May 29, 2020

Via Email

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

Re: Proposed Rule on Market Data Infrastructure (File No. S7-03-20)

Dear Ms. Countryman:

Intercontinental Exchange, Inc. ("ICE") respectfully submits this comment letter on behalf of ICE Data Services ("IDS") in response to the February 14, 2020 proposed rulemaking on Market Data Infrastructure from the Securities and Exchange Commission (the "Commission").[1]

In the Proposing Release, the Commission proposes that, instead of having an exclusive securities information processor ("SIP") for each NMS stock, the exclusive SIPs' critical collection, consolidation, and dissemination functions be performed by two new categories of entities: (1) competing consolidators, which would collect, consolidate, and disseminate market data to customers, and (2) self-aggregators, which would be brokers or dealers that would perform the collection and consolidation of market data for their own internal use (the "Decentralized Consolidation Proposal").[2]

Through its IDS business, ICE operates the ICE Global Network ("IGN"), a global connectivity network whose infrastructure provides access to over 150 global markets and over 750 data sources. IGN offers market participants access to aggregated global markets through the ICE Consolidated Feed, which aggregates content from over 600 sources, including data from more than 150 exchanges, over-the-counter markets, indices, and news. IDS also provides pricing and reference data for fixed income securities and liquidity indicators through its pricing and analytics tools. As such, ICE believes that IDS brings a unique perspective to its review of the Decentralized Consolidation Proposal, in particular its competing consolidator concept, due to its

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1 See Securities Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020) (File No. S7-03-20) ("Proposing Release"). Capitalized terms not otherwise defined herein are used as defined in the Proposing Release.

2 See id., at 16730.

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comprehensive and extensive experience as a data vendor and provider of a global infrastructure.[3]

Executive Summary

The Decentralized Consolidation Proposal purports to replace the current model for collecting, consolidating and disseminating consolidated data with a decentralized consolidation model. The Commission asserts that its proposed new model "would foster competition in the consolidation and dissemination of proposed consolidated market data, better serve the needs of market participants and investors, and help mitigate the influence of certain conflicts of interest inherent in the exiting exclusive SIP model."[4] In addition, the Commission believes that its Decentralized Consolidation Proposal to replace the exclusive SIP model would modernize the infrastructure of the national market system.[5]

Among the weaknesses in the Decentralized Consolidation Proposal is the Commission's failure to consider the substantial impact the new model would have on an existing category of market participants: data vendors. The Decentralized Consolidation Proposal would expand the Commission's regulatory purview in a profound manner to include, for the first time, data vendors who directly receive quotation and trade information from self-regulatory organizations ("SRO").[6] While, as discussed below, it is unclear exactly which consolidation products and services the Commission would regulate, it is clear that the Decentralized Consolidation Proposal would subject data vendors who offer products and services today without Commission regulation, to new and substantial regulatory requirements. The Commission seems content to remain unaware of the Decentralized Consolidation Proposal's impact on what it describes as "non-SRO market data aggregators," stating that "the Commission currently does not have a precise estimate of the number of players in this market and does not know how specialized these players are."[7]

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3 ICE is also the parent company of 12 regulated exchanges around the world, including the New York Stock Exchange LLC ("NYSE") and its national securities exchange affiliates NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (together with the NYSE, the "Affiliate SROs"), futures markets, and clearing houses. In all, ICE has hundreds of subsidiaries, including more than thirty that are significant legal entity subsidiaries as defined by Commission rules. Intercontinental Exchange, Inc. Annual Report on Form 10-K for the year ended December 31, 2019 (filed February 6, 2020), at Exhibit 21.1. All the ICE subsidiaries are ultimately controlled by ICE, as the indirect parent company, but generally they do not control each other.

4 Proposing Release, at 16764.

5 See id., at 16771.

6 National securities exchanges and national securities associations are SROs. There are currently 16 equities national securities exchanges and one national securities association. Id., at 16800.

7 Id., at 16819.

A plain reading of proposed Rule 614(a) suggests that, if data vendors want to continue to "generate consolidated market data" received directly from an SRO, they will be required to register as competing consolidators, and comply with competing consolidator regulatory requirements.[8] Proposed Rule 614(a) clearly would impose a new registration requirement (and associated compliance obligations) on data vendors that "generate consolidated market data" in NMS stocks received directly from an SRO and disseminate it. Because of other Commission statements in the Proposing Release, however, it is unclear whether the Commission intended to require data vendors to register as competing consolidators in order to continue engaging in their current businesses or not. Regardless of whether the Commission is able to clarify these fundamental ambiguities, the Commission does not meet its burden to assess the impact of the Decentralized Consolidation Proposal on efficiency, competition, and capital formation or to reasonably consider whether it would do more harm than good.[9]

In addition, as the Commission notes, whether or not the Decentralized Consolidation Proposal would achieve its goals or address the problems it was designed to address depends entirely on the participation and viability of multiple competing consolidators. The Commission fails to reasonably consider not just whether any competing consolidators would form,[10] but also whether they could sustain operations once created, or the costs to investors and other market participants if competing consolidators ceased operating. In addition, the Commission fails to consider—and in some cases, fails to even recognize—many of the costs and other factors that a rational actor would take into account in determining whether to establish and operate a competing consolidator. As a result, the Decentralized Consolidation Proposal lacks a reasoned basis to assume that multiple competing consolidators would be established.

ICE believes it is unrealistic to think that market participants would create competing consolidators, given the many issues left unresolved by the Commission, including when—and whether—the Commission would ever approve an NMS Plan that allowed competing consolidators.[11] The Decentralized Consolidation Proposal does not adequately consider or analyze the structural requirements or potential revenue and cost streams for competing consolidators or the implications of this model on costs to market participants, leaving many open questions regarding the regulatory framework the Commission is proposing. As a result, the Decentralized Consolidation Proposal fails to fully assess the viability of its radical approach, and leaves unanswered many critical questions regarding the value that a competing consolidator could provide to its clients and the fees it could charge.

In particular, the Commission assumes that half the competing consolidators would be affiliated with an exchange,[12] but does not establish criteria for determining whether a competing consolidator that is affiliated with an exchange is a "facility" of that exchange

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8 See proposed Rule 614(a), id., at16870.

