

COMMITTEE ON CAPITAL MARKETS REGULATION

February 28, 2020

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

VIA ELECTRONIC MAIL: rule-comments@sec.gov

Re: File Number 4-757: 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 (the “**Governance Proposal**”)

Dear Madam:

The Committee on Capital Markets Regulation (the “**Committee**”) appreciates the opportunity to comment on the Governance Proposal by the Securities and Exchange Commission (the “**SEC**”).¹ The Committee supports the SEC’s Governance Proposal to enhance the efficiency and fairness of the distribution of critical market data with respect to national market system stocks (“**NMS stocks**”). However, the Committee believes that the SEC should take an additional step to lower the unnecessarily high cost of critical market data by allowing competition among consolidated market data aggregators for NMS stocks.

Founded in 2006, the Committee is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. Our membership includes thirty-five leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Dean, Columbia Business School) and John L. Thornton (Chairman, The Brookings Institution) and led by Hal S. Scott (Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

Executive Summary

This letter proceeds in three parts. **Part I** describes the current landscape with respect to the dissemination of critical U.S. equity market data. At present, market participants can purchase: (i) consolidated market data from securities information processors (“**SIPs**”) jointly controlled by

¹ U.S. SEC. & EXCH. COMM’N, *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*, 85 FED. REG. 2164 (Jan. 14, 2020), <https://www.federalregister.gov/documents/2020/01/14/2020-00360/notice-of-proposed-order-directing-the-exchanges-and-the-financial-industry-regulatory-authority-to> [the “**Governance Proposal**”].

exchanges through Reg NMS plans; and (ii) unconsolidated market data directly from exchanges via proprietary data feeds.

Part II analyzes the Governance Proposal, which would: (i) combine the three existing Reg NMS plans into one; (ii) provide market data stakeholders other than exchanges voting power in Reg NMS plan governance; and (iii) require SIPs to disclose pertinent operational and performance metrics. The Committee supports these proposed changes as a first step and recommends additional transparency as to the cost of operating the SIPs.

Part III sets forth the Committee’s longstanding position that the SEC should adopt a “competing consolidators” model for the dissemination of consolidated market data. Under that model, non-exchange market participants could purchase, consolidate, and resell market data in competition with the SIP. By introducing competition to the dissemination of consolidated market data, a “competing consolidators” model could reduce the cost and improve the quality of consolidated market data and render the U.S. equity markets less vulnerable to a single point of failure.

Part I: Consolidated Market Data and Regulation NMS

“**Consolidated market data**” refers to (i) timely information about offers to buy and sell securities across all trading venues, and (ii) real-time retrospective reports of trades as they are executed.² As a general matter, consolidated market data promotes fair and efficient trading by integrating otherwise dispersed buyers and sellers into a national securities market.³ Consolidated market data is also necessary for certain market participants to satisfy certain obligations, such as the order protection rule for trading venues and the duty of best execution for broker-dealers.⁴

The Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), aims to “assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of [consolidated market data].”⁵ The Exchange Act further requires that consolidated market data is available on terms that are “fair and reasonable” and “not unreasonably discriminatory.”⁶

Under Regulation NMS (“**Reg NMS**”), which governs the dissemination of consolidated market data for NMS stocks,⁷ self-regulatory organizations (“**SROs**”), including SEC-registered national securities exchanges and the Financial Industry Regulatory Authority (“**FINRA**”), have a duty to “act jointly... to disseminate consolidated [market data], including a national best bid

² COMMITTEE ON CAPITAL MARKETS REGULATION, *The U.S. Equity Markets: A Plan for Regulatory Reform*, 105 (July 2016), https://www.capmktreg.org/wp-content/uploads/2018/12/07_27_FINAL_DRAFT_EMS_REPORT.pdf [“**CCMR Report**”].

³ *Governance Proposal*, *supra* note 1, at 2167 (“Widespread availability of timely market data promotes fair and efficient markets and facilitates the ability of brokers and dealers to provide best execution to their customers.”).

⁴ *See, e.g., Governance Proposal*, *supra* note 1, at 2170 (“Some broker-dealers use SIP data to comply with the requirements of Rule 611 of Regulation NMS to prevent trade-throughs and to meet their best execution obligations for customer orders.”); 17 C.F.R. § 242.611; U.S. SEC. & EXCH. COMM’N, *Best Execution* (May 9, 2011), <http://www.sec.gov/answers/bestex.htm>.

⁵ 15 U.S.C. 78k-1(c)(1)(B).

⁶ 15 U.S.C. 78k-1(c)(1)(C)-(D).

