



February 24, 2020

Via Electronic Mail (rule-comments@sec.gov)

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

***RE: File No. 4-757; Release No. 34-87906
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 ("Proposed Order" or "Proposal")***

Dear Ms. Countryman:

TD Ameritrade, Inc.¹ ("TD Ameritrade" or "the Firm") appreciates the opportunity to provide comments concerning the U.S. Securities and Exchange Commission's ("Commission") Proposed Order directing the Exchanges and the Financial Industry Regulatory Authority ("FINRA") to submit a New National Market System ("NMS") Plan regarding consolidated equity market data ("New Plan").

As a broker providing more than 12 million client accounts access to the U.S. markets, TD Ameritrade's goal is to deliver a consistent, quality experience by providing clients trading tools and platforms utilizing a mix of consolidated top-of-book and depth of book data. While TD Ameritrade serves registered investment advisors, the Firm's clients are primarily self-directed retail investors representing a diverse community of individuals with different trading and investment needs. TD Ameritrade provides consolidated top-of-book data across all of its platforms. In fact, TD Ameritrade is one of the largest redistributors of market data provided through the securities information processors ("SIPs"). Given its business model of making SIP consolidated data widely available to the individual investor, the Firm can provide a unique perspective concerning the SIPs.

TD Ameritrade appreciates the Commission's request for comments in their development of the Proposed Order that includes the Commission's concerns regarding the Equity Data Plan's provision of equity market data, its views regarding issues arising from the current governance structure of the Equity Data Plans, and the specific governance provisions that the Commission

¹ TD Ameritrade, Inc. is a wholly owned broker subsidiary of TD Ameritrade Holding Corporation (Nasdaq: AMTD). AMTD has a 44-year history of providing financial services to self-directed investors. TD Ameritrade provides investing services and education to over 12 million client accounts, totaling approximately \$1.4 trillion in assets, and custodial services for more than 7,000 independent registered investment advisors. As a leader in U.S. retail trading, TD Ameritrade executes an average of approximately 1 million trades per day for our clients.

preliminarily believes would enable the New Plan to address these concerns and issues.²

Executive Summary

TD Ameritrade recognizes the efforts of not only the Commission, but also the Plan Administrators, Operating Committees and Advisory Committees, in identifying fundamental issues regarding the current governance structure and proposing reforms aimed at strengthening the current Plans.³ Overall, TD Ameritrade applauds the Commission for taking these additional steps to address the underlying issues outlined in the Proposed Order, requesting the self-regulatory organizations (“SROs”) and FINRA to re-examine and modernize the provision of equity market data, and supporting the need for a New Plan.

While TD Ameritrade acknowledges the efforts of the three existing Plans to operate jointly, there continues to remain differences between the Administration of the Plans which impose significant administrative burdens to the retail community with respect to entitlements, subscriber designation, and quote counting/reporting. The combination of three existing Plans into one New Plan, with a single set of policies, will help to eliminate the existing differences in both policy and application and will provide the foundation for a more streamlined approach to the provision of consolidated equity market data. With this, the Firm would expect the realization of economies of scale with regard to operating efficiency, administration, and technology, ultimately reducing production cost. Adherence to the provisions set forth in the Proposed Order, with the suggested modifications, will ultimately achieve the goals outlined by the Commission for the “widespread availability of timely market data.”⁴ The New Plan, as proposed, should allow a Plan Administrator to adopt promptly the provisions set forth in the Proposed Order to:

- Appoint an independent Plan Administrator, effectively mitigating acknowledged real or perceived conflicts of interest between an Administrator and the New Plan;⁵
- Adopt a New Data Plan Committee (“NDPC”) responsible for the operations of the New Plan and comprised of SRO and non-SRO members along with restructured voting criteria;
- Introduce and adopt marked changes to policies, modernized to meet the interests of all end users, but specifically those to the Main Street investor; and
- Provide for an orderly transition of functions and responsibilities.

