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November 16, 2020

Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: File No. 4-757

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE") respectfully submits this comment letter on behalf of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (together, the "NYSE Exchanges") in response to the Securities and Exchange Commission's ("Commission") Notice of Filing of a National Market System ("NMS") Plan Regarding Consolidated Equity Market Data (the "Notice").[1]

Executive Summary

The consolidated tape is a hallmark feature of the U.S. equity markets, providing investors a simple mechanism to understand the state of displayed liquidity and recent transactions in NMS stocks across many venues. Conceived more than 45 years ago, it has played an important role in making American equity markets accessible, transparent, and resilient.

That important role and resiliency was on full display in March 2020, during unprecedented market volatility and volume in reaction to the unfolding COVID-19 pandemic. Despite multiple trading halts, extreme price swings, and unparalleled day-over-day trading volume and volatility, the Equity Data Plans[2] performed as designed and as required. As Commissioner Jay Clayton explained on May 14, 2020:

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1 See Securities Exchange Act Release No. 90096 (October 6, 2020), 85 FR 64565, at 64574-95 (October 13, 2020) (File No. 4-757) (the "Notice"), attaching the "Proposed NMS Plan" as Attachment A at 85 FR 64574-95.

2 Currently, the Consolidated Tape Association Plan ("CTA Plan") governs the collection, consolidation, processing, and dissemination of last-sale information in Tape A network securities (securities listed on the New York Stock Exchange LLC) and Tape B network securities (securities listed on an exchange other than the New York Stock Exchange LLC or the Nasdaq Stock Market LLC); the Consolidated Quotation Plan ("CQ Plan") governs the collection, consolidation, processing, and dissemination of quotation information for Tape A and Tape B network securities; and the Joint Self-Regulatory Organization Plan Governing the Collection,

> Despite these extraordinary volumes and volatility, the "pipes and plumbing" of the securities markets – *i.e.*, the clearing agencies, exchanges, ATSs and securities information processors, among other things – functioned largely as designed, and importantly, as market participants would expect. In other words, we can report that during this time of unprecedented stress, we have observed no systemically adverse operational issues with respect to our key infrastructure.[3]

Notwithstanding this success, NYSE is not complacent. In our role operating the securities information processor ("SIP") for the CTA Plan and the CQ Plan, we worked with the industry and the CTA Operating Committee over the last year, on new designs to enhance the SIP's resiliency and speed.[4] Specifically, NYSE invested in two major technology projects that improved the performance of the SIP:

- NYSE-funded new dedicated network. NYSE invested $4 million to build a new, dedicated network for consolidated tape data, allowing exchanges and subscribers to more quickly access SIP data processed by NYSE.[5] This change reduced the one-way CTA SIP data transmission latency, i.e., the time interval between when data is sent and when it is received, by approximately 144 microseconds.[6]

- New technology platform. NYSE moved the SIP data feed engine to our Pillar technology platform, which meaningfully reduced processing times and enhanced resiliency. That move was completed in July 2020 and as a result, the

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Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("UTP Plan") governs the collection, consolidation, processing, and dissemination of last-sale and quotation information for Tape C network securities (securities listed on Nasdaq). These three Plans are collectively referred to herein as the "Equity Data Plans."

[3] Jay Clayton, Chairman, SEC, Remarks to the Financial Stability Oversight Committee (May 14, 2020), available here: http://business.cch.com/srd/clayton-remarks-financial-stability-oversight-council-051420.pdf.

[4] As a Participant in the UTP Plan, NYSE also supported the improvements to the SIP for that Plan, which reduced its average latency for Tape C securities to an average of 16.9 microseconds for quotes and 17.5 microseconds for trades.

[5] See NMS Network Customer FAQs, FAQ 5, available here: https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/NMS_Network_FAQ.pdf. This new network is available to participants of the CTA and CQ Plans and to data subscribers.

[6] See https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/NMS_Network_FAQ.pdf.

> median aggregation latency for both CT and CQ SIP data has been reduced to under 20 microseconds.[7]

In addition to the technology improvements made to the SIP, NYSE also recommended that the Commission undertake rulemaking around the SIPs, and offered a specific proposal to enhance the SIP by offering a three-tiered product suite that would include a simplified and affordable retail product, a premium product that would include depth of book, and odd-lot quotes and primary auction imbalance information across the suite.[8]

Despite the Equity Data Plan's extensive experience in collecting, consolidating, and disseminating equity market data, and those Plans' recent successes under immense market stress, the Commission nevertheless ordered the SROs to propose a new NMS plan to address conflicts of interest that purportedly prevent those Plans from operating as they should. Given the proven ability of the Equity Data Plans, it is NYSE's view that replacing them by approving the Proposed NMS Plan would be reckless and inconsistent with Commission rules, as described below.

Background

On May 6, 2020, the Commission ordered the NYSE Exchanges, along with the other self-regulatory organizations ("SROs"), to jointly file a new NMS plan within 90 days of Federal Register notice of that order, and prescribed the content that the SROs would be required to include in the new NMS Plan (the "Order").[9] As required by the Order, the Proposed NMS Plan, if approved, would become operative following specified events, and at that point would replace the existing Equity Data Plans. The Commission required the SROs to file the Proposed NMS Plan notwithstanding that, at the same time, its Proposed Rule on Market Data Infrastructure (the "Market Data Infrastructure Proposal") is pending. In the Market Data Infrastructure Proposal, the Commission proposed, among other things, pervasive, fundamental changes to the consolidation and dissemination of equity market data.[10] Although commenters noted the relationship between the Order and the Market Data Infrastructure Proposal,[11] the Commission nevertheless compelled the SROs to propose a new Plan on an expedited basis.

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[7] See https://www.ctaplan.com/publicdocs/ctaplan/CTAPLAN_Processor_Metrics_3Q2020.pdf.

[8] See Letter from Elizabeth K. King, General Counsel and Corporate Secretary of NYSE, to Vanessa Countryman, Secretary, Commission, dated February 5, 2020, available here: https://www.sec.gov/comments/4-757/4757-6779249-208168.pdf.

[9] See Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 29702 (May 13, 2020) (File No. 4-757) ("Order").

[10] See Securities Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020) (File No. S7-03-20) ("Market Data Infrastructure Proposal").

[11] See, e.g., Letter from Elizabeth K. King, General Counsel and Corporate Secretary of NYSE, to Vanessa Countryman, Secretary, Commission, dated June 1, 2020,

Accordingly, on August 11, 2020, the SROs jointly filed the Proposed NMS Plan.[12] NYSE submitted the Proposed NMS Plan along with the other SROs in order to satisfy the requirements of the Order. But NYSE's compliance with the Order does not indicate NYSE's support for the Proposed NMS Plan, or a belief that its terms are consistent with the requirements for approval specified in Rule 608 of Regulation NMS ("Rule 608").[13]

On October 6, 2020, the Commission published the Notice of the Proposed NMS Plan, seeking comment within 30 days.[14] NYSE writes now to urge the Commission not to approve the Proposed NMS Plan. Under Rule 608(b)(2), the Commission may approve an NMS plan or amendment only

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available here: https://www.sec.gov/comments/s7-03-20/s70320-7261548-217665.pdf.

[12] See Notice, supra note 1. Similar to other NMS Plans, such as the Limited Liability Company Agreement of the Options Price Reporting Authority, LLC ("OPRA Plan"), which governs the collection and dissemination of quotations and transactions in eligible options contracts, the SROs proposed that the Proposed NMS Plan be formed as a limited liability corporation with the SROs as the members of the LLC. Under the Equity Data Plans, the SROs are referred to as the "participants" of the plans. In this letter, when referring to the SROs who would be the members of the Proposed NMS Plan, we use the terms "SRO Participants" or "SRO Members" interchangeably.

[13] 17 CFR 242.608. See Letter from James P. Dombach, counsel for the SROs, to Vanessa Countryman, Secretary, Commission, dated August 11, 2020, attaching the Proposed NMS Plan. In footnote 2 of the letter, NYSE reserved all rights regarding the Proposed NMS Plan: "As the Commission is aware, some of the SROs have challenged the Order in the D.C. Circuit. Those SROs (the "Petitioners") have joined in this submission, including the statement that the Plan complies with the Order, solely to satisfy the requirements of the Order and Rule 608. Nothing in this submission should be construed as an agreement by Petitioners with any analysis or conclusions set forth in the Order or as a concession by Petitioners regarding the Order's legality. Petitioners reserve all rights in connection with their pending challenge of the Order. The provisions reflected in the [Proposed NMS] Plan do not necessarily reflect each SRO's views related to governing and operating the consolidation and dissemination of equity market data. Further, while each SRO believes that the proposed Plan is compliant with the Order, one or more SROs intend to submit public comments regarding the proposed Plan." See also Opening Brief of Petitioners in Nasdaq Stock Market LLC v. SEC, No. 20-1181 (D.C. Cir. 2020) (the "Governance Appeal").

[14] See Notice, supra note 1. The Commission took nearly two months to publish the Notice, yet is providing for only a 30-day comment period, which is a relatively short period for SROs and other interested market participants to provide comments on an entirely new NMS Plan that would govern the collection, consolidation, and dissemination of equity market data.

> if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.[15]

Such a finding would be impossible for the Commission to make here. The Proposed NMS Plan contains numerous terms and provision that are not consistent with the requirements of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 608, and would frustrate the purposes of the Exchange Act and the national market system.[16] Accordingly, NYSE does not believe that the Commission can approve the Proposed NMS Plan.

In addition, in the Notice, the Commission enumerated 62 topics on which it seeks comment within 30 days from the publication of the Notice in the Federal Register.[17] But the Commission did not express its views on any of these topics. To the extent that the Commission believes, based on comments received, that the Proposed NMS Plan should be modified in any material way, NYSE believes that any such modified Proposed NMS Plan must be published for comment so that SROs, investors, and other market participants have an opportunity to comment on such proposed modifications. Failure to do so would violate Rule 608(b)(2), which requires Commission-initiated Plan amendments to be promulgated via rule, as well as the rulemaking requirements of the Administrative Procedures Act ("APA").

Discussion

I. The Terms of the Proposed NMS Plan Are Inconsistent with the Exchange Act and Rule 608

The Commission cannot approve the Proposed NMS Plan under Rule 608(b) because its (a) voting provisions, (b) "independent" Administrator requirement, and (c) conflicts of interest policy and confidentiality policy all conflict with the Exchange Act and Rule 608. Because of these conflicts, it would be impossible for the Commission to find that these terms are necessary or appropriate in the public interest or for the protection of investors and the maintenance of fair and orderly markets; remove impediments to, and perfect the mechanisms of, a national market system; or are otherwise in furtherance of the purposes of the Act. These issues are addressed in Points A through C below.

A. The Proposed NMS Plan's Voting Provisions Are Inconsistent with the Exchange Act and Rule 608

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15 17 CFR 242.608(b)(2).

16 Consistent with that view, the NYSE Exchanges and other SROs have petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review the Order. See Governance Appeal, supra note 13.

17 See Notice, supra note 1.

The Proposed NMS Plan, as required by the Order, includes the following two novel voting provisions (among others): (a) it would require the Operating Committee to include individuals representing six enumerated categories of market participants ("Non-SRO Voting Representatives") and grant voting rights to such Non-SRO Voting Representatives;[18] and (b) it would allocate votes among the SRO participants to the Proposed NMS Plan based on "exchange groups" instead of providing one vote per SRO.[19]

Because these terms are inconsistent with the Exchange Act and Rule 608, the Commission cannot approve the Proposed NMS Plan under Rule 608(b).

1. Providing Voting Rights to Individuals Representing Non-SROs Is Inconsistent with the Exchange Act and Rule 608

Section 4.2 of the Proposed NMS Plan would require the Operating Committee to include "individuals representing each of the following categories: (A) an institutional investor; (B) a broker-dealer with predominantly retail investor customer base; (C) a broker-dealer with a predominantly institutional investor customer base; (D) a securities market data vendor that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; (E) an issuer of NMS stock that is not affiliated or associated with a Member, broker-dealer, or investment adviser with third-party clients; and (F) a Retail Representative."[20] These six "Non-SRO Voting Representatives" would collectively have "one half of the aggregate number of votes attributable to the votes of the SRO Voting Representatives who are eligible to vote" on each matter.[21]

The Proposed NMS Plan's voting structure is not consistent with either Section 11A of the Exchange Act[22] or Rule 608(a)(3). Under Section 11A, the Commission may "authorize or require *self-regulatory organizations"* to act jointly in "planning, developing, operating, or regulating a national market system."[23] Similarly, Rule 608(a)(3) authorizes *SROs* to act jointly in "planning, developing, and operating any national market subsystem or facility contemplated by a national market system plan" or "implementing or administering an effective national market system plan."[24] Neither provision

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18 See Proposed NMS Plan, supra note 1, at 64580 (Section 4.2).

