

February 28, 2020



Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549-1090

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:

Charles Schwab & Company, Inc.¹ commends the Securities and Exchange Commission for its proposal to consolidate the three existing equity market data plans into one, provide voting rights on the new plan operating committee for market participants beyond exchanges and mandate the creation of an independent plan administrator. The proposed changes will reduce the ability of the conflicted exchanges to advance their commercial interests at the expense of the investing public.

Schwab has long advocated structural reform of the market data system beginning with a petition for rulemaking in 1999,² a response to the Commission concept release on market data,³ representation on the Seligman Advisory Committee on Market Information⁴ and multiple submissions of testimony before the Congress and the SEC. We thank the Commission for responding to our petition and advocacy by proposing substantial reforms as the problems we identified over 20 years ago remain. We look forward to working with the Commission, the self-regulatory organizations (exchanges and FINRA, or SROs) and the industry to implement these much-needed improvements.

¹ Charles Schwab & Co., Inc., (member SIPC) is the broker-dealer affiliate of The Charles Schwab Corporation (NYSE: SCHW), a leading provider of financial services, with more than 325 offices and 12.33 million active brokerage accounts, 1.74 million corporate retirement plan participants, 1.39 million banking accounts, and \$4 trillion in client assets as of December 31, 2019. Through its operating subsidiaries, the company provides a full range of securities brokerage, banking, money management and financial advisory services to individual investors and independent investment advisors. Charles Schwab & Co., Inc. and affiliates offer a complete range of investment services and products including an extensive selection of mutual funds; financial planning and investment advice; retirement plan and equity compensation plan services; referrals to independent fee-based investment advisors; and custodial, operational and trading support for independent, fee-based investment advisors through Schwab Advisor Services.

² See Petition for Rulemaking from the Charles Schwab Corporation, June 1999.

³ See letter from David S. Pottruck, President and Co-Chief Executive Officer, The Charles Schwab Corporation, to Jonathan G. Katz, Secretary, U.S. Securities and Exchange Commission, March 14, 2000.

⁴ See <https://www.sec.gov/divisions/marketreg/marketinfo/finalreport.htm>.

Market Data Plan Reform is Long Overdue

The structure and control of the market data system has been a subject of concern to Schwab for many years. Retail investors, our clients, require access to quality market data in order to make informed trading decisions. Going back decades, Schwab has challenged the notion that the slow, content-poor data currently provided by the market data monopolies is sufficient for investor needs. We are required by rule to purchase the consolidated market data feeds published by the Securities Information Processors (SIPs) and must show this data to our clients at the moment they implement a trading decision. Faster, more content-rich data is available directly from exchanges, but it is cost prohibitive to share generally with clients in addition to SIP data. And the exchanges are conflicted from significantly improving the SIP data because it may cannibalize the sale of their proprietary data streams. This leaves retail investors with market data inferior to that used by professional and institutional traders. The resulting two-tiered market data system is fundamentally unfair to retail investors.

Until now, however, our efforts to change the system that oversees this two-tiered unfairness have been stymied. The National Market System (NMS) Plans for market data overseen by the exchanges – government-sponsored monopolies when it comes to the dissemination of market data – have consistently rejected fundamental change. Regulation NMS created advisory committees in 2005 to provide non-SRO input on plan governance, but the plan operating committees used executive sessions to isolate members of these panels from important discussions and detailed revenue and cost information.

With the passage of years one might think the advisory committee structure would have injected transparency into the NMS Plans. “[I]t is difficult to argue that, in an era of heightened disclosure requirements, a virtual public utility should not be required to openly justify and account for the use of public funds.”⁵ This 15-year-old quote, unfortunately, remains true today. Advisory committee members are excluded from executive sessions at operating committee meetings where detailed revenue and cost information is shared among the SROs. With respect to market data, the more things change, the more they stay the same.