² See *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 (Jan. 8, 2020), 85 FR 2164 (Jan. 14, 2020) (“NMS Plan”). See generally the Commission’s reference to all contributing sources.

³ For recent examples, See *Consolidated Tape Association; Notice of Filing of the Thirtieth Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Second Substantive Amendment to the Restated CQ Plan*, Release No. 34-87907 (Jan. 8, 2020), 85 FR 2193 (Jan. 14, 2020) and *Consolidated Tape Association; Notice of Filing of the Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Fourth Substantive Amendment to the Restated CQ Plan*, Release No. 34-87909 (Jan. 8, 2020), 85 FR 2207 (Jan. 14, 2020).

⁴ *NMS Plan* at 2167.

⁵ See *NMS Plan* at 2183, explaining “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.”

The Firm is providing additional feedback on the Proposed Order, focusing on:

- the NDPC structure, voting criteria, and member terms;
- the definition of fair and reasonable fees for end users;
- the policy for executive sessions; and
- a reasonable timeframe required for implementation.

And finally, as requested by the Commission where commenters are able to identify and suggest additional or alternative measures to those the Commission has set forth in the Proposed Order, TD Ameritrade expresses continued support for the resolution of the professional and non-professional user classification issues.⁶

This comment letter should be considered in conjunction with the Firm's comments submitted for the recent proposals from the Plans regarding Conflicts of Interest and Confidentiality policies.⁷ Additionally, the SEC recently issued File S7-03-20 proposing to amend 17 CFR 242, Rules 600 and 603 and to adopt new Rule 614 of Regulation National Market System ("Regulation NMS") under the Securities Exchange Act of 1934 ("Exchange Act") to update the NMS for the collection, consolidation, and dissemination of information with respect to quotations for and transactions in NMS stocks ("NMS information").⁸ This comment letter and those previously submitted should be considered in conjunction with any comments the Firm may issue regarding these recent proposals.

As the Commission is seeking comment on each aspect of the Proposed Order, TD Ameritrade respectfully submits the following additional detail:

I. The Governance Structure of the New Plan

- A. Non-SRO New Data Plan Committee ("NDPC") membership should be revised to include specific nomination requirements for the retail-related categories, add membership for a broker-dealer with a substantial wholesale customer base, and incorporate further specifications for issuer participation.**

As of the date of this letter, the Plans provide for formal input without decision making authority from an Advisory Committee, comprised of representatives who have been nominated by Operating Committee Members. TD Ameritrade agrees the New Plan should require inclusion of non-SRO members on the NDPC responsible for the operation and administration of the New Plan, because

⁶ See *TD Ameritrade Roundtable on Market Data and Market Access Letter*, File No. 4-729, submitted on October 24, 2018, ("*TD Ameritrade Roundtable Letter*") 4 and 5, noting classification challenges regarding non-professional and professional users.

⁷ See *TD Ameritrade Inc. Comment Letters to File No. SR-CTA/CQ-2019-01*; Release No. 34-87907 and File No. S7-24-89; Release No. 34-87908 and File No. SR-CTA/CQ-2019-04; Release No. 34-87909 and File No. S7-24-89; Release No. 34-87910, submitted by Joseph Kinahan on February 4, 2020. ("*TD Ameritrade Conflicts of Interest Letter*" and "*TD Ameritrade Confidentiality Letter*," respectively)

⁸ See *Market Data Infrastructure*, Release No. 34-88216 and File No. S7-03-20 (Feb. 14, 2020).

the NDPC will benefit from the participation of such members. With respect to the Proposed Order, TD Ameritrade has three comments for consideration. First, the Proposed Order should explicitly state that an individual in a broker-dealer with a predominantly retail investor customer base category should be required to have a nomination from one of the top five retail firms by trade volume, with each firm limited to nominating one representative. This individual would be appointed to the NDPC from those nominations. Similarly, an individual representing the retail investor category should also require a nomination from one of the top five retail firms by trade volume. This would help to ensure those representing the retail investors are known to the retail trading community to have sufficient knowledge allowing them to fulfill the role of providing input on New Plan business in advancement of New Plan goals.

