

Via Email

February 20, 2020

Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. 4-757

Dear Madam Secretary:

On behalf of the Council of Institutional Investors (CII), we respectfully submit our comments on the Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data (Proposed Order).¹

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.²

In CII's letter to the Securities and Exchange Commission (SEC or Commission) last December³ in response to the Proposed Rule on Rescission of Effective-Upon-Filing Procedure for [National Market System (NMS)] . . . Plan Fee Amendments,⁴ we expressed the following views about the operation of the NMS plans:

¹ Notice of Proposed Order Directing the Exchanges and the Financial Industry Regulatory Authority To Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Exchange Act Release No. 87,906, 85 Fed. Reg. 2,164 (proposed order Jan. 8, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-01-14/pdf/2020-00360.pdf>.

² For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at <http://www.cii.org>.

³ Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission 4-5 (Dec. 5, 2020), [https://www.cii.org/files/issues_and_advocacy/correspondence/2019/December%205%202019%20comment%20letter%20\(final\).pdf](https://www.cii.org/files/issues_and_advocacy/correspondence/2019/December%205%202019%20comment%20letter%20(final).pdf).

⁴ Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments, Exchange Act Release No. 87,193, 84 Fed. Reg. 54,794 (proposed rules Oct. 11, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-1011/pdf/2019-21770.pdf>.

We do not believe that the proprietary data products sold by some [self-regulatory organizations (SROs)] . . . represent viable, competitively-priced alternatives to the core data distributed by the NMS plan processors. As indicated in the IAC Remarks of our Executive Director: “With a handful of exchange conglomerates controlling the dissemination and sale of essential market data [proprietary and core], market forces of supply and demand cannot independently provide a viable path for ensuring an optimal market.”⁵

In addition, last September we joined The Securities Industry and Financial Markets Association, Investment Company Institute, Managed Funds Association, and 14 capital market participants in filing a petition with the Commission for “Transparency of Funding of Consolidated Market Data” (Petition).⁶ The Petition included the following view reflecting our joint concerns about the governance of the NMS plans:

Notwithstanding this status of the Plans essentially as public utilities, investors and the industry have no voting representation on the governing committees and no visibility into how decisions on the setting of fees and use of [securities information processors (SIPs)] . . . funds are made by the voting representatives. At the same time, Plan Participants as a group are conflicted in their management of the SIPs, given their financial interest in the distribution of SIP revenues and in their individual proprietary market data feeds. The value of these feeds could be undercut depending on whether and how SIP feeds are enhanced to make them more useful for trading purposes by more participants.

The need for basic transparency is especially acute because of these conflicts and this closed governance structure.⁷

Given these views as background, we cannot support the Proposed Order for at least two reasons: (1) the Proposed Order does not directly address the core issues presented by the coexistence of SIPs and proprietary data feeds; and (2) the Proposed Order does not sufficiently improve the governance of SIPs.

The Core Issues

We believe the Proposed Order does not directly address the two core issues that SIPs present versus proprietary data fees: (1) content and (2) latency. On these issues, we agree with the SEC that:

[T]he SIPs have continued to meaningfully lag behind the proprietary data products and their related infrastructure with respect to content and speed. And while the

⁵ Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Vanessa A. Countryman, Secretary, Securities and Exchange Commission at 4-5 (footnote omitted).

⁶ Letter from The Securities Industry and Financial Markets Association et al. to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission 1 (Sept. 17, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/SIP%20Transparency%20Petition%20-%20September%2017,%202019%20.pdf.

⁷ *Id.* at 3.

[NMS] . . . Plans’ operating committees have discussed several ideas that could result in significant improvements to the SIPs both in terms of content and speed—ideas that could further reduce performance gaps when compared with proprietary data and its infrastructure—these potential upgrades have failed to garner the support by Participants necessary for action. Thus, market participants that choose to pay for some or all of the [depth-of-book (DOB)] . . . proprietary data feeds can consolidate those feeds and receive more comprehensive market data, and can receive it faster, than those who rely on the SIP feeds. *As a result, significant information asymmetries persist between users of core data and users of proprietary DOB data, as well as potential disadvantages for market participants who do not access the additional content included in proprietary data.*⁸