19 See id. at 64581 (Section 4.3).

20 See id. at 64580 (Section 4.2).

21 See id. at 64581 (Section 4.3(a)(ii)).

22 15 U.S.C. 78k-1 ("Section 11A").

23 Id. (emphasis added).

24 17 CFR 242.608(a)(3)(i), (iii).

authorizes non-SROs to act jointly along with SROs in performing these functions, as the Proposed NMS Plan would require.

The statute is not "silent" on this matter. While an agency has discretion to expand its power "when Congress has left a gap for the agency to fill," there are no statutory "gaps" in Section 11A's unambiguous authorization for the Commission to direct SROs to "act jointly" to develop and administer the national market system.[25] Section 11A identifies with specificity the respective roles of the Commission and the SROs, and, except for an expressly-conferred advisory role,[26] neither non-SROs nor individuals representing non-SROs have any place in that framework. Rule 608(a)(3) confirms this.

In addition, the Commission cannot approve the Proposed NMS Plan because it conflicts with the design and purpose of the Exchange Act. SROs are subject to comprehensive statutory obligations and regulatory duties under the Exchange Act: they are statutorily required to "protect investors and the public interest";[27] their rules are subject to Commission review and approval;[28] and they must comply with their own rules and enforce compliance with those rules, as well as with the securities laws, by their members and persons associated with their members.[29] It makes sense, then, that Congress would have entrusted responsibility for the planning, development, operation, and regulation of NMS plans to SROs, which must exercise that responsibility in a manner consistent with their statutory obligations and regulatory duties.

In contrast, the individuals who would be voting members of the Operating Committee would have no general obligation to protect investors or further the public interest, nor to comply with the terms of the Proposed NMS Plan. While these individuals are intended to "represent" each of the six enumerated categories of non-SRO market participants, such individuals would not even have the obligation to further the purportedly represented non-SROs' interest nor the public interest when voting on the Operating Committee, leaving each free to act in his or her own personal self-interest.[30] Allowing

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[25] See Ethyl Corp. v. EPA, 51 F.3d 1053, 1060 (D.C. Cir. 1995). See also New York Stock Exchange LLC v. SEC, 962 F.3d 541 (D.C. Cir. 2020) (rejecting Commission's assertion that it had authority to implement transaction fee pilot program pursuant to its general authority to promulgate such "regulations as may be necessary or appropriate").

[26] See 15 U.S.C. 78k-1(a)(3)(A) and (d)(1).

[27] See 15 U.S.C 78f(b)(5), 78o-3(b)(6), & 78q-1(b)(3)(F).

[28] See 15 U.S.C. 78s(b).

[29] See 15 U.S.C. 78f(b)(1), 78o-3(b)(2), 78q-1(b)(3)(A), & 78s(g).

[30] The Proposed NMS Plan is further flawed because it does not provide for a mechanism to verify whether the individuals selected to be Non-SRO Voting Representatives would actually "represent" such categories or provide clarity on what it means for an individual to "represent" a category. Pursuant to Section 4.2(b)(i) of the Proposed NMS Plan, the initial Non-SRO Voting Representatives for each category would be selected by a majority vote of the current individuals selected

such individuals to have voting power on the Operating Committee could have serious consequences for the functioning of the national market system, the well-being of investors, and the broader public interest.

For all these reasons, the provisions of the Proposed NMS Plan providing non-SRO individuals with roles in planning, developing, operating, implementing, or administering the NMS Plan are inconsistent with Section 11A and Rule 608. Accordingly, the Commission cannot approve the Proposed NMS Plan under Rule 608(b) because these voting provisions are inconsistent with both the Exchange Act and Rule 608(a)(3) and would disrupt the mechanisms of the national market system.[31]

2. Limiting Certain SROs' Votes Impairs the SROs' Ability to Act Jointly and Is Inconsistent with Section 11A and the Definition of "Self-Regulatory Organization"

In addition, the Proposed NMS Plan cannot be approved because its allocation of votes among SROs would impair the SROs' ability to act jointly in the operation of the national market system. Specifically, the Proposed NMS Plan would allocate one vote on the Operating Committee to each "Non-Affiliated SRO," while each "exchange group" – i.e., multiple exchanges operating under one corporate umbrella – would receive only one vote, with a second vote being added if the Non-Affiliated SRO or exchange group trades more than 15% of consolidated equity market share.[32]

But this "exchange group" structure would impermissibly impair the ability of SROs to "act jointly" in administering the Proposed NMS Plan and is inconsistent with both the Exchange Act and Rule 608.[33] Taken together with the Commission's mandate that individual persons purportedly representing non-SROs be permitted to vote on the Operating Committee, it is feasible that a *minority* of individual SROs would be able to adopt proposals over the objection of a *majority* of individual SROs. This result would be possible under the "augmented majority" voting structure also contained in the Proposed NMS Plan, pursuant to which a proposal could be approved by a two-thirds majority vote of the Operating Committee provided that it includes a majority of "SRO votes."[34] With

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pursuant to Section III(e)(ii)(A) of the CTA Plan and Section IV(e)(b)(i) of the UTP Plan as members of the Advisory Committees of the CTA Plan and UTP Plan. Thereafter, pursuant to Section 4.2(b)(iv) of the Proposed NMS Plan, the Non-SRO Voting Representatives would be responsible for filling any vacant positions of Non-SRO Voting Representatives. In neither case would the individuals responsible for selecting Non-SRO Voting Representatives be subject to any regulatory oversight with respect to how they identify and select individuals to purportedly represent the six categories of non-SROs.

31 See 17 CFR 242.608(b)(2).

32 See Proposed NMS Plan, supra note 1, at 64581 (Section 4.3).

33 See 15 U.S.C. 78k-1(a)(3)(B); 17 CFR 242.608(a)(3)(iii).

34 See Proposed NMS Plan, supra note 1, at 64581 (Section 4.3).

the "SRO votes" diluted by function of "exchange groups," it would be possible for the non-SRO voting representatives and a minority of Non-Affiliated SROs to force through plan actions and amendments without the assent of a majority of individual SROs.[35]

This voting structure would also impermissibly tie the number of votes that each Non-Affiliated SRO or "exchange group" may cast to market share – a Non-Affiliated SRO or "exchange group" with less than 15% market share would cast one vote, while those with 15% market share or more would cast two votes. But an SRO's responsibilities under the Exchange Act bear no relationship to its market share. An SRO with 1% market share has the same obligations as one with 18% market share, yet under the Proposed NMS Plan's voting structure, the latter SRO would have double the votes of the former. Such disparate treatment is nowhere supported in the Exchange Act or Commission rules.

In addition, the 15% market share threshold specified in the Proposed NMS Plan is arbitrary and may quickly become meaningless in light of ongoing changes to the exchange marketplace. In 2020 alone, three additional equities exchanges commenced operations. If additional exchanges continue to enter the market, the 15% threshold may become unattainable for even the largest "exchange groups." In that event, even the largest "exchange groups" would receive only one vote under the Proposed NMS Plan, diluting those SROs' voting power even further.

This "exchange group"-based voting structure would also be incompatible with the Exchange Act's definition of "self-regulatory organization," which encompasses "*any* national securities exchange,"[36] including those that share a corporate affiliation with one or more other exchanges. Moreover, Section 11A compels "self-regulatory organizations to act jointly with respect to . . . developing [and] operating . . . a national market system,"[37] and says nothing of permitting a minority of Non-Affiliated SROs to band together with Non-SRO Voting Representatives to override the views of the majority of individual SROs, thus subverting the ability of SROs to "act jointly."

In addition, the Proposed NMS Plan's "exchange group"-based voting would also depart from the longstanding practice of treating each SRO individually for regulatory purposes, regardless of its corporate affiliation with other SROs. The Commission requires SROs to maintain their separate identities in numerous ways, including by requiring separate

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[35] For example, a proposal that is supported by all of the non-SRO voting representatives (a total of five and a half votes), the five unaffiliated SROs, and the Nasdaq-affiliated exchange group (with two votes for its three exchanges) would have sufficient support to be adopted under the Commission's voting framework. But assuming that all five NYSE Group exchanges and the four CBOE-affiliated exchanges each opposed the proposal, the proposal would in fact be supported by only eight out of the seventeen individual SROs – a minority, and thus inconsistent with the statutory and regulatory requirements that SROs "act jointly" with respect to NMS plans.

[36] See 15 U.S.C. 78c(a)(26) (emphasis added).

[37] See 15 U.S.C. 78k-1(a)(3)(B).

exchanges to maintain separate pools of liquidity,[38] maintain separate fee and rebate schedules,[39] and propose rule changes on an exchange-by-exchange basis.[40] The Proposed NMS Plan would abandon that long-standing practice by operating based on "exchange groups."

Finally, the Proposed NMS Plan would subject certain exchanges to disparate treatment based solely on their affiliation with an "exchange group." Under the Proposed NMS Plan, exchanges that are part of an exchange group would have less voting power on the Operating Committee than exchanges that are not. For example, New York Stock Exchange LLC would effectively receive only two-fifths of a vote because it must share two votes with the four other NYSE Group exchanges. In contrast, Long-Term Stock Exchange, Inc. would continue to have a full vote because it is not affiliated with any other exchanges. This result is arbitrary and capricious.[41]

For all these reasons, the provisions of the Proposed NMS Plan diluting individual SROs' voting rights based on their affiliation with an "exchange group" are inconsistent with Section 11A and Rule 608. Accordingly, the Commission cannot approve the Proposed NMS Plan.

B. The Proposed NMS Plan's "Independent" Administrator Requirement Is Inconsistent with Rule 608(b)

The Proposed NMS Plan would require that the Administrator "selected by the Operating Committee . . . not be owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own [proprietary data products]."[42] This requirement would bar either NYSE, which is the current Administrator for the CTA Plan

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38 See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74790 (December 9, 2008) (SR-NYSEArca-2006-21) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NMSE Arca Data).

39 See Securities Exchange Act Release No. 72633 (July 16, 2014), 79 FR 42578, 42586 (July 22, 2014) (SR-Phlx-2013-113) (Order Disapproving Proposed Rule Change to Offer a Rebate Based on Members' Aggregate Customer Volume).

40 Id. at 42585 ("[T]he Commission historically has reviewed whether a proposed exchange rule is consistent with the provisions of Section 6 of the [Exchange] Act on an exchange-by-exchange basis – that is, an exchange's proposed rule change is analyzed at the individual level of the registered securities exchange and not at the group level of exchanges.").

41 See Etelson v. Office of Personnel Mgmt, 684 F.2d 918, 926 (D.C. Cir. 1982) (government "is at its most arbitrary when it treats similarly situated people differently").

42 See Proposed NMS Plan, supra note 1, at 64586 (Section 6.3).

and the CQ Plan, or Nasdaq, which is the current Administrator for the UTP Plan, from serving as Administrator of the Proposed NMS Plan.

NYSE's view is that the "independent" Administrator provision does not satisfy the standard the Commission must apply under Rule 608(b): it is not necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets; it would disrupt the mechanisms of the national market system; and it is contrary to the purposes of the Exchange Act.[43]

The current Administrators have decades of experience in performing the tasks that would be required of the Administrator under the Proposed NMS Plan. Specifically, the current Administrators have a long track record of, among many other things, successfully: managing the Plans' contractual relationships with data vendors that subscribe to SIP data; creating and maintaining systems for invoicing and billing such data vendors; performing collection efforts for non-payment; managing the revenue allocation system to make distributions to the SROs; preparing financial statements on behalf of the Plans and working with independent auditors to obtain annual audited financial systems; preparing international, federal, state, and local tax returns for the Plans for each jurisdiction in which a vendor may be located and preparing related tax information for each of the participants; responding to tax audits from federal, state, and local authorities; and managing audits of data vendors that fail to pay applicable charges and fees, including retaining outside counsel as necessary.

Yet the Proposed NMS Plan would throw away all of that experience and require the Operating Committee to hire as Administrator a new, unproven, inexperienced entity. The new Administrator would be starting from zero, and would have to build entirely new system infrastructure, train new personnel to perform tasks that the existing Administrators already perform, and create and then enter into new agreements with subscribers. The costs associated with this change on the SROs and market participant subscribers clearly outweigh any benefits.

