SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88827; File No. 4-757)

May 6, 2020

ORDER DIRECTING THE EXCHANGES AND THE FINANCIAL INDUSTRY REGULATORY AUTHORITY TO SUBMIT A NEW NATIONAL MARKET SYSTEM PLAN REGARDING CONSOLIDATED EQUITY MARKET DATA

Notice is hereby given that, pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 ("Act"),[1] the Securities and Exchange Commission ("Commission") orders the Cboe BYX Exchange, Inc. ("BYX"), Cboe BZX Exchange, Inc. ("BZX"), Cboe EDGA Exchange, Inc. ("EDGA"), Cboe EDGX Exchange, Inc. ("EDGX"), Cboe Exchange, Inc. ("Cboe"), Investors Exchange LLC ("IEX"), Long Term Stock Exchange, Inc. ("LTSE"), MEMX LLC, Nasdaq BX, Inc. ("BX"), Nasdaq ISE, LLC ("ISE"), Nasdaq PHLX LLC ("PHLX"), Nasdaq Stock Market LLC ("Nasdaq"), New York Stock Exchange LLC ("NYSE"), NYSE American LLC ("NYSE American"), NYSE Arca, Inc. ("NYSE Arca"), NYSE Chicago, Inc. ("NYSE Chicago"), NYSE National, Inc. ("NYSE National"), and Financial Industry Regulatory Authority, Inc. ("FINRA") (each a "Participant" or a "Self-Regulatory Organization" ("SRO") and, collectively, the "Participants" or "the SROs") to act jointly in developing and filing with the Commission a proposed new single national market system plan (the "New Consolidated Data Plan"). This new plan will replace the three existing national market system plans (the "Equity Data Plans" or "Plans") that govern the public dissemination of real-time, consolidated equity market data for national market system stocks ("NMS stocks").[2] The New Consolidated Data Plan shall be filed

---

1 15 U.S.C. 78k-1(a)(3)(B).

2 Generally, NMS stocks include any security, other than an option, for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan. See 17 CFR 242.600(b)(47).

with the Commission pursuant to Rule 608 of Regulation NMS[3] no later than [insert date 90 days after publication in the Federal Register].

I. INTRODUCTION

On January 8, 2020, the Commission issued for comment a Notice of Proposed Order Directing the Exchanges and FINRA to Submit a New National Market System Plan Regarding Consolidated Equity Market Data ("Proposed Order").[4] As the Commission explained in the Proposed Order, in Section 11A of the Act, Congress directed the Commission to facilitate the establishment of a national market system for securities. The public dissemination of consolidated information about quotes and trade activity is a fundamental component of that system. Pursuant to its statutory responsibility, therefore, the Commission has authorized the Equity Data Plans to facilitate the required collection and dissemination of core data[5] so that the public has ready access to a "comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time during the day."[6] In adopting Regulation NMS in 2005,[7] in order to improve the transparency and effective operations of the Plans, the Commission established advisory committees of non-SRO market participants to advise the Equity Data Plans.[8] The Commission stated that it was a useful first step toward improving the responsiveness of Plan participants to broader non-SRO market participants' concerns and the

---

3 17 CFR 242.608.

4 Securities Exchange Act Release No. 87906 (Jan. 8, 2020), 85 FR 2164 (Jan. 14, 2020) (File No. 4-757). Comments received in response to the Proposed Order are available at https://www.sec.gov/comments/4-757/4-757.htm.

5 See, e.g., Section 11A(b) of the Act and Rule 603(b) of Regulation NMS.

6 Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14. 2010), 75 FR 3593, 3600 (Jan. 21, 2010) ("Equity Market Structure Concept Release").

7 Regulation NMS, Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495 (June 29, 2005) ("Regulation NMS Release").

8 See id. at 37503.

efficiency of Plan operations.[9] The Commission also stated that it would continue to monitor and evaluate Plan developments to determine whether any further action is warranted.[10]

Since that time, developments in technology and changes in the equities markets have heightened an inherent conflict of interest between the Participants' collective responsibilities in overseeing the Equity Data Plans and their individual interests in maximizing the viability of proprietary data products that they sell to market participants. This conflict of interest, combined with the concentration of voting power in the Equity Data Plans among a few large "exchange groups"—multiple exchanges operating under one corporate umbrella—has contributed to significant concerns regarding whether the consolidated feeds meet the purposes for them set out by Congress and by the Commission in adopting the national market system. Additionally, the Commission believes that the continued existence of three separate NMS plans for equity market data creates inefficiencies and unnecessarily burdens ongoing improvements in the provision of equity market data to market participants. Addressing the issues with the current governance structure of the Equity Data Plans discussed in this Order is a key step in responding to broader concerns about the consolidated data feeds.[11]

To that end, in the Proposed Order, the Commission proposed to direct the exchanges and FINRA to jointly develop and file with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,[12] a single New Consolidated Data Plan that consolidates the three

---

9 See id. at 37561.

10 Id.

11 See Proposed Order, supra note 4, 85 FR at 2166, 2168–74 (discussing broader concerns about the Equity Data Plans and the consolidated data feeds).

12 17 CFR 242.608(a). The New Consolidated Data Plan, or any amendment thereto, must comply with the requirements of Rule 608 of Regulation NMS, including the requirement in Rule 608(a) to include an analysis of the impact on competition. 17 CFR 242.608(a).

current Equity Data Plans and that includes certain changes to the governance structure of the Equity Data Plans.[13]

II. DISCUSSION

A. Background

In 1975, Congress, through the enactment of Section 11A of the Act,[14] directed the Commission to facilitate the establishment of a national market system for the trading of securities in accordance with the Congressional findings and objectives set forth in Section 11A(a)(1) of the Act.[15] Among the findings and objectives of Section 11A(a)(1) are that new data processing and communications techniques create the opportunity for more efficient and effective market operations,[16] and that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure the availability of information with respect to quotations for and transactions in securities.[17]

Congress authorized the Commission to prescribe rules to ensure the "prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information."[18] In furtherance of these purposes, the Commission has sought

---

13 One commenter suggests that the governance structure in the Proposed Order be extended to apply to all NMS plans. See Letter from Ellen Greene, Managing Director, Equity & Options Market Structure, SIFMA (Feb. 28, 2020), at 6 ("SIFMA Letter"). The Commission is taking an incremental approach to addressing governance issues related to NMS plans and is at this time addressing only the governance of the Equity Data Plans. The Commission may in the future consider the governance of other NMS plans.

14 15 U.S.C. 78k-1.

15 15 U.S.C. 78k-1(a)(1).

16 See 15 U.S.C. 78k-1(a)(1)(B). See also H.R. Rep. No. 94-229, 94th Cong., 1st Sess. 93 (1975) (House Report noting that the systems for collecting and distributing consolidated market data would "form the heart of the national market system.").

17 See 15 U.S.C. 78k-1(a)(1)(C).

18 15 U.S.C. 78k-1(c)(1)(B).

through its rules and regulations to help ensure that certain "core data"[19] is widely available for reasonable fees.[20] The Commission has recognized that investors must have this core data "to participate in the U.S. equity markets."[21]

Section 11A of the Act also authorizes the Commission, by rule or order, to authorize or require the SROs to act jointly with respect to matters as to which they share authority under the Act in planning, developing, operating, or regulating a facility of the national market system.[22] Pursuant to this authority, the Commission adopted Regulation NMS.[23] Rule 608 of Regulation NMS authorizes two or more SROs, acting jointly, to file with the Commission a national market system plan ("NMS plan") or a proposed amendment to an effective NMS plan.[24] And Rule 603 of Regulation NMS requires the SROs to act jointly pursuant to NMS plans to "disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks."[25] The purpose of the Equity Data Plans, adopted pursuant to Regulation NMS, is to facilitate the collection and dissemination of core data so that the public has ready access to a "comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time during the trading day."[26] Widespread availability of

---

19 See infra note 31 and accompanying text (defining "core data").

20 See 17 CFR 242.603; see also, e.g., Regulation NMS Release, supra note 7, 70 FR at 37560 (stating that "[i]n the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of consolidated market data.").

21 Id. at 37560.

22 See 15 U.S.C. 78k-1(a)(3)(B).

23 17 CFR 242.600-612; see also Regulation NMS Release, supra note 7, 70 FR at 37560.