We also agree with one legal expert who observed “in many ways the [P]roposed Order is another example of the SEC avoiding the issue of market data fees that has arisen repeatedly over two decades.”⁹ Similarly, SEC Commissioner Robert J. Jackson Jr.’s statement in dissenting from the Proposed Order notes: “Instead of a clear solution to an obvious problem, today’s proposal will produce little more than a long process that will benefit lobbyists and lawyers—but not . . . ordinary investors”¹⁰

Our disappointment with the scope of the Proposed Order is tempered in some degree by the Commission’s announcement on February 14, 2020, of a proposal to “modernize the infrastructure for the collection, consolidation, and dissemination of market data for exchange-listed . . . [NMS] stocks” (February Proposal).¹¹ While long past due and the beginning of yet another long process, we support the stated purpose of the February Proposal “to improve the NMS market data infrastructure by *reducing the current disparity in content and latency between NMS market data and the proprietary data products* that some of the individual exchanges sell directly to market participants.”¹² Moreover, we believe it would be appropriate for the Commission to combine the Proposed Order and February Proposal and implement, as SEC Commissioner Allison Herron Lee, has suggested in her dissent, “a full package of necessary reforms.”¹³

The Governance of SIPs

We believe that the Proposed Order does not sufficiently improve the governance structure for SIPs in a manner that protects the public interest. We note that the Proposed Order provides for a

⁸ 85 Fed. Reg. at 2,172-73 (footnotes omitted & emphasis added).

⁹ Vivian Maese, Cadwalader Wickersham & Taft LLP, SEC Proposes Amendments to Governance of Market Data Plans, Lexology (Feb. 10, 2020), <https://www.lexology.com/library/detail.aspx?g=a23d3d4e-e220-4cd2-9960-a9c70094f324s> (registration required & on file with CII).

¹⁰ Commissioner Robert J. Jackson Jr., Statement on Reforming Stock Exchange Governance (Jan. 8, 2020), <https://www.sec.gov/news/public-statement/statement-jackson-open-meeting-2020-01-08>.

¹¹ Press Release, SEC Proposes to Modernize Key Market Infrastructure Responsible for Collecting, Consolidating, and Disseminating Securities Market Data (Feb. 14, 2020), <https://www.sec.gov/news/press-release/2020-34>.

¹² *Id.* (emphasis added).

¹³ Commissioner Allison Herren Lee, Statement on Proposed Order for Creation of a New Consolidated Market Data Plan for Equity Market Data (Jan. 8, 2020), <https://www.sec.gov/news/public-statement/lee-statement-proposed-order-creation-new-consolidated-market-data-plan>.

number of changes to the operating committees of SIPs to “support[] the integrity and affordability of SIP data.”¹⁴ Those changes include the following:

[]The New . . . Plan shall provide that each exchange group and unaffiliated SRO will be entitled to name a member of the operating committee (SRO member), who will be authorized to cast one vote on all operating committee matters pertaining to the operation and administration of the New . . . Plan, provided that an SRO member representing an exchange group or an unaffiliated SRO whose market center(s) have consolidated equity market share of more than 15% during four of the six calendar months preceding a vote of the operating committee will be authorized to cast two votes, and provided that an SRO member representing an exchange that has ceased operations as an equity trading venue, or has yet to commence operation as an equity trading venue, will not be permitted to cast a vote on New Consolidated Data Plan matters.

[]The New . . . Plan shall provide that the operating committee will include, for a term of two years, and for a maximum term to be set forth in the New . . . Plan, individuals representing each of the following categories: An institutional investor (e.g., an asset management firm), a broker-dealer with a predominantly retail investor customer base, a broker-dealer with a predominantly institutional investor customer base, a securities market data vendor, an issuer of NMS stock, and a retail investor (i.e., Non-SRO Members), provided that the representatives of the securities market data vendor, the issuer, and the retail investor, respectively, may not be affiliated with an SRO, a broker-dealer, or an institutional investor.

. . . .

[]The New . . . Plan shall provide that the aggregate number of votes provided to Non-SRO Members will, at all times, be one half of the aggregate number of SRO member votes and the number of Non-SRO Member votes will increase or decrease as necessary to ensure that the ratio between the number of SRO member votes and the number of Non-SRO Member votes is maintained, with Non-SRO Member votes equally allocated, by fractional shares of a vote as necessary, among the Non-SRO Members authorized and eligible to vote.

. . . .

[]The New . . . Plan shall provide that all actions under the terms of the New Consolidated Data Plan, except for the selection of Non-SRO Members and decisions to enter into an SRO-only executive session, will be required to be authorized by an augmented majority vote.