This "independent" Administrator provision is included in the Proposed NMS Plan because it is required by the Commission's Order. The Commission's stated reason for this requirement was to address purported conflicts of interest faced by the existing Administrators, which possess SIP customer information by virtue of their role as Administrators, but are affiliated with exchanges.[44] But that rationale is unsupported by the Commission and fails to consider any of the costs associated with requiring a change from the existing Administrators and requiring any future Administrator to be unaffiliated with an SRO. The Commission provided no evidence of any harms caused by the conflict of interest identified by the Commission, such as an SRO Administrator inappropriately using its access to SIP subscriber information to benefit its own proprietary data business or harm caused by any such potential use. The Commission

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[43] See 17 CFR 242.608(b)(2).

[44] See, e.g., Order, supra note 9, at 28722 ("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").

also did not allow the SROs to consider other ways to address the potential conflict, such as through information barriers, which are commonly allowed under Commission rules, or the use of confidentiality requirements.[45] In fact, before the Commission issued the Order, both Administrators of the Equity Data Plans were already operating under policies that implemented information barriers designed to protect SIP customer information. The NYSE Administrator policy had been disclosed to, and on numerous occasions, discussed with, both the Operating Committee and Advisory Committee to the Equity Data Plans, and the Commission has not articulated any deficiencies with this information barrier approach.[46]

In addition, while the Proposed NMS Plan would require that the new Administrator be "independent" from SROs that sell proprietary data products, as required by the Commission Order, it would not prohibit non-SRO data vendors from filling the Administrator role, even though such vendors may also separately sell market data and could also theoretically benefit from access to subscriber lists. As such, the Proposed NMS Plan's prohibition on an Administrator affiliated with an SRO imposes an unfair burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

In sum, the requirement in the Proposed NMS Plan for the Operating Committee to select a new, "independent" Administrator is not necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets. Moreover, such a mandatory change has the potential to disrupt the mechanisms of a national market system that, to date, has worked well. Finally, for the reasons stated above, it is contrary to the purposes of the Exchange Act. Accordingly, the NYSE does not believe that the Commission can make the necessary finding under Rule 608(b) to approve the Proposed NMS Plan.

C. The Proposed NMS Plan's Conflicts of Interest and Confidentiality Policies Are Inconsistent with Section 11A and Rule 608

The Proposed NMS Plan further cannot be approved because its conflict of interest and confidentiality policies are inconsistent with Section 11A and Rule 608. As such, the Proposed NMS Plan falls short of Rule 608(b)'s requirement that it be "necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act."[47]

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[45] For example, broker-dealers implement information barriers to qualify for independent trading unit aggregation under Regulation SHO Rule 200(f). 17 CFR 242.200(f).

[46] NYSE has had an information barrier policy designed to protect SIP customer information in place since at least 2009, and that policy and its updates were disclosed to the Operating Committee and Advisory Committee on July 27, 2016.

[47] See 17 CFR 242.608(b)(2).

1. Background

In 2019, the Participants of the existing Equity Data Plans proposed two policies related to conflicts of interest and confidentiality to be added as amendments to the Equity Data Plans. The Participants filed with the Commission the Proposed Conflicts of Interest Policy on July 3, 2019,[48] and the Proposed Confidentiality Policy on November 19, 2019.[49]

On January 8, 2020, the Commission published for comment the Proposed Conflicts of Interest Policy[50] and Proposed Confidentiality Policy.[51] In those notices, the Commission asked many open-ended questions on which it sought comment. But the Commission did not state that it was considering any specific revisions to the proposed text, and never published proposed revised text to either amendment for comment.

On May 6, 2020, in tandem with the Order, the Commission issued (a) the Conflicts of Interest Approval Order, which approved the Proposed Conflicts of Interest Policy with material changes,[52] and (b) the Confidentiality Policy Approval Order, which approved

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[48] See Letter from Robert Books, Chairman, Operating Committee, CTA/CQ Plans, to Vanessa Countryman, Secretary, Commission, dated July 3, 2019.

[49] See Letter from Robert Books, Chairman, Operating Committee, CTA/CQ Plans, to Vanessa Countryman, Secretary, Commission, dated November 19, 2019.

[50] See Securities Exchange Act Release No. 34-87907 (January 8, 2020), 85 FR 2193 (January 14, 2020) (File No. SR-CTA/CQ-2019-01) (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), including the "Proposed Conflicts of Interest Policy." The Commission also noticed a substantively identical amendment concerning the UTP Plan, which will not be cross-cited in this letter.

[51] See Securities Exchange Act Release No. 34-87909 (January 8, 2020), 85 FR 2207 (January 14, 2020) (File No. SR-CTA/CQ-2019-04) (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), including the "Proposed Confidentiality Policy." The Commission also noticed a substantively identical amendment concerning the UTP Plan, which will not be cross-cited in this letter.

[52] See Securities Exchange Act Release No. 34-88823 (May 6, 2020), 85 FR 28046 (May 12, 2020) (File No. SR-CTA/CQ-2019-01) (Order Approving the Thirtieth Substantive Amendment to the Second Restatement of the CTA Plan and the Twenty-Second Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning Conflicts of Interest) ("Conflicts of Interest Approval Order"), attaching the "Conflicts of Interest Policy" as Exhibit A at 85 FR 28056-59. The Commission also approved a substantively identical amendment concerning the UTP Plan, see Securities Exchange Act Release No. 34-88824 (May 6, 2020), 85 FR 28119 (May 12, 2020) (File No. S7-24-89) (Order Approving the Forty-Fourth Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for

the Proposed Confidentiality Policy with material changes.[53] These revised amendments were immediately effective for the existing Equity Data Plans.

Both the Conflicts of Interest Approval Order and the Confidentiality Policy Approval Order were unlawful because they constituted impermissible rulemaking. By introducing substantial, material changes to the amendments proposed by the SROs, the Commission converted the proposals into amendments "initiated by the Commission," which Rule 608(b)(2) requires to be promulgated through rulemaking. Moreover, the promulgation of prospective, Commission-authored plan amendments necessarily constituted rulemaking under the APA.

And yet, the Commission failed to follow the rulemaking requirements of the Exchange Act and the APA. Among other failings, the Commission failed to: identify a clear need for the rules it promulgated; analyze the rules' impact on efficiency, competition, and capital formation; determine that any burden on competition imposed by the rules was necessary or appropriate to further the purposes of the Exchange Act; perform any type of cost-benefit assessment; meaningfully consider alternatives to the rules; or even notice the proposed rules for comment. Merely posing questions regarding the SROs' proposals, without expressing its own views or notifying the public of the particular changes it intended to impose, was legally insufficient to meet the requirements for notice-and-comment rulemaking and the APA.

Compounding these errors, in the Order, the Commission directed the SROs to include the provisions of the Commission-revised versions of the Conflicts of Interest Policy and Confidentiality Policy in the Proposed NMS Plan.[54] The SROs did as directed, but NYSE

Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis, as Modified by the Commission, Concerning Conflicts of Interest), which will not be cross-cited in the balance of this letter.

[53] See Securities Exchange Act Release No. 34-88825 (May 6, 2020), 85 FR 28090 (May 12, 2020) (File No. SR-CTA/CQ-2019-04) (Order Approving the Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and the Twenty-Fourth Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning a Confidentiality Policy) ("Confidentiality Policy Approval Order"), attaching the "Confidentiality Policy" as Exhibit A at 85 FR 28101-05. The Commission also approved a substantively identical amendment concerning the UTP Plan, see Securities Exchange Act Release No. 88826 (May 6, 2020), 85 FR 28069 (May 12, 2020) (File No. S7-24-89) (Order Approving the Forty-Seventh Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges, as Modified by the Commission, Concerning a Confidentiality Policy), which will not be cross-cited in the balance of this letter.

[54] See Order, supra note 9, at 28730.

preserved its objection to the Commission-revised amendments,[55] and filed a notice to appeal them to the D.C. Circuit.[56]

2. The Proposed NMS Plan's Conflict of Interest and Confidentiality Provisions Would Preclude the SROs from Discharging Their Obligations Under Section 11A and Rule 608

Several of the Proposed NMS Plan's conflicts of interest and confidentiality provisions would preclude the SROs from fulfilling their obligations under the securities laws and, in particular, Rule 608. For these reasons, the Proposed NMS Plan is inconsistent with Rule 608(b)(2) and cannot be approved by the Commission.[57]

a. The Confidentiality Policy Would Restrict the Ability of Participants' Employees to Share Plan-Related Information

The Proposed NMS Plan's Confidentiality Policy is included as Exhibit C to the Proposed NMS Plan.[58] Several of its requirements are designed to, and would in fact, impair an SRO's ability to comply with its Rule 608 obligations with respect to the Proposed NMS Plan by restricting the ability of an SRO participant to share Plan-related information among its personnel. Specifically:

- Section (b)(ii) provides: "Except as provided below, Covered Persons[59] in possession of Restricted Information are prohibited from disclosing it to others, including Agents.";[60]

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55 See supra note 13.

56 See New York Stock Exchange LLC v. SEC, No. 20-1242 (D.C. Cir. 2020) (the "Amendments Appeal").

57 See 17 CFR 242.608(b)(2).

58 See Proposed NMS Plan, supra note 1, at 64593-94 (Exhibit C). Note that the text of Exhibit C conforms with the changes that the Commission made to the Proposed Confidentiality Policy in the Confidentiality Policy Approval Order, see supra note 53, which the Commission ordered the SROs to include in the Proposed NMS Plan, see Order, supra note 9, at 28730.

59 The Proposed NMS Plan defines "Covered Persons" as "representatives of the Members, the Non-SRO Voting Representatives, SRO Applicants, the Administrator, and the Processors; affiliates, employees, and Agents of the Operating Committee, a Member, the Administrator, and the Processors; any third parties invited to attend meetings of the Operating Committee or subcommittees; and the employers of Non-SRO Voting Representatives." See Proposed NMS Plan, supra note 1, at 64575 (Section 1.1(n)).

60 See id. at 64593 (Exhibit C, Section (b)(ii)).

- Section (b)(iii)(A)(1) provides: "Covered Persons in possession of Highly Confidential Information are prohibited from disclosing it to others, including Agents, except to other Covered Persons who need the Highly Confidential Information to fulfill their responsibilities to the [Plan].";[61]

- Section (b)(iv)(A) provides: "[A] Covered Person may disclose Confidential Information to other persons to allow such other persons to fulfill their responsibilities to the [Plan].";[62] and

- Section (b)(iv)(D) provides: "A Covered Person that is a representative of a Member may be authorized by the Operating Committee to disclose particular Confidential Information to other employees or agents of the Member or its affiliates only in furtherance of the interests of the [Plan] as needed for such Covered Person to perform his or her function on behalf of the [Plan]."[63]

The Proposed NMS Plan includes these provisions because the Order required the SROs to include them. The Commission's basis for requiring them is found in its Confidentiality Policy Approval Order, where the Commission asserted that "such non-Plan personnel likely would have no need to know such information as they have no responsibilities to the Plan"[64] and that individuals associated with an SRO Member of the Proposed NMS Plan would not need Plan-related Restricted, Highly Confidential or Confidential Information other than "to fulfill their responsibilities" to the Plan or "in furtherance of the interests" of the Plan. The Commission further noted its belief that "[a]llowing sensitive Plan-related information to be shared with and disclosed to non-Plan personnel of the Participant – particularly those responsible for the Participant's own proprietary data business that competes with the SIP – could create a potential conflict."[65]

But the Commission did not change the obligations of an SRO participant in an NMS plan under Exchange Act Rule 608, including obligations for implementing or administering an effective national market system plan and complying with the terms of an effective national market system plan in which such SRO is a participant. The Commission provided no basis for its claim that "non-Plan personnel likely would have no need to know such information" and such claim is without merit in the face of clear SRO obligations under Commission rules. Moreover, the restriction on Plan-related information being shared within an SRO that is a participant in the Plan is based on a faulty premise: that *individuals*, not SROs, have responsibilities under the Exchange Act and rules of the Commission. But in fact, individuals have no responsibilities to the Plan or under the Exchange Act. Under Section 11A, SROs act jointly in planning,

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61 See id. (Exhibit C, Section (b)(iii)A)(1)).