⁷ U.S. SEC. & EXCH. COMM’N, *Regulation NMS*, 69 FED. REG. 11125 (Mar. 9, 2004), <https://www.federalregister.gov/documents/2004/03/09/04-4712/regulation-nms> [“**Reg NMS**”].

and national best offer, on quotations for and transactions in NMS stocks.”⁸ Exchanges have developed two related but distinct services that market participants use to obtain consolidated market data.

SIP Data

Reg NMS authorizes SROs to jointly establish and operate Reg NMS plans (“**Equity Data Plans**”) that govern the dissemination of consolidated market data for NMS stocks.⁹ These Equity Data Plans must designate an *exclusive* securities information processor, or SIP, for each NMS stock.¹⁰ Exchanges (in their capacity as SROs) are then required to provide publicly displayed quotes and trade executions to the appropriate SIP, which aggregates and disseminates consolidated market data to market participants for a fee.¹¹

At present, there are three Equity Data Plans that govern the dissemination of consolidated market data through three designated SIPs: one for NYSE-listed securities, one for Nasdaq-listed securities, and one for other securities (the “**designated SIPs**”).¹² Each designated SIP disseminates: (i) top-of-book data for its NMS stocks, including the national best bid and offer and the shares available at those prices, each exchange’s best bid and offer and the shares available at those prices, and the last sale’s price, size, and exchange; and (ii) certain other data related to volatility control, trading halts, circuit breakers, and short-sales (collectively, the “**SIP data**”).¹³

As currently structured, the Equity Data Plans for the SIPs are governed by an operating committee on which each SRO, and therefore each exchange, has one vote.¹⁴ At present, the three Equity Data Plans have identical operating committees,¹⁵ and the three large exchange groups, CBOE Holdings (“**CBOE**”), Intercontinental Exchange Group (“**ICE**”), and Nasdaq, control 14 of the 17 votes on each.¹⁶ The remaining three votes are held by two unaffiliated exchanges and FINRA.¹⁷

The applicable Equity Data Plan allocates SIP data fee revenue among SROs participating in that plan.¹⁸ In 2018, exchanges derived \$389.4 million in revenue from SIP data fees, up slightly

⁸ 17 C.F.R. § 242.603(b).

⁹ *Governance Proposal*, *supra* note 1, at 2167.

¹⁰ 17 C.F.R. § 242.603(b). (“Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.”).

¹¹ 17 C.F.R. § 242.602; U.S. SEC. & EXCH. COMM’N, *Regulation NMS*, 70 FED. REG. 45529 (Aug. 8, 2005), <https://www.federalregister.gov/documents/2005/08/08/05-15597/regulation-nms>.

¹² *Governance Proposal*, *supra* note 1, at 2167.

¹³ *See Governance Proposal*, *supra* note 1, at 2167.

¹⁴ *Governance Proposal*, *supra* note 1, at 2174-2175.

¹⁵ *Governance Proposal*, *supra* note 1, at 2182.

¹⁶ *Governance Proposal*, *supra* note 1, at 2174-2175.

¹⁷ *Governance Proposal*, *supra* note 1, at 2181.

¹⁸ Charles M. Jones, *Understanding the Market for U.S. Equity Market Data*, U.S. SEC. & EXCH. COMM’N, 22 (Aug. 31, 2018), <https://www.sec.gov/comments/4-729/4729-4545881-176154.pdf>

from \$386.7 million in 2017.¹⁹ Exchanges do not disclose the underlying cost of providing SIP data.

As a practical matter, the SIPs provide the only *consolidated* market data available for purchase in the U.S. equity markets. According to the Governance Proposal, the SIPs “have significant market power in the market for core and aggregated market data products and are monopolistic providers of certain market information.”²⁰

Proprietary Data Feeds

Reg NMS also allows individual exchanges to sell access to their own “**proprietary data feeds**,” which provide high-quality, unconsolidated market data. Market participants can purchase access to proprietary data feeds from each exchange and consolidate that data themselves to obtain consolidated market data for their own use (not for resale).²¹ According to Reg NMS, fees for proprietary data feeds must be sold on “terms that are not unreasonably discriminatory.”²² Exchanges sell proprietary data feeds to market participants with greater content, higher quality, and faster speeds than SIP data,²³ including depth-of-book data that includes quotations at prices other than the best bid and offer.²⁴

As described by SEC Chairman Jay Clayton, “a significant and increasingly wide gap has developed between (1) the content and operational sophistication of the consolidated market data streams distributed pursuant to the Equity Data Plans, and (2) the content and operational sophistication of many proprietary data products.”²⁵

Part II: The Governance Proposal

The Governance Proposal identifies two important deficiencies in the provision of consolidated market data under Reg NMS: redundancy and conflicts of interest. It aims to address

