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

Re: 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, Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (File No. 4-757)

Dear Ms. Countryman:

The Nasdaq Stock Market LLC ("Nasdaq" or the "Exchange") appreciates the opportunity to comment on the above-captioned proposal (the "January Proposal") by the Commission to issue a Proposed Order that, if ultimately issued by the Commission, would require the Participants in the equity data plans[1] to propose a single, new equity data plan (the "New Consolidated Data Plan" or the "Plan").

While Nasdaq had intended to voice support for some aspects of the January Proposal as originally proposed, we are troubled by the Commission's subsequent release of an overlapping, and, in certain respects, inconsistent notice of proposed rulemaking on consolidated data less than a month later.[2] The February Proposal would radically change the purposes and powers of national market system plans and the nature of consolidated data, while re-opening the scope of Regulation NMS by changing the operation of rules pertaining to quotation display, locked and crossed markets, trade-throughs of displayed orders, disclosures of market performance, and

[1] The three equity data plans are the Consolidated Tape Association Plan, the Consolidated Quotation Plan, and the Nasdaq UTP Plan. The Participants in the Equity Data Plans are Cboe BYX Exchange, Inc. ("BYX"), Cboe BZX Exchange, Inc. ("BZX"), Cboe EDGA Exchange, Inc. ("EDGA"), Cboe EDGX Exchange, Inc. ("EDGX"), Cboe Exchange, Inc. ("Cboe"), Investors Exchange LLC ("IEX"), Long Term Stock Exchange, Inc. ("LTSE"), Nasdaq BX, Inc. ("BX"), Nasdaq ISE, LLC ("ISE"), Nasdaq PHLX LLC ("PHLX"), Nasdaq Stock Market LLC ("Nasdaq"), New York Stock Exchange LLC ("NYSE"), NYSE American LLC ("NYSE American"), NYSE Arca, Inc. ("NYSE Arca"), NYSE Chicago, Inc. ("NYSE Chicago"), NYSE National, Inc. ("NYSE National"), and Financial Industry Regulatory Authority, Inc. ("FINRA") (each a "Participant" or a "Self-Regulatory Organization" ("SRO") and, collectively, the "Participants" or "the SROs").

[2] See Securities Exchange Act Release No. 88216 (February 14, 2020) (File No. S7-03-20) (the "February Proposal").

other matters that are key to the proper functioning of the national market system. We do not believe that we exaggerate by stating that the Commission is proposing Regulation NMS 2.0 under the guise of a proposal on market data.

We note the following significant unexplained inconsistencies between the two proposals:

- The January Proposal would create a single consolidator for equity market data, while the February Proposal would replace a single-consolidator system with a system of multiple, competing consolidators.

- The January Proposal advocates changes in the governance of the New Consolidated Data Plan because, the Commission theorizes, the changes would lead to the operation of a single, exclusive consolidator in multiple, "distributed" locations and an expansion of the categories of data consolidated under the New Consolidated Data Plan. The February Proposal, instead, contains no explicit requirement for distributed data dissemination by any consolidator and replaces the concept of plan-driven, voluntary consideration of categories of data with government-mandated depth-of-book and auction data as "core" data.

- The January Proposal's changes in governance would be followed, under the February Proposal, by extensive changes in the scope of authority vested in the operating committee of the New Consolidated Data Plan. Whereas the January Proposal would require the Plan's operating committee to retain a processor and a non-SRO administrator to manage the consolidation of all equity data, the February Proposal would apparently nullify, or at least undermine, the authority of the New Consolidated Data Plan to continue to act as a data consolidator, but would vest the operating committee with unprecedented new authority to regulate SRO fees far beyond what is included in the consolidated feed operated by the New Consolidated Data Plan.

- The January Proposal does not directly address market structure, but the February Proposal would, as noted above, significantly impact substantive provisions of Regulation NMS. There is, however, no analysis of how these market structure changes may impact aspects of the January Proposal such as the mandate to create a single SIP.

In light of these inconsistencies, Nasdaq is not able to discern the vision for the national market system that the Commission is proposing, and we suspect that others share our confusion and concern. Indeed, the issuance of the February Proposal midway through the comment period for the January Proposal, and without a complete and reasoned explanation of how the two proposals are intended to interact, undermines the value of public comments on the January Proposal to a considerable extent.[3] Accordingly, we question whether the Commission has

[3] We note that several commenters filed letters on the January Proposal before the issuance of the February Proposal and will now likely be forced to reevaluate their comments in light of the Commission's subsequent actions. See, e.g., Letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Commission (February 5, 2020) (the "NYSE Comment Letter").

satisfied its obligations under the Administrative Procedure Act[4] (the "APA") to seek public comment in a manner that would not render its adoption arbitrary and capricious.

Even viewed in isolation, the expansive nature of the February Proposal warrants an extended comment period to ensure that commenters have an adequate opportunity to digest its details and form views. Just in terms of sheer volume, the February Proposal is, by our count, 80% longer than the SEC's initial proposal to adopt Regulation NMS. The proposal asks for comment on almost three hundred discrete topics, with many questions containing embedded sub-questions. Moreover, in addition to evaluating the substance of the proposal, commenters must also evaluate the rigor of the Commission's cost/benefit analysis, analysis of effects of the proposal on competition, efficiency, and capital formation, and statements regarding compliance with the Paperwork Reduction Act and Regulatory Flexibility Act. Since the February Proposal's analysis of these points does not even consider the cumulative, or potentially contradictory, effects of the January Proposal, the challenge facing commenters and ultimately the Commission is that much greater.

The proposals both present important questions about the operation of the national market system that merit extensive and thoughtful comment. Accordingly, we strongly urge the Commission to issue a statement that clearly articulates how the January Proposal and the February Proposal are intended to work together and reconciles the conflicts described above. Otherwise, the public will not have a meaningful opportunity to comment on either proposal and will be denied the procedural rights guaranteed by the APA. We also believe that the Commission should extend the comment period for both proposals, with the comment period to commence after the Commission has issued its explanatory statement. Even if the Commission is unwilling to provide a clarifying statement regarding the interaction between the two proposals, an extension of the comment period for both proposals should occur to enable commenters to develop their views as comprehensively as possible. Because we cannot be assured that the Commission will follow either course, however, we are submitting our comments on the January Proposal as originally proposed with only limited consideration of the impact of the January proposal on the market structure and market system that the SEC subsequently proposed in the February proposal. We will further consider the impact of the January proposal in the our comment letter on the February proposal, with the hope that the SEC will reconcile the contradictions and extend the timeline for the comment period on both proposals.

At least three aspects of the January Proposal appear to be generally consistent with Nasdaq's TotalMarkets proposal.[5] While we would like to support the Commission's efforts to implement aspects of that initiative, we see fundamental flaws in several aspects of the proposed implementation, both within the January Proposal and as potentially modified by the February Proposal.

First, Nasdaq has supported the industry's view that, as a public good, the securities information processors ("SIPs") should be governed by a partnership between the exchanges and

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[4] 5 U.S.C. §§ 551 to 559.