62 See id. (Exhibit C, Section (b)(iv)(A)).

63 See id. at 64594 (Exhibit C, Section (b)(iv)(D)).

64 Id.

65 See Confidentiality Policy Approval Order, supra note 53, at 28098.

developing, operating or regulating an NMS Plan; under Rule 608(a)(3), SROs act jointly in planning, developing and operating and implementing and administering an effective NMS Plan; under Rule 608(c), SROs are charged with complying with the terms of any effective NMS Plan and enforcing compliance with the NMS Plan by its members.[66]

By disallowing Plan-related information to be shared within an SRO Member of the Proposed NMS Plan, these provisions impair the ability of the SRO to meet its Exchange Act and Rule 608 obligations. Specifically, because the SRO, and not individuals, has the obligations, the SRO must be able to determine what information is available to individuals within an SRO in order to satisfy these regulatory obligations.[67] Yet, under the proposed confidentiality provisions, an SRO's senior management would not be able to have information that may be necessary to make decisions related to the Plan if that information is determined to be Highly Confidential or Confidential Information. For example, an SRO's decision whether to approve filing amendments to the Plan, including fees, could require reviewing Plan financial information, which is considered Highly Confidential. NYSE does not believe that the Commission can approve a Proposed NMS Plan that prohibits SROs' senior management from having access to information that may be necessary to their informed decision-making related to regulatory obligations.

Similarly, under the Proposed NMS Plan's confidentiality provisions, an SRO's senior management would also be denied access to privileged information (which is classified as Highly Confidential Information), meaning that the SRO's senior management would be prevented from participating in decisions regarding legal strategy and litigations involving the Plan, or the Plan's regulatory interactions with the Commission.

These confidentiality provisions could thus prevent an SRO Member of the Proposed NMS Plan from meeting its obligations under the Exchange Act. Under the Plan's provisions, any individual, no matter how senior or junior, that is appointed as an SRO's representative on the Operating Committee would effectively be on an island, required to operate without authorization or input from others at the SRO – including senior management – about decisions and responsibilities that the SRO faces under the Plan. But the individual appointed as an SRO's representative on the Operating Committee has no obligations under the Exchange Act and cannot alone make decisions on behalf of the SRO. An SRO complies with its obligations under the securities laws through the management structure that it puts in place. That management structure needs information to make decisions, and restricting information about the Plan while continuing to require SROs to meet the same obligations is not workable.

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[66] See 15 U.S.C. 78k-1(a)(3)(B); 17 CFR 242.608(a)(3)(iii); and 17 CFR 242.608(c).

[67] More specifically, neither the Exchange Act nor Commission rules require SROs to delineate "non-Plan personnel," which NYSE understands would be anyone at an SRO who is not acting as a representative of the SRO on the Operating Committee or does not attend meetings of the Operating Committee. Thus, the number of individuals at an SRO who would be "Plan personnel" would likely be only the two individuals designated as representatives under the Equity Data Plans and counsel.

Because these restrictions impede the SROs' ability to comply with their obligations under the securities laws and the Commission's regulations, the Commission cannot make the necessary finding under Rule 608(b) to approve the Proposed NMS Plan.

b. The Recusal Provision in the Conflicts of Interest Policy Would Impede SROs' Ability to Fulfill Their Obligations Under the Securities Laws

Similarly, the "recusal" provision in the Proposed NMS Plan's Conflicts of Interest Policy would impair SROs' abilities to choose how to manage their businesses and fulfill their regulatory responsibilities.

The Proposed NMS Plan provides that an SRO:

> may not appoint as its Voting Representative a person that is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of PDP [proprietary data products] offered to customers of the [Proposed NMS Plan feeds] if the person has a financial interest (including compensation) that is tied directly to the [SRO's] market data business or the procurement of market data and if that compensation would cause a reasonable objective observer to expect the compensation to affect the *impartiality of the representative*. [68]

The Commission does not define "impartiality" in this context, but appears to mean that an SRO is only appropriately "impartial" when there is a total separation between its involvement in an NMS Plan and its proprietary data activities. In the Conflicts of Interest Approval Order, the Commission purported to justify the recusal provision as follows:

> The Commission believes that the exchanges' commercial interests in their proprietary data businesses, as well as the exchange Administrators' access to confidential subscriber information, create a potential conflict of interest that could influence decisions as to the Plans' operation. In the case where a Participant chooses as its representative a person who has a financial interest (including compensation) that is tied directly to the exchanges' proprietary data business, then a reasonable objective observer could question whether the representative is able to act in a manner consistent with the interests of the Plans. In light of this conflict, even if such individuals have the requisite expertise, the Commission

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[68] See Proposed NMS Plan, supra note 1, at 64583 (Section 4.10(b)(i)) (emphasis added). Note that the text of Section 4.10(b)(i) conforms with the changes that the Commission made to the Proposed Conflicts of Interest Policy in the Conflicts of Interest Approval Order, see supra note 52, which the Commission ordered the SROs to include in the Proposed NMS Plan, see Order, supra note 9, at 28730.

> believes that it is appropriate to prohibit [an SRO Participant] from appointing such individuals as its representative to the Plans.[69]

This reasoning and purported justification are flawed for several reasons. First, the notion that an SRO's proprietary data business is an *impediment* to – and must be kept entirely separate from its NMS plan responsibilities – is directly contrary to the established structure of the national market system and the Commission's longstanding belief that an SRO's expertise and business activities related to data dissemination are an important *asset* to the efficient functioning of markets. In promulgating Regulation NMS in 2005, the Commission explicitly rescinded a prior prohibition on SROs' dissemination of their trade reports independently,[70] and stated that market forces should dictate what proprietary market data would be available to investors.[71] Far from finding any inconsistency between the SROs' selling of proprietary market data and their responsibilities under Rule 608, the Commission determined that SROs' proprietary data activities were beneficial. Now, however, the Commission appears to have changed its views on this issue without providing any reasoned explanation. The Proposed NMS Plan's recusal provision – and indeed, the entirety of both the conflicts of interest and confidentiality policies in the Proposed NMS Plan – seem to be based on the Commission's new view that the system is plagued by the negative effects of business activities that were previously seen as an important component of the national market system. It is improper for the Commission to adopt such a substantial change in view without explaining the factual basis for this shift or attempting meaningfully to justify it.

Second, regardless of the Commission's prior views, there is no requirement under Section 11A or Rule 608 for an SRO to be "impartial" in the manner described by the Commission when discharging its obligations to act jointly in the planning, development, operation, and regulation of an NMS plan. As noted above, SROs are required to act jointly under the Commission's rules and to effectuate the requirements of an NMS plan through an Operating Committee. But nothing in the statute or the regulations mandates SRO "impartiality" in doing so of the type envisioned by the Commission or empowers the Commission to impose such a requirement. Rather, when discharging its obligations under Section 11A and Rule 608, an SRO must do so in a manner that protects investors and the public interest or to enforce compliance with the terms of the NMS plan. The notion that an SRO must also be "impartial" – in the sense of ignoring and setting aside its experience and expertise associated with the selling of proprietary market data – is irreconcilable with the SRO's obligations under the securities laws.

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69 See Conflicts of Interest Approval Order, supra note 52, at 28055 (internal citations omitted).

70 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37569 (June 29, 2005) ("NMS Adopting Release").

71 Id. at 37567 ("The adopted consolidated display requirement will allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors. Investors who need the BBOs of each SRO, as well as more comprehensive depth-of-book information, will be able to obtain such data from markets or third party vendors.").

Third, the recusal provision again ignores that *individuals* are not the participants in the Plan with Exchange Act obligations. The individual that an SRO designates to act as its representative on the Plan's Operating Committee represents that SRO's views and the interests *of that SRO*, not the individual's own interests. The identity of the person "representing" the SRO and casting any vote on behalf of the SRO is irrelevant. Accordingly, the recusal requirements that impose limits on who an SRO can select as its representative do not serve any purpose and are not "necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act," as the Commission is required to find under Rule 608(b)(2).

In sum, because the recusal provision conflicts with the Commission's prior views, exceeds the Commission's authority under the Exchange Act, solves no identifiable problem, and impedes SROs' ability to fulfill their obligations under the securities laws and the Commission's regulations, the Proposed NMS Plan cannot be approved.

3. The Proposed NMS Plan's Conflict of Interest and Confidentiality Provisions Would Create Impediments to the Mechanisms of the National Market System and Would be Inconsistent with the Purposes of the Exchange Act

In addition to impeding the SROs' ability to comply with their obligations under Section 11A and Rule 608, the conflicts of interest and confidentiality provisions of the Proposed NMS Plan are unduly onerous, internally inconsistent, and would not advance the goals of the Plan. As such, these provisions raise impediments to the mechanisms of the national market system and are inconsistent with the purposes of the Exchange Act.[72]

Since the Commission imposed them on May 6, 2020, the Equity Data Plans have included conflicts of interest and confidentiality provisions substantially identical to the ones included in the Proposed NMS Plan. The SROs have already encountered difficulties implementing these provisions in the context of the Equity Data Plans, and these difficulties are proving insurmountable. These same provisions are now included in the Proposed NMS Plan; the Commission ordered the SROs to include them[73] and thus prevented the SROs from proposing alternative provisions that could have solved these problems. As a result, the Proposed NMS Plan presents the same insurmountable issues.

Because these provisions, discussed below, add impediments to the mechanism of the national market system and contravene the purposes of the Exchange Act, the Commission cannot approve the Proposed NMS Plan.

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[72] See 17 CFR 242.608(b)(2).

[73] See Proposed NMS Plan, supra note 1, at 64591-94 (Exhibits B and C).

a. The Proposed Confidentiality Policy Undertaking

The Confidentiality Policy at Exhibit C of the Proposed NMS Plan contains a provision that "[a]ll Covered Persons that are natural persons may not receive [Plan] data and information until they affirm in writing that they have read this Policy and undertake to abide by its terms."[74] Because the term "Covered Person" would expansively include any agent of an SRO, Administrator, or Processor, including attorneys, auditors, accountants, contractors, or subcontractors, this provision would impose onerous obligations that NYSE believes would impair the ability of the Proposed NMS Plan to identify agents necessary to provide services under that Plan. In addition, the proposed undertaking requirement may conflict with the independent obligations of certain categories of "Agents" included in the definition of "Covered Persons."

First, this proposed requirement uses an undefined term as the basis for determining when a Covered Person must affirm in writing that the entity or individual has read the Confidentiality Policy. Specifically, a Covered Person may not receive "Company data and information" until they have signed the Confidentiality Policy.[75] However, "Company data and information" is not a defined term. It is thus unclear whether information not designated as Restricted, Highly Confidential, or Confidential Information could nevertheless be "Company data and information" that Covered Persons would be prohibited from receiving absent affirmation that they had read the Confidentiality Policy and agreed to be bound by its terms.

Second, the requirement that all natural persons must sign the undertaking before receiving Plan information raises at least two distinct issues for Agents:

- It would conflict with independent professional standards established by some Agents – and, in particular, the public accounting firms that provide independent auditor services to the Plans. In the context of the CTA Plan, which includes a substantially identical undertaking provision, the independent auditor that provides services to the CTA Administrator has advised that signing an undertaking to comply with the confidentiality policy's terms would conflict with its independent professional obligations.

- The public accounting firm has further advised that obtaining signatures from all natural persons at the firm who would receive Plan information and data would also conflict with those professional obligations and, given how the firm staffs audits, could result in an ever-expanding roster of individuals who would need to review and sign the Confidentiality Policy.

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[74] See id. at 64593 (Exhibit C, Section (a)(ii)). The Proposed NMS Plan contains this provision because the Order compelled the SROs to include it. See Order, supra note 9, at 28730.

[75] See id. As used in the Proposed NMS Plan, the term "Company" refers to the Delaware limited liability company, which if approved by the Commission would be a national market system plan.

Consequently, this proposed requirement would make it impossible under the Proposed NMS Plan, as it has under the CTA Plan, for the SROs to comply with the Plan requirement of obtaining audited financial statements and providing such audited financial statements to the Members (i.e., Plan participants) and the Commission.[76]

Third, the requirement that all natural persons at an Agent must affirm in writing that they have read the Proposed NMS Plan's Confidentiality Policy and will undertake to abide by its terms is onerous and imposes an impractical burden on Agents that would provide services to the Plan. For example, under the terms of the Proposed NMS Plan, the bank that the Administrator may use to process incoming checks and payments from vendors would have access to Restricted Information, and therefore would be a Covered Person under the Confidentiality Policy. Given how a bank may be staffed, it is unlikely that it would have personnel dedicated to servicing specific customers. Accordingly, in the context of the Proposed NMS Plan, it would prove onerous to identify all of the natural persons at a bank that would be processing such information so that each could affirm in writing they have read and agree to abide by the terms of the Confidentiality Policy.