¹⁹ BURTON-TAYLOR INTERNATIONAL CONSULTING, *Quarterly Review of SIP Revenue for U.S. Securities Exchanges 2018* (2019), <https://burton-taylor.com/quarterly-review-of-sip-revenue-for-u-s-securities-exchanges-fy18-2/> (“SIP revenues totaled USD389.4 million in 2018, up 0.7% from the 2017 total.”). See also, BURTON-TAYLOR INTERNATIONAL CONSULTING, *Quarterly Review of SIP Revenue for U.S. Securities Exchanges Q319* (2019), <https://burton-taylor.com/quarterly-review-of-sip-revenue-for-u-s-securities-exchanges-q319/> (“SIP revenues totaled USD292.5 million in the first three quarters of 2019, down 0.3% from the previous year’s period.”).

See also, Charles M. Jones, *Understanding the Market for U.S. Equity Market Data*, U.S. SEC. & EXCH. COMM’N, 28-30 (Aug. 31, 2018), <https://www.sec.gov/comments/4-729/4729-4545881-176154.pdf>.

²⁰ *Governance Proposal*, *supra* note 1, at 2168.

²¹ PROGRAM ON INTERNATIONAL FINANCIAL SYSTEMS, *International Review of Equity Market Structure Regulation*, 94 (October 2019), <https://www.pifsinternational.org/wp-content/uploads/2019/10/PIFS-International-Review-of-Equity-Market-Structure-Reg-for-website.pdf>.

²² 17 C.F.R. § 242.603(a)(2).

²³ COMMITTEE ON CAPITAL MARKETS REGULATION, *Stock Market Data: A Call for Transparency to Assess Impact on U.S. Investors*, 3 (Sept. 24, 2018), <https://www.capmktsreg.org/wp-content/uploads/2018/09/CCMR.Market.Data.Statement-1.pdf>

²⁴ *Governance Proposal*, *supra* note 1, at 2168-2169.

²⁵ Chairman Jay Clayton, *Statement on Proposed Order to Modernize the Governance Structure of National Market System Plans for Equity Market Data*, U.S. SEC. & EXCH. COMM’N (Jan. 8, 2020), https://www.sec.gov/news/public-statement/statement-clayton-open-meeting-2020-01-08#_ftn11.

both by restructuring the governance of Equity Data Plans. The Governance Proposal would also increase SIP transparency.

Addressing Redundancy

The three existing Equity Data Plans responsible for SIP data have identical operating and advisory committees with the same members, share the same revenue distribution formula, legal representation, and professional services, and fulfill overlapping administrative and regulatory functions.²⁶ This fragmented structure creates inefficient redundancies and duplicative governance processes.²⁷ Therefore, to “promote the prompt, accurate, reliable, and fair dissemination of core data,” the Governance Proposal orders the exchanges to propose a single consolidated equity market data plan (the “**Consolidated Data Plan**”) to replace the existing Equity Data Plans.²⁸ The Committee supports replacing the three Equity Data Plans with one Consolidated Data Plan.

Addressing Conflicts of Interest

In the Governance Proposal, the SEC acknowledges an “inherent conflict of interest between [exchanges’] collective responsibilities in overseeing the Equity Data Plans and their individual interests in maximizing the viability of proprietary data products that they sell to market participants.”²⁹ In particular, since the introduction of Reg NMS in 2005, the exchanges in control of Equity Data Plans have demutualized, transforming from broker-dealer membership organizations into for-profit companies.³⁰ As a result, whereas the Equity Data Plans were once ultimately controlled by *purchasers* of market data (each exchange’s broker-dealer membership), they are now dominated by for-profit *sellers* of market data (the CBOE, ICE, and Nasdaq exchange groups).³¹ This demutualization, “combined with the Equity Data Plans’ current governance structure, have exacerbated the exchanges’ lack of incentives to improve the SIPs.”³² Consequently, “the differences between the SIP data feeds and proprietary data feeds have the effect of increasing the demand for, and marketability of, proprietary data products to the financial benefit of the exchanges.”³³ The Committee commends the SEC for acknowledging this fundamental conflict of interest.

The Governance Proposal aims to mitigate the impact of exchanges’ conflict of interest by reforming how the new Consolidated Data Plan is governed. The Consolidated Data Plan would do so by providing non-SRO stakeholders (including at least one institutional investor, one broker-dealer primarily serving retail investors, one broker-dealer primarily serving institutional investors, one securities market data vendor, one issuer of NMS stock, and one retail investor)

²⁶ *Governance Proposal, supra* note 1, at 2182.

²⁷ *Governance Proposal, supra* note 1, at 2182.