[5] Nasdaq Total Markets: A Blueprint for a Better Tomorrow (Apr. 2019), at 17 ("Nasdaq Total Markets Paper"), available at https://www.nasdaq.com/docs/Nasdaq_TotalMarkets_2019_2.pdf.

the industry, with appropriate government oversight and extensive public transparency, provided that the partnership recognizes the exchanges' unique regulatory responsibilities and ensures that exchanges can fulfill them.[6] Nasdaq proposed two non-exchange votes for members of the brokerage, institutional and investor community, with the two advisor votes apportioned equally among the six Advisors, and each voting advisor required to adhere to strict conflict of interest and confidentiality policies.[7] We did not, however, advocate the extensive reallocation of voting authority reflected in the January Proposal.[8] Moreover, the February Proposal would entirely alter the function of the Plan operating committee, transforming it into an SRO rate-setting board. While we intend to comment on this proposed change more extensively in a subsequent comment on the February Proposal, for now we note that the proposal appears to be in conflict with the authority granted to SROs by Sections 6 and 19 of the Securities Exchange Act of the 1934 (the "Act")[9] and would give rise to new conflicts of interest by giving SRO customers a role in setting SRO fees. Finally, TotalMarkets did not opine as to whether inclusion of non-SROs as voting members of a national market system plan operating committee could be accomplished through Commission order or rulemaking, or whether it would require an amendment to the Act. Upon further examination of that question, and as discussed in more detail below, Nasdaq has concluded that a statutory amendment is required.

Second, Nasdaq supports those portions of the January Proposal that seem to lend Commission support to the concept of a distributed SIP, which would reduce time spent transmitting quote information between data centers.[10] That said, the concept is nowhere to be found in the February Proposal, so we are unsure as to whether or not the Commission is advocating its adoption.

Third, Nasdaq agrees with the Commission's view that replacing the current equity data plans with a single plan is likely to promote efficiency and cost-savings, although these efficiencies may be considerably undermined if the creation of a single SIP is followed immediately by the adoption of an entirely different system for data dissemination, as advocated in the February Proposal.[11]

Fourth, as suggested in the January Proposal, Nasdaq believes that the SIP revenue allocation formula should be modified to reward displayed quotes where investors receive an

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[6] Id. at 22.

[7] Id. at 23.

[8] We also note that the Commission implicitly rejected, without explanation, the voting structure recommended by its own Equity Market Structure Advisory Committee ("EMSAC") in favor of a structure that was not so much as considered by EMSAC. See Recommendation of EMSAC Trading Venues Regulation Subcommittee (April 19, 2016) (available at https://www.sec.gov/spotlight/emsac/emsac-trading-venues-subcommittee-recommendations-041916.pdf).

[9] 15 U.S.C. §§ 78f, 78s.

[10] Nasdaq Total Markets Paper at 19.

[11] We note that the NYSE Comment Letter disagrees that a single Plan would produce cost savings and then also notes that the January Proposal is fundamentally flawed due to the Commission's failure to engage in any consideration of whether it "will promote efficiency, competition, and capital formation" as required by 15 U.S.C. § 78c(f). We agree with NYSE's comments to the extent that they focus on the Commission's clear obligations to assess the economic effects of its proposed action. See Business Roundtable v. SEC, 674 F.3d 1144 (D.C. Cir. 2011).

execution. In order to improve market quality, the revenue allocation formula should aim to improve the quality of quotes on public exchanges, where available liquidity is always on display and an execution can be accomplished.[12] The February Proposal, however, would completely replace the current revenue system with a process under which the fees for many exchange proprietary data products would be set and collected by an SRO/customer rate board and allocated back to exchanges in accordance with a formula to be determined at some point in the future. The absence of any specificity as to how this system may work, or what formula would be used, makes meaningful comment impossible and is therefore likely to render any Commission action arbitrary and capricious under the APA.

As detailed below, the January Proposal as written is fundamentally flawed in that its proposed voting structure is: (a) inconsistent with the current statutory and regulatory framework, and (b) assigns power to individuals unaffiliated with SROs without defining their obligations or providing a mechanism to enforce accountability to the provisions of the New Consolidated Data Plan or to investors. The Commission's analysis also relies on factual distortions to support its recommendations, institutes a patently inadequate timeframe to create the New Consolidated Data Plan, and exhibits a number of other errors based on inadequate analysis. These deficiencies would be further compounded by the adoption of the February Proposal, which would vest the New Consolidated Data Plan operating committee with authority that can be found nowhere in the Act.

A. The proposal disenfranchises individual exchanges in a manner that is inconsistent with the Act and current Commission rules and would allocate disproportionate voting shares to non-SROs.

Section 11A of the Act[13] provides the statutory authorization for the national market system and allows the Commission to authorize or direct "*self-regulatory organizations* to act jointly with respect to matters as to which they share authority … in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof."[14] Similarly, Rule 608 under Regulation NMS provides that "[a]ny two or more self-regulatory organizations, *acting jointly*, may file a national market system plan," and that "[s]elf-regulatory organizations are authorized to *act jointly* in" "[p]lanning, developing, and operating any national market subsystem or facility contemplated by a national market system plan," "preparing and filing a national market system plan," and "[i]mplementing or administering an effective national market system plan."[15]

While Nasdaq has supported, and continues to support, the inclusion of voting industry representatives on an operating committee whose authority is *consistent with* current plan authority, we do not believe that this result can be achieved without an amendment to this statutory and regulatory language. In the January Proposal, the Commission suggests that the statutory and regulatory requirement for joint SRO action – which it acknowledges to exist – is fulfilled by mandating that any Plan action must be supported by a majority of SRO votes, as

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[12] Nasdaq Total Markets Paper at 22.

[13] 15 U.S.C. § 78k-1.

[14] 15 U.S.C. § 78k-1(a)(3) (emphasis added).

[15] 17 C.F.R. § 242.608(3) (emphasis added).

allocated to SROs under the modified voting formula proposed in the January Proposal. Because the Act and Rule 608 refer explicitly only to SROs, however, permitting non-SROs to act "jointly" alongside SROs would impair the SROs' cooperative action and effectively (and impermissibly) rewrite the statute.[16] Where a statute or regulation contains express language limited only to a particular group, the negative implication is that other groups are not covered by that provision.[17] This defect in the proposal is accentuated by the reallocation of voting power, which would actually give non-SROs, working with a *minority* of SROs, the ability to control Plan action. Moreover, even if the proposed expansion of non-SRO powers were authorized, we would question its prudence unless the Commission takes affirmative steps to impose enforceable obligations on the individuals that would be granted governance powers with respect to the New Consolidated Data Plan.

The January Proposal would mandate that the New Consolidated Data Plan reflect a complex new voting structure having the following features:

- Each SRO and group of affiliated SROs could designate one voting member of the Plan's operating committee entitled to cast one vote, or two votes in the case of an exchange group having more than 15% consolidated equity market share during at least four of the preceding six calendar months.

- Six individuals drawn from certain non-SRO constituencies would be authorized to cast votes equal, in the aggregate, to one-third of the votes cast by SROs.

- In general, matters brought before the operating committee would require approval by a majority of SRO votes and two-thirds of all votes.

- Exchanges would be authorized to vote only when actually operating an equities trading facility; thus, dormant exchanges (whether mothballed or recently approved) would not be granted a vote unless and until they actually begin operations.

