



March 4, 2020

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: File No. 4-757; Proposed Order Concerning a New National Market System Plan for Consolidated Equity Market Data

Dear Ms. Countryman:

Investors Exchange LLC (“IEX”) is pleased to comment on the Securities and Exchange Commission’s (“SEC” or “Commission”) proposal to issue an order (“Proposed Order”) directing the self-regulatory organizations (“SROs”) to submit a new single national market system (“NMS”) plan (“New Plan”) governing consolidated equity market data, to replace the three existing plans that administer the dissemination of consolidated data today (“Existing Plans”).¹ The Proposed Order would mandate a substantial change to the governing and voting structure for the New Plan, compared to the Existing Plans, to increase non-SRO involvement and with the intention of limiting conflicts of interest that affect the governance of the Existing Plans. IEX supports the Proposed Order as a meaningful improvement to the existing governance structure, while recommending certain changes to further reduce conflicts of interest and expand the role of non-SROs in the governance process. We also believe changes in governance should be done in coordination with changes to the system for disseminating consolidated data, as described below.

IEX has supported changes to governance of the NMS plans to increase industry and investor involvement, including through the grant of voting rights, as well as changing to a competing consolidator model, since before it became an exchange.² We also have consistently urged and supported changes in regulatory policy to reduce the ability of the large exchange groups to exert market power in the pricing of their proprietary market data, which distorts trading costs for market participants and hinders competition.

In this regard, the Proposed Order needs to be considered in the context of the Commission’s recent proposal to increase the scope of consolidated data and provide for a system of new competing consolidators to disseminate it (“Infrastructure Proposal”).³ We believe that progress on both fronts – governance and changing the system for distributing consolidated data – is critical to addressing broker, fiduciary, and investor concerns about market data. Without changes to governance, we believe that existing conflicts of interest will act to delay and undermine achieving a better system for consolidated data. On the other hand, without substantial changes to the infrastructure in ways that increase

¹ See Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FR 2164 (January 14, 2020) (“Proposing Release”).

² See Letter from Donald Bollerman, Head of Market Operations, IEX, to Mary Jo White, Chair, SEC, dated December 10, 2014, avail. at <https://www.sec.gov/comments/s7-02-10/s70210-425.pdf>.

³ See Securities Exchange Act Release No. 88216 (February 14, 2020). IEX intends to write a separate comment letter on the Infrastructure Proposal.

competition, changes to governance of the existing system of exclusive processors may not result in lasting change to the content, distribution, and pricing of market data generally.

We also note that, at the same time it has issued these proposals, the Commission is considering amendments filed by the participants to the Existing Plans (“Participants”) to require disclosure of certain conflicts of interest by Participants and members of the plans’ Advisory Committee, and to address confidentiality of discussions by both participant representatives and advisors (“Existing Plan Amendments”)⁴. Where noted, our comments are relevant also to those pending proposals.

Comments on the Proposed Order

With regard to the Proposed Order, we would prefer to see a more proactive SEC role in prescribing the terms of the New Plan, rather than leaving it to the Participants to draft and submit the plan after the order is issued, which may delay implementation. But we realize this would mark a departure from the Commission’s previous practice under NMS Rule 608 and could heighten the potential for a legal challenge by the large exchange groups, which could also delay implementation.

The following comments address specific aspects of the proposal.

Timing

The Proposed Order would require the SROs to file the New Plan within 90 days after it is issued. We believe a shorter period, for example 45 days, should be sufficient, especially if the Commission is more prescriptive about how the New Plan should handle conflicts of interest and disclosure obligations, as recommended below.

Voting Structure – Plan Participants

We agree with the proposal to limit voting strength to one vote per exchange family with an additional vote once a threshold of market share is exceeded. As the Commission noted in the Proposing Release, the one share per exchange voting system makes less sense in an era where almost all the exchanges are owned by one of three companies. In IEX’s experience, it also reduces incentives for Participants to agree on changes that could impact the proprietary interests of one or two exchange groups. This aspect is also consistent with a carefully-considered recommendation of the Commission’s Equity Market Structure Advisory Committee (“EMSAC”). We recommend a change to the threshold required to receive a second vote from 15% to 10%, in line with the EMSAC’s recommendation. In the current fragmented market structure, 10% represents a very significant threshold that we believe would justify a slightly stronger voice in governance. At the same time, we agree with the Proposed Order that no exchange group should have more than two votes, regardless of its percentage of total market share.

⁴ See Securities Exchange Act Release Nos. 87907 and 87908 (January 8, 2020), 65 FR 2193 and 2202 (January 14, 2020); Securities Exchange Act Release Nos. 87909 and 87910 (January 8, 2020), 85 FR 2207 and 2212 (January 14, 2020).