9 See15 U.S.C. 78c(f). See also Proposing Release, at 16809.

10 The Commission estimates that a dozen competing consolidators would form. Id., at 16801.

11 See id., at 16795 and 16838.

12 See id, at 16801.

and thus subject to significantly greater costs and limitations than would be a non-exchange facility competing consolidator. In its failure to do so, the Decentralized Consolidation Proposal does not have a reasoned basis for believing that half the competing consolidators would be affiliated with an exchange.

Given these omissions, the Commission does not have the basis to conclude that replacing the current exclusive SIP model with competing consolidators would address the problems it identifies or do more good than harm.

I. The Decentralized Consolidation Proposal Does Not Adequately Assess the Economic and Competitive Burden Imposed on Data Vendors

The Decentralized Consolidation Proposal addresses the roles that competing consolidators, self-aggregators, and SROs would play in the new deconsolidated model, but spends very little time discussing a fourth category of market participants: data vendors.[13] Today, data vendors offer products to their customers that are similar to the consolidated market data products, the collection, consolidation and distribution of which the Commission proposes to substantially change. Currently, as the Proposing Release recognizes,[14] a data vendor not acting as an exclusive processor may purchase or disseminate proprietary market data from any seller, including SROs, without a requirement to register with the Commission.

It appears that proposed Rule 614(a)(1)(i) may change that. The proposed rule states that, other than an SRO, only competing consolidators would be able to directly receive market data from an SRO and consolidate it for dissemination.[15] This would mean that if a data vendor wants to "generate consolidated market data" it receives directly from an SRO, it must be a registered competing consolidator. Extending that concept to a real world example, it is common practice for a data vendor to mix and match bid and offer data from multiple exchanges to create a consolidated view of the market on the same screen. Such a data vendor would face a choice: (a) register as a competing

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13 Under Rule 600(b), a vendor is defined as ''any securities information processor engaged in the business of disseminating transaction reports, last sale data, or quotations with respect to NMS securities to brokers, dealers, or investors on a real time or other current and continuing basis, whether through an electronic communications network, moving ticker, or interrogation device.'' 17 CFR 242.600(b)(87), and Proposing Release, at note 59.

14 Id., at 16777.

15 Proposed Rule 614(a)(1)(i) provides as follows: "No person, other than a national securities exchange or a national securities association, (i) may receive directly from a national securities exchange or national securities association information with respect to quotations for and transactions in NMS stocks; and (ii) generate consolidated market data for dissemination to any person unless the person files with the Commission an initial Form CC and the initial Form CC has become effective pursuant to paragraph (a)(1)(v) of this section." If the Commission meant for the proposed rule to only apply to persons paying the prices set by the NMS Plan, this text would have to be revised. In that case, questions would arise with respect to who would set the market prices, whether the Commission or NMS Plan could require that they be different or greater than the NMS Plan prices, and what the rational basis for such a requirement could be.

consolidator, (b) stop displaying Level 2 market data that it purchased directly from SROs and consolidated, or (c) purchase all its displayed Level 2 market data from a competing consolidator.

Buried in the second half of a footnote to the Proposing Release is a significant statement that creates uncertainty regarding the meaning of Proposed Rule 614 and the impact of the Decentralized Consolidation Proposal on existing data vendors:

> if a vendor wished to receive directly from the SROs information with respect to quotations for and transactions in NMS stocks *at the prices established by the effective national market system plan(s)* and generate consolidated market data for dissemination, such vendor would be required to register as a competing consolidator. Thus, only competing consolidators and self-aggregators would be able to directly receive the NMS information that is necessary to generate consolidated market data from the SROs *at the prices established by the effective national market system plan(s).*[16]

The cited footnote purports to give an option to a data vendor that wants to keep purchasing consolidated market data directly from an SRO and consolidating it for dissemination: (a) pay the prices established by the relevant NMS Plan, register as a competing consolidator, and assume the substantial, associated regulatory costs, or (b) pay some different price, not established by the NMS Plan, and avoid registering as a competing consolidator. If that were true, then the Decentralized Consolidation Proposal's primary impact on a data vendor that opted not to register would be whether the unregulated data price changed. However, it is unclear whether the text "at the prices established by the effective national market system plan(s)" is limiting or descriptive, and the Commission does not further discuss the possibility that data vendors would have an option or its potential impact. Moreover, a reading of the footnote to provide an option to a data vendor is not consistent with proposed Rule 614(a)(1)(i).

Imposition of a competing consolidator requirement would be a substantial change that would significantly impact the current competitive landscape for data vendors and their market participant customers. It would impact data vendors' regulatory position, costs, and competitiveness. Every existing or potential data vendor would have to determine whether the benefits of purchasing market data directly from an SRO to "generate consolidated market data" for dissemination outweigh the regulatory costs and risks of being a competing consolidator.

The Securities Exchange Act of 1934 (the "Act")[17] requires the Commission to assess the impact of the Decentralized Consolidation Proposal on efficiency, competition, and capital formation, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[18] Even if one ignores the ambiguity about what

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16 Id., at note 434 (emphasis added).

17 15 U.S.C. 78s(b)(1).

18 See15 U.S.C. 78c(f) and 78w(a)(2). See also Proposing Release, at 16809.

requirements the Commission intends to impose on data vendors, the Commission has not met its obligation with respect to the impact that the Decentralized Consolidation Proposal would have on them.

