, [and so] every exercise of statutory interpretation begins with plain language of the statute itself."[26] Section 11A(a)(2) "direct[s]" the Commission "to use its *authority under this chapter* to facilitate the establishment of a national market system." Section 11A(a)(3) then proceeds to define the scope of that authority by providing a specific, enumerated list of items "authoriz[ing]" the Commission to:

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[25] See Cement Kiln Recycling Coal. v. EPA., 493 F.3d 207, 217 (D.C. Cir. 2007); see also Ethyl Corp. v. EPA, 306 F.3d 1144 (D.C. Cir. 2002).

[26] See Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 202 (3d Cir. 1998).

(i) "create one or more advisory committees . . . and employ one or more outside experts"[27];

(ii) "authorize or require [SROs] *to act jointly with respect to matters as to which they share authority* . . . in planning, developing, operating, or regulating a national market system"[28]; and

(iii) "to conduct studies and make recommendations to the Congress from time to time as to the possible need for possible modifications" to the national market system.[29]

None of those provisions authorize the Commission to require that SROs coordinate with non-SROs in developing or administering NMS plans. Rather, Section 11A(a)(3)(a) only "authorize[s]" the Commission to order that SROs "act jointly"—that is, to work together with other SROs with whom they share authority—to operate the national market system, including by developing and maintaining the SIPs. Section 11A(a)(3)(a) does not similarly authorize the Commission to order the SROs to "act jointly" with non-SROs, nor does it authorize the Commission to require the SROs to submit to the control of non-SROs. Indeed, because Congress only granted the Commission authority to empower SROs to develop and maintain the operation of the national market system, the Commission could not grant non-SROs voting authority over the SIPs under Section 11A even if the SROs wish the Commission to do so. In the face of specifically defined authority to act with respect to NMS plans, the Commission cannot act outside the explicit contours of that authority.[30]

The overall structure of Section 11A(a)(3) further clarifies that Congress did not authorize the Commission to allow non-SROs to "plan[], develop[], operat[e], or regulat[e]" NMS plans. In Section 11A(a)(3)(a), Congress granted the Commission authority to create advisory committees that could provide non-SROs the ability to advise the Commission on issues related to the national market system. Immediately after, in Section 11A(a)(3)(b), Congress granted the Commission authority to authorize SROs—but not non-SROs—to develop and maintain NMS plans. The differences in these grants of authority are meaningful: Congress contemplated the role of non-SROs in the national market system and chose to limit their role to serving on advisory committees, rather than participating directly in the development and maintenance of NMS plans. The Proposed Order ignores this considered dividing line that Congress established.

The Commission's interpretation of Section 11A also offends the underlying purpose of the statute. In limiting control over NMS plans to the Commission and SROs, Congress

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[27] 15 U.S.C. 78k-1(a)(3)(A).

[28] 15 U.S.C. 78k-1(a)(3)(B).

[29] 15 U.S.C. 78k-1(a)(3)(C).

[30] See, e.g., Cement Kiln Recycling Coal., 493 F.3d at 217; see also Ethyl Corp., 306 F.3d at 1144.

ensured that the national market system would be administered in a manner consistent with the Exchange Act's central purpose of advancing "public interest and the maintenance of fair and orderly markets . . . ."[31] That is because SROs are legally bound to only advance NMS plans that are in the public interest.[32] Therefore, limiting Section 11A authority to SROs ensures that each NMS plan carries out the central purpose of the Exchange Act. Permitting non-SROs to exert influence over the national market system, meanwhile, would risk undermining this central purpose. Non-SROs have no obligation under the Exchange Act to advance the "public interest"; they are free to vote in their economic self-interest without regard to whether their position helps or harms the market. Nor would non-SROs (unlike SROs[33]) have obligations to enforce compliance with NMS plans that they adopt, meaning they can be indifferent to critical and costly compliance-related issues when evaluating such plans.