²⁸ *Governance Proposal, supra* note 1, at 2182.

²⁹ *Governance Proposal, supra* note 1, at 2166.

³⁰ *Governance Proposal, supra* note 1, at 2167-2168.

³¹ *See Governance Proposal, supra* note 1, at 2174-2175 (“Notably, as the primary producers of exchange proprietary data products, these exchange groups’ voting power on the Equity Data Plans exacerbates the conflicts between their business interests and their regulatory obligations.”).

³² *Governance Proposal, supra* note 1, at 2173.

³³ *Governance Proposal, supra* note 1, at 2170.

with votes on the operating committee of the Consolidated Data Plan.³⁴ The Governance Proposal would provide non-SRO stakeholders with one third of the votes on the operating committee and SROs (the exchanges and FINRA) with two-thirds of the votes on the operating committee.³⁵ Thus, although exchanges would retain effective control over the operating committee, the Governance Proposal is a step in the right direction as investors could formally dissent by voting against operating committee decisions, which would provide the opportunity for increased public scrutiny as to whether the Consolidated Data Plan is in the best interest of investors. The Committee has long supported giving investors voting power in Equity Data Plans,³⁶ and we commend the SEC for doing so. We also note that if non-SRO stakeholders were to dissent on operating committee decisions, then the SEC should heavily scrutinize the Consolidated Data Plan. As with all Reg NMS Plans, the Consolidated Data Plan is subject to SEC review and approval.

Increasing SIP Transparency

The Governance Proposal requires the public disclosure of key information about SIPs, including performance metrics, performance evaluations, and “other pertinent information about the processor(s).”³⁷ Such disclosure can enable regulators, consumers, and operating committee members to evaluate SIP performance and incentivize operating committees to improve the speed and quality of SIP data.³⁸ The Committee supports these additional public disclosures. In addition, the Committee recommends that the SEC require detailed disclosure of SIP operating costs. The Committee believes that this cost transparency is crucial to ensuring that consolidated market data fees are “not unreasonably discriminatory” and “fair and reasonable.”³⁹

Part III: Promoting Competition Among Providers of Consolidated Market Data

While the Committee strongly supports the Governance Proposal, the SEC should go further by facilitating competition among consolidated market data providers in order to reduce the cost and increase the quality of consolidated market data. Indeed, Reg NMS itself acknowledges that, in adopting Section 11A of the Exchange Act, “Congress envisioned that competitive forces, to the extent feasible, would shape the structure of our markets.”⁴⁰

Specifically, the SEC should adopt the “competing consolidators” model by allowing data consolidators to sell consolidated market data and effectively compete with the SIPs.⁴¹ The resulting competition can benefit investors in multiple ways.⁴² First, competition between the SIPs and other data consolidators with respect to aggregation and dissemination would improve the speed and quality of consolidated market data, reducing the need for market participants to buy

³⁴ *Governance Proposal*, *supra* note 1, at 2179.

³⁵ *Governance Proposal*, *supra* note 1, at 2176-2181.

³⁶ *CCMR Report*, *supra* note 2, at 54-57 (“The NMS Plan process should be revised so that exchange SROs do not have outside influence in the rulemaking process. Representatives of exchanges, broker-dealers and investors should be permitted to vote on any NMS Plans.”).

³⁷ *Governance Proposal*, *supra* note 1, at 2183.

³⁸ *Governance Proposal*, *supra* note 1, at 2183.

³⁹ 17 C.F.R. § 242.603(a)(1).

⁴⁰ *Reg NMS*, *infra* note 7, at 11130.

⁴¹ *CCMR Report*, *supra* note 2, at 108.

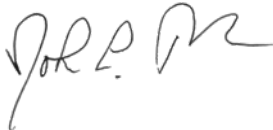
⁴² *CCMR Report*, *supra* note 2, at 111-112.

proprietary data feeds and consolidate it themselves.⁴³ Second, SIPs would be unable to charge excessive fees for consolidated market data, as market participants would have an alternative to purchasing consolidated market data from the SIPs. Third, with multiple alternative sources of consolidated market data, each SIP would no longer be a single point of failure capable of inducing stock market-wide paralysis.⁴⁴

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Thank you very much for your consideration of the Committee's position. Should you have any questions or concerns, please do not hesitate to contact the Committee's President, Prof. Hal S. Scott (████████████████████), or Executive Director, John Gulliver (████████████████████), at your convenience.

Respectfully submitted,



John L. Thornton
Co-CHAIR



Hal S. Scott
PRESIDENT



R. Glenn Hubbard
Co-CHAIR

⁴³ CCMR Report, *supra* note 2, at 111.

⁴⁴ CCMR Report, *supra* note 2, at 111.