Schwab began advocating for market data reform even before the SEC promulgated Regulation NMS. In 2001, Schwab’s general counsel at the time said, “Combined with the absence of public and industry representation on the processors’ boards, it could be only natural for the processors’ operations to favor the interests of the individual stock markets, rather than the interests of all market participants.”⁶ Nineteen years later we have not altered our view. The exchanges remain in control of the operating committees which refuse to disclose data revenue and cost information. Schwab believes the time has come for real change, change the financial industry and the investors they serve believe is long overdue.

⁵Dissent of Commissioners Cynthia Glassman and Paul Atkins, Regulation NMS Adopting Release, Release No. 34-51808, 2005.

⁶ Testimony of Carrie E. Dwyer, General Counsel and Executive Vice President, the Charles Schwab Corporation, before the Financial Services Subcommittee on Capital Markets, Insurance and Government-sponsored Enterprises, U.S. House of Representatives, March 14, 2001.

For these reasons Schwab applauds the Commission's Proposed Final Order requiring structural reform in the "New Consolidated Data Plan." Schwab believes that permitting non-SROs to vote on operating committee matters will enhance the transparency and fairness of SIP operations and reduce the ability of conflicted exchanges to advance their commercial interests at the expense of the investing public. Schwab urges the Commission to move with alacrity to issue the Final Order.

Schwab welcomes the SEC's understanding that the equity market data system overseen by the exchange groups and FINRA no longer reflects the commercial structure at the time the NMS Plan system was created in the late 1970s. Exchanges were not-for-profit enterprises governed by broker-dealer members that sat on their boards and influenced market data policy at the NMS plan operating committees. Since the early 2000s, however, exchange transformation to for-profit, shareholder-owned competitors of broker-dealers has decoupled the financial industry from oversight of market data. The Commission recognized this concern over 20 years ago when it held that enabling for-profit exchanges meant that the exchanges administering the NMS Plans would be obligated to exploit every economic advantage for the benefit of shareholders.⁷ The Commission, however, determined not to address this conflict at the time.

As one would expect, exchanges have filled the oversight vacuum with revenue-generating practices. Through the NMS plan operating committees, exchanges still control the content and price of core data products. Retail broker-dealers are compelled by rule to both supply, without compensation, the raw trade data that comprises these products and then purchase that same data from the exchanges in the form of the consolidated tape. Exchanges realized years ago that they could also offer superior data products directly to broker-dealers and other users without giving up control of SIP core data. Given the speed with which modern trading occurs, it should come as no surprise the faster, more robust proprietary data feeds have become necessary for efficient trade execution. This dynamic creates a clear incentive for the exchanges to maintain a distinction between the products. Schwab acknowledges the SIP processors have improved their speed of consolidating data, yet latency remains and the improvements often followed abject failures of the SIPs.

In addition, the exchanges have refused to improve the content of the SIP data, rejecting the addition of depth-of-book data as unnecessary for users of the core data feeds. Schwab believes this self-serving view of what retail investors should be able to see when making a decision to trade has nothing to do with what investors need and everything to do with protecting the value of proprietary data products sold by the exchanges. The issue of whether to enhance the public data feeds is now the subject of a separate SEC proposal and Schwab will address those issues in response to that release. Yet, the speed and content of the SIP feeds relate directly to the governance of the NMS plans and naturally arise in the discussion of governance solutions put forth by the SEC.

⁷ Release No. 34-42208 (Dec. 9, 1999) 64 Fed. Reg. 70613 (Dec. 17, 1999) at 70629 (Concept Release).

Schwab's Recommendations

The SEC's proposal to both consolidate equity market data plans and provide for non-SRO representation on the operating committees is both a welcome development and a substantial departure from the status quo of exchange-run market data plans. Schwab never believed that the creation of advisory committees would resolve the conflicts inherent in the market data system. In 2004, Schwab testified that: "[A] toothless advisory committee is a status quo proposal. Today, everyone acknowledges the need for independent members on the boards of public companies, mutual funds, and even SROs. Governance of market data should be no different."⁸ And the years since have proved Schwab correct. The advisory committees are shut out of important decisions and are denied detailed revenue and cost information.