If the Commission believes that market conditions warrant extending NMS authority to non-SROs, Section 11A requires that the Commission recommend such a change to Congress.[34] The Commission cannot simply expand the scope of who can propose and amend NMS plans under the securities laws through regulation or order. Because the Commission has not identified any statutory provision granting it authority either to order SROs to coordinate with non-SROs to develop and implement the proposed New NMS Plan, or to grant voting control over NMS plans to non-SROs, the Proposed Order violates the APA and exceeds the Commission's authority under the Exchange Act..

2. The Proposed Order Is Arbitrary and Capricious Because It Will Not Solve the Problem It Was Designed To Address

The Proposed Order violates the APA because it does not bear a "rational connection" to addressing the SIP performance issues identified by the Commission. The Supreme Court has established that an agency must demonstrate a "rational connection between the facts found and the choice made" before issuing regulations,[35] including by demonstrating a "rational connection to [a] problem identified" by the agency.[36] Here,

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31 15 U.S.C. 78k-1(a)(1)(C), (a)(2).

32 National securities exchanges and national securities associations, for example, may only adopt rules that "are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest." 15 U.S.C. 78f(b)(5).

33 See 15 U.S.C. 78s(g); 17 CFR 242.608(c).

34 15 U.S.C. 78k-1(a)(3)(C).

35 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm, 463 U.S. 29, 57 (1983).

36 Jifry v. FAA, 370 F.3d 1174, 1180 (D.C. Cir. 2004).

the Commission asserts that altering the current governance structure is necessary to address purported conflicts of interest among the Plan participants, which (the Commission asserts) have resulted in under-investment in SIP functionality. Even assuming (without accepting) the existence of such issues, the Commission does not reasonably support the conclusion that the proposed governance changes would remedy them, and there is every reason to believe they would not.

The Proposed Order relies on the unfounded assumption that granting non-SROs voting authority in the New NMS Plan would reduce conflicts of interest. But non-SROs are not bound to act in the public interest, and their participation in the governance of the SIPs would be in service of their own business interests. Indeed, rather than advancing the public interest, non-SROs might directly undermine the public interest by structuring data costs for their own individual economic benefit. Non-SROs could, for example, vote to lower the price of market data consolidated by the SIPs to such an extent that the New NMS Plan lacks sufficient funding to operate effectively. The Commission's decision to ignore the likely impact of the non-SROs' own conflicted interests is a critical oversight. Unsurprisingly, the Commission's proposal finds support in comments provided by the very conflicted parties who stand to gain voting power under the proposed structure. The Commission's reliance on cherry-picked opinions of self-interested market participants to justify the Proposed Order—without any of its own independent analysis—further underscores the arbitrary and capricious nature of its decision-making.

While failing to establish how the Proposed Order will reduce the influence of alleged conflicted interests, the Commission has also failed to demonstrate how the Proposed Order will otherwise improve SIP functionality. To the contrary, the only reasonable conclusion is that the voting structure proposed by the Commission will likely undermine efficient administration of the SIPs. For the SIPs to operate effectively, the SROs must collaborate and compromise despite being direct market competitors often with divergent interests. Adding voting non-SROs to the governance of the proposed New NMS Plan would further complicate this process and frustrate the ability of the Plan to make necessary changes to the SIPs. For instance, under the proposed New NMS Plan, SROs with divergent interests will no longer feel compelled to compromise, and might instead focus on convincing now-critical non-SRO members to vote with them. That dynamic would grant effective veto authority over SIP improvements to non-SROs, individuals and entities without any self-regulatory obligations under the Exchange Act. The Commission provides no reason to believe that providing such tremendous control over the SIPs to non-SROs—without providing any assurance that non-SROs would exert that control for the public benefit—would serve to improve SIP functionality.[37]

Put simply, the Commission's proposal to add more conflicted parties to the Plan governance structure will not address—and will instead exacerbate—the very concerns the Proposed Order is designed to resolve. Because the Proposed Order will not

