Managed Funds Association
The Voice of the Global Alternative Investment Industry
Washington, D.C. | New York

November 18, 2020

Via Electronic Submission: rule-comments@sec.gov

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

Re: 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:

Managed Funds Association[1] ("**MFA**") appreciates the opportunity to comment on the proposed single national market system plan governing the public dissemination of real-time consolidated equity market data for national market system ("**NMS**") stocks (the "**Plan**").[2] We strongly support the creation of a single NMS plan from the existing three plans consistent with the Commission's May 6, 2020, order (the "**Order**"),[3] and in particular: (i) the allocation of one-third of the voting representation to industry representatives not associated with a self-regulatory organization ("**SRO**"); (ii) the limits placed on exchange group's voting power; and (iii) requiring the use of an independent administrator to operate the Plan.[4] We believe that these and related measures designed to address the exchanges' conflicts of interests arising from their operation of the securities information processors ("**SIPs**") while selling proprietary market data are critical to enhancing the efficiency of the distribution of consolidated market data and aligning the operation of the SIPs with their statutory goals. In this regard, we recognize the complexities and challenges faced by the SROs in balancing their competing incentives and appreciate their good-faith effort to propose a Plan broadly consistent with the Order.

With that said, we have serious concerns regarding the SROs' responsibilities and obligations under the proposed Plan, which, if adopted, are likely to preserve the misaligned incentives that gave rise to the Order. Specifically, the SROs have disclaimed any duties or obligations owed to the Plan while retaining significant control over how the Plan would operate. For example, SROs would have explicit authority to

[1] MFA represents the global alternative investment industry and its investors by advocating for public policies that foster efficient, transparent, fair capital markets, and competitive tax and regulatory structures. MFA supports member business strategy and growth via proprietary access to subject matter experts, peer-to-peer networking, and best practices. MFA's more than 140 member firms collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia, supporting a global policy environment that fosters growth in the alternative investment industry.

[2] Securities Exchange Act Release No. 90096, 85 FR 64565 (Oct. 13, 2020).

[3] Securities Exchange Act Release No. 88827, 85 FR 28702 (May 13, 2020).

[4] *See* Letter from Jennifer Han, Associate General Counsel, MFA, and Adam Jacobs-Dean, Managing Director and Global Head of Markets Regulation, AIMA, to Vanessa Countryman, Secretary, Commission, 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) (Feb. 28, 2020), https://www.sec.gov/comments/4-757/4757-6891450-210922.pdf.

prioritize the sale of their proprietary market data products over the interests and statutory purposes of the Plan.

In this regard, the proposed Plan lays bare the governance structure under which the existing SIPs have been tacitly operating, where there is no meaningful incentive for the SROs to improve the efficiency of the SIPs. Indeed, there may be no greater argument in support of the Commission's Order and the need for governance reform in the distribution of equity market data than what the SROs have proposed.

As detailed below, we fear that the Plan structure will not promote the goals of Section 11A of the Securities Exchange Act of 1934 ("**Exchange Act**") of assuring the widespread availability of quotations and transactions in securities on fair and reasonable terms given the absence of any obligations on the SROs to operate the SIP(s) consistent with their statutory purposes.[5] We also believe that greater restrictions should be placed on the use of Member Observers, term limits for non-SRO voting members should be eliminated, and that specific timetables should be added to the Plan to avoid implementation delays.

I. The SROs' Lack Meaningful Obligations to the Plan to Ensure the SIPs Carry Out Their Intended Functions

Under the Proposal, the SROs lack any duty or obligation owed to the Plan and have express latitude to act in their own self-interest, including:

- Interests of the SRO v. the Plan (Section 4.6(b)) – SROs would have no obligation to recommend or take any action that prefers the interests of the Plan or any other SRO over its own interests.
- Fiduciary Duty (Section 3.7(e)) – SROs would have no duty, fiduciary or otherwise, owed to the company (*i.e.*, the company carrying out the Plan, the "**Company**").
- Exculpation (Section 12.1(b))– whenever an SRO is permitted to take any action in its "discretion, "sole discretion" or that it deems "necessary" or "necessary and appropriate," the SRO may make such decision in its sole discretion (regardless of whether there is a reference to "sole discretion" or "discretion") with no duty owed to the company.