Non-SRO Participation

IEX agrees that governance changes must include voting representation for non-SRO stakeholders, including, as proposed, representation of institutional and retail investors, institutional and retail broker-dealers, market data vendors, and issuers. All of these categories of participants have a vital stake in how consolidated data is provided, and each deserves voting representation. We also believe it is critical that non-SRO members be selected through an independent and transparent nomination and selection process.

We recommend a change to increase the voting strength given to the non-SRO members. As proposed, the SROs would have two-thirds of the voting representation on the Operating Committee, and non-SROs would be given one-third. We believe that a split of 50% for each of the SRO and non-SRO participants would better reflect the importance of consolidated market data to investor and industry stakeholders. This division would also be consistent with existing SRO governance structures, which generally contain a requirement that half of Board members be independent of the members and operators of the SRO. To further ensure that all stakeholders have a meaningful voice, the Commission should retain the requirement for an “augmented majority vote” to take action under the New Plan.

In addition, in terms of the composition of the non-SRO members, we recommend the Commission specify that those members may not be representatives of a company that has an ownership interest in an SRO or its holding company beyond a specified level. We believe this additional limitation would help to ensure that such non-SRO members represent interests independent of the SROs.

Consolidating into One Plan

We support replacing the existing three plans with one. The existence of separate plans with responsibilities divided by listing market is anachronistic, and it serves no purpose in the context of contemporary equity trading. The existence of separate plans perpetuates illogical inconsistencies among analogous but different policies and their interpretation and implementation by different processors and administrators, and it results in needless duplication of effort.

Role of the Operating Committee

We support the proposal to include in the New Plan language making explicit that the Operating Committee is responsible for taking action to meet the statutory goals of assuring “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.”⁵ In IEX’s experience, when considering whether to adopt conflicts policies or take other action, some representatives have voiced the view that the Existing Plans contemplate that individual members of the Operating Committee will represent the interests of their own companies, exclusive of any broader public purpose. We believe the proposed language would help to more clearly express the purpose for SROs’ participation in the plans.

IEX strongly believes that the administrator for the New Plan should be required to be independent, especially in order to avoid conflicts involving the audit process, as described below. As long as the SEC

⁵ Proposing Release, 85 FR at 2182.

retains the model for exclusive securities information processors (“SIPs”) (we support a change to a competing model as proposed in the Infrastructure Proposal), we think it is critical that the existing conflicts inherent in employing administrators that are exchange affiliates be eliminated. We agree with the language of the Proposed Order that these conflicts cannot be sufficiently eliminated through policies and procedures.⁶

Conflicts of Interest

The governance of the Existing Plans is riddled with conflicts. As the Commission explained in the Proposing Release, the largest source of conflicts involves the reliance of most exchanges on the sale of their proprietary market data, which conflicts with the public purpose for which the plans were created.⁷ There are also additional, and related, conflicts involving the affiliation between individual Participants and the processors and administrators for the plans, including the administration of the auction function.

The Proposed Order specifies that the New Plan must include provisions designed to address conflicts of interest for both SRO and non-SRO members. We agree with this concept, but we believe the order could be more specific in identifying minimum elements to be included in the New Plan. We have three specific recommendations.

First, we recommend the New Plan exclude as voting representatives and alternates persons who have a direct role in the development, dissemination, sale, or marketing of proprietary market data. Similarly, it should exclude from this role persons who are employees of, or have management responsibility for, any affiliated company that is serving as processor, administrator, or providing other services to the Plan, including auditing services.

As noted by the Commission in the Proposing Release, the dependence of exchanges on revenue from proprietary data is the source of the single greatest conflict of interest in the governance of the Existing Plans. This conflict affects all aspects of plan governance, including the willingness of Participant representatives to take action to make SIP data more competitive or useful as alternatives to proprietary data, including proprietary data products that are specifically promoted as superior alternatives to SIP data feeds. Excluding persons who have a direct role and financial stake in developing or selling proprietary data will not eliminate this conflict, but it will at least limit its impact at a personal, as compared to institutional, level.

Similarly, voting representatives should not be directly employed by or involved with managing processors, administrators, or other vendors hired to provide services to the New Plan. The Operating Committee is charged with overseeing the performance of such vendors and determining how to compensate them and whether to replace them. Individuals cannot be expected to responsibly oversee entities that employ them.

Second, we recommend that the New Plan require strict separation between the conduct of audits on behalf of the plan and those conducted for Participant proprietary data and that the audit function be independent of Participant business lines. The audit function creates special conflicts when it is managed by an affiliate of a Participant (which is presently the case for all the Existing Plans) because it is directly involved in raising revenue for the plans, which benefits the affiliated Participants directly through

⁶ See Proposing Release, 85 FR at 2183.