24 See 17 CFR 242.608.

25 17 CFR 242.603(b).

26 Equity Market Structure Concept Release, supra note 6, 75 FR at 3600.

timely market data promotes fair and efficient markets and facilitates the ability of brokers and dealers to provide best execution to their customers.[27]

Under Regulation NMS and the Equity Data Plans, the SROs are required to provide certain quotation[28] and transaction data[29] for each NMS stock to an exclusive securities information processor ("SIP"),[30] which consolidates this market data and makes it available to market participants on the consolidated tapes, as described below. For each NMS stock, the Equity Data Plans provide for the dissemination of top-of-book ("TOB") data, generally defining consolidated market information (or "core data") as consisting of: (1) the price, size, and exchange of the last sale; (2) each exchange's current highest bid and lowest offer, and the shares available at those prices; and (3) the national best bid and offer ("NBBO") (i.e., the highest bid and lowest offer currently available on any exchange).[31] In addition to disseminating core data, the SIPs collect, calculate, and disseminate certain regulatory data—including information required by the National Market System Plan to Address Extraordinary Market Volatility

---

27 See In the Matter of the Application of Bloomberg L.P., Securities Exchange Act Release No. 83755 at 3 (July 31, 2018), available at https://www.sec.gov/litigation/opinions/2018/34-83755.pdf ("Bloomberg Order"); SEC Concept Release: Regulation of Market Information Fees and Revenues, Securities Exchange Act Release No. 44208 (Dec. 9, 1999), 64 FR 70613, 70615 (Dec. 17, 1999) (stating that the distribution of core data "is the principal tool for enhancing the transparency of the buying and selling interest in a security, for addressing the fragmentation of buying and selling interest among different market centers, and for facilitating the best execution of customers' orders by their broker-dealers").

28 See 17 CFR 242.602.

29 See 17 CFR 242.601.

30 See 15 U.S.C. 78c(22)(A) (defining securities information processor). Rule 603(b) of Regulation NMS requires that every national securities exchange on which an NMS stock is traded and national securities association act jointly pursuant to one or more effective NMS plans to disseminate consolidated information on quotations for and transactions in NMS stocks, and that such plan or plans provide for the dissemination of all consolidated information for an individual NMS stock through a single SIP. See 17 CFR 242.603(b).

31 See Bloomberg Order, supra note 27, at 3; see also Rescission of Effective-Upon-Filing Procedures for NMS Plan Fee Amendments, Securities Exchange Act Release No. 87193 (Oct. 1, 2019), 84 FR 54794, 54795 (Oct. 11, 2019) ("Effective-Upon-Filing Proposing Release").

("LULD Plan"),[32] information relating to regulatory halts and market-wide circuit breakers, and information regarding the short-sale price test pursuant to Rule 201 of Regulation SHO.[33] They also collect and disseminate other NMS stock data and disseminate certain administrative messages. Together with core data, the Commission refers to this broader set of data for purposes of this Order as "SIP data."

The three Equity Data Plans that currently govern the collection, consolidation, processing, and dissemination of SIP data are (1) the Consolidated Tape Association Plan ("CTA Plan"), (2) the Consolidated Quotation Plan ("CQ Plan"), and (3) 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 Basis ("UTP Plan").[34] Pursuant to the Equity Data Plans, three separate networks disseminate consolidated data for equity securities: (1) Tape A for securities listed on the NYSE; (2) Tape B for securities listed on exchanges other than NYSE and Nasdaq; and (3) Tape C for securities listed on Nasdaq. The CTA Plan governs the collection, consolidation, processing, and dissemination of last sale information for Tape A and Tape B securities. The CQ Plan governs the collection, consolidation, processing, and dissemination of quotation

---

[32] The LULD Plan is available at http://www.luldplan.com.

[33] 17 CFR 242.201(b)(3).

[34] Each of the Equity Data Plans is an NMS plan under Rule 608 of Regulation NMS. 17 CFR 242.608; see also Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (order approving CTA Plan); 15009 (July 28, 1978), 43 FR 34851 (Aug. 7, 1978) (order temporarily approving CQ Plan); 16518 (Jan. 22, 1980), 45 FR 6521 (Jan. 28, 1980) (order permanently approving CQ Plan); and 28146 (June 26, 1990), 55 FR 27917 (July 6, 1990) (order approving UTP Plan). The Commission notes that the options exchanges are participants in the Limited Liability Company Agreement of Options Price Reporting Authority, LLC ("OPRA Plan"), an NMS plan under Rule 608 of Regulation NMS, which governs the collection, consolidation, processing, and dissemination of last sale and quotation information for listed options. See Securities Exchange Act Release Nos. 17638 (Mar. 18, 1981), 22 S.E.C. Docket 484 (Mar. 31, 1981); 61367 (Jan. 15, 2010), 75 FR 3765 (Jan. 22, 2010).

information for Tape A and Tape B securities. And the UTP Plan governs the collection, consolidation, processing, and dissemination of last sale and quotation information for Tape C securities.

B. The Need for Changes in the Governance Structure of the Equity Data Plans

As described in the Proposed Order, the Commission believes that the current governance structure of the three existing Equity Data Plans is inadequate to respond to changes in the market and in the ownership of exchanges, and to the evolving needs of investors and other market participants.[35] Below, the Commission explains the basis for its action in ordering the Participants to file the New Consolidated Data Plan, the reasons the Commission believes that the Order reasonably addresses concerns identified by the Commission, the relationship between the Commission's Order to create the New Consolidated Data Plan and the Commission's Infrastructure Proposal,[36] and the need for a new, single plan.

1. The Basis of the Commission's Order

The Equity Data Plans' governance model was established in the 1970s, at a time when trading volume in any given stock was concentrated on its listing market and when the U.S. equity exchanges were member owned, not-for-profit organizations. Since then, the markets have changed dramatically, and technology has fundamentally changed market operations. Exchanges have demutualized, and they or their parent companies now trade as public companies on exchanges. In addition, the three Equity Data Plans are effectively governed by the same operating committee and the same advisors, yet there are still three separate NMS plans for equity market data. The Plans—which, despite changes in the market, still provide sole voting

---

35 See Proposed Order, supra note 4, 85 FR at 2167–68.

36 See Market Data Infrastructure, Securities Exchange Act Release No. 88216 (Feb. 14, 2020), 85 FR 16726 (Mar. 24, 2020) (File No. S7-03-20) (Proposed Rule) ("Infrastructure Proposal").

power to the exchanges and FINRA as members of the operating committee—control the operations of the SIPs that produce and disseminate core data, as well as the data products offered and their prices, while most of the exchanges also offer proprietary data products for sale.

As discussed in the Proposed Order, the Commission believes that the demutualization of the exchanges and the proliferation of proprietary exchange data products have heightened the conflicts between the SROs' business interests in proprietary data offerings and their obligations as SROs under the national market system to ensure prompt, accurate, reliable, and fair dissemination of core data through the jointly administered Equity Data Plans.[37] And these conflicts bear on the exchanges' incentives to meaningfully improve the provision of core data.[38] For certain proprietary data products in particular, exchanges have deployed cutting edge technology to reduce latency and made other enhancements to improve content. For example, the exchanges have developed depth-of-book ("DOB") products that, relative to the SIPs, provide greater content at lower latencies. For another segment of the data market that is less sensitive to latency, exchanges have also developed proprietary TOB products that provide data that is

---

37 See Proposed Order, supra note 4, 85 FR at 2168–74 (discussing the basis for the Proposed Order and sources of input).