Second, a broker-dealer with a substantial wholesale customer base should be added as a Non-SRO Member category. In fact, the vast majority of orders from retail firms are routed to wholesalers. Market data structure policy directly affects these wholesalers' ability to protect the investment and retirement goals of retail customers. They have historically protected investors through price and liquidity enhancement, foundational components to ensuring public trust in the markets. The NDPC would benefit from the extensive knowledge these firms have of industry and market structure, and the New Plan should include a broker-dealer with a substantial wholesale customer base as an additional non-SRO member.

Lastly, the Firm has recommendations regarding the inclusion of an issuer of NMS stock as a non-SRO member as provided for in the Proposed Order. In general, companies can be seen as knowledgeable with regard to the industries in which they operate. However, most companies are likely not experienced or experts as it relates to market structure or market data. The Proposed Order should provide for more explicit definition around specific qualifications required for an NMS Issuer to provide effective representation to the New Plan, including the perspective and role they are expected to provide and how it is of specific value to the New Plan. For example, any company eligible for inclusion under another non-SRO member category should not be included as eligible under the issuer category. Considerations around the issuer's longevity and/or average daily trading volume (ADV) should be added to ensure the issuer is well established within the industry and has a fundamental understanding of the markets. Additionally, without explicit clarification as to the specific value the issuer may provide to the New Plan, voting rights for this non-SRO member should be eliminated. These revisions should be included in the Final Rule.

B. The definition of a "Fair and Transparent" non-SRO member nomination process should be clarified.

While TD Ameritrade agrees the New Plan should require a fair and transparent nomination process for non-SRO members, additional specificity regarding what is considered to be "fair and transparent" should be included. As mentioned in the Commission's comments on the Proposed Order, the nomination process shall be transparent to both the NDPC and the public.⁹ Further, TD Ameritrade recommends a minimum two week public notification period during which nominations are accepted

⁹ See *NMS Plan* at 2180, explaining that, "The Commission believes that the operating committee should provide for a process to publicly solicit, and make available for public comment, nominations for non-SRO members."

and available for public comment. All nominations should include a nominee's relevant experience for the group which they are representing, their active work/account sector showing alignment to such group, and relevant conflicts of interest disclosures in line with any such adopted policy.¹⁰ Lastly, the process to be followed in the event of an unexpected/untimely departure of an existing NDPC member should be defined.

C. The NDPC Members should serve four year terms.

All members of a committee should have established term limits. Term limits offer benefits to committees:

- by creating a natural path for succession planning for expected (or unexpected) turnover;
- by allowing membership to more easily adapt to changing needs in skill sets due to changing landscapes; and
- by ensuring a stream of new ideas, perspective, and enthusiasm to the NDPC in order to prevent members from becoming unproductive or stale in their role.

As is common with many boards, the Firm recommends the New Plan provide for a term of four years for all NDPC members. Recognizing the need for institutional knowledge specific to the New Plan and the need for new perspectives, both can be accomplished by rotating out one half of the members every two years. To avoid the initial members serving a term of six years, the first rotation cycle should begin two years following establishment of any new NDPC.

D. The proposed voting structure for an augmented majority vote should allow for the meaningful contribution of non-SRO members, by requiring inclusion of non-SRO support.

While the proposed voting structure provides for more input into the New Plan by non-SRO members an additional requirement should be added to the definition of an augmented majority vote as proposed in the Commission's commentary.¹¹ The Proposal's intent is to "ensure that the SROs have sufficient voting power to act jointly on behalf of the plan".¹² However, no change preventing the ownership of proprietary data products by an SRO, either directly or indirectly through an affiliate, is proposed. Therefore, those voting on behalf of SROs will continue to inherently maintain a real or perceived conflict of interest with respect to their individual product interests as compared to that of the New Plan. Allowing SROs the continued ability to pass New Plan amendments without buy-in from non-SRO members may lead to substantially similar circumstances which exist currently.

