



November 11, 2020

***VIA ELECTRONIC DELIVERY***

Ms. Vanessa A. Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

RE: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (Release No. 34-90096; File No. 4-757)

Dear Ms. Countryman:

Virtu Financial, Inc. (“Virtu”) respectfully submits this letter in response to the above-referenced proposal filed by the national securities exchanges and FINRA (collectively, the “SROs” or “Participants”) to establish under Section 11A of the Securities Exchange Act of 1934 (“Exchange Act”) a new single national market system plan governing the public dissemination of real-time consolidated equity market data for national market system (“NMS”) stocks (the “CT Plan”).<sup>1</sup> Virtu has long been a strong supporter of the Commission’s efforts to modernize the SEC’s rule set in a number of areas, including the rules governing U.S. equity market structure, and we believe that the Commission’s final order of May 6, 2020 (the “May 6 Order”)<sup>2</sup> directing the SROs to file a CT Plan represents an important step in enhancing the transparency and efficiency of the NMS Plan structure, while at the same time eliminating potential conflicts of interest associated with the dissemination of consolidated equity market data.

Broadly speaking, Virtu is also supportive of the overall framework of the SRO’s initial proposed CT Plan. The SROs have endeavored in good faith to implement the spirit of the May 6 Order and to provide detailed information about the CT Plan’s proposed structure, management, and operations. However, we have identified a number of items in the CT Plan that could be enhanced to more closely align with the objectives that the Commission articulated in its order. Most of our comments fall into two categories: (i) items that we believe warrant additional detail or clarification to ensure that the public fully understands how the plan will be carried out, and (ii) items for which a more active role for the Non-SRO participants would enhance the effectiveness and integrity of the CT Plan.

In formulating these comments, we found it helpful to view the CT Plan as a consortium, and applied principles and techniques that are commonly used to balance multiple competing interests in such a setting. We believe that these proposed enhancements provide the Non-SRO

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<sup>1</sup> Exchange Act Release No. 90096 (Oct. 6, 2020), 85 Fed. Reg. 64565 (Oct. 13, 2020).

<sup>2</sup> Exchange Act Release No. 88827 (May 6, 2020), 85 Fed. Reg. 28702 (May 13, 2020).

participants, who are the de facto Minority Stakeholders in the CT Plan, with appropriate rights and protections that should lead to a more balanced and collaborative CT Plan, which in turn should promote fair, orderly and efficient markets.

Our comments are provided below, keyed to the subheadings and paragraph numbers of the SEC's request for comment on the CT Plan.

### **Effective and Operative Dates**

Paragraphs 1 & 2: These paragraphs solicit comment on the CT Plan's proposed effective and operating dates.

- The proposed CT Plan sets forth a significant set of hurdles that must be satisfied before the plan becomes effective and operative, and lacks any hard and fast deadlines by which to achieve them. The Commission and the SROs have learned lessons from the numerous delays of the Consolidated Audit Trail ("CAT") project, which also suffered from a lack of deadlines or accountability for meeting them. We recommend that specific detail be included with respect to effective and operative dates. Specifically, we propose that the CT Plan become effective the day the Commission approves it, and that it become operative no later than one year from the effective date.

### **Plan Structure as an LLC Agreement**

Paragraph 3: This paragraph solicits comment generally on the distinctions drawn in the proposed CT Plan between actions that are governed by the Operating Committee, which includes Non-SRO Voting Representatives, versus actions that are governed solely by the SROs as the "Members" of the LLC.