As applied to the market as it currently exists, the exchange group owned by Intercontinental Exchange ("ICE") operates five exchanges but would receive two votes, the exchange group operated by Cboe operates four exchanges but would receive two votes, and the exchange group operated by Nasdaq operates three equities exchanges but would receive two votes. In addition, IEX and FINRA would each receive one vote. When the planned Long-Term Exchange and Members Exchange become operational, they would each receive one vote. Thus, one can anticipate that by the time the New Consolidated Data Plan would be implemented, it would comprise sixteen SROs, but those SROs would be entitled to cast a total of only ten votes. If this were the case, the non-SROs on the operating committee would be entitled to cast a total of five votes, or one-third of the total of fifteen votes. Thus, each of the six non-SRO members would cast $5/6^{th}$ of a vote.

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[16] See Lamie v. U.S. Tr., 540 U.S. 526, 538 (2004) (courts may not "read an absent word into the statute").

[17] See Lindh v. Murphy, 521 U.S. 320, 334–35 (1997).

The concept of "exchange group" is found nowhere in the statute or SEC rules, but operates to deprive SROs of the votes that they would otherwise have.[18] As a result, one can easily see a scenario in which a proposal could be adopted even though a majority of SEC-licensed SROs disapproved of the proposal. For example, in the future state described above, a proposal supported by four unaffiliated SROs and one exchange group would garner a majority of the permitted SROs votes (six to four in favor) but would not be supported by a majority of SROs (nine to seven against).[19]

Moreover, the substantial diminution in SRO votes means that one can also imagine a circumstance in which a majority of SROs, or even a majority of SRO votes under the new proposed structure, might conclude that a particular action was necessary to accomplish the purposes of the Act or the Plan, but would nevertheless be blocked from proceeding by votes of non-SROs. In short, SROs would be prevented from "acting jointly" by the opposition of non-SROs. For example, a majority of SROs might conclude that a particular expensive system enhancement was necessary for the cybersecurity of the SIP, but the proposal would be disapproved if non-SROs voted against it because they were concerned that the costs would need to be reflected in the fees they pay.

In other contexts, however, the Commission expects affiliated SROs to maintain their separate identities. Thus, affiliated SROs are required to maintain separate pools of liquidity, separate pricing schedules, and separate rulebooks. They are each required to prepare unconsolidated audited financial statements and file separate Form 1 amendments. They have been barred from developing pricing that would recognize the existence of an affiliate, such as pricing that would provide discounts for total volume routed to all affiliated exchanges.[20] Given the otherwise separate identity of affiliated SROs mandated by the Commission, we believe that the Commission must provide a reasoned explanation of its changed position and its basis for discriminating against SROs based on their affiliation with other SROs; the January Proposal fails to do so. Moreover, the Commission cannot adopt interpretations that are at odds with the Act.

We also believe that the proposed mechanism by which the non-SRO representatives would be selected for service on the Plan is clearly inconsistent with Section 11A of the Act and

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[18] Even if the concept is consistent with legal provisions governing joint action, we question why the Commission rejected, without explanation, the voting structure recommended by its Equity Market Structure Advisory Committee in favor of a structure that diminishes SRO responsibility even more than proposed by that Committee. Recommendation of EMSAC Trading Venues Regulation Subcommittee (April 19, 2016) (available at https://www.sec.gov/spotlight/emsac/emsac-trading-venues-subcommittee-recommendations-041916.pdf).

[19] Thus, in comparison with non-SROs casting 5/6th of a vote, each ICE-affiliated SRO would effectively cast 2/5th of a vote, each Cboe-affiliated exchange would cast ½ of a vote, and each Nasdaq-affiliated exchange would cast 2/3rd of a vote. The Commission has not provide a reasoned explanation for assigning such disparate voting power to operating committee members.

[20] See Securities Exchange Act Release No. 72633 (July 16, 2014) (finding that the Commission has historically applied the requirements of the Act "at the individual level of the registered securities exchange and not at the group level of exchanges."). Nasdaq believes that Commission policy regarding SRO identity directly encouraged the formation of exchange groups, because a single SRO was barred from creating multiple liquidity pools with distinct pricing strategies under a single license. Thus, acquisitions occurred primarily to allow exchanges to develop separate liquidity pools.

Rule 608, as it would bar SROs from having *any* role in the selection of those representatives. This restriction cannot be reconciled with the clear requirement of the statute and rule that NMS Plans be governed by the joint action of SROs. Quite simply, an NMS plan in which SROs play no part at all in important aspects of plan governance is not an NMS plan at all.

Finally, we note that if the Commission were to adopt both the January Proposal and the February Proposal, the statutory deficiencies associated with the reduced role of SROs in the New Consolidated Data Plan would be further accentuated, as the Plan would be vested with authority to set the fees charged by SROs themselves. Since Congress clearly assigned that authority to SROs under Sections 6 and 19 of the Act, it seems clear that this authority could not be reassigned by the Commission to an NMS plan, let alone a plan in which significant voting power is exercised by non-SROs.

B. The proposal assigns unfettered discretion to interested individuals without defining their responsibilities or providing a mechanism to enforce compliance with the Plan.

The Act provides multiple mechanisms by which SROs are held accountable to obligations that it imposes upon them. For example, Section 6 of the Act provides that an exchange must have the capacity to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, and the rules of the exchange. Similarly, under Section 19 of the Act, an exchange must comply with the Act and the Commission's rules and regulations thereunder, and is subject to a range of disciplinary actions for failure to do so, including revocation of its license, censure, removal of officers and directors, and fines. The obligations imposed by the Act include, among other things, the obligation to have and enforce rules "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, … 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."[21] Moreover, under Rule 608, an exchange is required to comply with the terms of an effective plan and enforce compliance with any such plan by its members and their associated persons.

However, the proposal does not impose any obligations on non-SRO voting representatives of the New Consolidated Data Plan, nor even a clear means to enforce their compliance with the terms of the Plan itself.[22] Arguably, Rule 608 would impose an obligation on SRO members to enforce compliance by the non-SRO representatives to the extent that they are associated persons of their members, although it is unclear whether such enforcement would be consistent with the Commission's intent that non-SRO representatives be "fully independent" of SROs. Moreover, at least half of the non-SRO representatives – the data vendor representative, the issuer representative, and the retail investor – would not be associated persons of a broker in any event. Thus, although the New Consolidated Data Plan would be required to have provisions governing matters such as confidentiality and avoidance of conflicts of interest, there does not appear to be a clear means by which the Plan or the Commission could enforce compliance with those provisions of the Plan against non-SRO representatives.

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[21] 15 U.S.C. § 78f(b)(5).

[22] Moreover, since an NMS Plan is a creation of federal law, the members of its operating committee would not be subject to state law duties of care and loyalty that apply to corporate directors.

Moreover, the January Proposal reflects the belief, unsupported by analysis, that SROs' decision-making is tainted by conflicts of interest, but that the decisions of non-SRO representatives will not be. In fact, there is no reason to believe that these new representatives will do anything other than vote in their own narrow self-interest. Thus, while the Commission theorizes that non-SROs will vote in favor of system enhancements above and beyond the substantial enhancements already implemented by SROs over the past decade, in fact the opposite may be true if the representatives focus only on the level of fees they are required to pay. The Commission's proposal to give significant authority to self-selected individuals with no enforceable obligations to the Plan, the Act, or the Commission is the very model of arbitrary and capricious decision-making.

