

October 10, 2022

VIA ELECTRONIC DELIVERY

The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime E. Lizarraga, Commissioner
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Dear Chair Gensler and Commissioners,

We the members of the Consolidated Tape Association and Unlisted Trading Privileges Advisory Committee (“CTA/UTP Advisory Committee”) respectfully petition the Commission to promptly issue an order directing the registered equity exchanges and the Financial Industry Regulatory Authority (“FINRA”) (together, the “Self-Regulatory Organizations” or “SROs”) to submit a revised version of the proposed CT Plan that was vacated by the D.C. Circuit earlier this year. The D.C. Circuit’s opinion invalidated only one discrete aspect of the original CT Plan that was approved unanimously by the Commission. Thus, there are no existing legal impediments or policy considerations that prevent the Commission from directing the SROs to propose a revised CT Plan incorporating vital governance enhancements that are needed to maintain the integrity of public dissemination of market data. We respectfully make this call to action at this critical juncture when it is clear that the Market Data Infrastructure Plan should move forward to further the Commission’s mandate to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

Background

On January 8, 2020, in an effort to address perceived deficiencies in the existing equity data plans that govern the public dissemination of real-time, consolidated equity market data for national market system stocks, the Commission issued a proposal (the “Proposed Governance Order”)¹ directing the SROs to propose a new consolidated equity data plan (referred to as the “CT Plan”) to replace the three existing equity market data plans. Among other items, the Commission’s Proposed Governance Order included three primary governance features:

- First, the Proposed Governance Order dictated that the CT Plan’s operating committee must include representatives of six classes of equity market participant: (i) institutional investors, (ii) broker-dealers with a predominantly retail investor customer base, (iii)

¹ 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; Release No. 34-87906; File No. 4-757 (Jan. 8, 2020) (“Proposed Governance Order”), available at <https://www.sec.gov/rules/sro/nms/2020/34-87906.pdf>.

broker-dealers with a predominantly institutional investor customer base, (iv) securities market-data vendors, (v) issuers of NMS stock, and (vi) retail investors. Pursuant to the Proposed Governance Order, these individuals would serve as voting members of the CT Plan operating committee, collectively controlling one-third of the committee's voting power.

- Second, the Proposed Governance Order contemplated allocating the votes held by the SROs according to an SRO's corporate affiliation. In other words, each "exchange group" or "SRO group" would be granted one vote on the operating committee, rather than one vote being held by each individual member of an "exchange group" or "SRO group". The Proposed Governance Order further recommended allocating one additional vote to any "exchange group" or "SRO group" with consolidated equity market share greater than fifteen percent. Relatedly, the Proposed Governance Order contemplated replacing the unanimity requirement for certain operating-committee actions by an "augmented majority vote" of two-thirds of all votes on the operating committee, provided that the vote includes a majority of SRO votes.
- Third, the Proposed Governance Order recommended that the CT Plan administrator be "independent," meaning "not . . . owned or controlled by a corporate entity that separately offers for sale" its own proprietary-data products.

Following a notice and comment period, the Proposed Governance Order was finalized and unanimously approved on May 6, 2020, in largely the same form as the proposal (the "Final Governance Order").² On October 6, 2020, the SROs submitted a proposed CT Plan that included the three governance features proposed by the Commission, reserving their right to object to the governance features.³ On August 6, 2021, the Commission issued an order unanimously approving the proposed CT Plan.⁴

Shortly after the CT Plan was approved, the SROs filed a lawsuit in the D.C. Circuit seeking review of the CT Plan and challenging the three governance features.⁵ The SRO petitioners also sought a stay of the August 2021 CT Plan Order⁶, which was denied by the Commission, but granted by the D.C. Circuit.

² Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data; Release No. 34-88827; File No. 4-757 (May 6, 2020) ("Final Governance Order"), available at <https://www.sec.gov/rules/sro/nms/2020/34-88827.pdf>.

³ 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 (Oct. 6, 2020), available at <https://www.sec.gov/rules/sro/nms/2020/34-90096.pdf>.

⁴ Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data; Release No. 34-92586; File No. 4-757 (Aug. 6, 2021), available at <https://www.sec.gov/rules/sro/nms/2021/34-92586.pdf>.

⁵ The NASDAQ Stock Market LLC et al. v. Securities and Exchange Commission, Case No. 21-1167, D.C. Cir. (Aug. 9, 2021).