- Virtu acknowledges that there are certain ministerial functions related to the operation of the LLC that should not require a vote and approval by the full Operating Committee. However, it is our view that the proposed CT Plan lacks sufficient detail regarding the nature and scope of decisions that are ministerial as compared to decisions that are material to the regulatory purposes articulated in the Commission's May 6 Order in which participation by the Non-SRO Voting Representatives is essential. We are concerned that the proposed CT Plan vests nearly unfettered discretion in the SROs to determine what decisions are appropriate for the Operating Committee, and strongly urge the Commission to require a much more detailed articulation of the limited activities that will be solely the province of the "Members" of the LLC. For example, the proposed CT Plan would reserve decisions related to indemnification and the selection of Officers to a simple majority vote of the SRO representatives. Contrary to the assertion made in the proposed CT Plan, decisions related to indemnification and the selection of Officers are highly material to the operation of the CT Plan and could affect the consolidation and distribution of equity market data under the plan.

## Definitions

Paragraph 6: This paragraph solicits comment about the definition of “Fees” in the CT Plan – specifically, whether it accurately reflects fees for all of the types of information currently made available from the existing NMS plans for equity market data and other types of fees that the CT Plan may charge to subscribers.

- We believe that the definition of Fees in the CT Plan needs to be described with more particularity to identify various components of the Fees that will be charged. For example, it is not clear whether connectivity charges also are included in the definition of Fees.

## Organization and Membership of LLC (Paragraph 11)

Paragraph 11: This paragraph solicits comment on the CT Plan’s proposal that the SROs shall have no liability for the debt, liabilities, commitments, or any other obligations of the CT Plan or for any losses of the CT Plan.

- We believe that this liability carve out is too broad. While we support a limitation on liability to the extent that the SROs are carrying out “quintessentially regulatory functions”<sup>3</sup> of the CT Plan, we do not believe that a blanket limitation on liability for non-regulatory activities is appropriate or warranted. The case law on regulatory immunity is clear that an SRO is entitled to immunity only when acting “under the aegis” of its regulatory duties—*i.e.*, when the SRO “stands in the shoes of the SEC.”<sup>4</sup> With respect to administration of the CT Plan, the vast majority of activities carried out by the SROs – from technology services, to operations, to maintenance – will not involve “quintessentially regulatory functions” and SRO liability for such functions should not be limited.

## Responsibilities of the Operating Committee

Paragraph 14: This paragraph solicits comment on a provision of the CT Plan stating that the responsibilities of the Operating Committee include “interpreting the Agreement and its provisions.”

- Virtu is supportive of this provision as long as the Non-SRO Voting Representatives have the opportunity to meaningfully participate in the process of interpreting a provision of the plan. We believe that this provision would benefit from greater detail explaining exactly what role the Non-SRO representatives would have with respect to such decisions. Virtu also supports a requirement for the Operating Committee to adopt policies and procedures

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<sup>3</sup> *In re Facebook Inc. IPO Securities and Derivative Litigation*, 986 F. Supp. 2d 428 (S.D.N.Y. 2013)

<sup>4</sup> *Id.*

distinguishing operational interpretations of the CT Plan from amendments required to be submitted to the Commission under Rule 608 of Regulation NMS.

Paragraph 15: This paragraph solicits comment on a provision of the CT Plan allowing the Operating Committee to delegate “administrative functions” to a subcommittee or to one or more of the Members (*i.e.*, SROs) or to one or more Non-SRO Voting Representatives or to another person, such as the Administrator.

- Virtu is supportive of this provision as long as the Non-SRO Voting Representatives have the opportunity to meaningfully participate in the process of delegation. However, we believe that the CT Plan would benefit from significantly greater detail about the nature and scope of “administrative functions” that are subject to delegation. Additionally, we believe that any delegation of an administrative function solely to SRO representatives or to any subcommittee controlled by SRO representatives should be subject to an augmented majority vote.

### **Composition and Selection of Operating Committee**

Paragraph 18: This paragraph solicits comment on the proposed terms and term limits for SRO and Non-Voting Representatives. Specifically, the CT Plan proposes two, two-year terms for Non-SRO representatives, and no set term or term limits for SRO representatives.