38 Proprietary data products are significant sources of revenues for exchanges that offer them. Consequently, the Commission believes, and market participants have stated, that the exchanges may not be incentivized to adequately improve the SIPs, including the content and latency of the SIPs, as making SIP content and latency comparable to the proprietary feeds could decrease revenues earned from certain proprietary data products. See, e.g., Clearpool Group Viewpoints Rethinking the Current Market Structure (Sept. 2019), at 7 (stating, "Currently, SIP [p]lans are governed by SROs that have conflicts of interest in the provision of market data (i.e., the exchanges, excluding FINRA) as they are selling market data products that directly compete with the SIPs. These SROs therefore have a disincentive to either invest in the SIPs or to make SIPs competitive products to their proprietary data products, and it is unlikely that they would vote to make needed changes to the SIP Plans."), available at https://cdn2.hubspot.net/hubfs/1855665/Clearpool%20Group%20Viewpoints%20-%20September%202019%20FINAL.pdf. See also Letter from John Ramsay, Chief Market Policy Officer, IEX, at 3 (Sept. 24, 2019) ("SIP governance is still under the control of exchanges that have no reason to want the SIPs to be competitive with their own lucrative feeds. Some exchanges even overtly market their own data as a better alternative to the SIPs. The conflicts of interest are obvious and acute.").

generally limited to the highest bid, lowest ask, and last sale price information at a lower cost to subscribers. Despite the Equity Data Plans' improvements to certain aspects of the SIPs and related infrastructure,[39] these improvements have not been sufficient to meet the needs of equity market participants, and the SIPs have continued to meaningfully lag behind the proprietary data products and their related infrastructure with respect to content and speed.[40]

Input received from a diverse array of market participants supports the Commission's view that the differentials between SIP data and DOB data feeds has reduced the usefulness of the form and content of SIP data.[41] One commenter on the Proposed Order asserts that "few market participants can rely on the SIP for order routing because the necessary improvements to the SIPs have not been made under the current governance structure."[42] Another commenter similarly states that it has "significant concerns regarding whether the consolidated feeds meet the purposes set out by Congress and by the Commission…."[43] And a third commenter asserts that the SIPs are "facially inadequate for investors' or brokers' trading strategies – or for operating a competitive trading venue."[44]

Certain commenters, however, challenge the need for the Commission's Proposed Order. One commenter states that the Commission's assertions that the exchanges have failed to invest

---

39 See Proposed Order, supra note 4, 85 FR at 2171–72 (describing improvements to some aspects of the SIPs and related infrastructure).

40 See Proposed Order, supra note 4, 85 FR at 2171–72. See, e.g., Letters from Gregory Babyak, Global Head of Regulatory Affairs, Bloomberg L.P. (Feb. 28, 2020), at 3 ("Bloomberg Letter"); Joe Wald, Chief Executive Officer, and Ray Ross, Chief Technology Officer, Clearpool Group (Feb. 28, 2020), at 2 ("Clearpool Letter"); Tyler Gellasch, Executive Director, Healthy Markets Association (Feb. 20, 2020), at 6 ("Healthy Markets Letter"); and SIFMA Letter, supra note 13, at 2.

41 See Proposed Order, supra note 4, 85 FR at 2169–70.

42 SIFMA Letter, supra note 13, at 2.

43 Clearpool Letter, supra note 40, at 2.

44 Healthy Markets Letter, supra note 40, at 5.

in improvements to the dissemination of data through the Equity Data Plans, and that the Equity Data Plans have not kept pace with the exchanges' proprietary data products, are "unsubstantiated," "demonstrably false," and "cannot provide a basis for agency action under the APA [Administrative Procedure Act]."[45] This commenter states that SIP performance is defined by three factors—availability, latency, and message throughput—and provides statistics that, it contends, demonstrate that investments by the Equity Data Plans have "significantly increased" the performance of the SIPs with respect to these three factors.[46] This commenter further asserts that the Commission has implied that the exchanges have intentionally slowed progress on employing a "distributed SIP" model, which would reduce geographic latency, "to make their own proprietary data products look better by comparison,"[47] and that such an allegation is "unwarranted" and reflects a "failure to grasp the complexity of the proposal."[48] Another commenter also highlights efforts that have already been undertaken to increase the speed with which subscribers can access SIP data.[49]

The Commission disagrees that recent improvements in SIP performance obviate the need for the governance changes outlined in this Order. While we recognize recent efforts by the

---

45 Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq (Feb. 28, 2020), at 9 ("Nasdaq Letter"); see also Nasdaq Letter at 10 ("The Commission must take these facts into account when analyzing the performance of the SIP processors, and base the proposal on grounds other than the verifiably false assertion that the SIP processors have under-invested in technology."). On February 28, 2020, Nasdaq filed a (i) petition for clarification and extension of comment period and (ii) comment letter in response to the Proposed Order, which restated portions of the petition. Throughout this Order, the Commission is citing to the latter.

46 Nasdaq Letter, supra note 45, at 9.

47 Id. at 10.

48 Id. at 11.

49 See Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, and General Counsel and Corporate Secretary, NYSE (Feb. 5, 2020), at 6–7 ("NYSE Letter").

Equity Data Plans to improve the performance of the SIPs,[50] those actions have not fully mitigated our concerns with SIP performance.[51] Congress charged the Commission with ensuring the "prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information."[52] In furtherance of this responsibility, the Commission seeks through its rules and regulations to help ensure that certain "core data"[53] is widely available for reasonable fees.[54] The Commission has recognized that investors must have this core data "to participate in the U.S. equity markets."[55] And the purpose of the Equity Data Plans, adopted pursuant to Regulation NMS, is to facilitate the collection and dissemination of core data so that the public has ready access to a "comprehensive, accurate, and reliable

---

50 See Proposed Order, supra note 4, 85 FR at 2172.

51 The Commission also notes that some of the recent improvements made to the SIPs have been responses to significant SIP outages. For example, in 2013, after a significant SIP outage that caused operations to cease and a market-wide halt in the trading of Nasdaq-listed securities ("UTP SIP Outage"), the then-Chair of the Commission met with the heads of the equities and options exchanges to address the reliability of market systems. See SEC Chair White Statement on Meeting With Leaders of Exchanges, September 12, 2013, available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539804861. In response, the exchanges implemented some enhancements to the reliability of the SIPs and backup systems. See Joint Press Release by the Participants, available at https://ir.theice.com/press/news-details/2013/Self-Regulatory-Organizations-Response-to-SEC-for-Strengthening-Critical-Market-Infrastructure/default.aspx. After the UTP SIP Outage, however, several market participants continued to raise concerns about the adequacy of the SIP infrastructure. SIFMA, for example, argued that the UTP SIP Outage was a symptom of the outdated system by which critical market data is controlled and distributed and stated that the current system suffers from a lack of transparency and competition, questions of underfunding, and insulated governance. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Mary Jo White, Chair, Commission (Dec. 5, 2013), available at https://www.sifma.org/wp-content/uploads/2017/05/sifma-submits-comments-to-the-sec-on-securities-information-processors-and-operational-resiliency.pdf.

52 15 U.S.C. 78k-1(c)(1)(B).

53 See supra note 31 for definition of core data.

54 See 17 CFR 242.603; see also, e.g., Regulation NMS Release, supra note 7, 70 FR at 37560 (stating that "[i]n the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of consolidated market data.").

55 Id. at 37560.

source of information for the prices and volume of any NMS stock at any time during the trading day."[56]

Despite recent efforts to improve SIP performance, disparities between SIP data and proprietary DOB data feeds with respect to both speed and content continue to affect the ability of many market participants to use core data to be competitive in today's markets and thereby call into question whether the SIPs continue to adequately serve their regulatory purposes. Moreover, the relevant measure of SIP performance under Section 11A of the Act is not limited to the three factors discussed by one commenter—availability, latency, and message throughput.[57] The Commission must evaluate whether the collection, processing, distribution, and publication of equity market data is "prompt, accurate, reliable, and fair"— and also, crucially, the "usefulness of the form and content of such information,"[58] which recent efforts have not sufficiently addressed.

Nor is the basis of the Commission's action that the Participants have failed to make any improvements to the SIPs. Rather, changes in the market, combined with the current governance structure of the Equity Data Plans, have "exacerbated the exchanges' lack of incentives to improve the SIPs."[59] As the Commission explained in the Proposed Order, addressing these governance concerns is a "key step" in responding to the broader concerns about whether the consolidated data feeds continue to serve their regulatory purpose.[60] While the Commission understands that substantial changes to the SIPs are complicated undertakings, the Commission

---

56 Equity Market Structure Concept Release, supra note 6, 75 FR at 3600.

57 Nasdaq Letter, supra note 45, at 9.

58 15 U.S.C. 78k-1(c)(1)(B).