⁷ 85 FR at 2167-2168, citing 15 U.S.C. 78k-1(c)(1)(B).

distributions of plan revenue (almost all plan revenue collected is distributed to Participants). In addition, there is the potential for the audit function to be used to advance the business objectives of one or more Participants, in cases where they compete in one or more businesses with an entity that is the subject of an audit. Moreover, the interpretation of terms in policy or contract documents concerning proprietary market data can bleed over into how similar terms are interpreted with respect to plan audits. In general, there is a lack of transparency around the audit process, which feeds into concerns about conflicts in plan governance generally.

To the extent the administrator would continue to be responsible for plan audits, the requirement in the Proposed Order that the administrator be unaffiliated with an entity that offers proprietary market data should address this concern, but we believe it would be helpful for the Commission to specify that the New Plan must require strict independence of the audit function.

Third, we recommend that the New Plan require mandatory recusal by an individual Participant in cases when the Operating Committee is voting on whether to award a contract to the Participant or its affiliate. There is no more obvious conflict than voting for your own company for a key contract. The integrity of the process for selection of companies that are performing key functions on behalf the Plan requires that these decisions be based as much as possible on objective factors. For as long as the exclusive SIP system continues to exist, the process for selecting vendors, at the very least, should not allow Participants to vote for themselves.

Transparency of Plan Finances

We also recommend that the Commission specify in its order that the New Plan should provide for quarterly public disclosure of (i) the amounts of fee revenue, by category, received by the Plan; (ii) the amounts that are paid out to SROs; and (iii) amounts that are paid to processors, administrators, or others to operate or enhance the SIPs (to the extent that data continues to be disseminated by exclusive SIPs). This tracks a recommendation submitted last September by a broad cross-section of market participants and associations, including IEX, in a petition submitted to the SEC last September.⁸ There is limited visibility into the finances of the Existing Plans, which limits the ability of stakeholders to evaluate how the collection and dissemination of consolidated market data is being administered. IEX believes there is a need for more transparency under the Existing Plans, and a need for transparency about the fees and revenues that are received by and allocated among SROs will persist if the Infrastructure Proposal is adopted.

Existing Plan Amendments

Conflicts of Interest Policy

With respect to the amendments proposed by the Participants to the Existing Plans covering conflicts of interest, the approach taken is limited to disclosure – specifically, to identify and require public disclosure of certain facts or relationships concerning the Participants or their representatives on the Operating Committee, members of the Advisory Committee, processors, or administrators.⁹ These disclosures would be useful in allowing industry participants or members of the public to better understand the nature

⁸ See <https://www.sec.gov/rules/petitions/2019/petn4-754.pdf>.

⁹ These amendments would seek to made mandatory a disclosure regime the relevant parties are presently observing voluntarily.

or extent of certain conflicts that are inherent in the current governing structure. But by themselves, they will not serve to limit or mitigate those conflicts, which is why we support the changes recommended above to address conflicts in the New Plan. If the Commission chooses to move forward on the Existing Plan Amendments concerning conflicts of interest before moving forward on the Proposed Order, we recommend the same three minimum elements described above be incorporated in those amendments.

Confidentiality

The proposed amendments to the Existing Plans concerning confidentiality would adopt a policy that provides a system for classification of information into different levels of sensitivity and restricting dissemination based on these categories. We agree generally with these categories, but the proposal applies different standards to Participants, compared to advisors, in defining when individuals may share information with others within their firms. Under the proposed amendment, a Participant representative (defined as a “Covered Person”) may share information with other employees of the Participant or affiliates “to perform his or her function on behalf of the Participant, as reasonably determined by the Covered Person.” Advisors, in contrast, would only be allowed to share confidential information for the purposes of gathering feedback and only when authorized by the Operating Committee.

IEX agrees with the Advisory Committee that the standard should be the same in either case.¹⁰ In order for Advisory Committee members to be able to effectively engage and provide the greatest value, they need to be able to exercise reasonable discretion to share information relevant to policy issues and proposals being considered by the Operating Committee.

Conclusion

IEX appreciates the Commission’s interest in promoting constructive change to the governance of the system for consolidated market data, which ordinary investors need to be able to rely on. Without significant reform in terms of both governance and competition in the offering of consolidated data, we believe this system will continue to fall short of the intended goal of providing the most useful, reliable, and accurate consolidated data possible for the benefit of all market participants.

Sincerely,



John Ramsay
Chief Market Policy Officer, IEX

¹⁰ See Letter from CTA/UTP Advisory Committee to Vanessa Countryman, Secretary, SEC (January 24, 2020), avail. at <https://www.sec.gov/comments/sr-ctacq-2019-04/srctacq201904-6694049-205989.pdf>.

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cc: The Hon. Jay Clayton, Chairman
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The Hon. Elad L. Roisman, Commissioner
The Hon. Allison Herren Lee, Commissioner

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