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[37] Moreover, non-SROs can currently influence the administration of the NMS Plans through the Advisory Committee and can also gain voting authority over the NMS Plans by forming an exchange and assuming the necessary self-regulatory obligations.

advance the Commission's stated purpose, it lacks the necessary "rational connection" between regulatory means and ends mandated by the APA.[38]

3. The Proposed Order's Changes to the SROs' Vote Allocations Lack a Reasoned Basis

The Commission's proposal to limit the voting power of affiliated SROs—and to thereby curtail the ability of independent SROs to act independently in service of their own obligations—also lacks a reasoned basis in violation of the APA. The Commission provides no rationale for stripping affiliated SROs of voting power, except the observation that affiliated SROs are likely to vote in unison. The Commission fails, however, to explain why the unified votes of multiple, independent SROs are less deserving or meaningful than the votes of unaffiliated SROs. Under the APA, an agency must explain and support the basis for any regulatory action, and may not simply rely on conclusory statements and opinions.[39] The Commission fails to meet that standard here.

The Commission's decision to strip certain separate SROs of votes in the New NMS Plan simply because they are affiliated with other SROs is arbitrary and capricious. Each SRO participating in the proposed New NMS Plan would have independent obligations under the Exchange Act and the Plan with respect to administering SIPs, irrespective of whether the SRO is affiliated with an exchange group. Yet the impact of the Proposed Order would be to curtail the independence of affiliated SROs by, in effect, requiring that they vote as a bloc. The Commission itself has historically treated affiliated SRO entities separately for purposes of their self-regulatory status and functions. Indeed, the Commission recently made clear that it has "historically" applied Exchange Act requirements "at the individual level of the registered securities exchange and not at the group level of exchanges."[40] The Commission's decision to deviate from that precedent—without even acknowledging, let alone explaining or justifying its choice—is arbitrary and capricious.[41]

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38 See, e.g., State Farm Mut. Auto. Ins. Co., 463 U.S. at 52.

39 See, e.g., Amerijet Int'l, Inc. v. Pistole, 753 F.3d 1343, 1350 (D.C. Cir. 2014) ("[C]onclusory statements will not do; an agency's statement must be one of reasoning." (internal quotation marks omitted) (emphasis in original)).

40 See Securities Exchange Act Release No. 72633 (July 16, 2014), Order Disapproving Proposed Rule Change to Offer a Rebate Based on Members' Aggregate Customer Volume in Multiply-listed Options Transacted on NASDAQ OMX PHLX LLC Or Its Affiliated Options Exchanges; see also Securities Exchange Act Release No. 59039 (December 2, 2008), Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data (noting that Exchange Act "requirements are applied at the level of the individual registered securities exchange, not at the group level of exchanges that are under common control.")

41 See, e.g., FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (holding that agencies must acknowledge and justify changes in position).

Nor has the Commission provided any justification whatsoever—let alone the affirmative justification required under the APA[42]—for treating affiliated SROs differently from non-affiliated SROs under the Proposed Order. The Proposed Order proceeds from the assumption that otherwise equal and independent SROs should have unequal voting power based on their corporate affiliations. And it assumes that the degree of voting power inequity should increase or decrease based on the SRO-affiliate group sizes. But the Commission provides no adequate rationale for the decision to cap the number of votes that affiliated SROs would be granted under the New NMS Plan. The decision to limit the voting power of separate SROs on the basis of corporate affiliations therefore is arbitrary and capricious.

4. The Proposed Order Is Arbitrary and Capricious as the Commission Does Not Adequately Consider the Cost Implications of the New NMS Plan

The Commission fails meaningfully to balance the costs and benefits of the New NMS Plan. By statute, the Commission is required to consider "whether the [proposed rulemaking] will promote efficiency, competition, and capital formation."[43] To meet this statutory requirement, the Commission must consider the economic effects of a proposed rule,[44] including the costs of implementation. The Commission's failure to address this statutory requirement renders the Proposed Order arbitrary and capricious.[45]

a. The Consolidated New NMS Plan Will Not Lower Costs

The Commission both overestimates the costs of the three current NMS Plans and underestimates the implementation costs associated with the New NMS Plan. The

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[42] See, e.g., Comcast Corp. v. FCC, 526 F.3d 763, 769 (D.C. Cir. 2008) (agencies must provide "an adequate explanation to justify treating similarly situated parties differently"); Burlington N. & Santa Fe Ry. Co. v. Surface Transp. Bd., 403 F.3d 771, 777 (D.C. Cir. 2005) (agencies must affirmatively justify differential treatment "with a reasoned explanation and substantial evidence in the record").