C. The Commission inaccurately asserts that exchanges have under-invested in technology to benefit their proprietary data products.

In an attempt to demonstrate exchanges' purported conflict of interest, the draft order claims that exchanges have failed to "invest in certain improvements to enhance the distribution of core data or the content of the core data itself,"[23] and have "not kept pace with the efforts of the exchanges to expand the content of—and to employ technology to reduce the latency and increase the throughput of—certain proprietary data products."[24]

These unsubstantiated claims are demonstrably false and cannot provide a basis for agency action under the APA. SIP performance is defined by three factors: (i) availability (the amount of system downtime calculated as a percentage of operating hours); (ii) latency (the time taken to process information from input to output); and (iii) throughput (the number of messages that can be processed by the system over a defined period of time). All three measures show significantly increased performance over time.

Availability of the UTP SIP processor for the UTP Quotation Data Feed ("UQDF") and the UTP Trade Data Feed ("UTDF") is shown in Exhibit A, expressed in minutes of downtime and the fraction of time the system was operational expressed as a percentage of operating hours.[25] The data demonstrates high system availability: no downtime in 2018 or 2019; 2.85 minutes of downtime in 2017; 0.9833 minutes of downtime in 2016; and no downtime in 2015. This performance has been sustained for nearly two decades: records show only approximately 2.5 hours of downtime in total since the processor began keeping records in 2003.[26]

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[23] 85 FR 2164, 2170 (January 14, 2020).

[24] Id. at 2168; see also id. at 2170 ("lagging investment in updating and maintaining the operations of the SIPs has resulted in meaningful latency and content differentials between core data and the exchanges' proprietary market data products that have become consequential to market participants."); Id. at 2172-73 ("Despite these changes, the SIPs have continued to meaningfully lag behind the proprietary data products and their related infrastructure with respect to content and speed.").

[25] A "Downtime Event" is a system failure in which: (i) any one or more individual Participants cannot input any or all of their quotation information or transaction reports into the system or (ii) the system does not disseminate any or all of one or more channels' quotation information or transaction reports to subscribers or vendors. Outbound dissemination is deemed "unavailable" in the event of a continuous period of unavailability of greater than five (5) seconds.

[26] The downtime statistics for a 2013 SIP outage reflect the period of system unavailability, but not the longer period during which market participants prepared for market restart.

Latency for UQDF and UTDF has improved dramatically over a decade. Processing time has fallen by over 99 percent, from approximately 5,700 microseconds in June 2009, to approximately 16 microseconds in December 2018, as shown in Exhibits B and C.

System capacity has increased over the same period.[27] Exhibits D and E show that capacity in UQDF and UTDF as measured in 100 millisecond peaks has increased six-fold between July 2013 and November 2018, from less than 500,000 messages per second in July 2013 to over 3,000,000 in November 2018.

These improvements—including a drop in latency by over two orders-of-magnitude—is an outgrowth of three distinct phases of investment, with the first major phase commencing in the fourth quarter of 2011, the next phase in the second quarter of 2014,[28] and a third phase in the fourth quarter of 2016.[29] Investment is continuing, with a new hardware refresh scheduled for 2020 and 2021 that is expected to result in further material decreases in latency.

The Commission must take these facts into account when analyzing the performance of the SIP processors, and base the proposal on grounds other than the verifiably false assertion that the SIP processors have under-invested in technology.

D. The Commission falsely asserts that exchanges have delayed SIP initiatives to benefit themselves.

Faster processing time means that "geographic latency," the time it takes for electronic data to be sent from one processing center to another, has become the most significant component of the time taken for the recipient to obtain SIP information. As such, Nasdaq supports a distributed SIP, which would reduce time spent transmitting quote information between data centers.

Notwithstanding the support from Nasdaq and other exchanges, the Commission blames the exchanges for a purported lack of progress in addressing geographic latency: "despite consideration by the dedicated subcommittee established by one of the Equity Data Plans, none of the Equity Data Plans' operating committees has yet addressed the SIP's geographic latency disadvantages."[30] The Commission implies that the exchanges delayed implementation of a distributed SIP intentionally to make their own proprietary data products look better by comparison.[31]

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[27] The SIP UQDF system processed almost 50 billion quote messages in 2018, with an average daily total of almost 200 million quotes. The UTDF system processed over 3.1 billion trade messages (average daily volume of over 12 million messages), resulting in a total of over 566 billion shares reported (average daily share volume of 2.26 billion shares).

[28] The UTP SIP upgraded capacity and resiliency of the disaster recovery environment in June 2014.

[29] The UTP SIP implemented the INET platform upgrade in October 2016.

[30] 85 FR 2164, 2172 (January 14, 2020).

[31] Id. at 2175 n.128 ("Specifically, the three exchange groups, which represent 14 of the 17 votes on the operating committees of the Equity Data Plans, sell proprietary data products that are significant sources of revenues for these exchanges. Consequently, the Commission believes that they may not be incentivized to adequately improve the latency of the SIPs, as making SIP latency comparable to the proprietary feeds could decrease revenues earned from certain proprietary data products.").

The allegation that exchanges have intentionally slowed progress on the distributed SIP is unwarranted, and appears to be based on a failure to grasp the complexity of the proposal. The operating committee has worked diligently with Advisory Committee members on the distributed SIP, convening three subcommittees to work on the technical, commercial, and regulatory aspects of the distributed SIP, respectively. Progress has not been "slow," but rather based on a step-by-step approach. As a first step, the operating committee is examining how to implement multicast distribution, which can both reduce geographic latency immediately and is also a preparatory step toward a distributed SIP. As a second step, the operating committee is examining the costs of a distributed SIP with a view toward estimating the costs and benefits of the proposal. In Nasdaq's view, the challenges to be resolved before implementing a distributed SIP are not intractable, but they are time-consuming and require careful analysis and exercises in consensus-building.

The Distributed SIP is not an illustration of a failure of the current operating committee, but rather demonstrates that it is performing its assigned function effectively, examining the proposal in a considered, careful process. An operating committee for the New Consolidated Data Plan would take much the same approach, if it functions properly. The distributed SIP should not, and cannot, be used as a justification for the Commission's proposed changes in governance. This is all the more the case since the Commission's own commitment to a distributed SIP seems to have been abandoned in the February Proposal.

E. The proposal advocates an unwarranted expansion of a government-sponsored pricing consortium.

The Commission alleges that exchanges have a conflict of interest with respect to top-of-book[32] and depth-of-book[33] products that has prevented the SIP from competing directly with the proprietary data products offered by the exchanges.[34] The Commission proposes to address this issue by "[i]mposing a direct responsibility on the operating committee of the New Consolidated Data Plan to keep abreast of changes in the marketplace regarding demands for and pricing of equity data, and to ensure that the SIP data meets those demands."[35]

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[32] Id. at 2173-2174 ("Another example of the divergence between commercial interests and regulatory goals has been the development by certain exchanges of limited TOB data products, which are offered at a discount compared to the SIP and marketed to a more price-sensitive segment of the market, without corresponding development by the Equity Data Plans of a less expensive SIP product for the price-sensitive segment of the market.").