59 Proposed Order, supra note 4, 85 FR 2173.

60 Proposed Order, supra note 4, 85 FR at 2173.

believes that the current governance model of the Equity Data Plans—with its concentration of voting power in a small number of exchange groups, its lack of voting power for non-SRO representatives, and the requirement for unanimity in support of any substantial change to the SIPs—perpetuates disincentives for the Equity Data Plans to invest in certain improvements to enhance the distribution of core data or the content of the core data itself.

Finally, one commenter argues that the Commission has relied on "cherry-picked opinions of self-interested market participants to justify the Proposed Order—without any of its own independent analysis" and that this "further underscores the arbitrary and capricious nature of its decision-making."[61] The Commission has studied market data issues over the course of many years and has devoted considerable resources to this study and to the analysis of these issues.[62] Moreover, the Commission published the Proposed Order expressly to provide the opportunity for public comment on this proposal by all interested parties, including the Participants, for the Commission to consider in its analysis.[63] Indeed, the Proposed Order specifically solicited any "additional insights into the concerns and issues discussed in the Proposed Order" from the Participants and stated that the Commission "will consider such information and suggestions, as well as any other comment on the Proposed Order."[64] In addition, the New Consolidated Data Plan submitted in response to this Order will itself be

---

61 NYSE Letter, supra note 49, at 16.

62 See Regulation of Market Information Fees and Revenues, Securities Exchange Act Release No. 42208 (Dec. 9, 1999), 64 FR 70613 (Dec. 17, 1999); Equity Market Structure Concept Release, supra note 6; Securities and Exchange Commission, "SEC Announces Members of New Equity Market Structure Advisory Committee" (Jan. 13, 2015), available at https://www.sec.gov/news/pressrelease/2015-5.html; and Securities and Exchange Commission, Equity Market Structure Roundtables, https://www.sec.gov/spotlight/equity-market-structure-roundtables (last visited Apr. 17, 2020).

63 The Commission also notes that the Proposed Order itself included a summary of comments raised in the past by this commenter and others who were opposed to central aspects of the Commission's proposal, including the limitation on exchange-group voting, see Proposed Order, supra note 4, 85 FR at 2175–76, and the provision of votes to non-SROs. See Proposed Order, supra note 4, 85 FR at 2178–81.

64 Proposed Order, supra note 4, 85 FR at 2165.

published for public comment prior to any Commission decision to disapprove or to approve the plan with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.

2. The Efficacy of the Proposed Order

(a) The Proposed Order Reasonably Addresses the Concerns Identified by the Commission

One commenter argues that, "[r]ather than improving the SIPs, the Proposed Order will instead undermine the SROs' ability to efficiently improve them for the benefit of investors and the market," and that, therefore, "[b]ecause the Commission's approach is not reasonably calculated to address the disparate data feed problem identified by the Commission, it is arbitrary and capricious."[65] This commenter also argues that the Proposed Order relies on the "unfounded assumption" that granting non-SROs authority in the New Consolidated Data Plan would reduce conflicts of interest,[66] and that the Commission's "decision to ignore the likely impact of the non-SRO's own conflicted interests is a critical oversight."[67] This commenter further argues that, "[w]hile failing to establish how the Proposed Order will reduce the influence of alleged conflicted interests, the Commission has also failed to demonstrate how the Proposed Order will otherwise improve SIP functionality."[68] This commenter concludes that the Proposed Order will not advance the Commission's stated purpose and therefore "lacks the necessary 'rational

65 See NYSE Letter, supra note 49, at 12.

66 Id. at 16.

67 Id.

68 Id.

connection' between regulatory means and ends mandated by the APA [Administrative Procedure Act]."[69]

Other commenters assert that the Proposed Order does not go far enough. One commenter argues that the Proposed Order uses an "overly elaborate and conflicted process to potentially implement piecemeal changes that will not fix the fundamental conflict of interest at the heart of SIP governance,"[70] because the Proposed Order would direct the for-profit exchanges to draft the terms of the New Consolidated Data Plan.[71] The commenter concludes that the Commission should instead "exercise its authority to directly assume control over the equity data plans, and appoint the SROs to … an advisory committee for the provision of the public market data stream,"[72] ensure that filings by the Equity Data Plans meet the applicable regulatory standards, and adopt its proposed rule to rescind effective-on-filing procedures for NMS plan amendments.[73] Another commenter similarly asserts that the Proposed Order does not directly address the issues presented by the coexistence of SIPs and proprietary data feeds and that the Proposed Order would not sufficiently improve the governance of the Equity Data

---

69 Id. at 16–17.

70 Healthy Markets Letter, supra note 40, at 14; see also Letter from Dan Jamieson (Mar. 29, 2020) ((generally concurring with the comment letters submitted by Healthy Markets and Council of Institutional Investors ("CII"), infra note 74).

71 See id. at 8–9, 14; see also id. at 15 ("While we appreciate the intent of the Proposed Order, it simply doesn't do enough, and in our view further entrenches the deeply flawed system for years to come.").

72 Id. at 14–15.

73 See Effective-Upon-Filing Proposing Release, supra note 31.

Plans.[74] This commenter suggests that the Commission itself should appoint the members of the SIPs' operating committees and include a majority of non-SRO members.[75]

Other commenters, however, support the Commission's view that improving the governance structure of the SIPs would likely improve the SIPs. One commenter offers support for the Commission's belief that the evolution of the exchanges into publicly held companies has created a conflict with their regulatory objectives in operating the SIPs.[76] One commenter states that it agrees that "broader industry participation in the governance of the NMS Plans would be an effective tool to address these conflicts of interest and ensure that core data provided by the SIP[s] continues to improve."[77] Another commenter states that it believes that the Proposed Order would "substantially improve the governance of the SIP, which should enhance both the operations of the SIP and the quality of SIP data."[78] And another commenter agrees that "[i]mproving the governance structure should help ensure that the SIPs keep up with market data innovations in the future."[79] Several other commenters also express the view that the

---

74 See Letter from Jeffrey P. Mahoney, General Counsel, CII, (Feb. 20, 2020), at 2 ("CII Letter"). See also Letters from Jeffrey T. Brown. Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Company, Inc. (Feb. 28, 2020), at 5 ("Schwab Letter") (expressing concern that "the proposed changes to the voting structure of the operating committees may still yield only the status quo"); Joseph Kinahan, Managing Director, Client Advocacy and Market Structure, TD Ameritrade, Inc. (Feb. 24, 2020), at 5 ("TD Ameritrade Letter") (asserting that allowing the SROs to propose amendments to the New Consolidated Data Plan without buy-in from non-SROs "may lead to substantially similar circumstances which exist currently"); Kelvin To, Founder and President, Data Boiler Technologies, LLC (Feb. 4, 2020), at 2, 4 (asserting that "spinning off" the SIPs from the exchanges would be better than prescribing a particular governance structure).

75 See CII Letter, supra note 74, at 6.

76 See Letter from Nathaniel N. Evarts, Managing Director, Head of Trading, Americas, et al., State Street Global Advisors (Feb. 28, 2020), at 2 ("State Street Letter").

77 Letter from Lisa Mahon Lynch, Associate Director, Global Trading, Wellington Management Company LLP (Feb. 28, 2020), at 1 ("Wellington Letter").

78 Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Feb. 28, 2020), at 6 ("ICI Letter").

79 SIFMA Letter, supra note 13, at 3; see also id. at 2 ("We support the Commission mandating these governance changes and recommend finalizing the order as quickly as possible….").