The exchanges see the writing on the wall and have been attempting to demonstrate that recent changes have solved the concerns with the advisory committees. The New York Stock Exchange claims the adoption of an executive session policy and policy formalizing the consultative role of the advisory committee and the proposals of conflicts and confidentiality policies⁹ address outstanding concerns.

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.¹⁰

If only it were true. These subtle adjustments to the interaction between the operating committee and the advisory committee are insufficient attempts to forestall the SEC from proposing the more appropriate remedy of granting non-SROs full voting authority on the operating committee.

In the Proposed Final Order, the Commission sought to strike a balance in its allocation of proposed voting power among SROs and non-SROs that respects the special responsibilities faced by the SROs as well as the interest of non-SRO market participants – who are required by SEC rule to purchase the core SIP product. By proposing a two-to-one voting majority for SROs, the Commission believes it permits the SROs to honor the obligation of Section 11A of the Exchange Act¹¹ to act jointly on behalf of the plan. The NYSE argues that the SEC lacks authority under Section 11A to force SROs to act "jointly" with non-SROs in the operation of NMS Plans.¹² Schwab finds this reading of section 11A to be too narrow. Congress granted the SEC plenary authority in Section 11A(c)(1) to prescribe rules and regulations as necessary or appropriate in the public interest to "assure the prompt, accurate, reliable and fair collection,

⁸Testimony of Jeffrey T. Brown, General Counsel, Schwab Soundview Capital Markets, L.P., before the Securities and Exchange Commission, March 26, 2004.

⁹ For Schwab's view on these policies see letter from Jeff Brown, SVP, Schwab Office of Legislative and Regulatory Affairs to Ms. Vanessa Countryman, Secretary, February 4, 2020.

¹⁰ See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE to Ms. Vanessa Countryman, Secretary, SEC, February 5, 2020.

¹¹ 15 U.S.C. 78k-1.

¹² See note 3 above at 14.

processing, distribution and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information.”¹³ Following years of soliciting public comment both written and at roundtables, the SEC rightly determined that reform is necessary or appropriate in the public interest to improve the operating committees through non-SRO participation.

Schwab’s concern remains, however, that the proposed changes to the voting structure of the operating committees may still yield only the status quo. Permitting the SROs to retain 2/3 majority of voting power and allowing plan amendment adoption with a 2/3 majority of operating committees means continued SRO dominance of plan actions. Schwab believes the better course, and the one likely to lead to greater compromise and common interest, is to equally weight the voting strength of SROs and non-SROs. Schwab urges the Commission to reconsider the weighting of voting power in developing the Final Order.

Composition of Non-SRO Operating Committee Members

Schwab applauds the Commission for thinking outside the box in selecting the categories of possible non-SRO members of the plan operating committees. With an institutional investor, a retail-focused broker-dealer, an institutional-focused broker-dealer, a data vendor, and a retail investor, the SEC has included important perspectives in the operating committee membership. We question, however, the utility of including a representative of a listed company. Public corporations have a strong interest in efficient equity markets and how well their securities trade but lack the operational knowledge relevant to operating committee discussions. The views of issuers are also often highly correlated with the views of their listing markets and thus may only serve to echo exchange views. Rather, Schwab believes that an off-exchange wholesale executing firm or a market-making broker-dealer may be a better representative of industry issues.

And given the complexity of decisions before the Operating Committee, Schwab also believes member terms should run three, not two years. To allow for continuity, the terms should be appropriately staggered. These two changes will enable more time for both individuals and the Committee as a whole to develop a thorough understanding of the issues before the Committee.

Single SIP and Independent Administrator and Processor, with More Public Transparency

Schwab also supports the Commission’s proposal to merge the three NMS Plans and their related SIPS into a single SIP under the New Consolidated Data Plan. Schwab believes, as does the Commission, that this will, “promote the application of consistent policies, procedures, terms, fees, and conditions that would be more transparent and easily understood across all data products. . . .”¹⁴ Schwab agrees with the Commission that merging the plans will ameliorate redundant efforts that burden the plans. The differences among the plans are substantial and create needless compliance complexity for SIP data users. The differences include, among other things:

¹³ 15 U.S.C. 78k-1(c)(1).