Its failure to meet its obligation to assess the impact of the Decentralized Consolidation Proposal on data vendors is not necessarily surprising, because the Commission is open in stating that it is not familiar with the industry as a whole:

> Regarding the level of competition among non-SRO market data aggregators that sell consolidated data to market participants, the Commission currently does not have a precise estimate of the number of players in this market and does not know how specialized these players are.[19]

The Commission cannot adequately assess the impact of the Decentralized Consolidation Proposal on data aggregators' business if it is unwilling to understand it. In total, the Commission devotes only one paragraph of the Proposing Release to the potential economic impact of the Decentralized Consolidation Proposal on data vendors, without mentioning, much less analyzing, the consequences the Rule 614(a) change in regulatory requirements would have for these market participants. It does not assess whether the costs imposed by the Decentralized Consolidation Proposal, including the regulatory costs and uncertainty discussed below, would outweigh any potential benefits. Nor does it assess whether the costs associated with the Decentralized Consolidation Proposal would lead any current data vendors to exit the market, reducing competition. In place of all this, the paragraph speculates about the cost and content of the consolidated market data, and concludes that the Commission is uncertain about the effects.[20]

The Proposing Release details the Commission's logic for requiring competing consolidators to register pursuant to Rule 614:

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[19] Id., at 16819, pointing to a list of market data vendors published on Nasdaqtrader.com. See http://www.nasdaqtrader.com/Trader.aspx?id=MarketDataVendorsList&StartAlphabet=A&EndAlphabet=ZZZ

[20] The paragraph reads as follows: "To the extent that the amendments lead to cheaper (relative to proprietary data feeds) and higher content consolidated market data, the Commission preliminarily expects that costs to data vendors would go down and the ability of such vendors to grow their customer base would increase. It is also possible that data vendors may increase the range and quality of products they offer using the new expanded core data and that new firms enter the data vendor business. To the extent that the risk of price increases for core data is realized instead, the Commission believes these businesses could potentially face higher costs, which when passed on to clients could cause their customer base to shrink. In the event that these outcomes are severe, it is possible that some data vendors could exit the market. The Commission is uncertain about the potential size and scope of these effects because it is unable to determine both the role of these costs in producing the products supplied by the data services industry and the extent to which the enhanced quality of new core data could play a role in the quality of their products. The Commission invites comments on the issue." Proposing Release, at 16856.

> under the proposed rules, competing consolidators would play a vital role in the national market system by collecting, consolidating, and disseminating proposed consolidated market data. Because the availability of prompt, accurate, and reliable consolidated market data, as proposed, is essential to investors and other market participants, the Commission preliminarily believes that it is necessary and appropriate in the public interest and for the protection of investors to require each SIP that wishes to act as a competing consolidator to register with the Commission as a SIP pursuant to proposed Rule 614.[21]

This logic is based on the premise that competing consolidators would essentially play the role that the exclusive SIPs play now. But the proposed Rule 614 requirement would not just apply to competing consolidators set up for that purpose: it would also apply to any data vendor that "generates consolidated market data [in NMS stocks] for dissemination." Nonetheless, the Decentralized Consolidation Proposal does not address why requiring data vendors to become competing consolidators is reasonably calculated to address the problems it identifies. Those problems are with the exclusive SIPs, not the data vendors.

II. The Decentralized Consolidation Proposal Does Not Have a Reasoned Basis to Believe that Competing Consolidators Would Be Established and Permanently Viable

In order to work, the proposed decentralized consolidation model needs multiple competing consolidators to enter the market, "so that competitive market forces would have a significant effect on their behavior."[22] As stated in the Proposing Release,

> the Commission preliminarily believes that a higher number of competing consolidators would lead to lower fees paid by market participants for proposed consolidated market data, larger gains in efficiency in the delivery of proposed consolidated market data and market data communication innovations, as well as a reduction in data consolidation and dissemination latencies.[23]

If the assumptions in the Proposing Release are wrong, and only a few or just one competing consolidator forms, no competitive market would develop, leaving the market vulnerable to competing consolidators that "charge high prices for the service fee portion of the overall price and thus capture supra-competitive profits from all market participants."[24] If no competing consolidators are created, the model would fail entirely. Despite this, the Decentralized Consolidation Proposal does not consider the possibility that the decentralized consolidation model may be materially delayed, never become viable, or cease to be viable, and provides no plan for those contingencies. As a result,

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21 Id., at 16777.

22 Id., at 16836.

23 Id., at 16838.

24 Id.

the Commission fails to meet its burden to examine the inefficiencies and economic costs of the proposed rulemaking.[25]

The Decentralized Consolidation Proposal offers up one safeguard against having too few, or no, competing consolidators: trusting the Commission's judgment. More specifically, the Proposing Release states that the Commission will not put the new structure in place unless it decides the market is ready:

> in determining whether to approve an NMS Plan amendment that would effectuate a cessation of the operation of the existing exclusive SIPs, the Commission would consider the state of the market and the general readiness of the competing consolidator infrastructure.[26]

The Proposing Release lists examples of what factors the Commission might consider:

> The status of registration, testing, and operational capabilities of multiple competing consolidators, self-aggregators, and market participants; capabilities of competing consolidators to provide monthly performance metrics and other data required to be published pursuant to proposed Rule 614(d)(5)–(6); and the consolidated market data products offered by competing consolidators.[27]

An important assumption underlies these lists: they are predicated on the idea that competing consolidators will be formed *before* the Commission approves the NMS Plan amendment.

This assumption is deeply flawed. It fails to recognize that a market participant would have no incentive to expend the millions of dollars,[28] time, and effort to create a competing consolidator before the Commission approves the NMS Plan. The NMS Plan will set the cost of the consolidated market data and establish important elements of how the decentralized consolidation model would work,[29] all of which are necessary for a market participant to determine whether to create a competing consolidator in the first place. No rational entity would expend the effort to create a competing consolidator if it cannot estimate the relevant costs and benefits.[30]

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25 See 15 U.S.C. 78c(f).

26 Proposing Release, at 16838. See also id., at 16795. The Proposing Release does not state whether the Commission expects to approve any SRO rule filings relating to connectivity to the competing consolidators, and the related fees, before it approves the NMS Plan changes.

27 Id.

28 See id., at 16843.

29 See "Competing Consolidator Costs," in Part III, infra, for a discussion of the specific elements of the Decentralized Consolidation Proposal that are not addressed in the Proposing Release, and so would presumably be addressed in the NMS Plan.

30 A potential competing consolidator would also have to consider that it would have no control over the NMS Plan proposing to change the prices or relevant structures.