Commission's proposed changes to SIP governance would facilitate improvements to the SIPs.[80] One of these commenters states, "the decision to give non-SROs voting rights and recognizing exchange operators as a single entity for purposes of voting is a positive step in helping to promote useful upgrades of the SIP."[81] Another commenter observes, "[w]e anticipate that the proposed changes will help mitigate the conflicts of interest that are inherent to the current structure and will establish a solid, new foundation through which future enhancements to the SIPs, as necessary, can be more efficiently and fairly made."[82] One commenter agrees that "reform of the current governance structure of the Equity Data Plans can better serve the needs of investors and other market participants."[83] Another commenter anticipates that "reducing the concentration of power in large exchange groups makes SIP enhancements more likely."[84] Additionally, one commenter states that, as long as the Commission's final order "explicitly directs [the] exchanges to take specific actions in the new Plan, without allowing them

---

80 See Letters from Michael Blasi, SVP, Enterprise Infrastructure, and Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Feb. 28, 2020), at 2 ("Fidelity Letter"); Clearpool Letter, supra note 40, at 2; Allison Bishop, President, Proof Services LLC (Feb. 27, 2020), at 7 ("Proof Letter"); Anders Franzon, General Counsel, MEMX LLC (Feb. 28, 2020), at 3 ("MEMX Letter"); see also Letters from Sherry Madera, Chief Industry & Government Affairs Officer, Refinitiv (Feb. 27, 2020), at 3 ("Refinitiv Letter") (asserting that the Proposed Order "will significantly improve the health of our industry and all the market to take concrete, reasonable action to improve administrative, operational and fee-setting processes associated with market data and market access"); Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (Feb. 25, 2020), at 1 ("Virtu Letter") (asserting that the Proposed Order "represents an important step forward in enhancing the transparency and efficiency of the NMS [p]lan structure, and in eliminating potential conflicts of interest associated with the dissemination of consolidated equity market data"); Schwab Letter, supra note 74, at 4 ("The SEC's proposal to both consolidate equity market data plans and provide for non-SRO representation on the operating committees is both a welcome development and a substantial departure from the status quo of exchange-run market data plans.").

81 Clearpool Letter, supra note 40, at 2.

82 Fidelity Letter, supra note 80, at 2.

83 MEMX Letter, supra note 80, at 3.

84 Proof Letter, supra note 80, at 7.

optionality to craft a different alternative – the current process ought to be sufficient to ensure substantial progress in this area."[85]

The Commission believes, as it stated in the Proposed Order, that addressing issues with the current governance structure of the Equity Data Plans is "an important first step in responding to concerns about the consolidated data feed."[86] And, as the Proposed Order explained, the Commission believes that the current governance structure of the Equity Data Plans is inadequate to respond to recent changes in the market and to the evolving needs of investors and other market participants,[87] and that, under the current governance structure, sufficient improvements to the consolidated market data feeds have not occurred.[88] Further, the Commission recognizes that the inadequacies in the governance model of the Equity Data Plans that it has identified may not be the sole cause of broader concerns about the consolidated feed. But, based on its extensive experience overseeing the Equity Data Plans and the national market system, as well as input received from market participants through numerous Commission initiatives,[89] the Commission believes that the governance structure of the Equity Data Plans contributes significantly to the broader concerns about the consolidated data feed.[90] Thus, the Commission believes that changes to the governance structure of the SIPs are appropriate to create a governance structure that will reduce obstacles to ongoing improvement of the

---

85 Letter from Daniel Keegan, Head of North America Market Securities Services, Co-Head of Global Equities & Securities Services, Citigroup Global Markets Inc. (Mar. 2, 2020), at 4 ("Citi Letter").

86 Proposed Order, supra note 4, 85 FR at 2173.

87 See Proposed Order, supra note 4, 85 FR at 2168.

88 See Proposed Order, supra note 4, 85 FR at 2168.

89 See supra note 62 and accompanying text.

90 See Proposed Order, supra note 4, 85 FR at 2169–73 (discussing the Commission's concerns regarding the Equity Data Plans' provision of equity market data).

consolidated market data feeds in ways that the current governance structure of the Equity Data Plans has not. The Commission recognizes that additional operational changes may also be appropriate in order to improve SIP functionality, and believes that making these governance changes will facilitate decision-making regarding operational changes.[91]

As noted above, certain commenters question whether the Commission's proposed changes to SIP governance will, in fact, improve the governance of the SIPs, either because the Commission has not, in their view, appropriately considered the conflicted interests of the non-SRO members of the operating committee of the proposed New Consolidated Data Plan,[92] or because the Commission has not removed the conflicted SROs from the process of creating the New Consolidated Data Plan.[93] Regarding the conflicts of interests of non-SROs, the Commission recognizes that each representative of a buyer of market data would also have an inherent conflict of interest in serving on the operating committee of the Plans.

With respect to both SROs and non-SRO representatives, it is not possible to completely eliminate conflicts from the governance structure of the existing Equity Data Plans or the New Consolidated Data Plan. But the Commission is attempting to balance the views of the exchanges, which are subject to inherent conflicts of interest and which also have dominant voting power on the Equity Data Plans (as well as on the New Consolidated Data Plan), with the views of non-SROs, which would also be subject to conflicts of interest.[94] The Commission believes that a more diverse set of perspectives from full voting members of the operating

---

91 Separately, the Commission has proposed to make specific changes to the operations of the SIPs through the Commission's market data infrastructure proposal. See Infrastructure Proposal, supra note 36.

92 See NYSE Letter, supra note 49.

93 See Healthy Markets Letter, supra note 40; CII Letter, supra note 74.

94 See infra Section II.E. The Commission also believes that many non-SROs, as subscribers to SIP data, would have incentives to improve the usefulness of SIP offerings.

committee of the New Consolidated Data Plan would improve the governance structure of the SIPs and would help to ensure that the operating committee benefits from these views before it takes action or files proposed plan amendments with the Commission.

In addition, the Commission believes that broadening the perspectives represented on the operating committee by including non-SROs would be beneficial in providing more meaningful inclusion of key stakeholders' views in New Consolidated Data Plan decision-making. As the Plans play an important role in the national market system, and because the Plans' decisions frequently place financial and operational burdens on non-SRO market participants, the non-SROs' representation as voting members, combined with a reallocation of voting power, would support the goals of the New Consolidated Data Plan by ensuring that a broader range of relevant opinions and perspectives have voting representation on the operating committee, which the Commission believes will help to facilitate enhanced decision-making and innovation in the provision of equity market data.

Moreover, the Proposed Order specifically acknowledged that the New Consolidated Data Plan should also include provisions to address conflicts of interest of non-SRO representatives on the operating committee.[95] As discussed in more detail below, a conflicts-of-interest policy would apply to non-SRO representatives and would require disclosures similar to those of SRO representatives.[96]

---

95 Proposed Order, supra note 4, 85 FR at 2185; see also infra Section II.E.1.

96 See infra Section II.E.1.

(b) The Relationship Between the Proposed Order and the Commission's Infrastructure Proposal

Two commenters argue that significant unexplained inconsistencies exist between the Proposed Order and the Commission's Infrastructure Proposal.[97] The commenters assert that the Proposed Order would create a single consolidator for equity market data, while the Infrastructure Proposal would replace this system with a system of multiple competing consolidators.[98] One of the commenters also argues that the Proposed Order advocates changes in the governance model because these changes would lead to a distributed SIP model and an expansion of the categories of data disseminated, and that the Infrastructure Proposal instead does not mandate distributed data dissemination by any consolidator and replaces voluntary consideration of expanded data content with "government mandated depth-of-book and auction data."[99] That commenter further argues that the Infrastructure Proposal would make "extensive changes in the scope of authority vested in the operating committee of the New Consolidated Data Plan"; that the Infrastructure Proposal "would apparently nullify, or at least undermine, the authority of the New Consolidated Data Plan to continue to act as a data consolidator"; and that the Infrastructure Proposal would "vest the operating committee with unprecedented new authority to regulate SRO fees far beyond what is included in the consolidated feed operated by the New Consolidated Data Plan."[100] And the commenter states that, while the Proposed Order does not directly address market structure, the Infrastructure Proposal would "significantly

---

97 See Nasdaq Letter, supra note 45, at 2–3, 5; Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, and General Counsel and Corporate Secretary, NYSE (Apr. 23, 2020), at 3–4 ("NYSE Letter 2").