[33] Id. ("An important example of this divergence of interest has been the development by certain exchanges of proprietary data products with reduced latency and expanded content (*i.e.*, proprietary DOB data products), without the exchanges, in their role as Participants, similarly enhancing the data products offered by the Equity Data Plans."); see also id. at 2168 ("In the Commission's view, these market developments have heightened conflicts of interest between the exchanges' commercial interests and their regulatory obligations under the Act and the Equity Data Plans to produce and provide core data.").

[34] Id. at 2168 ("By contrast, the Participants of the Equity Data Plans have not taken comparable measures to update the SIPs to reflect new innovations in market data in response to evolving markets and the changing needs of investors (*e.g.*, those that use low-latency DOB products versus those that use TOB products).").

[35] Id. at 2183 ("Imposing a direct responsibility on the operating committee of the New Consolidated Data Plan to keep abreast of changes in the marketplace regarding demands for and pricing of equity market data, and to ensure that SIP data meets those demands and are widely distributed at fair and reasonable prices, should help ensure that the SIPs' data feeds support the findings and goals of Section 11A of the Act.").

A month later, however, the Commission has apparently grown impatient with even this new approach and instead proposes to mandate that depth-of-book data and exchange auction data should be forced into the framework of a government-sponsored pricing consortium, with the fees to be charged for these products in any form to be set by a board composed of competitors and customers. Both proposals would reflect a fundamentally anti-competitive transformation that will harm investors, particularly Main Street investors, stifle innovation, and undermine the regulatory structure established by Regulation NMS. We will reserve our complete review and comments of the draconian structure of the February Proposal for our comment letter on that proposal; however, we note the contradiction and confusion that the two proposals generate impairs the ability of commenters to direct meaningful comments to either proposal, since no one can be certain which combination of elements may ultimately make their way into a final rule.

Limiting our comments to the January proposal, however, there is no doubt that expanding the breadth and scope of products offered under the SIP would fundamentally change the balance between competition and regulation established by Regulation NMS in 2005. At that time, the Commission sought to avoid creation of a "totally centralized system that loses the benefits of vigorous competition and innovation among individual markets,"[36] and therefore "allow[ed] market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors."[37] The Commission granted SROs increased authority and flexibility to offer new and unique market data to the public in order to expand the amount of data available to consumers, and also spur innovation and competition for market data.[38] This proposal changes that balance from competition to regulation. As Nasdaq said in its TotalMarkets proposal, the Commission should be moving in exactly the opposite direction: reviewing the SIP to ensure that it "only include[s] the data needed to meet regulatory mandates, which in turn must match the needs of investors."[39]

F. The proposal diminishes competition by excluding exchange groups—the only entities with experience in administering NMS Plans—from competing for a contract to administer the plan.

Noting that "concerns have been raised about the exchange administrators' use of market data and associated customer information obtained through their role as Equity Market Data Plan

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[36] See Securities Exchange Act Release No. 51808, 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

[37] See Regulation NMS Adopting Release at 37567; see also id. at 37530 ("Given the existence of highly sophisticated order routing technology and the requirement to route orders to access the best bids and offers under the Market BBO Alternative, these commenters asserted that competition and best execution responsibilities would lead market participants to voluntarily access depth-of-book quotations in addition to quotations at the top-of-book. The Commission believes that such a competition-driven outcome would benefit investors and the markets in general.").

[38] See Regulation NMS Adopting Release at 37597 ("[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.").

[39] Supra n.5.

administrators for their proprietary data feed businesses,"[40] the Commission proposes to mandate that the administrator of the New Consolidated Data Plan not be owned or controlled by an entity that offers market data products.[41] According to the Commission, the purported conflict cannot be mitigated by the conflict-of-interest or confidentiality provisions of the New Consolidated Data Plan, or by the policies and procedures of SROs.[42] The same prohibition would not apply to the processors.[43]

Nasdaq supports a single administrator. In fact, as set forth in TotalMarkets, Nasdaq believes that there is no longer a reason for maintaining separate network processors and administrators, and the Commission should consider a single consolidated tape for all exchange-listed equities.[44] The markets will become simpler, and investors and firms will save money.[45]

While the proposal leaves untouched the savings that could be achieved through a single processor, it is overly prescriptive in the hiring of a new administrator. By excluding firms that sell proprietary data, the Commission eliminates all firms that have actual experience in managing a SIP. This will constrain the selection process, and necessarily diminish the quality of the competition among potential administrators. It may also impair the eventual functioning of the administrator, as having separate firms responsible for administration and processing may slow coordination and response time during a possible market event. The Commission cites no actual evidence as justification for impairing the functioning of the administrator, only "concerns." Nasdaq believes that the operating committee selecting an administrator is in the best position to weigh conflict-of-interest issues against the risk of hiring an administrator without experience, and recommends that the Commission not impose such a restriction.

G. Abrogation of contractual rights held by the current administrators and processors by regulatory fiat would violate the Fifth Amendment prohibition against takings without just compensation.

The proposed order states that "the New Consolidated Data Plan's terms should provide for the orderly and predictable transition of functions and responsibilities from the three existing Equity Data Plans to the New Consolidated Data Plan,"[46] noting that "before commencing

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40 85 FR 2164, 2174 (January 14, 2020).

41 Id. at 2183 (The "administrator of the New Consolidated Data Plan should be independent, meaning that the administrator should not be owned or controlled by a corporate entity that separately offers for sale a market data product, either directly or via another subsidiary."); see also id. ("an entity that acts as the administrator while also offering its own proprietary data products faces a substantial, inherent conflict of interest, because it would have access to sensitive customer information.").

42 Id. ("While conflict-of-interest and confidentiality provisions of the New Consolidated Data Plan, or of the administrator, may serve to mitigate conflicts to some extent, the Commission believes the conflicts of interest faced by a non-independent administrator are so great that these conflicts cannot be sufficiently alleviated through policies and procedures.").

43 Id. ("Under the independence provision discussed above, NYSE and Nasdaq would be excluded from operating as plan administrators, although they would not be excluded from continuing to act as SIPs.").

44 Nasdaq Total Markets Paper at 21.

45 Id.

46 85 FR 2164, 2185 (January 14, 2020)

operations, the operating committee of the New Consolidated Data Plan would need to, among other things, select plan processors and an independent plan administrator . . . ."[47]

The current administrators and processors of the UTP and CTA/CQ Plans operate pursuant to service contracts. Termination of these agreements pursuant to the proposed order without regard to the administrators' or processors' rights under these contracts would violate the Fifth Amendment prohibition against takings without just compensation.

As explained by the Supreme Court, "if a regulation goes too far it will be recognized as a taking."[48] There are two guidelines for determining whether a regulation goes "too far." First, "with certain qualifications . . . a regulation which 'denies all economically beneficial or productive use of land' [or property] will require compensation under the Takings Clause."[49] Second, "when a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on a complex of factors, including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[50]

Termination of the administrator or processor agreements pursuant to the proposed order without regard to the contracts' termination provisions would be a taking. The same may be true for other actions that interfere with the administrators' and processors' rights under the contract. To avoid an unconstitutional taking, the Commission should amend the proposed order to mandate that no action may be taken that alters the administrators' or processors' rights under current contractual provisions.