All members of the NDPC should be appointed and positioned to represent the interests of

¹⁰ See *TD Ameritrade Conflicts of Interest Letter*, generally.

¹¹ See *NMS Plan* at 2181, stating the "augmented majority vote" is defined as: "a two-thirds majority of all votes on the operating committee, provided that this vote also includes a majority of the SRO votes, which will ensure that the SROs have sufficient voting power to act jointly on behalf of the plan pursuant to the requirements of Section 11A of the Act (15 U.S.C. 78k-1.) and Rule 608 of Regulation NMS (17 CFR 242.608.)."

¹² See *NMS Plan* at 2181.

their represented category/group for the furtherance of New Plan goals to make market data widespread and available.¹³ Therefore, in addition to requiring a two thirds majority vote of all members including a majority vote of SRO members, the definition of augmented majority should be expanded to include, at a minimum, a required one-third total vote of the non-SRO members in support of any amendment. Such a structure would still preclude non-SRO members from passing an amendment without SRO approval as outlined in the Proposed Order, but would help to ensure that the New Plan takes into account not only the needs of those providing the data, but also the needs of those specifically required by regulation to display New Plan data to their clients when implementing trades due to the Vendor Display Rule.¹⁴

II. The Operation of the New Plan

A. **The NDPC should address the definition of “fair and reasonable” as it applies to all aspects of the Proposal, including fees, or the Commission should codify more explicit requirements as to what is fair and reasonable.**

The term reasonable is generic and relative, and applies to that which is appropriate for a particular situation. Therefore, what may seem reasonable to some may not be considered reasonable to others without more specificity provided. As was noted in the Firm’s recent letter to the Commission,¹⁵ the cost difference between the individual proprietary feeds as compared to the maximum fee for the SIP feeds is almost ten times greater. With the Commission mandated requirements for broker-dealers to consume and display consolidated equity market data,¹⁶ and similar information priced substantially different than these consolidated feeds, this cannot be viewed as fair and reasonable.

This disparity should be addressed by the NDPC, as they have been directed to address the governance concerns the Commission noted within the Proposed Order which seems to have led to the present day circumstances. If the NDPC does not address the ambiguity associated with the terms “fair and reasonable” in the New Plan, as has historically been the case, then the Commission should use its rulemaking authority¹⁷ to codify the additional guidance published by the Commission in May 2019 to

¹³ See *TD Ameritrade Conflicts Letter*, generally.

¹⁴ See *Regulation NMS*, Release No. 34-51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“*Regulation NMS Release*”), at 37627 stating: “(1) No securities information processor, broker, or dealer shall provide, in a context in which a trading or order-routing decision can be implemented, a display of any information with respect to quotations for or transactions in an NMS stock without also providing, in an equivalent manner, a consolidated display for such stock.”

¹⁵ See *TD Ameritrade Roundtable Letter at 4 and 5*, generally discussing the cost inconsistencies between SIP and proprietary data products.

¹⁶ See *Regulation NMS Release at 37627*.

¹⁷ See *Regulation of Market Information Fees and Revenues*, Release No. 34-42208 (Dec. 9, 1999) 64 FR 70613 (Dec. 17, 1999) (“*Regulation of Market Information Release*”) at 70618 that states “Although the Commission has not yet exercised its rulemaking authority under section 11A(c)(1)(C) or (D) to specify the fees that can be charged for market information, these provisions plainly indicate Congress’ intent that an exclusive processor’s fees be “fair and reasonable” and “not unreasonably discriminatory.””

assist in the review of prices¹⁸ and, as a last resort if an agreement is not reached, the Commission should introduce additional rulemaking¹⁹ to include clear and specific cost based requirements, similar to a utility cost model as such products can be viewed as utilities,²⁰ to support fees for SIP data.