In addition, the Decentralized Consolidation Proposal puts no time limit on the Commission's potential delay of the model's implementation, and gives no time frame for how long the Commission would give the market to get ready for the new structure before approving the NMS Plan. As a consequence, potential competing consolidators, potential self-aggregators and SROs could incur substantial costs to get ready for the change, only to be left in limbo during a delay, potentially indefinitely. This would create a substantial inefficiency, as the resources spent preparing for the change would be wasted and market participants would lose the ability to use them elsewhere. Contrary to the assumptions in the Decentralized Consolidation Proposal, potential new competing consolidators would not be blind to these potential uncertainties. They would weigh against creating a competing consolidator before the NMS Plan was approved.

The Decentralized Consolidation Proposal also fails to consider the possibility that, once the new model was in place, sufficient numbers of competing consolidators could cease operations, resulting in a system that is not viable. Unlike the exclusive SIPs, which are obligated to perform their duties in accordance with the NMS Plans, competing consolidators could terminate operations simply by filing a Form CC. If that happens and no other competing consolidators enter the business, the Commission would have dismantled the current reliable system for collecting, consolidating and disseminating consolidated market data and left market participants, other than self-aggregators, with nothing.

III. The Decentralized Consolidation Proposal Does Not Adequately Consider the Costs of the Competing Consolidator Model

The Commission estimates the costs associated with establishing and operating a competing consolidator.[31] ICE provides some feedback on these estimates below, but in the end, it is unable to truly estimate the potential costs or benefits. In the limited time the Commission provided to review the Decentralized Consolidation Proposal, ICE identified a number of unspecified, critical details regarding the proposed competing consolidator model. Ultimately, there are so many open questions that ICE cannot make a reasoned estimate of what establishing and maintaining a competing consolidator would cost.

ICE would not be alone in this. As noted above, no rational competing consolidator would commence operating or remain in operation unless it believes that its potential return on investment is commensurate with the risk. Unfortunately, the Decentralized Consolidation Proposal does not provide sufficient detail for a prospective competing consolidator to analyze the regulatory, compliance, and technology obligations, potential revenues, or related risks. One risk that is clear is that multiple uncertainties remain.[32] Given that the Decentralized Consolidation Proposal rests on the assumption that competing consolidators would be created, this is a remarkable failure.

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31 Proposing Release, at 16843.

32 As noted in Section II, the risks include whether, and when, the Commission would approve an NMS Plan.

The primary issues the Commission did not consider in its Decentralized Consolidation Proposal are set forth below.

Regulatory Responsibilities of, and Limitations on, Competing Consolidators

Proposed Rule 614(d) would mandate that a competing consolidator collect information with respect to quotations for, and transactions in, NMS stocks "directly or indirectly" from the SROs, calculate and generate consolidated market data, timestamp it, and make it available to subscribers on "terms that are not unreasonably discriminatory."

- The Commission does not explain what "unreasonably discriminatory" means or whether it is the same or different from "unfairly discriminate," which is the standard exchanges must meet under Section 6 of the Act. Presently, unregulated data vendors are not restricted by securities regulation in the services provided and charged to clients and can discriminate among those clients, including choosing not to offer services to clients. The Decentralized Consolidation Proposal would change this by subjecting competing consolidators' services to clients to a standard of not "unreasonably discriminatory." The Commission does not articulate how this standard would apply and it is therefore not possible for commenters to assess the burdens it would place on potential competing consolidators, including any currently unregulated data vendors.

- The Commission does not describe the consequences for a competing consolidator that makes data available on terms that are deemed to be unreasonably discriminatory. Similarly, it does not address whether a competing consolidator's actual or potential clients could petition the Commission if they believe the competing consolidator is not meeting this standard.

- The Commission does not consider the costs of the mechanisms and consequences for application and enforcement of the unreasonably discriminatory requirement for both the relevant competing consolidator and its clients and does not provide sufficient information for commenters to evaluate such costs.

- The ability of a competing consolidator to maintain its operations is dependent on collecting fees from clients, yet the Decentralized Consolidation Proposal does not explain how far ahead of implementing a new service or fee a competing consolidator would be required to amend its Form CC or whether the Commission or its staff could object to such new service or fee.

- Any estimate of a business' potential costs would include an assessment of potential liability. Accordingly, whether the Commission believes that agreements between a Competing Consolidator and its clients that limit the liability of the Competing Consolidator are "unreasonably discriminatory" would be a critical factor in such an assessment. The Commission has failed to describe terms a

> Competing Consolidator may require under its agreement with customers to whom it disseminates consolidated market data.[33]

Proposed Rule 603(b) would require that exchanges make any connectivity options provided to proprietary data customers also available to all competing consolidators and self-aggregators in the same manner and using the same methods for the purpose of collecting and consolidating proposed consolidated market data. IDS offers customers wireless connectivity, which the Commission considers Affiliate SRO services.[34] The IDS wireless network, however, is not presently large enough to add all of the consolidated market data from the Affiliate SROs.

- The Commission does not consider that an exchange's connectivity options may not have the capacity to be provided to all competing consolidators and self-aggregators in the same manner and using the same methods.

- Similarly, the Commission does not consider the inherent limitations on the amount of data that a particular connectivity option can handle, as is the case with wireless connectivity. Absent a full description by the Commission, ICE cannot provide comments on the burdens of the Decentralized Consolidation Proposal.

- The Commission needs to consider the burdens associated with its proposed requirement to mandate that SROs satisfy all potential demand for connectivity options, and the competitive impact if not all competing consolidators and self-aggregators are able to connect to SROs using their preferred method. For example, the Proposal does not address what its impact would be on wireless connectivity or how customers would be affected if the SROs ceased to offer wireless connectivity.

Proposed Rule 614(a)(1)(i) would provide that, other than an SRO, only competing consolidators would be able to receive market data from an SRO and "[g]enerate consolidated market data for dissemination to any person …."[35] Importantly, the Decentralized Consolidation Proposal does not include a definition for "generate," thus leaving it unclear what activity with respect to "consolidated market data" would require registration as a competing consolidators. The Decentralized Consolidation Proposal provides that competing consolidators may collect data other than consolidated market data, and may offer other data products and connectivity services.