[43] 15 U.S.C. 78c(f); see also Bus. Roundtable v. S.E.C., 647 F.3d 1144, 1148 (D.C. Cir. 2011) (holding the proposed rule arbitrary and capricious as the Commission did not meet its "unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation.'").

[44] See Bus. Roundtable, 647 F.3d 1144 (finding the proposed rule arbitrary and capricious as the Commission failed to adequately "assess the economic effects of a new rule."); Chamber of Commerce of U.S. v. Sec. & Exch. Comm'n, 412 F.3d 133, 144 (D.C. Cir. 2005) (holding the Commission must "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure" for the companion provision of the Investment Company Act, tracking the same language).

[45] See Pub. Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004) (finding a proposed rule arbitrary and capricious because the agency failed to address a required factor in its organic statute).

Commission asserts without support that the current administrative structure of the NMS Plans creates "redundancies, inefficiencies, and inconstancies" that necessitates consolidating the Plans under a single Plan with one Administrator. But this is incorrect. The NMS Plans already have "the same distribution formula, legal representation, and other professional services." And, as the Proposed Order recognizes, the SIP Operating Committees and Advisory Committees each have identical membership, and their quarterly meetings are held concurrently, such that the multiple Plans already largely function as one plan today. As the three NMS Plans operate jointly, the Plan participants and Advisory Committee do not incur additional costs for the three Plans to meet at the same time, compared to one plan.

The Commission also fails to consider the costs associated with creating a New NMS Plan. The SROs would expend significant resources hiring outside counsel to assist with a number of tasks to create the Plan—including negotiating and drafting the New NMS Plan, drafting contracts with the SIP processors, replacing current contracts with data recipients, and filing to obtain Commission approval of the draft new Plan. There are also costs associated with the length of time it would take not only to finalize a New NMS Plan, but also to obtain Commission approval of such Plan and then draft and obtain effectiveness of new fees under the Plan.[46] The SROs would also incur costs in the process of identifying, negotiating with, and hiring a new Plan Administrator. Under the Proposed Order, only the SROs would face this financial burden in Plan consolidation development. Despite this asymmetric financial burden between SROs and non-SROs, the SROs would be forced to abdicate decision-making to non-SROs under the New NMS Plan.

NYSE notes that combining the Plans will not reduce the costs of the Plan participants to produce—nor the costs of the processors to aggregate and distribute—consolidated market data for Tapes A, B, and C. Thus, it is unfounded for the Commission to assume that combining the three existing Plans into one Plan will provide meaningful cost-savings that would support lowering the fees charged for market data products.

The Commission fails to consider the economic effects of requiring a consolidated New NMS Plan. Instead, the Commission simply concludes without analysis that consolidating the administrative requirements into a single Plan with one Administrator is necessary. The Commission's conclusory approach renders the Proposed Order arbitrary and capricious.