¹⁴ Release No. 34-87906 at A-56.

- Audit practices and requirements
- Entitlement controls,
- Administrative usage policies,
- Free trial policy,
- Non-professional usage,
- Qualifications as non-professional users.

A single plan and SIP can remedy these divergent standards and reduce the complexity of the system.

As we discussed in our letter of February 4, wherein we expressed our views on the proposed Plan Amendments submitted by the operating committees, Schwab supports the creation of an independent administrator and processor for the plan. The Commission is correct to propose independence of the administrator because the function should not be owned or controlled by any entity that also offers for sale proprietary market data products: “The Commission believes that an entity that acts as the administrator while also offering its own proprietary data products faces substantial inherent conflict of interest, because it would have access to sensitive customer information.”¹⁵ As one might expect, Schwab has advocated this position for many years. “Just as one SRO can spin-off its market operations, the exchanges should be required to spin-off their market data operations to an independent administrator.”¹⁶ Schwab rejects the unsupported and illogical argument put forth by the SROs that the proposed plan amendments will overcome the inherent conflicts identified by Schwab and the Commission. True separation or independence is necessary to mitigate the conflicts of controlling the SIP data products while selling proprietary products.

Plan processors should also be independent – for all the same reasons. The Commission failed to go this far in its proposed New Consolidated Data Plan, although it requires the operating committee to enhance the review of the performance of the plan processors and ensure the public reporting of plan processor’ performance and other metrics and information about plan processors.¹⁷

Schwab also urges the Commission to require the New Consolidated Data Plan to include specific elements to assure public transparency: an annual accounting of SIP and Plan costs, independently audited, with the final report made available to the public. This is consistent with the authority Congress granted the Commission to require “information and documents” relating to SIPs that are germane to the purposes of Section 11A, which includes assuring “fair and reasonable” dissemination of information with respect to quotations for and transactions in NMS securities, on terms that are not “unreasonably discriminatory.”¹⁸ Schwab believes this public reporting must also include detailed information about budgetary decisions and plans to ensure performance is maximized. For example, there should be regular public updates provided on investment in the processor’s infrastructure, and mitigation plans to address technical issues that

¹⁵ Release No. 34-87906 at A-60.

¹⁶ See letter responding to the SEC Concept Release from David S. Pottruck, President and Co-CEO, The Charles Schwab Corporation, to Jonathan Katz, Secretary, SEC, March 14, 2000, at 13.

¹⁷ Release No. 34-87906 at A-73.

¹⁸ Exchange Act Section 11A(b)(2) and (c)(1).

cause unexpected latency or outages to occur. Providing full transparency into the inner workings and decision-making process as described above would provide a check on the conflicted nature of SROs owning the processors while marketing proprietary data streams.

Conclusion

Schwab welcomes the SEC's interest in reforming equity market data plans and agrees the Commission has the authority to pursue changes by ordering the creation of a new NMS plan. It is a fact that exchanges are currently in a position to dictate the terms of a data product to a captive set of customers while at the same time maximizing profits from the sale of superior data streams. The Commission has proposed significant changes to address conflicts of interest, however, the governance structure called for in the draft SEC order falls short of resolving the conflict problem. In order to realize a true compromise, SROs and non-SROs must have an equal number of operating committee votes as discussed above.

We appreciate the opportunity to comment on the proposed order to create a new equity market data plan and thank the Commission for its consideration of the views we express above. If you have any questions regarding this letter, please contact Jeffrey T. Brown on [REDACTED].

Sincerely,



Jeffrey T. Brown
Senior Vice President
Legislative and Regulatory Affairs
Charles Schwab & Co., Inc.

cc: The Honorable Jay Clayton
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee

Brett Redfearn, Director
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