H. The proposed timeline of 90 days is unreasonable given the complex business, legal and technical issues involved in consolidating the current NMS Plans.

The proposed order allocates 90 days to the current operating committees to file with the Commission the New Consolidated Data Plan.[51] This 90-day deadline is far less than the time needed to develop NMS plans. The operating committee will have to resolve numerous issues before proposing a revised Plan. These include, but are not limited to: (i) developing comprehensive conflict-of-interest provisions for both SRO and non-SRO representatives of the operating committee, which will be particularly complex in light of the new conflicts presented by the new Non-SRO voting members; (ii) reconciling inconsistencies between the UTP and CTA Plan; (iii) designing processes for the selection and evaluation of an independent plan administrator, an auditor and other professional service providers; and (iv) setting parameters for a revision to the revenue allocation formula. The Commission is mandating that these complex determinations be resolved in less time than it takes to develop discrete policy changes within an existing plan. The UTP/CTA operating committee recently required six months to develop

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47 Id. at 2185-2186 (emphasis added).

48 Murr v. Wisconsin, 137 S. Ct. 1933, 1942 (2017) (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

49 Id. (quoting Palazzolo *v.* Rhode Island, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001)).

50 Id. at 1943 (internal quotation marks omitted).

51 85 FR 2164, 2166, 2187 (January 14, 2020).

conflict-of-interest disclosures (November 2018 - May 2019); five months for a confidential information policy (April 2019 - September 2019); and six months for policy guidelines on advisor participation (August 2019 - February 2020). The proposed 90-day deadline is simply not enough time.[52]

The UTP Plan, for example, began to develop a plan to form itself into a limited liability company, CTC Plan, LLC, in approximately October of 2013; a completed plan was submitted to the Commission in July of 2015, nearly two years later, and the Commission has never bothered to act upon it. The Commission directed the SROs to submit a plan for the Consolidated Audit Trail (CAT) in September 2012. The SROs submitted a plan in September 2014, which the Commission took nearly two years thereafter to approve, in August 2016. The plan to Address Extraordinary Market Volatility, known as the Limit Up – Limit Down ("LULD") Plan, began development in the aftermath of the "Flash Crash" on May 6, 2010, and was approved on May 31, 2012.[53] Full implementation did not occur until May 12, 2014.[54]

Moreover, developing a Plan with undue haste may lead to unforeseen problems, such as a failure to achieve consensus that may cause different stakeholders to offer competing plans,[55] or undue delay in the Commission's consideration of the proposed plan.[56] As such, if the Commission proceeds with mandating the creation of a new Plan, Nasdaq recommends replacing the proposed 90-day deadline with a 180-day deadline for an initial progress report, followed by further progress reports every 90 days until completion.

* * *

Nasdaq appreciates this opportunity to comment on the January Proposal, but for the reasons described above, believes that meaningful comment on the January Proposal is impossible unless the Commission explains how the January Proposal is to be reconciled with the February Proposal. Accordingly, the Commission should issue a statement that reconciles conflicts between the proposals and should extend the comment period for both proposals. Viewing the January Proposal in isolation, as the current comment deadline forces us to do, however, we strongly believe that the proposed voting structure, supporting analysis, timeframe for implementation, and other aspects of the January Proposal are fundamentally flawed in a manner that would render adoption inconsistent with the Act and the APA.

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[52] Based on the copious references the Market Data Roundtables held in October 2018 in the January Proposal, we speculate the Commission has been working on drafting the proposal for at least fifteen months, but would mandate implementation of the proposal in a fifth of that time.

[53] See http://www.luldplan.com/.

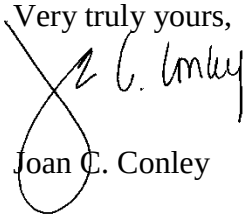
[54] See http://www.nasdaqtrader.com/TraderNews.aspx?id=ETU2014-09. It is reasonable to expect that Commission staff might also review drafts of the Plan before its formal submission, as has been the case in some of the plans cited in this paragraph.

[55] Compare http://www.sec.gov/rules/sro/nms/2007/34-56037.pdf with http://www.sec.gov/rules/sro/nms/2008/34-57171.pdf (competing proposals for the National Market System Plan for Selection and Reservation of Securities Symbols).

[56] There has been historically considerable delay in the consideration of NMS plans by the Commission. The CAT Plan was submitted in September 2016, but not approved until August 2016. The proposed CTC Plan was submitted in 2014, but never approved.

Please do not hesitate to contact me with any questions.

Very truly yours,



Joan C. Conley

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

EXHIBIT A

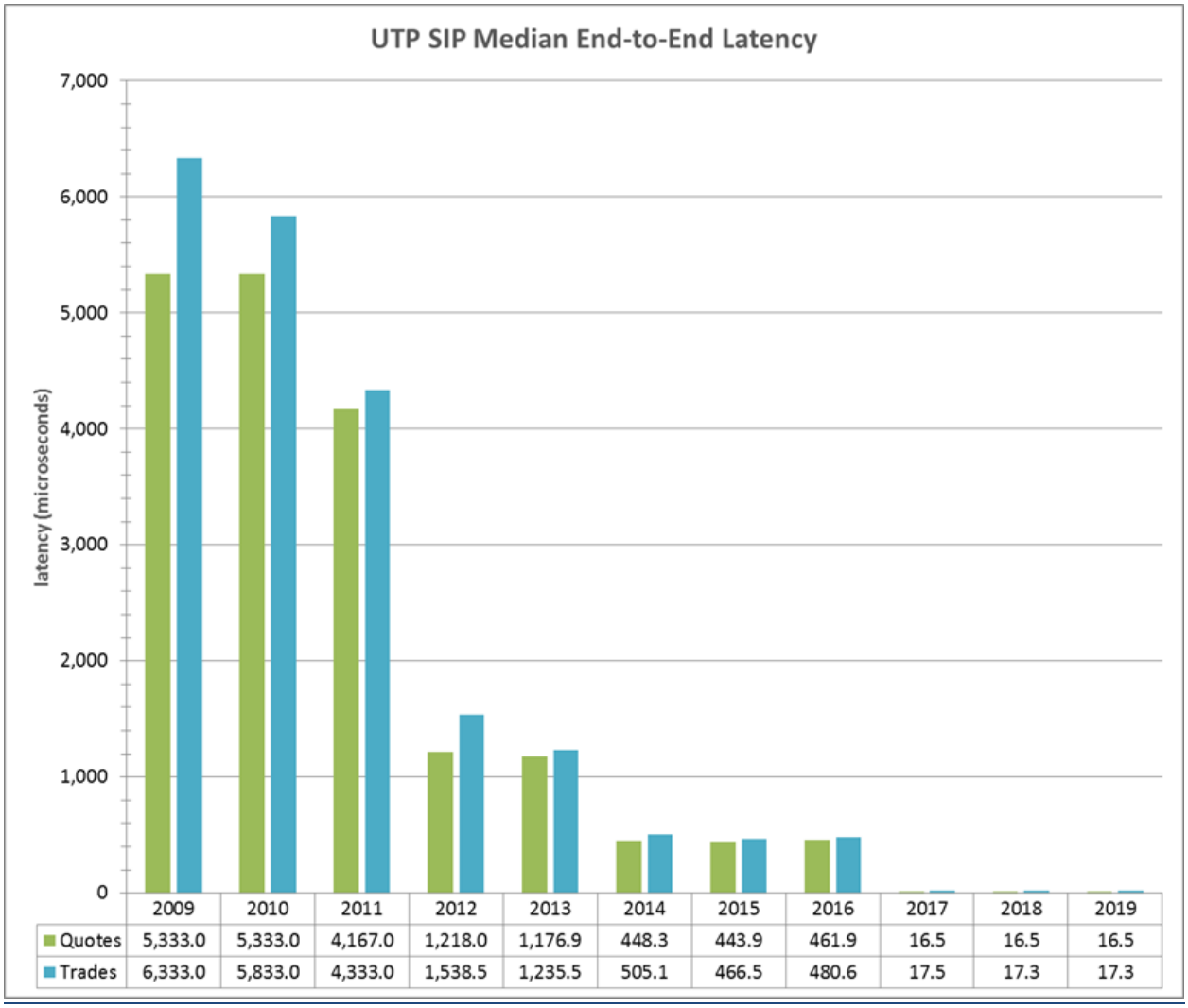
Service Downtime (minutes) and Uptime (% of operating hours)