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33 In other NMS plan contexts, users have challenged as an unfair denial of access a requirement that users agree to limit the liability of the regulated entities See, e.g., In the Matter of the Application of Securities Industry and Financial Market Association for Review of Action Taken by CAT LLC and Certain Self-Regulatory Organizations, Admin. Proc. File No. 3-19766 (April 22, 2020). Whether such a provision in an agreement would between a competing consolidator and its customers constitutes an "unreasonably discriminatory term" or a denial of access has not been adequately addressed by the Commission.

34 See note 52, infra.

35 Proposing Release, at 16870.

- Nothing in the Decentralized Consolidation Proposal prohibits entities that are not registered as competing consolidators from offering any form of data product or connectivity service, so long as they do not receive data directly from an SRO. Non-competing consolidators could still receive the NMS stock information indirectly, receive other information directly or indirectly, and consolidate and disseminate the data. Accordingly, it is unclear why the Commission believes that allowing competing consolidators to offer other data products and connectivity services will entice entities to register as competing consolidators. For this reason, it is not reasonable for the Commission to consider this an incentive or benefit to registering as a competing consolidator.

- If a competing consolidator creates a data feed for a client that includes both consolidated market data and other market data, the Commission does not provide sufficient information in the Decentralized Consolidation Proposal to understand whether that data feed would be subject to prices established by the NMS Plan and the Form CC requirement.

Competing Consolidator Costs

A competing consolidator's costs would include, among other things: creating and maintaining a redundant and resilient infrastructure; connecting to all exchanges and FINRA; paying for consolidated market data at fees established by the NMS plan; consolidating and adding a time stamp to the data; acquiring subscribers and establishing connectivity with such subscribers; distributing data to subscribers; and regulatory compliance.

- The Commission proposes that competing consolidators' customers would be charged for consolidated market data in accordance with the NMS Plan. The Decentralized Consolidation Proposal, however, does not explain how the contracting for data would work under the NMS Plan. It does not specify who would enter into the contracts with, collect fees from, and resolve disputes with, the customers of a competing consolidator that receives the consolidated market data. For example, the Decentralized Consolidation Proposal does not clearly state whether (a) the SROs would charge data fees to the competing consolidators and then competing consolidators would pass through the cost of that data to their customers, (b) the SROs would charge the competing consolidators' customers directly for the SROs data, or (c) the NMS plans would charge data fees to the competing consolidators and their customers.

  This lack of clarity is compounded by the Commission's approval on May 6, 2020 of an order that requires the SROs to act jointly to develop and file with the Commission a proposed new single NMS Plan to collect, consolidate, and disseminate data in NMS stocks ("Governance Order").[36] Among other things,

[36] Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4-757) (order directing the exchanges and the Financial Industry Regulatory Authority to submit a new National Market System Plan regarding consolidated equity market data).

the Governance Order envisions a Plan administrator for the new single NMS Plan that is not owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary market data product for NMS stocks. The Proposal does not discuss the role of the administrator under the proposed decentralized consolidation model.

- Similarly, the Decentralized Consolidation Proposal does not state whether the terms of the contracts with customers would be dictated by the NMS Plan, and therefore would be subject to Commission review, or by the competing consolidator. These questions are essential for a market participant to understand in order to determine whether to establish a competing consolidator. The Commission's failure to reasonably consider these issues in sufficient detail makes it impossible for commenters to assess the costs associated with the Decentralized Consolidation Proposal.

The Commission estimates that potential competing consolidators would incur "total one-time costs of up to between approximately $897,000 and $2.40 MM, depending on entity type."[37]

- Even the higher end of that range is a fraction of what ICE believes it would cost to build the necessary infrastructure to be a competing consolidator. To comply with Regulation SCI, and in the interest of redundancy and resiliency, a competing consolidator would need three or four distinctive technology environments: one each for production, disaster recovery, development/quality assurance, and, ideally, customer testing (non-production) purposes. Accordingly, ICE believes the total one-time costs would greatly exceed the Commission's estimate, and possibly be four or more times larger.[38]

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[37] Proposing Release, at 16843. The Commission estimates that the one-time costs to new entrants, which would be on the higher edge of this range, would be "composed of costs of $93,540 to complete the initial Form CC; costs of $50 to obtain digital IDs for the purposes of signing the initial Form CC; costs of $5,604 to file two amendments to Form CC; labor costs of $1.175 MM, external costs of $825,000 to build its systems to comply with Rules 614(d)(1)–(d)(4), external costs of $14,000 to purchase market data from the SROs, an additional initial external cost of $194,000 to co-locate itself at four exchange data centers; as well as $89,348 in costs that are common to all competing consolidators…." Id., at 16844.

[38] For example, the "NMS network" is a dedicated connection to access the NMS feeds for which SIAC is the exclusive SIP. The cost of building the NMS network, which is inside only one data center, was substantially greater than the Commission's estimation for networks that would extend to four data centers. Specifically, the capital expenditure costs to build the NMS network were estimated at $3.8 million, and the ongoing costs to maintain and operate the NMS network are estimated to be $215,000 annually. Securities Exchange Release No. 87927 (January 9, 2020), 85 FR 2468, at 2470 (January 15, 2020) (SR-NYSE-2019-46) (notice of filing of Amendment No. 1 to proposed rule change amending the Exchange's price list related to co-location services in the Mahwah, New Jersey data center).

- Based on experience, ICE believes that the cost of creating a consolidated feed and distributing it would also be substantial. The process is not just about aggregating a consolidated feed, but about creating highly complex but easy to consume data models that facilitate, rather than hinder, a client's workflow.[39]

Competing Consolidator Revenues

The Decentralized Consolidation Proposal posits that there would be three sources of competing consolidator revenues, all of which would be determined by competition among competing consolidators: (a) charges for the consolidation and dissemination of consolidated market data; (b) charges for the consolidation and dissemination of other data; and (c) charges paid by customers for the connectivity to the competing consolidator to receive the consolidated market data and other data.

The amount of revenues a competing consolidator could obtain would be based on two fundamental factors: the estimated number of potential customers and competitors, and the fees that the competing consolidator could charge. Without knowing either variable, there is no way for an entity to determine whether a competing consolidator's revenue would exceed its costs.