98 Nasdaq Letter, supra note 45, at 2; NYSE Letter 2, supra note 97, at 3.

99 Nasdaq Letter, supra note 45, at 2.

100 Id. at 2; see also id. at 11–12.

impact substantive provisions of Regulation NMS," but that the Commission has not provided an analysis of how these market structure changes may affect aspects of the Proposed Order.[101]

The commenters argue that the alleged inconsistencies between the Proposed Order and the Infrastructure Proposal work to deny commenters a meaningful opportunity to comment on either proposal, and that commenters will therefore be denied procedural rights guaranteed by the Administrative Procedure Act ("APA").[102] One of the commenters further urges the Commission to extend the comment period for both the Proposed Order and the Infrastructure Proposal,[103] and to issue a statement that articulates how the Proposed Order and the Commission's Infrastructure Proposal are intended to work together and that reconciles the conflicts between the two proposals.[104] The other commenter argues that the Commission has offered no explanation for why the Proposed Order remains necessary in light of the Infrastructure Proposal,[105] and asks that the Commission withdraw both proposals and propose a "single, unified, and well-reasoned rule" to address the issues.[106]

The Commission disagrees with the view that there are inconsistencies between the Proposed Order and the Infrastructure Proposal. The two proposals address distinct aspects of the SIPs. The Proposed Order, as discussed above, addressed only the governance structure of the Plans that oversee the SIPs, and it did not address the core operational structure of the SIPs—

---

101 Id. at 2.

102 See Nasdaq Letter, supra note 45, at 3–5; NYSE Letter 2, supra note 97, at 4–5.

103 See Nasdaq Letter, supra note 45, at 3. The Commission extended the comment period for the Proposed Order from February 28, 2020, to March 20, 2020. See Securities Exchange Act Release No. 88340 (Mar. 6, 2020), 85 FR 14987 (Mar. 16, 2020).

104 See id. at 2–3; see also id. at 2 (asserting that the Commission has not provided an analysis of how the market structure changes of the Infrastructure Proposal might affect aspects of the Proposed Order, such as the mandate to create a single SIP).

105 NYSE Letter 2, supra note 97, at 4.

106 NYSE Letter 2, supra note 97, at 2, 5.

including the content of SIP data products and the method by which such NMS stock information is collected, consolidated, and disseminated—or whether there would continue to be multiple SIPs for equity market data. Contrary to the commenter's assertion, the Commission did not propose governance changes in order to bring about specific operational changes to the SIPs, such as a distributed SIP model or specified expansion of data content. Rather, the governance changes are designed to address the Plans' inefficiencies and the inherent conflicts of interest of the SROs, which have affected the provision of core data. The Commission believes that an improved governance structure should foster improvements to the SIPs; however, in the Proposed Order, it did not specify what those improvements might be. In contrast, specific operational changes that the Commission has proposed to the SIPs are contained within the Infrastructure Proposal.

Moreover, while the Proposed Order would require that the three existing Equity Data Plans be replaced by the single New Consolidated Data Plan, it clearly contemplated that processors—plural—could continue to exist.[107] Accordingly, the Commission disagrees with the argument that the Proposed Order would require the Plans to retain a processor, but that the Infrastructure Proposal would subsequently "nullify, or at least undermine the authority of the New Consolidated Data Plan to continue to act as a data consolidator."[108] For the same reason, although one commenter argues that the Proposed Order seeks to mitigate a problem that the Infrastructure Proposal hopes to eliminate,[109] this Order addresses governance issues that are not

---

[107] See, e.g., Proposed Order, supra note 4, 85 FR at 2182 ("[t]he Commission believes that the New Consolidated Data Plan operating committee's role should also include selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of … plan processors"), 2185 ("the operating committee of the New Consolidated Data Plan would need to, among other things, select plan processors").

[108] Nasdaq Letter, supra note 45, at 2.

[109] NYSE Letter 2, supra note 97, at 4.

addressed in the Infrastructure Proposal. Should the Commission adopt the operational changes contemplated by the Infrastructure Proposal, the governance structure of the operating committee of the New Consolidated Data Plan would be applicable to the new operational structure for the equity market's data collection, consolidation, and dissemination and any changes would be subject to the augmented majority voting structure of the new plan, as discussed below.

Further, the Commission disagrees with one commenter's view that, through the Proposed Order and the Infrastructure Proposal, the Commission proposes to create a "government-sponsored pricing consortium."[110] This commenter argues that—because the Proposed Order requires the operating committee to assess the marketplace for equity market data and ensure that SIP data is priced in a manner that is fair and reasonable and not unreasonably discriminatory, and because the Infrastructure Proposal mandates inclusion of DOB and exchange auction data—these proposals, taken together, would promote a framework where fees would be set by a committee of data providers and consumers. But under the Proposed Order—as under the current Equity Data Plans—the operating committee of the New Consolidated Data Plan would file with the Commission proposals to create and set prices for SIP data products, which would be reviewed consistent with the requirements of Rule 608 of Regulation NMS. And exchanges would be able, as they are now, to file with the Commission proposals to create and set prices for proprietary data products, which would be reviewed consistent with the requirements of Section 19(b) of the Act and Rule 19b-4 thereunder.[111] The Commission therefore disagrees that the changes contemplated in the Proposed Order, even if

[110] Nasdaq Letter, supra note 45, at 11–12.

[111] 15 U.S.C. 78s(b); 17 CFR 240.19b-4.

combined with the changes contemplated in the Infrastructure Proposal, would create a pricing consortium.

Other commenters also addressed the relationship between the Commission's Proposed Order and the Commission's Infrastructure Proposal. One commenter encourages the Commission to combine governance and infrastructure into a single package of reforms.[112] Another commenter states that the Commission should coordinate changes in governance with changes to the system for disseminating consolidated data.[113] And other commenters express the view that changes to market data infrastructure are necessary in addition to changes to SIP governance.[114] As discussed above, the Commission has proposed to address its concerns with two aspects of consolidated equity market data—the governance of the SIPs and the operation of the SIPs—with different remedies. And while the Commission has proposed to modify the governance and operations of the SIPs separately with different remedies, each of these efforts has been undertaken in furtherance of the same, broader goal: to ensure the "prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect

---

112 See CII Letter, supra note 74, at 3; see also MEMX Letter, supra note 80, at 3 (recommending that the Commission consider the Proposed Order and the Infrastructure Proposal together to ensure that issues around the content of the SIP and market data in general are appropriately considered).

113 See Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (Mar. 4, 2020), at 1–2 ("IEX Letter") ("We believe that progress on both fronts – governance and changing the system for distributing consolidated data – is critical to addressing broker, fiduciary, and investor concerns about market data.").

114 See, e.g., Letter from Hubert De Jesus, Managing Director, and Joanne Medero, Managing Director, BlackRock, Inc. (Feb. 28, 2020) at 1 ("BlackRock Letter") (supporting the Commission's Proposed Order, but noting that "effective governance only addresses one dimension of market data regulations" and that "more comprehensive reforms are warranted"); Virtu Letter, supra note 80, at 4 ("While we strongly support the efforts of the agency to make enhancements to the NMS [p]lans governing SIP data, we urge the Commission to take even bolder steps to introduce needed reforms in the regulatory construct governing market data and market access."); Bloomberg Letter, supra note 40, at 1 (encouraging the Commission to move forward on plan governance issues, as well as continue the Commission's broader efforts, including the Infrastructure Proposal). One commenter also expressed support for enhancements both to the governance structure of the Equity Data Plans and the content and delivery of market data through the consolidated tape. See Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, Inc. (Feb. 28, 2020), at 2 ("Cboe Letter").

to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information," consistent with Section 11A of the Act.[115]

3. The Commission's Proposals Are Consistent with the Act and Will Benefit Investors and Support the Regulatory Structure of Regulation NMS

One commenter argues that the Proposed Order, combined with the Infrastructure Proposal, would "reflect a fundamentally anti-competitive transformation that will harm investors, particularly Main Street investors, stifle innovation, and undermine the regulatory structure established by Regulation NMS."[116] This commenter further asserts that "there is no doubt that expanding the breadth and scope of products offered under the SIP would fundamentally change the balance between competition and regulation established by Regulation NMS in 2005," which, the commenter argues, "sought to avoid creation of a 'totally centralized system that loses the benefits of vigorous competition and innovation among individual markets,' and therefore 'allow[ed] market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors.'"[117] This commenter argues that, instead of requiring the SROs to file the New Consolidated Data Plan, the Commission should review the SIPs to ensure that they only include the data needed to meet regulatory mandates, which in turn must match the needs of investors.[118]

As the Commission stated in the Proposed Order, it believes that changes to the current SIP governance model are appropriate precisely because the Equity Data Plans, under the current

---

115 15 U.S.C. 78k-1(c)(1)(B).