B. Use of an executive session should be infrequent and highly controlled, and include full participation from both SRO and non-SRO members.

Use of an executive session should be confined to extremely limited circumstances, largely due to the continued exclusion of non-SRO members from such discussions.²¹ The Firm recognizes and applauds the progress in limiting use of executive sessions by the SROs in recent years, and the improvements in transparency that have resulted from a shift in discussions to general sessions, however significant concerns about their use still remain. A risk posed in any use of executive sessions, especially those where information discussed therein is restricted from public distribution, is that matters may be raised which are beyond the original scope and intent disclosed during open session and providing the shield of privilege to discussions which would not ordinarily warrant it.

To aid in transparency, the New Plan should require inclusion of executive session requests on a written agenda, along with the clearly stated rationale for each matter to be discussed. However, the approved augmented majority voting procedure, as discussed above, should be applied when approving requests to enter into executive session. Limiting voting rights to SRO members provides a possibility that topics outside of the stated policy are approved for executive session. There should be transparency into such votes per the requirements for inclusion in the minutes, there would be no redress to address violations of the scope limitations set forth by written agenda and proceeding authorization as the New Plan and its policies continue to evolve.

Furthermore, any adopted confidentiality policy should be sufficient and implemented in such a manner to ensure topics in executive session are appropriately secured by committee members, and

¹⁸ See *Staff Guidance on SRO Rule Filings Relating to Fees* available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

¹⁹ With established and similar proprietary exchange services that, as noted above, may be licensed at one tenth the cost of the current SIP fees, and which further do not require individual user based reporting, fees or a user type qualification – it appears a benchmark for “fair and reasonable” fees has been established.

²⁰ See *CTA/UTP Advisory Committee Comment Letter to File No. SR-CTA/CQ-2019-01*; Release No. 34-87907 and File No. S7-24-89; Release No. 34-87908, submitted on Jan. 24, 2020, at 2 stating “As custodians of a public utility, [...]”

²¹ See *NMS Plan* at 2184 that states “The Commission believes that, by permitting the SROs to hold discussions and make decisions in executive session without the advisory committee members present, the Equity Data Plans have limited the ability of advisory committee members to influence the operation of the Equity Data Plans.” See also Letter from Marcy Pike, SVP, Enterprise Infrastructure, Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Oct. 26, 2018), at 4, available at <https://www.sec.gov/comments/4-729/4729-4566044-176136.pdf> (“Fidelity Letter”).

therefore non-SRO member participation in executive session would be appropriate.²² Any such executive session policy should provide a means by which decisions to close meetings can be challenged by any member with cause. Simply limiting or removing non-SRO member voting rights during such session should be sufficient to allow SRO members to effect any SRO business as necessary for the New Plan, while providing non-SRO members the necessary context to inform their positions.

However, if the Commission determines this course of action is unadvisable, the Firm proposes that either:

- one non-SRO member voted by their peers, be selected for participation in any executive sessions, without voting rights; or
- independent legal counsel employed by the New Plan, without any conflict of interest due to outside relationships with the SROs, be in attendance at such executive session.

While the Firm understands the Commission staff listens to session calls, the intent for including one of the above representatives would be to monitor activities discussion, specifically ensuring the topics remain focused to those disclosed within the request to enter into executive session. Additionally, use of a non-SRO member as opposed to an independent legal counsel would allow such member to provide any feedback to the Committee on whether topics continue to remain appropriate for executive session or would be better addressed with the inclusion of non-SRO members. Either party should then be given the instruction to communicate with the Commission (or independent Plan Administrator) regarding any concerns arising but not adequately addressed by the SRO members.