Disclaiming any duty or obligation to the Company or the Plan appears to be a complete abdication of any responsibility to ensure that the SIP(s) carry out their intended functions. The SROs could have instead sought to affirmatively describe and limit the obligations that *are* owed to the Company. For example, at minimum, the SROs might have established a duty to promote the Company's function of assuring the widespread availability of equity market data on terms that are fair and reasonable, consistent with statutory requirements,[6] or to promote the interests of fair and orderly markets and the protection of investors and the public interest.

Additionally, it is unclear why an SRO's representative to the Company and the Plan should not owe a fiduciary duty to the Company. Presumably, the reason for this would be to avoid conflicting fiduciary duties. However, a conflict of fiduciary duties would only arise if an SRO's voting representative was also an officer or director of the SRO. Accordingly, it would seem that a SRO voting representative that is not an officer or director of the SRO could avoid any conflict of fiduciary duties. We therefore encourage the SROs to adopt a fiduciary duty as well as affirmatively articulate the duties the duties that are owed to the Company.

[5] 15 U.S.C. 78k-1(a)(1) and (c)(1)(C).

[6] 15 U.S.C. 78k-1(c)(1)(C).

Moreover, the absence of any duties or obligations are particularly problematic in light of the significant control the SROs would retain over the operation of the Company and, in turn, the Plan. Under the Plan, SROs would have exclusive control (*i.e.*, without the non-SRO voting members ("**NSVRs**") of the operating committee) by majority vote over, among other things, the selection of officers of the Company (other than the Chairman) and the selection of NSVRs.[7] As a result, the Plan incentivizes the SROs to run the Plan and the Company poorly to the extent they believe it is in their self-interest. Indeed, there is no downside for an SRO to act in its self-interest contrary to the Plan as they are exculpated in taking any such action. The Plan appears perfectly designed to facilitate the continued neglect of the distribution of consolidated market data in order to benefit the sale of SROs' proprietary market data feeds.

The SROs cannot both disclaim any duty to the Company *and* maintain this level of control over the Company if the Plan is to function properly. There must be some balance struck here with the guiding principle of creating a governance arrangement that is reasonably designed to ensure the Company will carry out its statutory purposes.[8]

II. The SROs' Control over the Election and Tenure of Non-SRO Voting Representatives Should Be Curtailed

As previously noted, SROs would also have exclusive authority over the selection of NSVRs. In addition, NSVRs would be subject to term limits of two years and could serve for no more than two terms (consecutive or non-consecutive – *i.e.*, four years total).[9]

We believe that the SROs' authority to exclusively select NSVRs should be amended to ensure that NSVRs do not consist exclusively of individuals that the SROs believe will support the SROs' interests. As proposed, the SROs' exclusive control over NSVRs selection appears to be a conspicuous attempt to exercise *de facto* control over NSVRs and their one-third voting control. There are numerous ways that the selection of NSVRs could be made more equitable. For example, the existing NSVRs, or a special NSVR governance and nominating subcommittee chaired by a NSVR could select the next slate of NSVRs.[10] Given that the purpose of establishing NSVRs is to "balance the views of the exchanges, which are subject to inherent conflicts of interest," the selection of NSVRs should be as free from the SROs influence as possible.

In addition, we believe that the term limits for NSVRs should be modified to allow a NSVR that has served two consecutive terms to serve again after a one-term break. For example, if a NSVR serves for four years, that individual could be eligible to serve as a NSVR again after a two-year break.[11] There is a relatively limited pool of individuals with adequate experience and knowledge that could serve as NSVRs, and there are benefits from institutional knowledge that can arise from having served as a NSVR.

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[7] *See* Section 4.3(c) of the LLC Agreement.

[8] For example, if SROs ultimately owe no duty to the Company, NSVRs should have a significant say in who the officers of the Company are. To do otherwise creates the incentive for (or at least allows for the possibility of) the SROs selecting officers that operate will operate the Company poorly, thereby increasing the attractiveness of their competing proprietary market data products.

[9] *See* Section 4.2(b) of the LLC Agreement.

[10] If it is critical that the full Operating Committee elect the NSVRs, such a subcommittee could alternatively provide a list of NSVR candidates from which the full Operating Committee could select.

[11] Thus, we propose that there should be no cap on the number of terms that a NSVR may serve provided that he or she does not serve more than two terms consecutively.

Accordingly, while we support the rotation of individuals serving as NSVRs to allow for fresh thinking on the operating committee, we believe that an individual should become eligible again after not serving for a term.