116 Nasdaq Letter, supra note 45, at 5, 8, 11–12.

117 Id. at 12 (quoting Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005)).

118 See id. at 12.

governance structure, have not taken sufficient measures to update the SIPs to reflect innovations in market data in response to evolving markets and the changing needs of investors.[119] Given the Congressional mandate that the Commission ensure the "prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information"[120]—and the Commission's ongoing monitoring and evaluation of Equity Data Plan developments[121]—the Commission believes that the structure governing the provision of SIP data should be improved to better meet the needs of market participants in light of changes in the markets since the adoption of Regulation NMS. And the Commission believes that the governance changes addressed in this Order will facilitate those improvements.

4. The Need for a Single New Consolidated Data Plan

Several commenters oppose the proposed creation of a single New Consolidated Data Plan.[122] These commenters assert that the Commission failed to adequately consider the cost implications of consolidating the three separate Equity Data Plans.[123] One of these commenters states that the Commission both overestimates the costs of the Equity Data Plans and underestimates the implementation cost associated with the New Consolidated Data Plan.[124] This commenter believes that the Commission is required under Section 3(f) of the Act to consider

---

119 See, e.g., Proposed Order, supra note 4, 85 FR at 2168.

120 15 U.S.C. 78k-1(c)(1)(B).

121 See supra note 10 and accompanying text.

122 See, e.g., Cboe Letter, supra note 114, at 12; Nasdaq Letter, supra note 45, at 4, n.11; NYSE Letter, supra note 49, at 18–19.

123 See, e.g., Cboe Letter, supra note 114, at 12; Nasdaq Letter, supra note 45, at 4, n.11; NYSE Letter, supra note 49, at 18–19.

124 See NYSE Letter, supra note 49, at 18.

"whether the [proposed rulemaking] will promote efficiency, competition, and capital formation."[125] To meet this requirement, this commenter states, "the Commission must consider the economic effects of a proposed rule, including the costs of implementation."[126] This commenter further states that the Commission "asserts without support that the current administrative structure of the [Equity Data Plans] creates 'redundancies, inefficiencies, and inconsistancies' [sic] that necessitates consolidating the Plans under a single Plan with one [a]dministrator."[127] This commenter argues that, as recognized in the Proposed Order, the Equity Data Plans "already largely function as one plan today" with "the same distribution formula, legal representation, and other professional services," and that the Participants and advisory committee "do not incur additional costs for the three Plans to meet at the same time, compared to one plan."[128] The commenter also states that the SIP operating committees and advisory committees each have identical membership, and their quarterly meetings are held concurrently.[129]

This commenter further asserts that the SROs would need to expend significant resources hiring outside counsel to assist with tasks related to the creation and adoption of the New Consolidated Data Plan, including "negotiating and drafting the New [Consolidated Data] Plan, drafting contracts with the SIP processors, replacing current contracts with data recipients, and

---

125 See id.; 15 U.S.C. 78c(f). Another commenter states that it agrees with the commenter above "to the extent that they focus on the Commission's clear obligations to assess the economic effects of its proposed action." See Nasdaq Letter, supra note 45, at 4, n.11.

126 See NYSE Letter, supra note 49, at 18.

127 See id. at 19.

128 See id.

129 See id.

filing to obtain Commission approval of the draft new Plan."[130] Additionally, this commenter asserts that "only the SROs would face the financial burden in Plan consolidation development" despite being "forced to abdicate decision-making to non-SROs" under the New Consolidated Data Plan.[131] Moreover, the commenter states that the New Consolidated Data Plan would "not reduce the costs of the Participants to produce – nor the costs of the processors to aggregate and distribute – consolidated market data for Tapes A, B, and C."[132] This commenter concludes that creating a single New Consolidated Data Plan would not "provide meaningful cost-savings that would support lowering the fees charged for market data products."[133]

The Commission disagrees with this commenter's position for several reasons. By its terms, Section 3(f) of the Act does not apply to the Commission's issuance of an order such as this one requiring the Participants to file a new NMS plan.[134] Moreover, the particular costs of implementing the New Consolidated Data Plan will depend on the specific choices made by the Participants as they consider how to implement this Order. And when the Participants file the New Consolidated Data Plan, it will be considered by the Commission under Rule 608 of Regulation NMS. Among other things, Rule 608 requires every national market system plan to be accompanied by an analysis of the impact on competition,[135] which is then published for

---

130 See id. at 19.

131 See id.

132 See id.

133 See id.

134 "Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." Section 3(f) of the Act, 15 U.S.C. 78c(f).

135 17 CFR 242.608(a)(4)(ii)(C)

comment and evaluated by the Commission.[136] In this Order, the Commission considers the overall scope of the implementation costs as well as the costs of developing the New Consolidated Data Plan.

In publishing the Proposed Order for comment, the Commission asked interested parties to "submit written presentations of views, data, and arguments concerning the Proposed Order," including comments on "the likely economic consequences" of issuing a final order to the SROs containing the provisions in the Proposed Order.[137] While commenters did not provide quantitative data on development or implementation costs for creating a single New Consolidated Data Plan, the Commission has considered those costs qualitatively by leveraging its oversight experience of the Equity Data Plans and examining the qualitative factors raised by a broad range of market participants.

The Commission acknowledges certain efforts of the Equity Data Plans to operate jointly regarding certain administrative elements.[138] But the Commission believes that redundancies, inefficiencies, and inconsistencies remain under the current administrative structure of the Equity Data Plans that can be significantly reduced under a single New Consolidated Data Plan. Some commenters agree with the Commission's view and state that maintaining three separate Equity Data Plans is inefficient and creates redundant efforts on the part of the operating and advisory committee members that unnecessarily burden ongoing improvements to the SIPs and that

---

136 17 CFR 242.608(b).

137 See Proposed Order, supra note 4, 85 FR at 2165.

138 See id. at 2182. The Commission believes that the current examples of joint operation of the Plans demonstrates that there are certain areas of operation for which creating a single New Consolidated Data Plan would be expected to give rise to minimal, if any, additional implementation costs.

contribute to certain duplicative costs.[139] As one commenter states, the "historical reasons that resulted in the three plans for NYSE-listed, Nasdaq-listed and other exchange-listed stocks no longer exist today in a post-Regulation NMS world." And this commenter opines that "consolidation is a good first step to reforming the current market data infrastructure."[140]

One commenter states that a single New Consolidated Data Plan "will promote efficiencies, especially in terms of streamlining the operation of the SIP feeds."[141] Another commenter states that consolidating the Plans would "lead to greater efficiency in meeting the purposes of Section 11A of the Act" and "reduce confusion for investors."[142] Another commenter states that the differences between the Equity Data Plans are "substantial and create unnecessary compliance complexity for SIP data users" in the areas of "audit practices and requirements[,] entitlement controls, administrative usage policies, free trial policy, non-professional usage, [and] qualifications as non-professional users."[143] Another commenter states that the needless duplication under the current framework results in "two different sets of staff to deal with, two sets of contracts, two sets of reporting requirements, and two separate audit teams to manage."[144] The same commenter states that "there is no reason for the three distinctive plans

---

139 See, e.g., Fidelity Letter, supra note 80, at 3; IEX Letter, supra note 113, at 3; MEMX Letter, supra note 80, at 2; Schwab Letter, supra note 74, at 5; SIFMA Letter, supra note 13, at 3; Wellington Letter, supra note 77, at 2. While one commenter agrees with the Commission's view that creating a single New Consolidated Data Plan is "likely to promote efficiency and cost-savings," this commenter believes that "those efficiencies may be considerably undermined" by the Infrastructure Proposal. See Nasdaq Letter, supra note 45, at 4. See supra Section II.B.2 for a discussion on the relationship between this Order and the Infrastructure Proposal.

140 See SIFMA Letter, supra note 13, at 3.

141 See State Street Letter, supra note 76, at 2.

142 See Letter from Jennifer W. Han, Associate General Counsel, Managed Funds Association, and Adam Jacobs-Dean, Managing Director, Global Head of Markets Regulation, Alternative Investment Management Association (Feb. 28, 2020), at 2 ("MFA/AIMA Letter").