Finally, the requirement conflicts with standard market practice with respect to the types of Agents at issue and is not necessary or appropriate in the public interest for the protection of investors and the maintenance of fair and orderly markets. The Administrator frequently retains Agents in contexts where provision of confidential information is expected and routine – e.g., law firms prosecuting vendor non-compliance, public accounting firms reviewing the financial statements of the Proposed NMS Plan, and banks processing vendor payments. Access to confidential customer information is core to the types of services these entities would provide, and such entities generally are not expected to sign such bespoke undertakings in other similar customer relationships. To the contrary, NYSE believes that existing customer relationship documents, such as engagement letters with such institutions, are more than sufficient to protect the confidentiality of Restricted, Highly Confidential, or Confidential Information that such Agents may need to perform services for the Proposed NMS Plan.

As a result of these flaws, these proposed provisions[77] would add, not remove, impediments to and perfect the mechanism of a national market system. NYSE believes the Commission should propose and solicit comment on changes to the Proposed NMS Plan that would eliminate the provision requiring Agents to affirm in writing that they have reviewed the Confidentiality Policy and agree to abide by its terms before such Agents may provide services to the Proposed NMS Plan. At the very least, the Commission should propose revisions that would (i) modify the undertaking such that Covered Persons must agree to abide by it only to the extent that it does not conflict with the applicable professional standards of conduct; and (ii) that a single representative

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[76] See Proposed NMS Plan, supra note 1, at 64586 (Section 6.1).

[77] As noted above, the Commission ordered the SROs to include these terms in the Proposed NMS Plan. See Order, supra note 9, at 28730. Accordingly, the SROs were unable to propose a confidentiality policy that did not include these unworkable provisions.

would sign on behalf of the firm, rather than requiring a written undertaking from all natural persons.

b. The Confidentiality Policy's Prohibition on Sharing Restricted and Highly Confidential Information with Agents

Sections (b)(ii) and (b)(iii)(A)(1) of the Proposed NMS Plan's Confidentiality Policy, which, as discussed above, limit Covered Persons' ability to disclose Restricted Information and Highly Confidential Information "to others, including Agents,"[78] are broad, and on their face would impede the ability of the Administrator and Processors to perform functions necessary for the Member SROs to comply with their obligations under Rule 608.[79]

The Proposed NMS Plan's definition of "Covered Persons" includes the Plan's Administrator,[80] such that the Administrator would be prohibited from disclosing Restricted Information and Highly Confidential Information to others, including Agents. But in order to provide administrative services to the Plan, such as providing audited financial statements, the Administrator must be able to provide Restricted Information and Highly Confidential Information to an independent auditor that can perform such services, i.e., an Agent. Similarly, when negotiating the Administrator services agreement with the new Administrator, the Administrator is likely to expect the right to retain legal counsel to represent it in proceedings against vendors that fail to pay charges. But the Confidentiality Policy would prohibit the Administrator from providing any Restricted Information or Highly Confidential Information to either an independent accounting firm or outside counsel hired for the express purpose of pursuing a proceeding against a vendor. Such a prohibition would impair the SROs' ability, through the Administrator, to implement and administer the Plan, as required by Rule 608(a)(3), and to comply with the Proposed NMS Plan provision to conduct an annual audit in Section 6.1,[81] as required by Rule 608(c).

In the context of the Equity Data Plans – which include substantially identical language – the Legal Subcommittee of those Plans brought this issue to Commission staff and asked whether it was permissible to share Highly Confidential Information and Confidential Information with outside auditors and outside legal counsel.[82] The staff's

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[78] See Proposed NMS Plan, supra note 1, at 64593 (Exhibit C, Sections (b)(ii), (b)(iii)(A)(1)).

[79] The Proposed NMS Plan contains these provisions because the Order compelled the SROs to include them. See Order, supra note 9, at 28730.

[80] See supra note 59.

[81] See Proposed NMS Plan, supra note 1, at 64586 (Section 6.1).

[82] On August 4, 2020, the Operating Committee of the Equity Data Plans forwarded to staff of the Division of Trading and Markets a list of 17 interpretive questions about the changes that the Commission had made to the Conflicts of Interest and Confidentiality Policies. Following a telephone discussion with staff on August 24, 2020, counsel for the Equity Data Plans forwarded to staff a written summary of the

view is that it draws a distinction between the agents of the Operating Committee, Administrator, or Processor versus the agents of a Participant. According to the staff, to the extent that an agent is an agent of the Operating Committee, Administrator, and Processor, specific Highly Confidential and Confidential Information "can be shared with those agents when they need it and use it solely to perform Plan business."[83] The staff added that whether a Participant may provide Highly Confidential or Confidential Information to its own agents is governed by a different standard.

NYSE appreciates this additional input from the staff but does not believe it provides sufficiently clear or appropriate guidance. More fundamentally, the staff's input is unfortunately inconsistent with the plain language of the Confidentiality Policy imposed by the Commission on both the current Equity Data Plans and the Proposed NMS Plan, and if the Participants were to interpret these Plans in the way suggested by the staff, the Commission could later assert that Participants were not complying with the Plans' terms, as required by Rule 608(c).

Accordingly, the Commission should propose a change to the Proposed NMS Plan that eliminates or substantially modifies the prohibition on providing confidential information to Agents, and publish that new proposal for comment. Without modification, this provision of the Proposed NMS Plan would not remove impediments to and perfect the mechanism of a national market system, but instead would create such impediments, contrary to the purposes of the Exchange Act.

c. The Confidentiality Policy's Restrictions on Sharing Confidential Information

As noted above, Section (b)(iv)(A) of the Proposed NMS Plan's Confidentiality Policy provides that a "Covered Person may disclose Confidential Information to other persons to allow such other persons to fulfill their responsibilities to the [Plan]."[84] The only Exchange Act obligations that relate to the Plan are the Member SROs' obligations under Rule 608(a)(3) and Rule 608(c). But those obligations are the Member SROs' obligations under the securities laws, not "responsibilities to the [Plan]." Since no Covered Person other than an SRO has responsibilities to the Plan, this provision would appear to suggest that Confidential Information cannot be shared at all, or at a minimum, casts substantial doubt on what can be shared.

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responses staff orally had provided. On a subsequent October 19, 2020 video call, staff shared with the Equity Data Plans' counsel additional proposed edits to the written responses. Counsel for the Equity Data Plans asked for and was granted permission by staff to take screenshots of staff's proposed edits. Attachment A to this comment letter is a document consisting of those screenshots. The red tracking on Attachment A shows staff's proposed changes.

83 See Attachment A, supra note 82, at question 5.

84 See Proposed NMS Plan, supra note 1, at 64593 (Exhibit C, Section (b)(iv)(A)). The Proposed NMS Plan contains this provision because the Order compelled the SROs to include it. See Order, supra note 9, at 28730.

The Operating Committee is likely to need to authorize the disclosure of Confidential Information. As noted above, in performing their obligations under Rule 608, the SROs use various service providers, including law firms, tax advisors, and auditors. None of these service providers has any "responsibilities to the Plan," yet may need access to Confidential Information. If the SROs are unable to share such Confidential Information with such service providers, they will be unable to meet their obligations under Rule 608.

This issue has arisen in the context of the Equity Data Plans, which contain substantially identical language. Specifically, the Management Committee of the OPRA Plan requested a redacted version of a draft UTP Plan processor contract so that it could update its processor contract. The OPRA Management Committee has no responsibilities to the Equity Data Plans, such that under the plain language of the Confidentiality Amendment, this transmittal would to be prohibited. In response to a request for guidance, Commission staff responded that such disclosure would be permissible because "Confidential Information is a lower level of confidentiality and the Operating Committee can authorize its disclosure if such disclosure is not inconsistent with the goals and aims of the Confidentiality Policies. The disclosure does not have to be in furtherance of the goals of the Plans, but should not be inconsistent with them."[85]

As drafted, this provision of the Proposed NMS Plan impedes the functioning of the national market system and is contrary to the purposes of the Exchange Act, and cannot be approved. If the Commission agrees with the staff's views, it should propose to eliminate or substantially modify this restriction and solicit comment.

d. Treatment of Operating Committee Minutes

The Proposed NMS Plan contains contradictory provisions regarding the treatment of the Operating Committee's official meeting minutes. On the one hand, the definition of "Public Information" includes "the duly approved minutes of the Operating Committee with detail sufficient to inform the public on matters under discussion and the views expressed thereon (without attribution)."[86] On the other hand, the Operating Committee's official meeting minutes frequently contain Highly Confidential Information, which the Confidentiality Policy prohibits disclosing to the public.[87]

In the context of the Equity Data Plans – which include substantially identical language – the Legal Subcommittee of those Plans asked Commission staff for clarification of this inconsistency. The Legal Subcommittee informed the staff that the Operating Committee's practice has been to generate official meeting minutes, which were not publicly disseminated, as well as a meeting summary, which was made available to the public. The staff "confirmed that the Confidentiality Policy is designed to ensure that meeting summaries continue to be publicly disseminated," and "does not require the

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85 See Attachment A, supra note 82, at question 11.

86 See Proposed NMS Plan, supra note 1, at 64576 (Section 1.1(kkk)).

87 See id. (Exhibit C, Section (b)(iii)(A)(1)). The Proposed NMS Plan contains these provisions because the Order compelled the SROs to include them. See Order, supra note 9, at 28730.

official meeting minutes to be publicly disseminated in full if they contain Confidential Information, Highly Confidential Information, or Restricted Information."[88]

Unfortunately, here again, the staff's interpretation is inconsistent with the terms of the Confidentiality Policy incorporated into the Plan, and approval of the terms as drafted would not remove impediments to and perfect the mechanism of a national market system, but would in fact add impediments inconsistent with the purposes of the Exchange Act. NYSE asks that the Commission propose a change to the Proposed NMS Plan consistent with the staff's ad hoc interpretation and solicit comment.

e. Extension of Applicability of Confidentiality Policy to Non-SRO Voting Representatives and Their Employers

The Proposed NMS Plan's definition of "Covered Persons" includes not only the Non-SRO Voting Representatives, but also "the employers of Non-SRO Voting Representatives."[89] But it is not clear how or why the Proposed NMS Plan's Confidentiality Policy would extend to either. Under the securities laws and the Commission's regulations, a non-SRO – whether individuals serving in the capacity of a Non-SRO Voting Representative or their employers – has no regulatory obligations vis-à-vis the Plan. The Proposed NMS Plan cannot create such obligations where there are none by simply declaring that an unregulated individual or entity must abide by its terms.

Because Rule 608(c) requires SROs to comply with the terms of an NMS Plan, this provision also would obligate the SRO Members of the Plan to monitor whether the Non-SRO Voting Representatives and those individuals' employers adhere to the terms of the Confidentiality Policy. But the SROs have no authority over the Non-SRO Voting Representatives or their employers for this purpose, no ability to monitor for or enforce compliance, and no authority to impose sanctions for violations.

Because there is no way for the SROs to comply with these provisions of the Proposed NMS Plans, these provisions add impediments to the functioning of the national market system and are inconsistent with the purposes of the Exchange Act. The Commission should propose and solicit comments on revisions to the Proposed NMS Plan that would remove Non-SRO Voting Representatives and their employers from the definition of Covered Persons, and would require anyone seeking to become a Non-SRO Voting Representative to enter into a contractual relationship with the Proposed NMS Plan requiring that individual to protect the confidentiality of Plan information. For example,

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[88] See Attachment A, supra note 82, at question 13.

[89] See supra note 59. The Proposed NMS Plan contains this provision because the Order compelled the SROs to include it. See Order, supra note 9, at 28730.

the Proposed NMS Plan could create a non-disclosure agreement[90] that individuals would need to sign before they could serve in such capacity.[91]

f. Unlawful Delegation of Operating Committee Responsibilities to the Administrator

The Proposed NMS Plan would also compel certain obligations of the Operating Committee to be delegated to the agents of the Plan, including the Administrator. For example, Section (b)(i)(B) of the Proposed NMS Plan's Confidentiality Policy would provide that:

> The Administrator may, under delegated authority, designate documents as Restricted, Highly Confidential, or Confidential, which will be determinative unless altered by an affirmative vote of the Operating Committee pursuant to Section 4.3.[92]

But the Administrator has no obligations under the securities laws; it is an agent of the SROs, and its only obligations are to the Operating Committee under its contract to perform functions required to allow the SRO to meet its own obligations under the securities laws. The Proposed NMS Plan's assignment of obligations directly to the Administrator, as the confidentiality provision purports to here, is therefore unlawful.