	UQDF		UTDF		OMDF	
Year	Downtime (minutes)	Service Uptime (%)	Downtime (minutes)	Service Uptime (%)	Downtime (minutes)	Service Uptime (%)
2003	0.0000	100.0000	0.0000	100.0000	0.0000	100.0000
2004	5.9500	99.9976	0.3833	99.9998	0.0000	100.0000
2005	34.2000	99.9861	0.0000	100.0000	0.0000	100.0000
2006	0.0000	100.0000	15.7500	99.9936	24.0833	99.9902
2007	26.5833	99.9892	23.9833	99.9903	19.6167	99.9920
2008	0.7500	99.9997	0.0000	100.0000	86.0000	99.9651
2009	0.1800	99.9999	0.0000	100.0000	0.0000	100.0000
2010	0.0000	100.0000	0.0000	100.0000	0.0000	100.0000
2011	18.7000	99.9924	0.0000	100.0000	0.0000	100.0000
2012	4.0000	99.9984	23.2700	99.9905	0.0000	100.0000
2013	49.0666	99.9800	52.2333	99.9787	36.0000	99.9853
2014	11.8000	99.9952	13.0166	99.9947	0.000	100.0000
2015	0.0000	100.0000	0.0000	100.0000	0.000	100.0000

	Q1		Q2		Q3		Q4	
Year	Calculated Downtime (minutes)	Service Uptime (%)	Calculated Downtime (minutes)	Service Uptime (%)	Calculated Downtime (minutes)	Service Uptime (%)	Calculated Downtime (minutes)	Service Uptime (%)
2016	0	100	0.9833	99.9984	0	100	0	100
2017	2.6833	99.9955	0.1667	99.9997	0	100	0	100
2018	0	100	0	100	0	100	0	100
2019	0	100	0	100	0	100	0	100

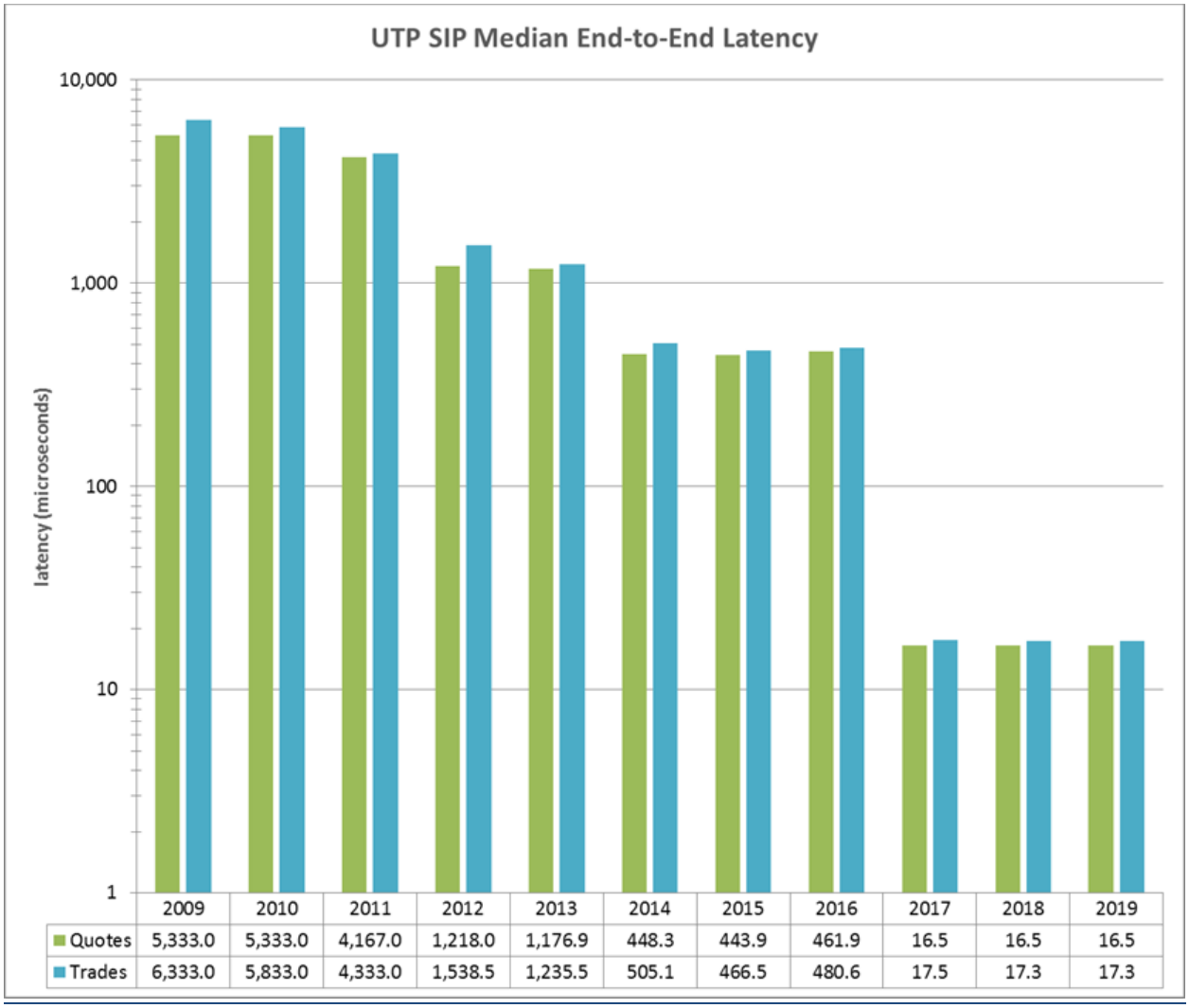
** Availability calculation methodology changed in 2016 from an annual data feed-specific measurement to a quarterly overall system measurement*