In a similar vein, we also believe that SRO voting representatives should be subject to similar term limits. It is unclear why NSVRs should be subject to terms limits while SRO voting representatives are not, and it would be more fair to subject all members of the operating committee the same. Although any new SRO voting representative replacing an individual that is termed-out is likely to act consistent with the interests of his or her SRO, we believe there are nonetheless benefits to adding fresh perspectives to the Operating Committee through new individuals.

III. The Role of Member Observers Requires Greater Explanation and Functional Specifications

Under the Plan, SROs would be entitled to select "Member Observers" as non-voting representatives that each SRO determines, in its sole discretion, is necessary to help ensure that the SRO is able to comply with the terms and conditions of the Plan, pursuant to Rule 608(c).[12] Member Observers would be permitted to attend regular and executive sessions of the Operating Committee, could participate on subcommittees of the Operating Committee, and are not explicitly required to comply with the Plan's Conflicts of Interest Policy or Confidentiality Policy.[13] There does not appear to be any limit on the number of Member Observers any one SRO could select.

We are concerned that the absence of any reasonable constraints placed on Member Observers will dilute the voice and interests of NSVRs and ultimately enhance the SROs ability to operate the Plan in their own interests rather than consistent with the statutory purposes for which the Plan exists. While we recognize that the SROs have an interest in ensuring their compliance with Rule 608(c), they have offered no explanation as to why their voting representatives are insufficient to accomplish this task or why Member Observers require such expansive activity. The Plan should consider: (i) placing reasonable limitations on the number of Member Observers an SRO may select (*e.g.*, one per SRO); (ii) limiting the ability of Member Observers to speak and participate during meetings of the Operating Committee; (iii) eliminating the ability of Member Observers to participate on subcommittees or attend executive sessions; and (iv) expressly subjecting Member Observers to the Plan's Conflicts of Interest Policy or Confidentiality Policy.

IV. The Plan Should Be Amended Consistent with Regulatory Requirements

We believe the Plan should be amended to comply with the regulatory requirements pursuant to Rule 608(a) of the Exchange Act, including in particular by setting timelines for when the SROs will carry out the next steps toward making the Plan operational.[14] Rule 608(a) requires, among other things, that accompanying any NMS plan or amendment thereto must be a listing of "all significant phases of development and implementation . . . together with the projected date of completion of each phase."[15]

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[12] 17 CFR 242.608(c). *See* Section 1.1(oo) of the LLC Agreement.

[13] *See* Sections 4.4(g) and 4.7(a) of the LLC Agreement.

[14] 17 CFR 242.608(a).

[15] 17 CFR 242.608(a)(4)(ii)(B).

We are concerned that without setting timelines for items like forming an LLC, selecting a processor and administrator, and establishing contracts between vendors and subscribers, the SROs will seek to delay implementation of the Plan. The deadlines need not be overly prescriptive, but it is not unreasonable to set a deadline such as, within three months of approval of the Plan by the Commission, the SROs shall select a Plan administrator.

We also note that a number of other items required by Rule 608 of the Exchange Act appear to be missing from the Proposal. These include, but are not limited to: (i) a detailed description of the manner in which the Plan will be implemented;[16] (ii) an analysis of the impact on competition of implementation of the Plan,[17] and (iii) provisions pertaining to the method by which disputes arising in connection with the operation of the Plan will be handled.

We recognize that certain aspects of the Plan, such as the fee schedule may come further down the road as a separate filing. We also recognize that there is some degree of uncertainty regarding exactly how the Plan may operate given the Commission's Market Data Infrastructure Proposal, which would likely effect a number of aspects of the Plan.[18] However, the three items we note with respect to Rule 608 are of particular relevance to the current Plan and do not appear to be addressed. For example, the manner in which disputes, such as fee disputes, are settled between subscribers, vendors, and the Plan processor are of particular concern. There is currently no effective or efficient mechanism for addressing disputes that subscribers to consolidated market data products have under the existing NMS plans for equity market data.

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We appreciate the opportunity to provide these comments on the Plan. While we support the adoption of a Plan consistent with the Commission's Order, it will be of little practical utility if the incentives of the Plan participants and the statutory objectives of the Plan remain unaligned. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact me at (202) 730-2600.

Respectfully Submitted,

/s/ Jennifer W. Han

Jennifer W. Han
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Managed Funds Association

CC: The Honorable Jay Clayton, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner

[16] 17 CFR 608(a)(4)(ii)(A).

[17] 17 CFR 608(a)(4)(ii)(C).

[18] Exchange Act Release No. 88216, 85 FR 16726 (Mar. 24, 2020).