⁶ Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data available at <https://www.sec.gov/rules/sro/nms/2021/34-92586.pdf>

On July 5, 2022, the DC Circuit issued an opinion⁷ vacating the August 2021 CT Plan Order, finding that SEC’s decision to include non-SRO representatives on the plan’s operating committee was “unreasonable” and unanchored from “any reasonable reading” of the Securities Exchange Act. However, the court also found that other aspects of the CT Plan Order were permissible, including the governance feature that would allocate votes held by the SROs according to their corporate affiliation. The court’s opinion also rejected the SROs’ argument that the SEC failed to consider the disadvantages of a requirement for an independent administrator of the plan. Furthermore, the D.C. Circuit largely upheld the Final Governance Order, rejecting only the provisions calling for non-SRO representative participation in the CT Plan.

Call to Action

We respectfully petition the Commission to issue a revised order directing the SROs to submit a new proposed CT Plan that complies with the findings of the D.C. Circuit opinion. The revised governance order should include all of the governance features contained in the Final Governance Order, except for the provisions allowing for non-SRO voting representatives participating on the operating committee, and instead as an Advisory Committee. All of the merits of the SEC’s rationale for enacting the Final Governance Order in the first place are still applicable, and it is imperative that the SEC act to enhance the governance of the SIPs.

SRO Vote Allocation: Nothing has changed in the marketplace or regulatory framework that would substantiate a change in the Commission’s opinion – unanimously adopted in the Final Governance Order – that would allocate votes by “exchange group” or “SRO group” rather than by each individual exchange or SRO. As the Commission stated in the Final Governance Order:

“The Commission continues to believe that there is a need to rebalance voting power in Plan governance to address the disproportionate influence of affiliated exchange groups. The Proposed Order described in detail the effects on Plan governance of the exchange groups’ conflicts of interest arising from their sale of proprietary data products. The current governance structure provides voting power based on each exchange license and thereby concentrates voting power in a small number of exchange group stakeholders, which also have inherent conflicts of interest with respect to the operation of the Plans. The Commission believes that this has perpetuated disincentives for the Equity Data Plans to make improvements to the SIP data products. The Commission continues to believe that modernizing plan governance by reallocating votes by exchange group should help to ensure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information.”⁸

Independent Plan Administrator: Nothing has changed in the marketplace or regulatory framework that would substantiate in a change in the Commission’s opinion – unanimously

⁷ The NASDAQ Stock Market LLC et al. v. Securities and Exchange Commission, Case No. 21-1167, D.C. Cir. (July 5, 2022), available at <https://cases.justia.com/federal/appellate-courts/cadc/21-1167/21-1167-2022-07-05.pdf?ts=1657031457>.

⁸ Final Governance Order at pp. 40-41.

adopted in the Final Governance Order – that the CT Plan should be operated by an Independent Plan Administrator. As the Commission stated in the Final Governance Order:

“The Commission continues to believe that, as stated in the Proposed Order, an entity that acts as the administrator while also offering for sale its own proprietary data products faces a substantial, inherent conflict of interest, because it would have access to sensitive SIP customer information of significant commercial value... The Commission continues to believe that the conflicts of interest faced by a non-independent administrator are so great that these conflicts cannot be sufficiently mitigated. Unlike the exchanges, an independent plan administrator would not have as a competing objective maximizing the profitability of its own proprietary data products... Additionally, because the relevant conflict of interest for an administrator would arise from administration of the SIPs while selling overlapping proprietary data products, the Commission believes that the independence requirement for the administrator must prohibit an entity from serving as administrator of the New Consolidated Data Plan if it is owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary market data products for NMS stocks.”⁹

Non-SRO Representatives Participation: With the D.C. Circuit decision to eliminate non-SRO voting representation on the CT Plan Operating Committee, it is imperative that the revised CT Plan include a provision for the six non-SRO representatives to participate in the capacity of an Advisory Committee in a similar manner as the CTA/UTP Advisory Committee does currently. As the Commission stated in the Final Governance Order:

“an operating committee that takes into account views from non-SRO members that are charged with carrying out the objectives of the New Consolidated Data Plan will have an overall improved governance structure that better supports the “prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information,”¹⁹⁸ because it will reflect a more diverse set of perspectives from a range of market participants, including significant subscribers of SIP core data products.”

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⁹ Final Governance Order at pp. 77-78.

For all the reasons articulated above, the members of the CTA/UTP Advisory Committee are unaware of anything that has changed since May 2020 to address the conflicts of interest that the Commission unanimously resolved to address with respect to SRO vote allocation and the need for an Independent Plan Administrator. We therefore respectfully petition the Commission to issue a revised order directing the SROs to propose a new CT Plan that incorporates the governance features discussed herein, except with respect to the non-SRO participant feature that was invalidated by the D.C. Circuit.

Respectfully submitted,

CTA/UTP Advisory Committee