EXHIBIT B



	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Quotes	5,333.0	5,333.0	4,167.0	1,218.0	1,176.9	448.3	443.9	461.9	16.5	16.5	16.5
Trades	6,333.0	5,833.0	4,333.0	1,538.5	1,235.5	505.1	466.5	480.6	17.5	17.3	17.3

EXHIBIT C



	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Quotes	5,333.0	5,333.0	4,167.0	1,218.0	1,176.9	448.3	443.9	461.9	16.5	16.5	16.5
Trades	6,333.0	5,833.0	4,333.0	1,538.5	1,235.5	505.1	466.5	480.6	17.5	17.3	17.3

EXHIBIT D

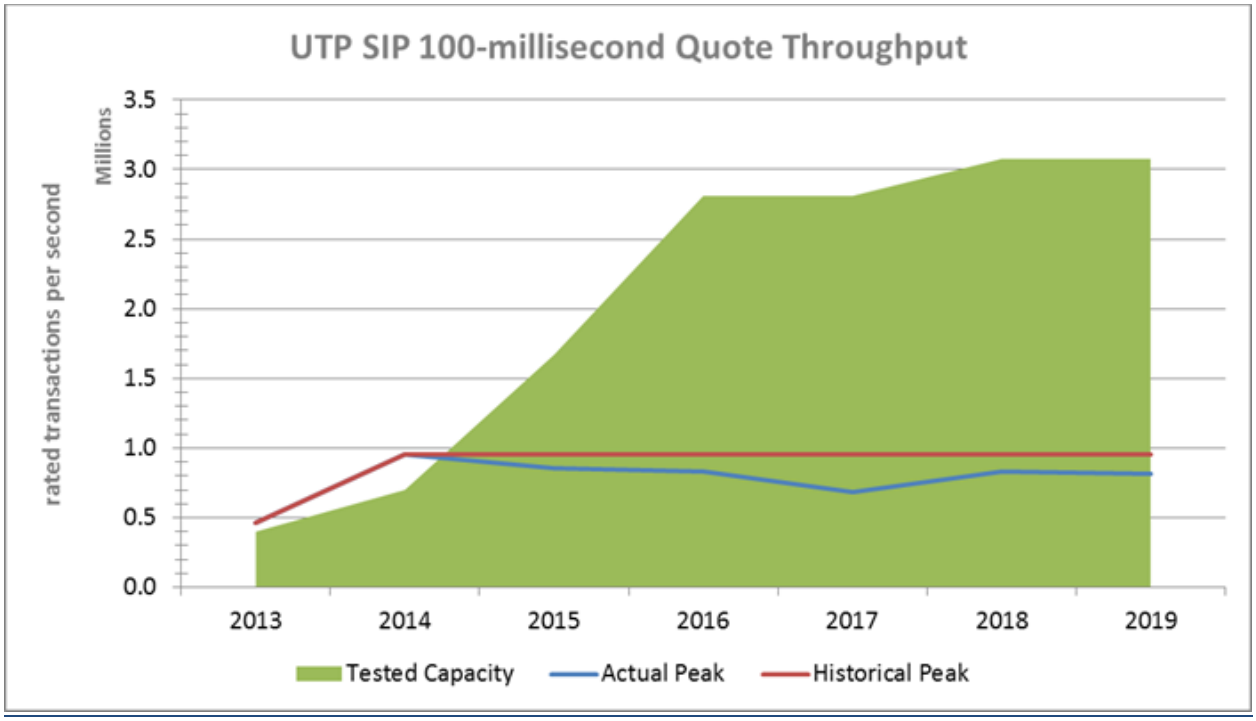
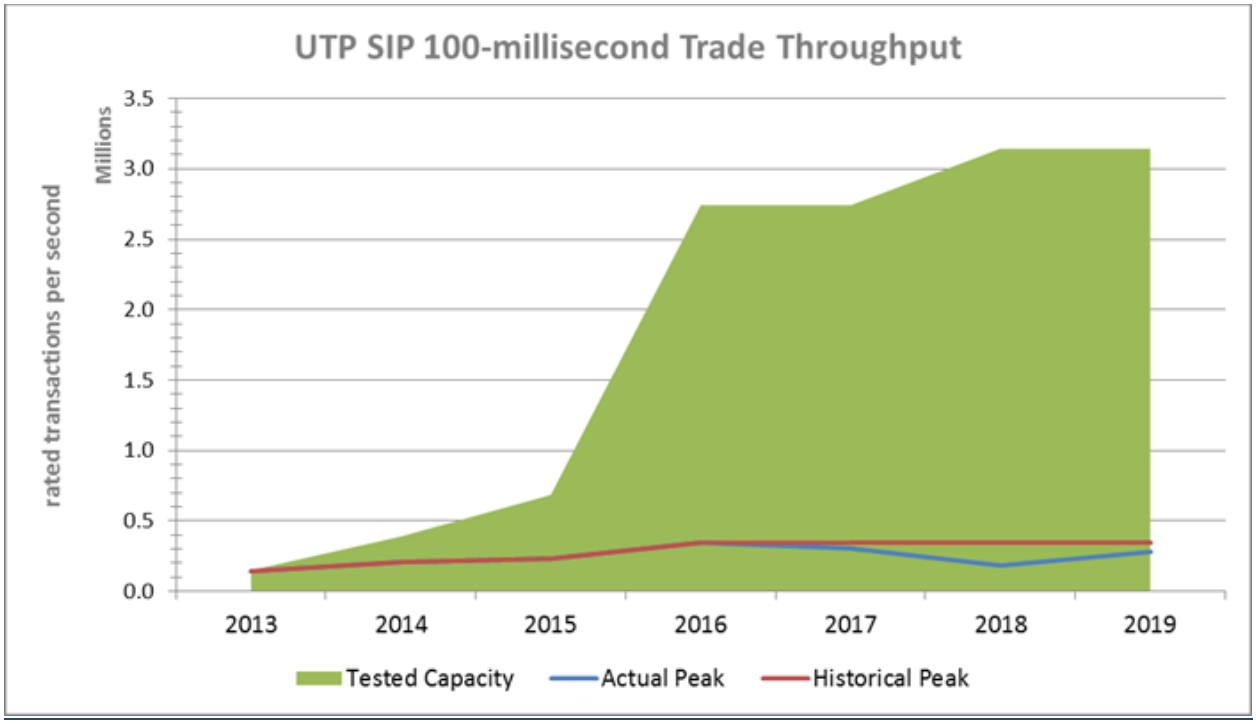

UTP SIP 100-millisecond Quote Throughput
rated transactions per second
Millions
3.5
3.0
2.5
2.0
1.5
1.0
0.5
0.0
2013
2014
2015
2016
2017
2018
2019
Tested Capacity
Actual Peak
Historical Peak

EXHIBIT E


UTP SIP 100-millisecond Trade Throughput
rated transactions per second
Millions
3.5
3.0
2.5
2.0
1.5
1.0
0.5
0.0
2013
2014
2015
2016
2017
2018
2019
Tested Capacity
Actual Peak
Historical Peak