- If major customers decide to become self-aggregators rather than use a competing consolidator, it will reduce the pool of customers, and therefore the potential revenues of competing consolidators. Yet even as it proposes to enable self-aggregators, the Decentralized Consolidation Proposal has not even attempted to evaluate the minimum number of customers necessary to create a market for multiple competing consolidators to provide services.

- With regard to the potential revenue from charges for the consolidation and dissemination of consolidated market data and connectivity to such data, the Decentralized Consolidation Proposal does not analyze whether a potential competing consolidator's revenues would be sufficient to cover its costs. In particular, as noted above, the Decentralized Consolidation Proposal does not reasonably consider how competing consolidators could set their initial fees, a pre-requisite for acquiring clients, when the Regulation NMS Plan will not have been approved and no competing consolidators will have begun business.

- ICE does not believe that it is reasonable for the Commission to consider the charges for the consolidation and dissemination of other data as revenue for a competing consolidator operating under Commission rules. The Commission cannot reasonably expect that a competing consolidator would cross subsidize its regulated business with revenue from its unregulated business.

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[39] The Commission posits that market participants "would save money by either self-aggregating proposed consolidated market data or subscribing to a competing consolidator's data feed." Proposing Release, at 16853. Market participants have invested substantial amounts of money and resources to connect to the exclusive SIPs or data vendors. The Proposal does not consider the costs such market participants would incur in moving to a new competing consolidator, which, based on experience, ICE believes could be substantial.

> Indeed, in its unregulated business a competing consolidator would compete directly with non-competing consolidators, which could receive the NMS stock information indirectly, receive other information directly or indirectly, and consolidate and disseminate the data—as they do now. The difference between the two would be that the competing consolidator would have additional regulatory costs and obligations, which could hamper its ability to compete against unregulated entities. Accordingly, it is not reasonable for the Commission to cite unregulated services as two of the three bases on which competing consolidators would compete, since data vendors can already offer those unregulated services, and all the Proposal would do is create new burdens that would carry over to the unregulated businesses.

Basis of Competition

The Decentralized Consolidation Proposal posits that competing consolidators would compete based on the efficiency of their aggregation of raw SRO data to generate consolidated market data, the number of customers, technology, and differentiated products.[40] It suggests that competing consolidators could differentiate themselves by specializing in lower latency data because exchanges offer different connectivity options. This is only true if the SRO can continue to offer lower latency connectivity—but the Decentralized Consolidation Proposal could potentially lead to the discontinuation of lower latency connectivity options, such as wireless. The Commission has not assessed the competitive impact the Decentralized Consolidation Proposal would have on the market for lower latency connectivity options.[41]

In addition, the Proposing Release posits that "competition among competing consolidators would put downward pricing pressure on these service fees."[42] At the same time, it estimates that a competing consolidator would amend its Form CC once a year.[43] In a truly competitive market, competing consolidators would amend their fees more often than once a year, as they responded to market forces. The Commission does not explain this inconsistency.

IV. The Decentralized Consolidation Proposal Does Not Have a Reasoned Basis to Believe That There Would be Competing Consolidators Affiliated with Exchanges

The Commission posits that fully half of the competing consolidators would be affiliated with SROs. It estimates that as a result of the Decentralized Consolidation Proposal, 12 competing consolidators would come into existence, including four SROs and the two

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40 Id., at 16836.

41 See 15 U.S.C. 78c(f).

42 Proposing Release, at 16840.

43 Id., at 16801.

exclusive SIPs, both of which are affiliates of SROs.[44] This assumption is based on a substantial reliance on SRO affiliates. If only a couple or no SROs create competing consolidators, the potential number of competing consolidators would be dramatically reduced, significantly affecting the competition on which the proposed model relies upon.

Compared to other entities, an exchange affiliate would have an additional factor to weigh in its decision whether to operate a competing consolidator: what regulatory regime would apply. Indeed, an entity affiliated with an exchange, no matter how remotely, would not consider developing a competing consolidator without certainty about the regulatory structure. Yet the Proposing Release fails to provide sufficient guidance on what the dividing line is between (a) an exchange, including its facilities, and (b) exchange affiliates that are not facilities. The answer would determine the competing consolidator's regulatory requirements and profoundly affects its costs and competitiveness, but is not provided. As a result, the Commission cannot reasonably expect that any, let alone half, of the competing consolidators would be affiliates of SROs.

The Proposing Release Does Not Provide Certainty to Potential Competing Consolidators Affiliated With Exchanges

The definition of "exchange" under the Act includes "the market facilities maintained by such exchange."[45] Accordingly, if a competing consolidator is a facility of an exchange, it is part of that exchange for purposes of the Act, and subject to the exchange's regulatory regime. In other words, whether a competing consolidator is a facility or not will determine not just whether it is considered part of an exchange, but also its regulatory requirements and, therefore, its costs and competitiveness.

The definition of a "facility" set forth in the Act does not resolve the question of whether an affiliated competing consolidator would be a facility of an exchange.[46] As the Commission has noted, whether something is a "facility" is not always black and white, as "any determination as to whether a service or other product is a facility of an exchange requires an analysis of the particular facts and circumstances."[47]

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44 The other types of entities that the Commission posits may become competing consolidators are market data aggregation firms, broker-dealers that currently aggregate market data for internal uses, and entities entering the market data aggregation business for the first time. Id., at 16801.

45 15 USC §78c(a)(1).

46 "The term 'facility' when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service." 15 USC §78c(a)(2).

47 Securities Exchange Act Release No. 76127 (October 9, 2015), 80 FR 62584 (October 16, 2015) (SR-NYSE-2015-36), at note 9 (order approving proposed rule change amending

The Proposing Release states that an SRO that wishes to operate a competing consolidator could determine whether to structure it as a facility. In fact, the Proposing Release suggests that SROs may find it more convenient to structure competing consolidators so that they are not facilities:

> The Commission preliminarily believes that SROs that wish to become competing consolidators could find it convenient to arrange an affiliate to do this work so as to avoid having their competing consolidator business subject to the same regulatory regime as an SRO.[48]

The problem is that, while the Decentralized Consolidation Proposal is clear that an affiliate of an SRO *can* set up a competing consolidator that is not a facility of the SRO, it does not say *how* it can do so.