- We believe that the proposed term limits for Non-SRO representatives are too restrictive. While we are supportive of term limits generally in order to incentivize a healthy rotation of industry experts on the Committee, we are concerned that the proposed term limits do not offer enough runway for experts to get up to speed and to participate meaningfully in the work of the Committee. We therefore propose a slight modification, keeping the term at two years, but allowing Non-SRO representatives to serve for a maximum of three terms (six years total) instead of two. We would also recommend staggered terms for the Non-SRO representatives to ensure some continuity among the representatives over time, and note that it may be appropriate to have half the initial Non-SRO representatives begin their term at the fifth quarterly meeting (instead of the third quarterly meeting) in order that not all Non-SRO representatives terms expire within the same year.
- We also believe that there should be a set term and term limits for SRO Voting Representatives. We believe that the work of the Committee would benefit from a regular cadence of new and fresh perspectives, including from the SRO representatives, and that allowing the SRO Representatives to serve indefinitely may be counterproductive.

### **Action of Operating Committee**

Paragraph 19: This paragraph solicits comment on whether decisions related to the following items should not be subject to an augmented majority vote: (i) the operation of the CT Plan as an LLC, (ii) modifications to LLC-related provisions of the proposed CT Plan, and (iii) the selection (including appointment and removal) of Officers of the CT Plan, other than the Chair.

- Again, Virtu appreciates that certain purely ministerial functions of (i) the operation of the LLC entity and (ii) modifications to the LLC-related provisions of the CT Plan should not require an augmented majority vote. However, the proposed CT Plan lacks any specific details concerning or examples of the types of decisions that would fall into these categories. We believe that more detail is needed to ensure that Non-SRO Voting Representatives have an opportunity to participate in any material decisions related to the regulatory operations of the CT Plan LLC. We also strongly believe that the selection (including appointment and removal) of Officers of the CT Plan, including the Chair, should be subject to an augmented majority vote. The selection of Officers of the plan is one of the most important functions of the Participants, and it is vital that Non-SRO representatives have a voice in this critical and material decision. Permitting only the SROs to control the appointment of Officers would be inconsistent with the CT Plan’s objective of providing a meaningful role to Non-SROs in the governance of the collection, processing, and dissemination of equity market data.

### **Meetings of the Operating Committee**

Paragraph 21: This paragraph solicits comment on the proposed topics for which it is appropriate to excluded Non-SRO Voting Representatives from Executive Session.

- As a threshold matter, we submit that the Executive Session should be reserved only to instances where there is a direct conflict of interest for participation by Non-SRO representatives. We would anticipate that such sessions would be infrequent and the exception instead of the rule.
- We also believe this provision requires significantly more detail and clarity with respect to the circumstances that warrant resorting to a secretive and non-transparent process that excludes meaningful participation by the Non-SRO representatives.
- In addition, the list of topics reserved for Executive Session is too broad, lacks sufficient detail, and essentially grants the SROs unfettered discretion about what topics are appropriate for Executive Session. For example, the enumerated item “any topic that requires discussion of Highly Confidential Information” is a vague and subjective threshold with no specific guideposts to determine what is and what is not appropriate for Executive Session.
- We also question why Non-SRO Voting Representatives should be excluded from discussion of litigation matters, especially if they agree to be bound by non-disclosure agreements.
- Finally, by its very nature, we must agree with the statement in the CT Plan that the enumerated items regarding Executive Sessions are “not dispositive of all matters that may by their nature require discussion in an Executive Session,” but it is unfathomable that the determination of such other matters that may require Executive Session rests entirely in the discretion of the SROs.

## **Certain Transactions**

Paragraph 23: This paragraph solicits comment as to whether any additional disclosure, recusal, or voting procedures should be required before the CT Plan employs or deals with persons in which an SRO or any of its affiliates has a direct or indirect interest or a connection.