C. A timeline should be established by the Commission for the formation and implementation of the New Plan.

TD Ameritrade agrees the New Plan should require an orderly transition of functions and responsibilities. Without deadlines, however, any project will be subject to scope creep and lack of urgency leading to unnecessary delays. Therefore, the Final Rule should include a timeframe required for transition to compel an expedient approach. The Firm recommends the NDPC and Plan Administrator be implemented within 180 days, with the ability for the Commission to approve an extension. Providing for specific timelines for further implementations (*e.g.*, technology, processor, etc.) would help direct the NDPC to consider an incremental approach to implementation, allowing for certain impactful changes (*e.g.* a change in Administrator, consolidation of policies from three independent sets to one, etc.) to occur earlier than larger, more technical changes.

Finally, the Firm agrees the New Plan should require adoption and inclusion of all other provisions of the Equity Data Plans necessary for the operation and oversight of the SIPs under the New Consolidated Data Plan, and the New Consolidated Data Plan should, to the extent possible, attempt to harmonize and combine existing provisions in the Equity Data Plans that relate to the Equity Data Plans' separate processors.

²² See *TD Ameritrade Confidentiality Letter*, generally, which includes recommendations for the implementation of procedures to redact, anonymize and/or aggregate information.

III. Additional Consideration

A. **Non-Professional User Qualification**

As previously noted, TD Ameritrade provides data primarily to self-directed retail investors, essentially Main Street investors. The Firm recommends that the Final Rule should include reform of the policies defining the Main Street investor. Currently, a distinction between professional and non-professional users is based on the occupation of the investor. Also under the current definition, a professional user in the workplace is also a professional user for their personal account at home. At this time, the burden to define the type of user, the associated costs to manage the distinction, and administer the user qualification must be modernized. The basis for this reform can be illustrated by this excerpt on the home page of the UTP Plan website which states, “most nonprofessional investors do not pay fees because the low cost allows for brokerage firms to include real-time prices as part of their service.”²³

In the Firm’s view, a Main Street investor is an account holder that makes use of SIP data for his or her personal benefit regardless of occupation. A professional user is one who makes use of SIP data on behalf others. A professional user may, on occasion, be a non-professional account holder for his or her personal accounts, should that use be strictly for personal benefit.

This simplification and modernization will address fair and equal access to SIP data for Main Street investors and reduce client experience burden associated with the non-professional subscriber qualification agreement. Further, simplified policy improves compliance with policy terms and reduces the overhead administration costs of managing the complexity of the current policies defining non-professional user qualification.²⁴ The alternative proprietary data feed products currently achieve a greater level of simplicity than proposed here and do not require a qualification process for retail Main Street investors to differentiate or distinguish themselves by occupation or service or for any other criteria. As stated above, the two simple questions to drive a user status should be:

- Is your use of market data for personal use (*e.g.* your personal or family brokerage account, retirement account, trust or other similar use solely on behalf of yourself or your family)
- Is your use of market data associated with your employment or any commercial purpose or function (*e.g.*, do you receive compensation of any kind associated with your use of the information?).

* * * *

²³ See UTP Plan Website available at <http://www.utpplan.com/>.

²⁴ See TD Ameritrade Comment Letter in Response to Nasdaq’s Solicitation for Potential Changes to the Definitions of Professional and Non-Professional Usage for Market Data Fee Filings, submitted on July 30, 2019, at 4, general discussion regarding administrative overhead for costs to brokerage firms.

Conclusion

TD Ameritrade supports a strong and healthy National Market System. TD Ameritrade appreciates the opportunity to comment on the Commission's Proposal for directing the Exchanges and FINRA to submit a New Plan regarding consolidated equity market data. The Firm strongly supports the reformation of market data structure, including the need for creation and implementation of a New Plan. TD Ameritrade believes that the Commission could significantly improve the structure and operations of the Plan by addressing the above recommendations in its Final Rule.

TD Ameritrade greatly appreciates the Commission's consideration of the above comments and concerns. Please feel free to contact me, at [REDACTED] with any questions regarding our comments.

Respectfully Submitted,



Joseph Kinahan
Managing Director, Client Advocacy and Market Structure