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[46] For example, on July 12, 2012, the Commission adopted Rule 613 under the Exchange Act to require the SROs to jointly submit the CAT NMS Plan to create, implement, and maintain a consolidated audit trail system. After retaining outside counsel to assist with this effort, on February 27, 2015, the SROs filed the proposed CAT NMS Plan and it was approved on November 16, 2016. See Securities Exchange Act Release No. 79318, 81 FR 84695 (November 23, 2016). The SROs spent substantial sums negotiating and drafting the CAT NMS Plan, in addition to devoting substantial internal resources to that effort. Further, in 2014, in connection with the process to determine whether to replace the processor for the UTP Plan, the SROs also spent a substantial amount over the course of multiple years to negotiate and draft a replacement to the UTP Plan, which was shared multiple times with Commission staff for review but was never noticed for public comment.

b. An Unaffiliated Plan Administrator Will Impose More Burdens Than Benefits

Based on the Proposed Order, the single Administrator of the New NMS Plan must be "independent" and not affiliated with any participant SRO or SRO group. However, the Commission does not adequately weigh the costs and the benefits of requiring a governance plan that includes an unaffiliated Plan Administrator.

At the outset, the Commission fails to enumerate any shortcomings or problems with the current approach, in which the Plan Administrators are SRO-affiliated. Currently, NYSE serves as Administrator for the CTA Plan, and Nasdaq Stock Markets LLC is the Administrator of the UTP Plan. NYSE has long agreed that, due to the confidential nature of the information handled by a SIP Administrator, it should be subject to information barriers, information control policies, and external audits of their compliance with such strictures. For example, with respect to the CTA Plan, NYSE has been operating under such principles since the 1970s. There is no reason to think that it cannot continue to do so, ethically and responsibly, into the future. Nonetheless, the Commission asserts that a non-independent Administrator faces conflicts of interest too substantial to be overcome by "policies and procedures." The Commission's claim is unsupported and inconsistent with the historical record.

The Commission fails to acknowledge the substantial problems that may be caused by employing an Administrator that is independent from any of the SROs. Instead of selecting an inexperienced, unaffiliated Administrator, the existing Administrators have decades of combined experience in their highly-specialized roles, and have established relationships with the SIP customers and familiarity with their systems. All of that experience and shared institutional knowledge would be lost in a transition to an unaffiliated Administrator, and SIP customers would have to shoulder the burden of familiarizing the new Administrator with their practices and systems.

The Commission not only failed to consider how switching to an unaffiliated Administrator—one who would be unfamiliar with the SIPs and their administration—would disrupt the administration process; it also failed to consider the substantial benefits enjoyed by SIP customers as a result of the Administrators' affiliation with SROs. One of the main functions that the Administrators perform is auditing the SIP customers' use of SIP data. Customers generally appreciate that Administrators can concurrently audit the customer's use of the SRO's proprietary data feeds when auditing the customer's SIP usage, which eliminates the need to meet and educate multiple audit staffs and offers the convenience of having both the SIP and proprietary feed audits conducted simultaneously. Under the system envisioned by the Commission's Proposed Order, each SIP customer that is also a customer of NYSE and Nasdaq proprietary data feeds would have to be audited three times—by the new SIP Administrator, by NYSE, and by Nasdaq—where previously, it was audited only by NYSE and Nasdaq.

In sum, because the Commission identifies no problem to justify the abandonment of the current reliance on SRO-affiliated Administrators, because it overlooks the substantial costs and burdens that such a change would impose, and because it identifies no meaningful benefits that would justify imposing those costs and burdens on market

participants, the Proposed Order's requirement of an unaffiliated Administrator lacks a reasoned basis, rendering the Proposed Order arbitrary and capricious.[47]

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NYSE recognizes the critical importance of the SIPs to a well-functioning national market system and commends the Commission's desire to improve the SIPs. To that end, the Commission should reform the SIPs through formal rulemaking, adopting specific policy recommendations such as expanding the content of the SIPs and modernizing its delivery. We offer an alternate approach in this letter and look forward to continuing dialogue with the Commission, broker-dealers, investors, and other stakeholders.

Respectfully submitted,

Elizabeth K. King

cc: Honorable Jay Clayton, Chairman
Honorable Robert J. Jackson, Jr., Commissioner
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Brett Redfearn, Director, Division of Trading and Markets

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[47] See, e.g., Md. People's Counsel v. FERC, 761 F.2d 768, 779 (D.C. Cir. 1985) (holding that regulations must "do more good than harm" under the APA).