. . . .

¹⁴ 85 Fed. Reg. at 2,176.

[]The New . . . Plan shall include provisions designed to address the conflicts of interest of SRO Members and Non-SRO Members.¹⁵

We generally agree with the following conclusion of Commissioner Lee regarding the effects of these proposed changes:

The . . . proposal would potentially add non-SRO voting members to the governance structure, essentially giving these new members one-third of the vote. But simply adding non-SRO voting members will not protect the public interest in ensuring robust and useful SIPs. Indeed, these members would have neither the voting power, nor necessarily the market incentives, to affirmatively usher in the larger reforms required for the SIPs to provide adequate market data to investors on a fair and reasonable basis.¹⁶

In considering potential improvements to the proposed governance structure of SIPs, we note that a core principle of good governance for corporate boards—independence—may have relevance to the governance of the operating committee of SIPs.

CII policies provide that “[a]t least two-thirds of the directors [of corporate boards] should be independent; their seat on the board should be their only non-trivial professional, familial or financial connection to the corporation, its chairman, CEO or any other executive officer.”¹⁷ Our policies also provide that “[c]ompanies should have audit, nominating and compensation committees, and all members of these committees should be independent.”¹⁸ Our policies view the definition of independence¹⁹ narrowly explaining:

A narrowly drawn definition of an independent director (coupled with a policy specifying that at least two-thirds of board members and all members of the audit, compensation and nominating committees should meet this standard) is in the corporation’s and shareowners’ financial interest because:

- Independence is critical to a properly functioning board;
- Certain clearly definable relationships pose a threat to a director's unqualified independence;
- The effect of a conflict of interest on an individual director is likely to be almost impossible to detect, . . . ; and
- While an across-the-board application of any definition to a large number of people will inevitably miscategorize a few of them, this risk is sufficiently small and is far outweighed by the significant benefits.²⁰

¹⁵ *Id.* at 2,186-87.

¹⁶ Commissioner Allison Herren Lee, Statement on Proposed Order for Creation of a New Consolidated Market Data Plan for Equity Market Data.

¹⁷ Council of Institutional Investors, Corporate Governance Policies, § 2.3 Independent Board (Sept. 17, 2019), https://www.cii.org/files/ciicorporategovernancepolicies/09_17_19_corp_gov_policies.pdf.

¹⁸ § 2.5 All-Independent Board Committees.

¹⁹ See § 7.2 Basic Definition of an Independent Director; § 7.3 Guidelines for Assessing Director Independence.

²⁰ § 7.1 Introduction—Independent Director Definition.

In considering the principle of independence and the deficiencies in the Proposed Order identified by Commissioner Lee, we would respectfully offer the following potential improvements to the proposed governance structure of SIPs²¹ for the Commission's consideration:

- The Commission shall appoint the members of the operating committee
- The operating committee shall have at least a majority of non-SRO members
- The operating committee members shall include at least two representatives from institutional investors, including at least one representative from a public pension plan
- Each member of the operating committee shall have equal voting power and the decisions of the committee shall be approved by a majority of its members
- The Commission shall adopt a fair and transparent conflicts of interest policy for the operating committee requiring robust disclosure and substantive requirements, including recusals, designed to ensure that on an ongoing basis the conflicts of interest of committee members are identified, fully disclosed and appropriately managed, and
- The Commission shall be cognizant that SRO and non-SRO members of the operating committee alike may have conflicts of interest and incentives²² that may not align with the provision of timely and comprehensive "market data to investors on a fair and reasonable basis."²³

CII appreciates the opportunity to submit comments on this important matter. We are available to provide any additional information the Commission requests.

Sincerely,



Jeffrey P. Mahoney
General Counsel

²¹ We have not evaluated and take no position on allegations by the NYSE that "[t]he 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." Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission 13 (Feb. 5, 2020), <https://www.sec.gov/comments/4-757/4757-6779249-208168.pdf>.

²² We believe that non-SRO representatives may have disqualifying conflicts of interest, including "dual roles as voting members of the operating committee and employees of businesses that utilize core data or proprietary data feeds." 85 Fed. Reg. at 2,185.

²³ Commissioner Allison Herren Lee, Statement on Proposed Order for Creation of a New Consolidated Market Data Plan for Equity Market Data.