On its face, the cited language suggests that if a competing consolidator were operated by an affiliate of an SRO, it would not be a facility of that SRO. But the Proposing Release stops short of saying that and leaves open the possibility that other, unspecified factors could make a competing consolidator operated by an SRO affiliate a facility of that SRO and thus regulated as an SRO, not a competing consolidator.[49] In other contexts, the mere fact that a service is conducted by an affiliate, not the SRO itself, does not determine whether that service is a facility of the SRO.[50] As a result, a potential competing consolidator could not rely on the existing statements in the Proposing Release as adequate assurance that it would not be considered a facility of an SRO.

Prior Commission statements do not provide clarity on this matter. The Commission has previously stated that services were facilities of an exchange without fully explaining its

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Section 907.00 of the Listed Company Manual). See also Securities Exchange Act Release No. 71990 (April 22, 2014), 79 FR 23389 (April 28, 2014) (SR-NASDAQ-2014-034) at note 4 (noting that that the definition of the term "facility" has not changed since it was originally adopted) and 23389 (stating that the SEC "has not separately interpreted the definition of 'facility'").

48 Proposing Release, at 16837. Interestingly, the Proposing Release uses the term "facility" with respect to all SROs, not just exchanges. The Commission should clarify whether it considers the concept of a "facility" to apply to national securities associations, or whether they would have a different standard.

49 Elsewhere, the Commission has stated that an exchange could operate an alternative trading system ("ATS") without that ATS being a "facility," subject to limitations. See Securities Exchange Act Release No. 40760, 63 FR 70844 (December 22, 1998) (S7-12-98), at 70891 ("any subsidiary or affiliate of a registered exchange could not integrate, or otherwise link the alternative trading system with the exchange, including using the premises or property of such exchange for effecting or reporting a transaction, without being considered a 'facility of the exchange.'").

50 For example, the Affiliated SROs' co-location services are provided by their affiliates, not the SROs themselves.

reasoning, leaving it unclear as to what constitutes a facility.[51] Recently, the Staff of the Commission advised the Affiliate SROs that it believed certain IDS wireless services were facilities of the Affiliate SROs, and therefore subject to filing requirements under Section 19(b) of the Act. The Staff did not set forth the basis of its conclusion, beyond verbally noting that the wireless services were provided by an affiliate of the Affiliate SROs, and that a market participant could use wireless connections to either trade on, or receive the market data of, the Affiliate SROs, or to connect to market data feeds of some of the Affiliate SROs.[52]

It is clear that the Commission reads the "facility" definition broadly, but there is inconsistent interpretation. Knowing that in some contexts an affiliate of an SRO is considered its facility, but without knowing what factors the Commission considers determinative, there is no way for a market participant affiliated with an exchange to determine whether a potential competing consolidator it operated would be considered a facility. The Commission's failure to address this important issue for potential competing consolidators makes it impossible for ICE to adequately and comprehensively comment on the Decentralized Consolidation Proposal.

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51 For example, in 2010, the Commission stated that exchanges had to file proposed rule changes with respect to co-location because "[t]he Commission views co-location services as being a material aspect of the operation of the facilities of an exchange." Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (concept release on equity market structure), at note 76. The Commission did not specify why it reached that conclusion.

Similarly, in 2014, the Commission instituted proceedings to determine whether to disapprove a proposed rule change by The NASDAQ Stock Market LLC ("Nasdaq") on the basis that Nasdaq's "provision of third-party market data feeds to co-located clients appears to be an integral feature of its co-location program, and co-location programs are subject to the rule filing process." Securities Exchange Act Release No. 72654 (July 22, 2014), 79 FR 43808 (July 28, 2014) (SR-NASDAQ-2014-034). In its order, the Commission did not explain why it believed that the provision of third party data was an integral feature of co-location, or even if it believed that it was a facility of Nasdaq, although the Nasdaq filing analyzed each prong of the definition of facility in turn. Securities Exchange Act Release No. 71990 (April 22, 2014), 79 FR 23389 (April 28, 2014) (SR-NASDAQ-2014-034).

52 Telephone conversation between Commission staff and representatives of the NYSE, December 12, 2019, cited in Securities Exchange Act Release Nos. 88168 (February 11, 2020), 85 FR 8938 (February 18, 2020) (SR-NYSE-2020-05) (notice of filing of proposed rule change to establish a Schedule of Wireless Connectivity Fees and Charges with wireless connections); and 88237 (February 19, 2020), 85 FR 10752 (February 25, 2020) (SR-NYSE-2020-11) (notice of filing of proposed rule change to amend the Schedule of Wireless Connectivity Fees and Charges to add wireless connectivity services). See also Securities Exchange Act Release No. 88901 (May 18, 2020) (SR-NYSE-2020-05, SR-NYSEAMER-2020-05, SR-NYSEArca-2020-08, SR-NYSECHX-2020-02, SR-NYSENAT-2020-03, SR-NYSE-2020-11, SR-NYSEAMER-2020-10, SR-NYSEArca-2020-15, SR-NYSECHX-2020-05, and SR-NYSENAT-2020-08) (order instituting proceedings to determine whether to approve or disapprove proposed rule changes to establish a Wireless Fee Schedule setting forth available wireless bandwidth connections and wireless market data connections and associated fees).