- As a threshold matter, Virtu is very concerned about the proposed CT Plan's matter of course treatment of the plan's authority to employ or deal with persons in which an SRO or any of its affiliates has a direct or indirect interest or connection, which raises significant conflict of interest concerns. While there may be limited circumstances in which it is appropriate for the CT Plan to employ or transact with its affiliates, we believe there needs to be robust disclosure of, and guardrails around, the terms of such activity to ensure that no further conflicts of interest arise.
- We believe that the CT Plan should require the Operating Committee to adopt detailed policies and procedures articulating the specific circumstances where it is appropriate for the CT Plan to deal with or employ and SRO affiliated entity, disclosure requirements as well as a process mandating recusal of an individual SRO in circumstances where there is a potential conflict of interest.
- We believe that the same standard should be applied to transactions with Non-SRO Voting Representatives or any of their affiliates.

## **Subcommittees**

Paragraph 26: This paragraph solicits comment on whether Non-SRO Voting Representatives should be allowed to serve as chairpersons of subcommittees.

- We believe that it is entirely appropriate for Non-SRO representatives to serve as subcommittee chairs. Subcommittees should be chaired by those individuals who are most qualified and expert in the topical area that is the remit of the subcommittee, regardless of their status as an SRO or Non-SRO representative.

## **Officers**

Paragraph 28: This paragraph solicits comment about whether decisions related to Officers and duties should be made solely by the SROs.

- We believe that decisions concerning the appointment of Officers and the delegation of authority to such Officers should be subject to an augmented majority vote by all representatives. The Officers of the CT Plan will be vested with significant authority to control the operation of the plan and we believe the Non-SRO representatives should have the opportunity to meaningfully participate in the decision-making about who should occupy Officer roles and what authority they wield with respect to the operation of the CT Plan.

## **Disclosure of Potential Conflicts of Interest; Recusal**

Paragraph 30: This paragraph solicits comment on the provisions of the CT Plan governing recusals and the disclosure of conflicts of interest for Members, the Processors, the Administrator, the Non-SRO Voting Representatives, and service providers.

- With respect to recusals, in addition to our comment on Paragraph 23 above, we note that the CT Plan does not include treatment of instances where recusal of a Non-SRO Voting Representative would result in the Non-SROs having less than one third of the aggregate votes of the Operating Committee. To avoid this scenario, we strongly suggest that the proposed CT Plan be amended to provide that the votes of the Non-SROs will always equal one-third of the votes of the Operating Committee even if one or more Non-SRO representatives has recused.

## **Processor Functions and Responsibilities**

Paragraph 36: This paragraph solicits comment on whether the CT Plan should require the CT Plan Processors to ensure the “fairness and usefulness of the form and content” of Transaction Reports and Quotation Information in Eligible Securities collected by the Processors and consolidated and disseminated to vendors and subscribers.

- Virtu strongly supports a requirement that Processors make a “fairness and usefulness” determination with respect to this topic. The data collected by the Processors from the SROs is data belonging to market participants themselves, and it is imperative that the collection and dissemination of this information is tightly controlled and monitored to ensure that it is delivered in a fair and non-discriminatory manner. Including a requirement in the CT Plan imposing an obligation on the Processors to make a “fairness and usefulness” determination would add a layer of much needed accountability to the process.

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Virtu appreciates the opportunity to comment on the proposed CT Plan. We are strongly supportive of a CT Plan that will provide industry representatives with a meaningful opportunity to participate in the governance of the NMS plan for the collection and dissemination of equity market data. We view the initial CT Plan proposed by the SROs as an important and welcome first effort to address the directives in the Commission's May 6 Order, but believe it would benefit from the enhancements articulated above aimed at ensuring greater transparency and a meaningful role for the Non-SRO representatives.

Respectfully submitted,



Thomas M. Merritt  
Deputy General Counsel

cc: Walter J. Clayton, III, Chairman  
Caroline A. Crenshaw, Commissioner  
Allison H. Lee, Commissioner  
Hester M. Peirce, Commissioner  
Elad L. Roisman, Commissioner  
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