Nor is it clear how the Operating Committee could provide oversight of the Administrator's designation of such documents, given the Proposed NMS Plan's restrictions on the sharing of Restricted, Highly Confidential, and Confidential Information. The Proposed NMS Plan provides no guidance as to how the Operating Committee's oversight function should be conducted. And in some cases, such oversight may be not be possible. For example, while the Plan purports to assign the Administrator the job of designating documents as "Restricted Information," the Plan simultaneously prevents the Administrator from disclosing Restricted Information to anyone.[93] It would thus be impossible for the Operating Committee to oversee the Administrator's performance of its task to so-designate documents or to make any

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[90] Non-disclosure agreements are standard industry practice in a multitude of scenarios when an entity or individual that is not otherwise subject to an independent obligation to protect confidential information of another entity but needs access to such information, for example, in the context of performing due diligence in a corporate acquisition.

[91] NYSE makes these suggestions without prejudice to its position, set out at Point I.A above, that the Proposed NMS Plan's grant of voting rights to Non-SRO Voting Representatives is inconsistent with Section 11A and Rule 608, such that the Commission cannot approve the Proposed NMS Plan.

[92] See Proposed NMS Plan, supra note 1, at 64593 (Exhibit C, Section (b)(i)(B)).

[93] See id. (Exhibit C, Section (b)(ii)).

alteration to the Administrator's determination as purportedly permitted under Section (b)(i)(B).

These provisions would not remove impediments to and perfect the mechanisms of a national market system, but would add impediments in a manner inconsistent with the purposes of the Exchange Act. NYSE believes that the Commission should propose and publish for comment revised text authorizing the Operating Committee to direct the Administrator and Processors to apply confidentiality designations documents, which the SROs could jointly administer and implement through the Plans' contracts with the Administrator and Processors. Without such revisions, the Proposed NMS Plan cannot be approved.

g. Requirement that the Operating Committee Review and Approve the Confidentiality Policies of the Administrators and Processors

The Proposed NMS Plan also would require that the Plan's Operating Committee review and approve confidentiality policies created by the Plan Administrators and Processors:

> The Administrator and Processors will establish written confidential information policies that provide for the protection of information under their control and the control of their Agents . . . . Such policies will be reviewed and approved by the Operating Committee pursuant to Section 4.3, publicly posted, and made available to the Operating Committee for review and approval every two years thereafter or when changes are made, whichever is sooner.[94]

While having such policies reviewed may make practical sense, it is not clear that the benefits outweigh the potential burdens. The Proposed NMS Plan requires the Operating Committee to review and approve the Administrator's and Processors' confidential information policies, but provides the Operating Committee no real ability to disapprove those policies. If the Operating Committee does not approve the Administrator's or Processors' policies, then those agents will be unable to perform essential functions under the Plan, which jeopardizes the SROs' abilities to meet their obligations under Rule 608. Moreover, the composition of the Operating Committee would allow Non-SRO Voting Representatives (who have no regulatory obligations) together with a minority of SROs to refuse to approve the confidentiality policies of these agents, thus making it impossible for the other SROs to meet their obligations under the Plan.

Nor does the NYSE believe that the Commission has assessed less onerous ways to achieve the same goal of protecting information to which the Administrator or Processors would have access. For example, instead of specifying a prescriptive policy in the Plan, the Plans could instead provide for principle-based requirements relating to the protection of confidential information, and the SRO Members could jointly administer and

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[94] See id. (Exhibit C, Section (a)(iv)). The Proposed NMS Plan contains this provision because the Order compelled the SROs to include it. See Order, supra note 9, at 28730.

implement such principle-based requirements, as required by Rule 608(a)(3), through the contractual relationship with the Administrator or Processors.

These provisions of the Proposed NMS Plan would not remove impediments to and perfect the mechanism of a national market system, but would in fact add impediments inconsistent with the purposes of the Exchange Act. NYSE believes that the Commission should propose revised text that sets out principle-based requirements regarding the protection of confidential information, which the SROs could jointly administer and implement through the Plan's contracts with the Administrator and Processors, and publish those proposed revisions for comment. Without such revisions, the Proposed NMS Plan cannot be approved.

h. Disclosures by Members, Processors, and the Administrator Under the Proposed Conflicts of Interest Policy

The Conflicts of Interest Policy contained in Section 4.10 and Exhibit B of the Proposed NMS Plan requires the Plan's SRO Members, its Processors, and its Administrator (among others) to disclose potential conflicts of interest. Among other things:

- SROs ("Members")[95] must disclose, for each Voting Representative, "any direct responsibilities [the individual has] related to the development, dissemination, sales, or marketing of the Member's PDP, and the nature of those responsibilities sufficient for the public to identify the nature of any potential conflict of interest that could be perceived by a reasonable objective observer as having an effect on the operation of the [Plan]."[96]

- In addition, each SRO must disclose whether "its Voting Representative, or its alternate Voting Representative, or any affiliate have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with their responsibilities to the [Plan.] If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the [Plan]."[97]

- Similarly, Processors and the Administrator must disclose whether they "or [their] representatives, have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with the representatives'

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[95] As noted above, the capitalized term "Members," as used in the Proposed NMS Plan, refers to the SRO Members of the LLC establishing the Proposed NMS Plan, and is thus comparable to the term "Participants" in the existing Equity Data Plans.

[96] See Proposed NMS Plan, supra note 1, at 64592-93 (Exhibit B, Section (a)(iii)). The Proposed NMS Plan contains this provision and the provisions listed in the subsequent bullets because the Order compelled the SROs to include them. See Order, supra note 9, at 28730.

[97] See Proposed NMS Plan, supra note 1, at 64592-93 (Exhibit B, Section (a)(iv)).

> responsibilities to the [Plan.] If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the [Plan]."[98]

NYSE believes that these expansive disclosures would impose substantial costs without any benefit. With respect to the SRO Members of the Plan, the disclosures above would not be necessary to the performance of their obligation to comply, or enforce their members' compliance, with the Plan, since the SROs continue to have an obligation under Rule 608(c) to comply with and enforce compliance with the Plan. In addition, the disclosures about an SRO's Voting Representative would serve no purpose since, as discussed above, the individual who would be the SRO Voting Representative does not have any obligations under the Exchange Act, and that individual is not acting on his or her own behalf as an individual, but instead as a representative of the SRO. Because it is the SRO's interest that is represented on the Operating Committee, it does not matter which individual casts the SRO's vote, or what potential conflicts of interest that individual discloses. Accordingly, the disclosures of an individual's potential conflicts of interest would serve no benefit.

The benefits of the required disclosures by the Administrator and Processors are similarly unclear. The Administrator and the Processors would be agents of the Plan, and do not have any obligations under the securities laws with respect to the Proposed NMS Plan. The Administrator and Processors carry out functions required for the SROs to meet their obligations under Rule 608, and therefore the SROs are strongly incentivized to oversee the Administrator and Processors. The Administrator and Processors themselves do not have any obligations under Rule 608; their obligations to the Plan are contractual. Nor would either the Administrator or the Processors serve in a governing role with respect to the Proposed NMS Plan; neither would have a vote, and would simply administer the functions as determined by the Operating Committee. Accordingly, they have no "responsibilities to the Plan," as the provision's language assumes, other than to provide either administrative or processor services pursuant to their agreements with the Plan. There is thus no benefit to this disclosure.

Finally, the "reasonable objective observer" standard referenced in the provisions above is not, in fact, objective. Rather, it is subjective, since it is not clear what such an observer might consider to be a potential conflict of interest.

For all these reasons, the Conflicts of Interest Policy's disclosure provisions for Members, Processors, and the Administrator impose burdens for no recognized purpose under the Exchange Act, and raise impediments to the mechanisms of the national market system. Accordingly, the Proposed NMS Plan cannot be approved.

i. Disclosures by Service Providers and Subcontractors Under the Proposed Conflicts of Interest Policy

Finally, the Proposed NMS Plan's Conflicts of Interest Policy requires extensive disclosures from service providers and subcontractors that would impose costs and provide few, if any, benefits. Section 4.10(a) of the Plan requires "each service provider

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[98] See id. (Exhibit B, Sections (b)(v) and (c)(iv)).

or subcontractor engaged in [Plan] business (including the audit of Subscribers' data usage) that has access to Restricted or Highly Confidential information" to make certain disclosures, and that they must do so before the Operating Committee, a Member, Processor, or the Administrator may use such service provider or subcontractor on Plan business.[99]

In the disclosures, the service provider or subcontractor must identify:

- whether it is "affiliated with a Member, Processor, Administrator, or employer of a Non-SRO Voting Representative? If yes, disclose with whom the person is affiliated and describe the nature of the affiliation."[100];

- whether its "compensation is on a commission basis or is tied to specific metrics, provide a detailed narrative summary of how compensation is determined for performing work on behalf of the [Plan]."[101];

- whether it is "subject to policies and procedures (including information barriers) concerning the protection of confidential information that includes affiliates? If so, describe. If not, explain their absence."[102]; and

- whether it "or its representative, have additional relationships or material economic interests that could be perceived by a reasonable objective observer to present a potential conflict of interest with the representatives' responsibilities to the [Plan.] If so, provide a detailed narrative discussion of all material facts necessary to identify the potential conflicts of interest and the effects they may have on the [Plan]."[103]

There is no reason for the Proposed NMS Plan to prohibit the Operating Committee, SROs, Processors, or Administrator from using service providers and subcontractors that have not provided the disclosures listed above. The only service providers and subcontractors that would likely require access to Restricted or Highly Confidential Plan information, and thus be required to submit disclosures, would be public accounting firms retained to perform independent audits or law firms retained either to advise the Operating Committee or to support the Administrator in its functions (such as recovery of audit findings, or support for tax functions on behalf of the Plans). But such accounting firms and outside law firms have no role in governing the operations of the Plan or making decisions concerning the Plan – those are responsibilities of the SROs through

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99 See id. at 64583 (Section 4.10(a)). The Proposed NMS Plan contains this provision and the ones listed in the bullets above because the Order compelled the SROs to include them. See Order, supra note 9, at 28730.

100 See Proposed NMS Plan, supra note 1, at 64592 (Exhibit B, Section (e)(i)).

101 See id. (Exhibit B, Section (e)(ii)).

102 See id. (Exhibit B, Section (e)(iii)).

103 See id.

the Operating Committee. As such, the service providers and subcontractors to which this disclosure provision applies do not have "responsibilities to the Plan," as the language of the disclosure presupposes.

Nor is it clear how such disclosures by service providers and subcontractors would advance the objectives of the Plans, which are for the collection, consolidation, and dissemination of specified market data information. As such, this expansive disclosure provision covering service providers and subcontractors would impose onerous and burdensome requirements that would do nothing to advance the goals of the Plan.

Accordingly, NYSE believes that these proposed provisions would not remove impediments to and perfect the mechanism of a national market system, but would in fact add impediments to the ability of SROs to perfect the mechanism of a national market system. As such, the Proposed NMS Plan cannot be approved.

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The Proposed NMS Plan contains numerous terms and provisions that would impede the mechanisms of a national market system and are inconsistent with the purposes of the Exchange Act. Accordingly, NYSE does not believe that the Commission can make the necessary finding under Rule 608(b) to approve the Proposed NMS Plan.

II. The Commission Cannot Make Changes to the Proposed NMS Plan Without Proper Notice and Comment

The Notice seeks comment on 62 separate topics of interest, on which the Commission has posed literally hundreds of open-ended questions.[104] The Commission seeks comment on those topics within 30 days, but has not stated its position regarding any of the topics, and has not proposed any specific textual changes upon which the SROs and other market participants can meaningfully comment.

This approach does not fulfill the Commission's notice and comment obligations under the Exchange Act, Rule 608, or the APA. If the Commission intends to make any changes to the Proposed NMS Plan's language (other than immaterial changes), it must put the public on notice of the specific changes it proposes, and give the public an opportunity to comment on those specific changes.[105]

Despite these shortcomings with the Commission's approach, NYSE offers several general comments now, as set out below. By providing these general comments in response to the Commission's numerous open-ended questions, NYSE does not waive its right to a further opportunity to comment on any specific textual changes the Commission proposes to make, nor does it waive its legal claim that the Notice provides an insufficient opportunity for comment because it does not contain the text of any actual changes the Commission proposes to make.

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[104] See Notice, supra note 1.

[105] See supra Point I.C.1.

A. The Proposed NMS Plan's Operative Date

In the Notice, at Topic 2, the Commission poses numerous questions about the proposed definition of "Operative Date."[106] In the Proposed NMS Plan, the SROs defined "Operative Date" such that the Proposed NMS Plan would only come into operation, and the current Equity Data Plans would only cease to operate, 90 days following the completion of five specific events. It is necessary and appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets,[107] for the Proposed NMS Plan to include all five of these steps as precursors to the Proposed NMS Plan becoming operative, because each is plainly necessary before the Proposed NMS Plan could function:

- SRO Voting Representatives and Non-SRO Voting Representatives must be determined before the Proposed NMS Plan can become operative. While the selection of SRO Voting Representatives is within the SROs' power, the selection of Non-SRO Voting Representatives is not. The Proposed NMS Plan requires that the initial Non-SRO Voting Representatives would be selected by the members of the Advisory Committee of the existing Equity Data Plans.[108] Neither the SROs nor the Commission has jurisdiction over the individuals that comprise the Advisory Committee, so any timeframes imposed on them to select such representatives would be unenforceable, yet the Operating Committee of the Proposed NMS Plan cannot function until such representatives are in place. Therefore, this step is a necessary precursor for other actions that would need to be completed by the Operating Committee, such as determining fees, before the Proposed NMS Plan could become operative.