Whether an Entity is a Facility Determines its Regulatory Requirements and Therefore is a Major Determining Factor in its Costs and Competitiveness

Whether a competing consolidator would be a facility of an exchange is not an academic question. The answer determines the competing consolidator's regulatory requirements and profoundly affects its costs and competitiveness. As stated in the Proposing Release:

> [a]n SRO could operate a competing consolidator as a facility of the SRO, which would be subject to the rule filing requirements of Section 19(b) of the Exchange Act and Rule 19b–4 thereunder, or the SRO could operate a competing consolidator in a separate affiliated entity, not as a facility, which, like other competing consolidators, would be subject to the proposed registration requirements under proposed Rule 614.[53]

Although it briefly acknowledges that there is a distinction, the Proposing Release does not actually describe the differences in the regulatory burden of the two regimes.[54] In reality, a competing consolidator that is not a facility of an SRO (a "Non-Facility Competing Consolidator") would have a much lighter regulatory burden than a competing consolidator that is a facility of an SRO (a "Facility Competing Consolidator"), as described below:

- Initial Registration: A Non-Facility Competing Consolidator's initial registration on Form CC would become effective unless declared ineffective by the Commission no later than 90 calendar days from the date of filing. "The registration process . . . would not require the publication for notice and comment of an application for registration as a competing consolidator, nor would it require Commission approval of such an application."[55] The Commission may declare an initial Form CC ineffective, but only "if it finds, after notice and opportunity for hearing, that such action is necessary or appropriate in the public interest and is consistent with the protection of investors."[56]

  By comparison, if a Facility Competing Consolidator wanted to register as a competing consolidator, it would face much more substantial hurdles. All of its proposed operations, market data products and services would be subject to the SRO rule filing requirements, including publication, comment, and approval.[57] Any such change would be vulnerable to a challenge by any aggrieved parties, including its competitors, through the comment process. In all, the rule-making process can extend up to 240 days from the date the proposed change is

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53 Proposing Release, at note 537.

54 Id..

55 Id., at 16778.

56 Id., at 16779. The Proposing Release does not say when the notice and hearing would occur.

57 Id., at note 537. See also 17 CFR 240–19b–4.

published,[58] longer if challenged. The rule filings would have to meet all the standards set out in Section 6(b) of the Act.[59] Filings for fees would be immediately effective upon filing, but the Commission would have 60 days to suspend them if it appeared to the Commission that such action was necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of Section 19(b) of the Act.[60]

- Changes to Existing Services and Fees: The differences are even more marked after operations have commenced. At that point, if a Non-Facility Competing Consolidator wanted to make a material change to the pricing, connectivity or products of its offerings, all it would have to do is file an amendment to its Form CC prior to the date of implementation.[61] As with the registration process, no Commission approval would be required and no comment period would apply, which presumably means that any service or fee changes could be implemented immediately. The competing consolidator would be required to make timestamped data "available to subscribers on a consolidated basis on terms that are not unreasonably discriminatory,"[62] but no additional requirements apply, and the Decentralized Consolidation Proposal does not mandate how far ahead of implementation the amendment must be filed.

  By contrast, if a Facility Competing Consolidator wanted to make any change to its products, services or fees, it would be subject to the same SRO rule filing requirements as its initial registration. For services that would require Commission approval, competitors could comment on the proposal and it could take up to 240 days from the publishing date to find out whether the Commission would take action and the proposed change could even be made. For changes to fees, a Facility Competing Consolidator would need to meet all the standards set out in Section 6(b) of the Act, including that fees must be fair and reasonable and not unfairly discriminatory, and the Commission would have 60 days to suspend fee filings if they failed to meet the required standards.

- Ceasing Operations: If a Non-Facility Competing Consolidator wanted to cease operations, it would just have to file notice on Form CC at least 30 business days before it ceased to operate. The Decentralized Consolidation Proposal does not include any measures that would allow the Commission to stop a Non-Facility Competing Consolidator from ceasing operations.

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58 15 U.S.C. 78s(b)(2).

59 15 U.S.C. 78f(b).

60 15 U.S.C. 78s(b)(3)(C).

61 Proposing Release, at 16780. The Non-Facility Competing Consolidator would have to file an update to Form CC once a year.

62 Id., at 16870.

> If a Facility Competing Consolidator wanted to cease operations, it would have to follow the same rule process as above, which would take significantly longer—and the Commission may not approve the change at all.

In sum, under the Decentralized Consolidation Proposal, a Facility Competing Consolidator would be unable to make changes to its products, services, or fees without the delay and uncertainty of a Commission filing, an obstacle not faced by its Non-Facility Competing Consolidator competitors. All such Non-Facility Competing Consolidators would have to do is file an amendment to Form CC. As such, these different types of Competing Consolidators would be operating under different frameworks and timelines which could lead to a variety of disparate consequences. If a competitor decided to undercut a Facility Competing Consolidator's fees or otherwise make a competitive change to its services, the Facility Competing Consolidator would not be able to respond quickly, if at all. Indeed, because Non-Facility Competing Consolidators would not be subject to a Commission determination of whether their services or fees meet the standards in Section 6(b) of the Act, a Facility Competing Consolidator would be at a competitive disadvantage from the very start.

The Proposing Release states that "the proposed competing consolidator registration regime and responsibilities . . . are intended to be a relatively streamlined process that would impose appropriate burdens on entities likely to register as competing consolidators."[63] But by failing to address how an affiliate of an exchange could be a Non-Facility Competing Consolidator, the Decentralized Consolidation Proposal effectively sets up a two-tier system, where one set of competing consolidators would enjoy the relative nimbleness of the lighter Form CC regime, while those affiliated with an exchange could all potentially be subject to the more stringent 19b-4 process. Ultimately, the proposed rulemaking seems inconsistent with Section 3(f) of the Act, because it would not promote efficiency, competition, or capital formation.[64]

In addition, unless the Commission makes a determination regarding its facility status—or at least provides guidance as to what would make it a facility—a competing consolidator affiliated with an exchange runs the risk of following the wrong regulatory regime, and potentially being out of compliance with its obligations under the Act or increasing its costs substantially.

The Commission's failure to provide clarity on these issues substantially reduces the likelihood that entities affiliated with SROs would create competing consolidators, despite the Decentralized Consolidation Proposal's assumptions that they will.

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ICE recognizes the critical importance of a well-functioning national market system. As detailed above, ICE believes that the Decentralized Consolidation Proposal leaves a number of issues and important structural points regarding the changes in the regulatory regime for data vendors and the requirements for competing consolidators unclear, or

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63 Id., at 16776.

64 See 15 U.S.C. 78c(f).

ignores them entirely. ICE asks that the Commission address these issues, including the questions set forth herein, before taking any action with respect to the Decentralized Consolidation Proposal.

Respectfully submitted,

Doris Choi (May 29, 2020 16:19 EDT)

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cc: Honorable Jay Clayton, Chairman
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner

Brett Redfearn, Director, Division of Trading and Markets