



MANAGED FUNDS
ASSOCIATION



February 28, 2020

Via Electronic Submission: www.sec.gov/rules/sro.shtml

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, 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 Number 4-757)

Dear Ms. Countryman:

Managed Funds Association (“MFA”)¹ and the Alternative Investment Management Association² (“AIMA,” together with MFA, the “Associations”) appreciate the opportunity to submit comments to the Securities and Exchange Commission (the “Commission” or “SEC”) on its proposed order of January 8, 2020 (the “Proposed Order”), directing the exchanges and FINRA to submit a new National Market System plan (the “New NMS Plan”) regarding consolidated equity market data.³ In general, the Associations support the Proposed Order, but share concerns raised by Commissioners Allison Lee and Robert Jackson with respect to the inherent conflicts of interests from exchanges both operating public data feeds and selling

¹ Managed Funds Association (“MFA”) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policymakers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

² The Alternative Investment Management Association (“AIMA”) is the global representative of the alternative investment industry, with around 2,000 corporate members in over 60 countries. AIMA’s fund manager members collectively manage more than \$2 trillion in hedge fund and private credit assets.

³ See SEC 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, 85 Fed. Reg. 2,164 (Jan. 14, 2020) (“Proposed Order”), available at: <https://www.govinfo.gov/content/pkg/FR-2020-01-14/pdf/2020-00360.pdf>.

proprietary data feeds.⁴ Nevertheless, the Association view the Proposed Order as a positive development for investors, especially in light of the Commission’s recent Market Data Infrastructure proposal, to which the Associations will separately comment.⁵

Comments

1. New Consolidated Data Plan

The Associations support the Proposed Order’s requirement that the Participants⁶ of existing national market system plans that govern the public dissemination of real-time, consolidated equity market data for national market system stocks (“**NMS stocks**”) consolidate the Consolidated Tape Association Plan (“**CTA Plan**”), the Consolidated Quotation Plan (“**CQ Plan**”), and the Joint SRO Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (“**UTP Plan**,” together with the CTA Plan and the CQ Plan (the “**Equity Data Plans**”) into a “New Consolidated Data Plan.” We agree with the Commission that consolidating the Equity Data Plans would streamline operation of the securities information processor (“**SIP**”) feeds, lead to greater efficiency in meeting the purposes of Section 11A of the Securities Exchange Act of 1934 (the “**Act**”), including ensuring the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of quotation and transaction information, as well as the fairness and usefulness of the form and content of such data.⁷ Moreover, consolidating the CTA Plan, the CQ Plan and the UTP Plan into a New Consolidated Data Plan would reduce confusion for investors.

2. The Governance Structure and Non-SRO Participation

The Associations strongly support the Proposed Order’s terms that the operating committee of the New Consolidated Data Plan include, for a term of two years: an institutional investor, 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

⁴ See Statement on Proposed Order for Creation of a New Consolidated Market Data Plan for Equity Market Data, Commissioner Allison Herren Lee, January 8, 2020, available at: <https://www.sec.gov/news/public-statement/lee-statement-proposed-order-creation-new-consolidated-market-data-plan>; and Statement on Reforming Stock Exchange Governance, Commissioner Robert J. Jackson Jr., January 8, 2020, available at: <https://www.sec.gov/news/public-statement/statement-jackson-open-meeting-2020-01-08>.

⁵ See SEC Market Data Infrastructure Proposal, SEC Rel. No. 34-88216 (proposing to update the national market system for the collection, consolidation, and dissemination of information with respect to quotations for and transactions in NMS stocks), available at: <https://www.sec.gov/rules/proposed/2020/34-88216.pdf>.

⁶ Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Investors Exchange LLC, Long Term Stock Exchange, Inc., Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX LLC, Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., and Financial Industry Regulatory Authority, Inc. (each a “**Participant**” or a “**Self Regulatory Organization**” (“**SRO**”) and, collectively, the “**Participants**” or “**the SROs**”).

⁷ See 15 U.S.C. 78k-1(c)(1)(B).

NMS stock, and a retail investor.⁸ In our view, it is critical that non-SRO market participants are represented on the operating committee and granted voting power with respect to the New Consolidated Data Plan.

MFA has raised concerns in the past and the Associations continue to be concerned with the lack of effective representation of non-SRO market participants on the operating committee of Equity Data Plans, especially as non-SRO market participants are the users of the consolidated data and the decisions of the operating committee may have a significant financial impact on market participants. We believe it is important for the users of the data to have a more meaningful role in determining the information to be processed, the level of reinvestment and upgrades, and the fee and revenue structure for the consolidated data. Thus, the Associations support the New Consolidated Data Plan's governance structure to include non-SRO market participants on the operating committee.

3. Exchange Group Voting Power

The Associations support the Proposed Order's terms that provide each exchange group with one Operating Committee vote, provided that an SRO member representing an exchange group will be authorized to cast an additional vote if the exchange group or unaffiliated SRO had a consolidated equity market share of more than 15% during four of the six calendar months preceding a vote of the Operating Committee.⁹ We believe the current voting scheme of the Equity Data Plans, which entitle each Participant to one vote, is no longer fair or effective as: (1) exchanges have significantly grown their proprietary market data services; and (2) consolidation of exchanges has provided exchange groups with outsized voting power on Equity Data Plan governance matters. We strongly agree with the Commission that as the primary producers of exchange proprietary data products, these exchange groups' voting power on the Equity Data Plans exacerbates the conflicts between their business interests and their regulatory obligations.¹⁰ Further, we are concerned that the current voting structure no longer promotes the goals of Section 11A of the Act.¹¹