- Fees must be established by the Operating Committee, be effective as an amendment to the LLC Agreement, and be ready to be implemented before the Proposed NMS Plan can become operative. This precursor to the operation of the Proposed NMS Plan cannot be eliminated, since the Order requires the new plan's fees to be effective before the transition away from the current plans is complete.[109] Fees cannot be effective until they are filed with and approved by the Commission; the Commission's approval process, as well as any post-approval challenge, is out of the control of the SROs.[110]

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[106] See Notice, supra note 1, at 64567 (Topic 2).

[107] See 17 CFR 242.608(b)(2).

[108] See Proposed NMS Plan, supra note 1, at 64580 (Section 4.2(b)(i)).

[109] See Order, supra note 9, at 28729.

[110] Amended Rule 608(b)(1)(ii) would require the Commission to notice a proposed amendment to an NMS Plan within 15 days of filing, and pursuant to amended Rule 608(b)(2), the Commission can extend its time to act on such filing up to 300 days after the Federal Register publication date of the notice of such filing. See Securities Exchange Act Release No. 89618 (August 19, 2020), 85 FR 65470 (October 15, 2020) (S7-15-19) (Rescission of Effective-Upon-Filing Procedures for NMS Plan Fee

In addition, such fees cannot become effective until the new Administrator has been retained and has created a functioning system for charging and collecting those fees. (See below.)

- The LLC must enter into an agreement with the current Processors before the Proposed NMS Plan can become operative. The current Processors operate under the existing Plans, but the Proposed NMS Plan would be entirely new, and would need to separately retain the Processors. At a minimum, this would require negotiation of new contracts and related service level agreements with such Processors. In addition, if the Commission finalizes some or all of its pending Market Data Infrastructure Proposal[111] before the Proposed NMS Plan becomes operative, the Proposed NMS Plan could need to contract with as-yet unidentified "Competing Consolidators." Substantial questions remain as to how such Competing Consolidators would contract with and be compensated by the Proposed NMS Plan for their services, and resolving these questions could impact the time it takes to implement the Proposed NMS Plan.

- The LLC must enter into an agreement with the new independent Administrator, and the Administrator must be ready to provide services, including that new contracts between the LLC and Vendors and the LLC and Subscribers are ready, and the Administrator has in place a system to administer distributions and fees before the Proposed NMS Plan can become operative. It is without question that the new Plan could not become operative until a new Administrator has been identified and hired and is ready to function. As discussed above, the current Administrators are NYSE and Nasdaq, both of whom are ineligible to be the Administrator of the Proposed New Plan; a new Administrator must be selected and must enter into a new contract with the LLC. The Proposed NMS Plan could not become operative until the new Administrator's systems for administering distributions and fees are fully functional. In addition, NYSE's vendor contracts could not be assigned to the new Administrator because they also cover NYSE proprietary data products, so new vendor contracts with each vendor would be required. As a related matter, the Operating Committee would need to determine the vendor contract structure for the Proposed NMS Plan, which could either be a direct-bill model, as the CTA Plan currently uses, or an indirect-bill model, as currently used by the UTP Plan. Once that structure is determined and the contracts drafted, any data subscriber wishing to continue to receive SIP data would need to enter into such new contracts before the Proposed NMS Plan could begin disseminating data to vendors and data subscribers.

- All policies and procedures necessary for the operation of the Company would need to be effective before the Proposed NMS Plan could become operative. Here, "operation of the Company" means "operation of the

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Amendments and Modified Procedures for Proposed NMS Plans and Plan Amendments).

[111] See supra note 10.

> Proposed NMS Plan." It stands to reason that the Proposed NMS Plan could not become operational until all policies and procedures necessary for that operation have been established.

The Commission also asks whether deadlines should be set for any of the steps listed above. But it is unclear how the Proposed NMS Plan could establish deadlines when there are so many unregulated entities that must agree to provide services in order for the new Plan to become operational. For example, a new Administrator must be selected through a request for proposal ("RFP") bidding process, which would need to be agreed to by the Operating Committee. The Operating Committee would need to ensure that such RFP accurately describes all of the functions that an Administrator would be expected to perform, which, at a minimum, would include the full scope of services that the current Administrators provide. It is unknown whether there would be any bidders that not only meet the independence requirements, but also could fulfill all of the functions specified in the RFP, or how long it would take to solicit bids from such bidders and then to review the bids and make a selection. Once the new Administrator is selected, the Operating Committee would have to negotiate a services agreement with it and there would need to be an agreement among the SROs on how to pay the Administrator during the setting up of the new Plan before any revenue is collected through the sale of market data. None of these financial issues have been considered to date. After the services agreement is in place, the Administrator would need to finalize all new contracts between the Company and Vendors and the Company and Subscribers, such that all Vendors and Subscribers under the Equity Data Plans would be ready to transition to the new contracts, and to create, test, and implement systems that would allow it to administer contracts, collect fees, manage vendors, manage subscribers, calculate and make distributions of revenue, prepare tax filings on behalf of Participants, and prepare financial statements.

Because each RFP process is so highly specialized and idiosyncratic, there is no way to reasonably impose time limits on any part of that process, let alone a time limit for the entire process overall. To put it in context, the OPRA plan recently went through an RFP process to select a new Processor. That process, start to finish, including determining a new services contract, will likely take over two years to complete – and in that case, the Processor that was selected was already the current OPRA Processor. Here, where there is no option for an incumbent Administrator to continue in that role under the Proposed NMS Plan, the process is likely to take substantially longer. Moreover, as was the case when the CAT Plan selected Thesys CAT LLC,[112] once the RFP process is complete, there is a risk that the Administrator will prove unable to meet its obligations, which would require the Proposed NMS Plan to go through the RFP process again.

Additionally, the Commission asks whether it is necessary to include the 90-day period after the completion of the five listed categories of tasks, and whether it should be changed. SROs proposed a 90-day period based on the current industry standard that

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[112] In 2017, the NMS Plan Governing the Consolidated Audit Trail ("CAT Plan") selected Thesys CAT LLC as its Plan Processor. After years of ineffective management, CAT Plan replaced Thesys CAT LLC with FINRA. See Securities Exchange Act Release No. 34-86901 (September 9, 2019) (File No. S7-13-19) (Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail) at 9-11.

changes to market data plans are announced 90 days in advance of implementation. More importantly, the importance of consolidated market data distribution to the securities markets should not be underestimated. Moving the entire industry to a different system for subscribing to and purchasing such data should be done carefully and a 90-day period is prudent.

B. Exclusion of Non-SRO Voting Representatives from Voting on Certain Matters

As directed by the Order, the SROs proposed that all decisions affecting operations of the Proposed NMS Plan be subject to the "augmented majority" voting structure laid out by the Commission. But there are a number of areas that solely affect the structure of the LLC – and not Plan operations – where the SROs proposed that Non-SRO Voting Representatives would be excluded from voting.

That list is spare, consisting of:

- Decisions concerning the operation of the Company as an LLC, as per Section 10.3 (regarding the creation of a "Partnership Representative" to serve as point person for tax audits and tax litigation) and Section 11.2 (regarding liquidation and distribution of LLC assets after the LLC is dissolved);

- Modifications to the LLC-related provisions of the Agreement pursuant to Section 13.5(b) (including modifications to Article IX regarding the allocation of profits and losses among the LLC's members (i.e., SROs), Article X regarding taxes of the LLC, Article XI regarding dissolution and termination of the LLC (of which the SROs are the only Members), and Article XII regarding the exculpation and indemnification of LLC Members (i.e., SROs); and

- Selection of Officers of the LLC, other than the Chair, per Section 4.8.

The Commission asked several questions about these provisions at Topics 19, 28, 48, and 52 of the Notice,[113] including whether excluding Non-SRO Voting Representatives from voting on these matters would be consistent with giving such Non-SRO Voting Representatives a meaningful role in the governance of the Plan. The answer is yes, it is consistent: the listed subjects would have no bearing on the governance of the Plan or the collection, processing, and dissemination of equity market data. They solely deal with matters pertaining to the LLC form and structure. Only the SROs are Members of the LLC, and thus only the SROs can vote on such matters. This stands to reason: only SROs can "jointly act" to create an NMS plan, which the Commission recognized in ordering only the SROs, not non-SROs, to be responsible for that creation.[114]

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[113] See Notice, supra note 1, at 64569-70, 64572-73 (Topics 19, 28, 48, 52).

[114] See 15 U.S.C. 78k-1(a)(3)(B); 17 CFR 242.608(a)(3)(iii).

C. Protections for SRO Members

In the Proposed NMS Plan, the SROs included several appropriate protections for the Members of the LLC:

- "Except as provided in this Agreement or Applicable Law, no Member shall have any liability whatsoever in its capacity as a Member, whether to the Company, to any of the Members, to the creditors of the Company or to any other Person, for the debts, liabilities, commitments or any other obligations of the Company or for any losses of the Company." (Section 3.7(b))

- "To the fullest extent permitted by law, no Member shall, in its capacity as a Member, owe any duty (fiduciary or otherwise) to the Company or to any other Member other than the duties expressly set forth in this Agreement." (Section 3.7(e))

- Article XII includes exculpation and indemnification provisions for LLC Members.

The Commission asked several questions about these provisions at Topics 11, 12, and 49 of the Notice,[115] including whether such protections are consistent with the SROs' obligations to the Proposed NMS Plan and the purposes of the Plan. The Commission also asked whether the exculpation and indemnification provisions of Article XII should cover Non-SRO Voting Representatives in addition to the SROs that are Members of the LLC.

The provisions at issue are standard protections for the members of an LLC and are commonly included in LLC agreements. In fact, the Commission has already approved substantially identical provisions in the Limited Liability Company Agreement of the CAT Plan.[116] The limitation on liability provision at Section 3.7(b) of the Proposed NMS Plan is nearly identical to the provision at Section 3.8(b) of the CAT Plan;[117] the limitation on duties provision at Section 3.7(e) of the Proposed NMS Plan tracks the language of a corresponding provision at Section 4.7(c) of the CAT Plan;[118] and Article XII of the

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[115] See Notice, supra note 1, at 64568, 64572 (Topics 11, 12, 49).

[116] The CAT Plan is available here: https://catnmsplan.com/sites/default/files/2020-02/CAT-2.0-Consolidated-Audit-Trail-LLC%20Plan-Executed_%28175745081%29_%281%29.pdf.

[117] See CAT Plan, supra note 116, at Section 3.8 (b) ("Except as provided in this Agreement and except as otherwise required by applicable law, no Participant shall have any personal liability whatsoever in its capacity as a Participant, whether to the Company, to any Participant or any Affiliate of any Participant, to the creditors of the Company or to any other Person, for the debts, liabilities, commitments or any other obligations of the Company or for any losses of the Company.").

[118] See id. at Section 4.7(c) ("To the fullest extent permitted by the Delaware Act and other applicable law . . . (c) no Participant or member of the Operating Committee, in such Person's capacity as such, shall have any fiduciary or similar duties or

Proposed NMS Plan on exculpation and indemnification is substantively identical to similar language in Section 4.8 of the CAT Plan.[119]

Both the CAT Plan and the Proposed NMS Plan would extend liability protection and indemnification coverage only to the SROs that created the LLC. This stands to reason; only the SROs can "act jointly" to create an SRO, and only they should receive the standard LLC protections for members. The individuals serving as Non-SRO Voting Representatives need no such protection as they are not members of the LLC, and thus the Proposed NMS Plan does not include any such coverage for them.[120]

D. Operation of the Plan

In the Notice, the Commission asks numerous questions about the SROs' proposals for how the Proposed NMS Plan should operate. For example, the Commission asks:[121]

- Whether SROs should be permitted to have "Member Observers" (Topic 7);
- Whether the Operating Committee's responsibilities should include interpreting the Plan (Topic 14);
- Whether the Operating Committee should be permitted to delegate "administrative functions" (Topic 15);
- Whether SRO Voting Representatives and/or Non-SRO Voting Representatives should be subject to term limits (Topic 18);
- Whether Non-SRO Voting Representatives should be permitted to chair subcommittees, and whether subcommittees should be required to have the same relative balance between SRO and Non-SRO Voting Representatives as the Operating Committee (Topic 26); and

obligations to the Company or any other Participant or member of the Operating Committee, whether express or implied by the Delaware Act or any other law . . . .").