⁸ See letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to the Honorable Mary Jo White, Chair, SEC, on September 28, 2015, regarding MFA Equity Market Structure Policy Recommendations (recommending that the SEC and the SEC Equity Market Structure Advisory Committee conduct a more in-depth examination of SIPs and market data, including the governance of the SIPs), available at: <https://www.managedfunds.org/wp-content/uploads/2015/09/Equity-Market-Structure-Recommendations-withCover-Letter.pdf>; letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA to Brent J. Fields, Secretary, SEC, on December 21, 2017, regarding File No. SR-CTA/CQ-2017-04 (raising concerns with the proposed fee increases in the Consolidated Tape Association Plan and the Consolidated Quotation Plan), available at: <https://www.managedfunds.org/wp-content/uploads/2018/01/MFA-Comments-toCTA-Plan.final.12.21.17.pdf>; and letter from the Honorable Richard H. Baker, President and CEO, MFA, and Jiří Król, Deputy CEO, Global Head of Government Affairs, AIMA, to Brent Fields, Secretary, SEC, on August 22, 2018, on Petition for Rulemaking Regarding Market Data Fees and Request for Guidance on Market Data Licensing Practices; Investor Access to Market Data, available at: <https://www.managedfunds.org/wp-content/uploads/2018/08/MFA-AIMA-Mkt-Data-Petition.final.8.22.18.pdf>.

⁹ See Proposed Order *supra* n. 3 at 2,180.

¹⁰ See Proposed Order *supra* n. 3 at 2,175.

¹¹ 15 U.S.C. 78k-1.

In general, we support the Proposed Order's voting scheme, which would provide the aggregate number of votes to non-SRO members to be one half of the aggregate number of SRO member votes.¹² While having non-SRO members on the operating committee will help mitigate exchange conflicts of interest, we continue to be concerned over whether it will be sufficient in addressing conflicts of interest, particularly with respect to market data fees. We think that these conflicts of interest can be further mitigated through additional clarification of the operation of the New Consolidated Data Plan and market data fees, as discussed below.

4. Operation of the New Consolidated Data Plan and Market Data Fees

The Proposed Order provides that the operating committee shall be responsible for “developing and maintaining fair, reasonable, and consistent terms and fees for the distribution, transmission, and aggregation of core data”.¹³ It also provides that the operating committee shall be responsible for “assessing the marketplace for equity market data products and ensuring that SIP data offerings are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of SIP data to investors and market participants”.¹⁴ Currently, with respect to proprietary market data and Equity Data Plans, there is a great deal of disagreement as to the meaning of “fair and reasonable”. Thus, we support the New Consolidated Data Plan making clear that one of the primary goals is to assure reasonable fees that promote the wide public availability of consolidated market data.¹⁵ In this respect, the Commission's final order on a New Consolidated Data Plan should make clear that fees should be related to the cost of production, aggregation and distribution, rather than based on user value.¹⁶ In addition, the Commission should make clear that licensing agreements should be easy to administer and transparent, without “display” versus “non-display” categories and “derived data” terms and conditions;¹⁷ and users should not be subject to intrusive audits. In our view, these categories and terms and conditions are predatory in nature, solely for the purpose of increasing user fees and not designed based on the cost of providing data. Finally, in order to ensure that the New Consolidated Data Plan promotes the wide availability of

¹² See Proposed Order *supra* n. 3.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.* at n. 16 (citing to the final Regulation NMS Release stating that “[i]n the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of consolidated market data.”); Regulation NMS Final Rule, 70 Fed. Reg. 37,496 (June 29, 2005), available at: <https://www.sec.gov/rules/final/34-51808fr.pdf>.

¹⁶ See, e.g., Consolidated Tape Association; Notice of Filing and Immediate Effectiveness of the Twenty-Second Charges Amendment to the Second Restatement of the CTA Plan and the Thirteenth Charges Amendment to the Restated CQ Plan, Release No. 34-82071; File No. SR-CTA/CQ-2017-04, November 14, 2017, available at: <https://www.sec.gov/rules/sro/nms/2017/34-82071.pdf>.

¹⁷ “Display” and “non-display” categories refer to whether a human can see and use the market data or whether the market data is used through a software application. “Derived data” refers to data that is derived from exchange or SIP market data and may be subject to additional licensing fees. Exchanges typically interpret “non-display” and “derived data” terms very broadly, raising concerns of fairness and reasonability.

SIP data the Commission should make clear that the technology used to disseminate the data be reasonably suited to the needs of the end users of SIP data.

5. Independent Plan Administrator, Conflicts of Interest and Confidentiality Provisions

The Associations support the New Consolidated Data Plan provisions: (1) that require an independent plan administrator; (2) designed to address the conflicts of interest of SRO Members and Non-SRO Members; and (3) designed to protect confidential and proprietary information from misuse. We believe these provisions are fundamental in addressing conflicts of interest and will help minimize inherent conflicts of interest when an entity that acts as an administrator also offers its own proprietary products, when an operating committee member also has responsibility for an exchange's proprietary data business or is an employee of a business that utilizes core data, and when an operating committee becomes privy to confidential and proprietary information of substantial commercial or competitive value. In fact, we find it surprising that the Equity Data Plans do not include these basic good governance provisions.

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The Associations welcome the opportunity to discuss their views with the Commission or its staff. Please do not hesitate to contact Jennifer Han, Associate General Counsel, MFA at [REDACTED], and Adam Jacobs-Dean, Managing Director, Global Head of Markets Regulation, AIMA at +[REDACTED]

Respectfully submitted,

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AIMA