[119] See id. at Section 4.8.

[120] Note that in the sections cited above, the CAT Plan extends liability protection and indemnification rights to "Participants *and members of the Operating Committee*." (Emphasis added.) But in the context of the CAT Plan, the "members of the Operating Committee" are the SRO Participant's voting representatives. Because the Proposed NMS Plan's Operating Committee would also include individuals not affiliated with the SRO Members of the LLC, removing the "and members of the Operating Committee" language was appropriate.

[121] See Notice, supra note 1, at 64568-72 (Topics 7, 14, 15, 18, 26, 35-45).

- Whether detailed terms about the responsibilities of the Administrator (Topics 40-45) and the Processor (Topics 35-39) should be included in the LLC Agreement itself, as opposed to in service agreements.

These decisions are for the SROs to make, not the Commission. In the Order, the Commission ordered the SROs to act jointly to create the Proposed NMS Plan. Commission regulations are clear that it is the SROs – and not the Commission – that are "authorized to act jointly in . . . [i]mplementing or administering an effective national market plan system."[122] While the Commission has a role in supervising and enforcing those SRO obligations, Commission rules establish that the SROs make these operational decisions.

E. Burden on Competition

Finally, in the Notice, the Commission asks for commenters' views about the impact the Proposed NMS Plan would have on competition.[123] NYSE believes that the Proposed NMS Plan imposes a substantial burden on competition because it requires the SROs – who compete with Non-SROs for order flow – to bear the costs of creating and administering the Proposed NMS Plan, while Non-SROs do not have similar obligations. Without any legal obligations or financial responsibility, individuals representing Non-SROs would have a significant role in the governance of the Proposed NMS Plan, including establishing fees for SROs' market data and the costs associated with implementing and administering the Plan paid for by the SROs. As such, the Proposed NMS Plan places an undue burden on the competition between SROs and non-SROs.

In addition, the requirement in the Proposed NMS Plan that the Administrator be "Independent" would prohibit SROs from competing to provide these services. As discussed above,[124] NYSE does not believe that this "independence" requirement is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets; it would disrupt the mechanisms of the national market system; and it is contrary to the purposes of the Exchange Act.[125] In particular, prohibiting SRO-affiliates from providing Administrator services would place an undue burden on competition. Non-SRO data vendors would be free from having to compete with SRO-affiliates for the role of providing Administrator services. And yet, such non-SRO data vendors may have the same conflicts of interest that the Commission cited in prohibiting an SRO-affiliate to serve as the Plan Administrator, because non-SRO data vendors may be sellers of market data and could benefit from access to subscriber lists. Thus, the requirement in the Proposed NMS Plan for an "independent" Administrator places a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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[122] See 17 CFR 242.608(a)(3)(iii).

[123] See Notice, supra note 1, at 64573 (Topics 55-61).

[124] See supra Point I.B.

[125] See 17 CFR 242.608(b)(2).

Because of these burdens on competition, the Proposed NMS Plan would not remove impediments to and perfect the mechanisms of a national market system or further the purposes of the Exchange Act, as Rule 608(b)(2) requires.

* * * * *

For all of the foregoing reasons, NYSE does not believe that the Commission can approve the Proposed NMS Plan. To the extent that the Commission believes material changes should be made to the Proposed NMS Plan, the Commission is required under the Exchange Act, Rule 608, and the APA to make public and seek comment on any such changes to the text of the Proposed NMS Plan that the Commission proposes to make. Failure to do so would be unlawful.

Respectfully submitted,

Elizabeth K. King

cc: Honorable Jay Clayton, Chairman
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
Brett Redfearn, Director, Division of Trading and Markets

Attachment

Attachment A

1. Does the Staff agree that certain senior management at Participants may receive Highly Confidential and Confidential Information? A Participant may be unable to ensure that it is satisfying its obligations under Rule 608(c) or its corporate oversight obligations unless its senior management is made aware of matters that involve Highly Confidential Information or Confidential Information. It is unclear why senior management could attend the Operating Committee meetings and receive Highly Confidential and Confidential Information but could not receive the same information outside of Operating Committee meetings.

SEC Staff stated that, as originally proposed, Highly Confidential Information could be shared only in an Executive Session and Legal Subcommittee meeting of the Plans. The SEC Staff stated that, beyond that, the question is "who wants it and what do they want to use it for?" While 608(c) obligations are important and are obligations of the SRO, these obligations are not particular to any specific senior manager. The SEC Staff stated they would not agree with the premise that all senior managers are entitled to receive Highly Confidential Information; instead, a specific senior manager must have a specific need to see a specific piece of ~~the~~ Highly Confidential Information for the fulfillment of a specific Plan-related responsibility consistent with the interests, goals, and purposes of the Plan that cannot otherwise be discharged without such information (or information of a lower classification, including Public), and the person cannot share that information with others or use it for purposes other than those for which access to the information was obtained., ~~for example to ensure that SRO complies with Rule 608, for requirements associated with Sarbanes Oxley, or necessary for their corporate responsibilities and not otherwise inconsistent with the purposes of the Plans.~~ SEC Staff stated that the SRO should make and document a "considered determination" as to whether a senior manager meets the standards noted above to access specific Highly Confidential Information, but that it is hard to envision a scenario where a senior manager needs highly sensitive Participant-specific, customer-specific, or individual-specific Plan information. The sharing of specific information with senior managers under this interpretation must also be consistent with the Administrator and Processor's policies and procedures, since the Administrator and Processor are responsible for, among other things, safeguarding Plan information.

* * * * *

2. Under what circumstances can Highly Confidential Information be shared outside of the Executive Session of the Operating Committee or the Legal Subcommittee? The Plan language states that the prohibition against sharing does not apply to disclosures to "other Covered Persons authorized to receive it" but does not address under what circumstances a Covered Person would be considered authorized and is not explicit about how one authorized Covered Person can share Highly Confidential Information with another authorized Covered Person apart from during the Executive Session and Legal Subcommittee

meetings. Additionally, Highly Confidential information can be shared when "required by law." Under what circumstances would the sharing of Highly Confidential Information be required by law?

As proposed, HCI could only be disclosed in Executive Session of the Operating Committee, to the Legal Subcommittee, or to SEC Staff. The Commission added "as otherwise required by law, or to other Covered Persons authorized to receive it" (the former

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was a concept under the proposed Confidential Information procedures). SEC Staff stated that it is possible for a Covered Person to be authorized to receive Highly Confidential Information (e.g., legal counsel); however, the amendment does not specify how such a person becomes authorized. SEC Staff suggested that the Operating Committee could create a process to grant such authorizations for persons to see such information in furtherance of the interests, goals, and purposes of the Plans. SEC Staff also confirmed that although there is an explicit mechanism related to the sharing of Confidential Information, the existence of this explicit mechanism does not foreclose the Operating Committee's creation of a mechanism (which could also be reflected in the Administrator's policies and procedures) related to the sharing of Highly Confidential Information with Covered Persons authorized to receive it (a concept discussed in #1).

* * * * *

3. *Under what circumstances can Confidential Information be shared outside of the Operating Committee without Operating Committee approval? The Plan language states that Confidential Information may be disclosed to other persons who need to receive such information to fulfill their responsibilities to the Plan. What does "responsibilities to the Plan" mean? Would senior management, who ensure that the Participant complies with Rule 608(c), be deemed to "need to receive Confidential Information to fulfill their responsibilities to the Plan"?*

SEC Staff stated that if something can be made public, that is their preference. In that case, senior management can use Public Information. For Confidential Information to be shared, -however, "responsibilities to the Plan" means related to SIP oversight and governance or SIP business. The question is whether someone needs to know the Confidential Information for that purpose, and will use it only for that purpose, rather than generally wanting access to the information. SEC Staff confirmed that once someone needs to receive such information to fulfill their responsibilities to the Plan, the Operating Committee does not need to provide permission for such person to receive the information.

* * * * *

5. *Does the Staff agree that Participants can share Highly Confidential Information and Confidential Information with outside legal counsel and outside auditors? The language states that Covered Persons may not disclose Highly Confidential Information to others, including Agents. These entities need to receive Highly Confidential and Confidential Information for various legal reasons (e.g., Sarbanes-Oxley, Rule 608(c), providing advice to Participants), but the language is unclear as to when that might be permitted.*

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SEC Staff stated that they draw a distinction between agents of the Operating Committee, Administrator, and Processor versus agents of a Participant. To the extent that the agent is an agent of the Operating Committee, Administrator, and Processor, then specific Highly Confidential and Confidential information can be shared with those agents when they need it and use it solely to perform Plan business. ~~In contrast, an agent of a Participant who was not also acting as an agent for the Operating Committee, Administrator, or Processor would need to have a strong reason to access such information. SEC Staff also indicated that any such disclosure would have to be tailored to the need for such information.~~ Participants sharing information with others is addressed in Question #1.

* * * * *

7. *Does the Staff agree that the Administrators can share Restricted Information with outside legal counsel to bring legal action to collect unpaid fees? The collection of fees is a requirement under the Plan, and therefore the engagement of legal counsel to collect fees is sometimes necessary to enforce compliance with the Plans.*

   Solely for this example, SEC Staff stated that if there is a legitimate need in furtherance of the interests, goals, and purposes of the Plan to share specific ~~the~~ Restricted Information, then it is permissible to share it solely for purposes related to, and not inconsistent with, Plan business. It must be held in confidence and not shared with others.

8. *Does the Staff agree that outside auditors and counsel that provide services to the Administrator or Processor (e.g., financial audits and RAS audits as required by the Plans and processor agreements or tax services) are entitled to have access to Restricted Information in the first instance so that such auditors can perform their functions on behalf of the Plans?*

   Solely for this example, SEC Staff stated that if there is a legitimate need in furtherance of the interests, goals, and purposes of the Plan to share specific ~~the~~ Restricted Information, then it is permissible to share it solely for purposes related to, and not inconsistent with, Plan business. It must be held in confidence and not shared with others.

* * * * *

10. *Does the Staff agree that the Administrator can use shared services provided by affiliates to conduct back-office functions (e.g., billing) where such persons may have access to Restricted Information?*

SEC Staff stated that access to information would be permissible where these individuals are separate and walled off from all prop data ~~sales~~personnel.

11. *Are there any limits on the ability of the Operating Committee to authorize the disclosure of Confidential Information other than when (1) disclosing Confidential Information generated by a Participant or Advisor, (2) sharing Confidential Information with employees or agents of a Participant/Affiliate, or (3) authorizing disclosure of Confidential Information by the Advisory Committee? For example, would the Operating Committee be authorized to share a redacted version of the processor contract with the OPRA Operating Committee?*

SEC Staff recognized that Confidential Information is a lower level of confidentiality and the Operating Committee can authorize its disclosure if such disclosure is not inconsistent with the goals and aims of the Confidentiality Policies. The disclosure does not have to be in furtherance of the goals of the Plans, but should not be inconsistent with them. SEC Staff stated that the Operating Committee can release the contract to OPRA if it wants to.

* * * * *

13. *Does the Commission expect the meeting minutes of the Operating Committee to be made public? The Commission made a change to the definition of "public information" to include "duly approved minutes" that contain "detail sufficient to inform the public on matters under discussion and the views expressed thereon"; however, there is no requirement to disseminate such minutes publicly.*

SEC Staff confirmed that the Confidentiality Policy is designed to ensure that meeting summaries continue to be publicly disseminated. The Confidentiality Policy does not require the official meeting minutes to be publicly disseminated in full if they contain Confidential Information, Highly Confidential Information, or Restricted Information. Otherwise, because the Commission refers to the "public availability" of the minutes, SEC Staff understands that public dissemination is contemplated.

* * * * *

17. Are recused individuals allowed to receive Highly Confidential or Confidential Information? The recusal provisions do not reference the Confidentiality Policy, or the potential effects of being recused, other than that the recused person cannot be appointed as a representative.

SEC Staff stated that the Confidentiality Policies apply to a recused individual like any other person. For example, recused persons could receive Confidential Information to fulfill their responsibilities to the Plan. ~~would need to have a legitimate need in furtherance~~

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~~of the interests of the Plan to receive Highly Confidential or Confidential Information,~~ ~~but~~ Because they are recused, it would be difficult to imagine a situation where a recused individual met the applicable ~~such a~~ standard.