143 See Schwab Letter, supra note 74, at 5–6.

144 See Refinitiv Letter, supra note 80, at 2.

to exist," and believes that combining the two administrators along with their policies and staffs under a single New Consolidated Data Plan would "significantly decrease the administrative burden" that SIP consumers experience.[145]

The Commission agrees with these commenters' statements for the reasons discussed below and believes that creating a single New Consolidated Data Plan with the governance structure discussed below would simplify the administration of the Equity Data Plans' operations to facilitate functional improvements to the provision of equity market data, and would further efforts to ensure that core data meets on a continuing basis the needs of market participants and furthers the objectives of Section 11A of the Act.[146]

The Commission believes that a single New Consolidated Data Plan would simplify the Plans' billing structure to require only one inventory reporting system, one billing method, one reporting obligation for data subscribers, and one plan administrator payment for the Participants. The Commission believes that the simplified billing structure would provide the Plans with a single standardized and comprehensive view of SIP data costs for subscribers. Additionally, the Commission expects that, instead of two auditing teams under the Equity Data Plans, only one auditing team would be necessary for SIP data usage under the New Consolidated Data Plan. Finally, the Commission anticipates that the Plans would no longer need to maintain separate books and records for the Equity Data Plans' businesses (including separate plan websites and secure web portals for Participants), to file with the Commission separate (and often duplicative) plan amendments regarding some aspects of the Equity Data Plans,[147] or to

---

145 See id.

146 See 15 U.S.C. 78k-1(c)(1)(B).

147 One commenter suggests as an alternative consideration to the New Consolidated Data Plan that the Commission amend its rules to allow filings made by the Equity Data Plans to be filed with the Commission as

devote additional personnel resources to coordinate and facilitate three separate Equity Data Plans.[148]

The Commission believes that reducing the existing redundancies, inefficiencies, and inconsistencies through a single New Consolidated Data Plan should further the goals of Section 11A of the Act and provide meaningful cost savings in the long term for SROs and for other market participants by consolidating the operational costs incurred by the administration of three separate Equity Data Plans. Whereas market participants today must navigate their obligations under three separate Plans, a single New Consolidated Data Plan would remove impediments to the efficient operation of the national market system by providing the foundation for the application of consistent policies,[149] procedures, terms,[150] and conditions. This should provide

---

a single filing for all three Equity Data Plans. See Cboe Letter, supra note 114, at 12–13. The Commission agrees with the commenter that the Equity Data Plans' filing process is one aspect of the many inefficiencies that need to be addressed under the New Consolidated Data Plan. This commenter also highlights the inefficiencies of the SRO rule filing process under Section 19(b) of the Act and Rule 19b-4 thereunder. See Cboe Letter, supra note 114, at 13, n.24. While the Commission appreciates the views shared by the commenter on the SRO rule filing process, more generally, we do not believe that such arguments support keeping three separate Equity Data Plans, which is the issue addressed in this Order. Indeed, consolidating NMS plan filings would be facilitated by creating a single New Consolidated Data Plan.

148 See, e.g., Refinitiv Letter, supra note 80, at 2; Schwab Letter, supra note 74, at 5–6.

149 For example, the Commission understands that there are currently differences among the Equity Data Plans in the policies related to, among other things, the following: consolidated volume, audit look-back period, entitlement review, entitlement control, disaster recovery, non-display usage, service facilitator, administrative usage, quote meter, and controlled versus uncontrolled products.

150 See supra note 143 (commenter stating that differences among the qualifications as non-professional users create compliance complexity for SIP data users). Additionally, exchanges have acknowledged the administrative burden associated with determining the professional and non-professional status of broker-dealers' customers. See, e.g., NYSE Sharing Data-Driven Insights – Stock Quotes and Trade Data: One Size Doesn't Fit All (Aug. 22, 2019), available at https://www.nyse.com/equities-insights#20190822 (last accessed Apr. 20, 2020) ("Subscribers pay different rates for the product based on whether the individual viewing the data is deemed a 'professional' or 'non-professional' user. This is a policy that has provided steep discounts for Main Street investors, but has created complex administrative burdens for brokers."); Nasdaq Total Markets: A Blueprint for a Better Tomorrow (Apr. 2019), at 4, available at https://www.nasdaq.com/docs/Nasdaq_TotalMarkets_2019_2.pdf (stating that the distinctions between "professional" and "non-professional" users "have become arbitrary and more complex than is necessary and create undue administrative burden to manage. We should modernize the user definitions to achieve the same general goals while streamlining the administrative burden.").

for a more streamlined approach to the administration and provision of consolidated equity market data and thereby reduce the costs imposed on other market participants, including SIP data subscribers.[151]

In addition, the Commission believes that the economic effects of creating a single New Consolidated Data Plan are likely to provide long-term cost-savings for the SROs in the administration of the Plans, as well. The Commission acknowledges that SROs would incur costs in the process of creating the New Consolidated Data Plan. One commenter asserts that, given the significant resources that would need to be diverted to drafting the New Consolidated Data Plan, the effort would likely increase rather than decrease inefficiencies.[152] Three commenters highlight prior experience in the joint development of an NMS plan as instructive for the significant amount of time and resources devoted to the creation a new NMS plan.[153]

However, while it is likely that initially, the implementation cost of combining the Equity Data Plans may exceed the short-term cost savings from the reduction of existing redundancies, inefficiencies, and inconsistencies described above, the Commission anticipates that ongoing cost savings would continue to accrue over the period that the New Consolidated Data Plan is likely to remain in effect, thereby providing long-term cost savings. In addition, with respect to the costs of creating the New Consolidated Data Plan, we note that SROs, as the parties that have been operating the NMS plans, can provide unique insight in formulating the specific terms and provisions of the New Consolidated Data Plan. The Commission also believes that the plan

---

151 See State Street Letter, supra note 76, at 2; TD Ameritrade Letter, supra note 74, at 2; Virtu Letter, supra note 80, at 2.

152 See Cboe Letter, supra note 114, at 12.

153 See Cboe Letter, supra note 114, at 12, n.22; Nasdaq Letter, supra note 45, at 15; NYSE Letter, supra note 49, at 19, n.46. As discussed below, the Commission acknowledges that there will be a transition period with additional costs to onboard a new independent Plan administrator pursuant to this Order. See infra Section II.D.

development costs will differ significantly from those incurred in the development of prior NMS plans. Specifically, the Equity Data Plans have been in existence for over 30 years. This should provide the Participants with the requisite experience to limit the scope of the costs to create the New Consolidated Data Plan.[154] In addition, the Participants may incorporate some or all of the current operational provisions of the existing Equity Data Plans into the New Consolidated Data Plan.[155] Furthermore, as contemplated in the Proposed Order,[156] the New Consolidated Data Plan could retain the same SIP processors under the same terms and conditions, thereby eliminating what otherwise would be a significant burden for the development of the New Consolidated Data Plan.[157] Thus, the Commission anticipates that, at least initially, most of the detailed provisions relating to the operation of the existing Equity Data Plans could be imported into the New Consolidated Data Plan without substantial effort or great cost.[158]

---

154 For example, the Commission believes that the Participants' and the advisory committee members' longstanding experience in the Plans would reduce the costs for identifying Plan provisions that could be harmonized or combined under a New Consolidated Data Plan. In fact, based on information the Commission obtained through its oversight of the Plans, the Commission is aware that the Participants and the advisory committee members of the Equity Data Plans have already engaged in some recent efforts to facilitate standardization of the policies of the Equity Data Plans.

155 The Commission believes that the New Consolidated Data Plan submitted by the SROs under this Order should harmonize inconsistencies among, and combine duplicate provisions in, the Equity Data Plans that do not unavoidably arise from the existence of separate and distinct SIPs. See Proposed Order, supra note 4, 85 FR at 2186. The Commission believes that this exercise would be incorporated into the process of creating a single New Consolidated Data Plan and provide the administrative benefits described above.

156 See supra note 107 (quoting statements from the Proposed Order that the existing SIP processors could continue to exist under the New Consolidated Data Plan).

157 The Commission's requirement to create the New Consolidated Data Plan does not contemplate changes to the production, aggregation, or distribution of consolidated market data. Thus, the Commission does not anticipate that any costs associated with the production of market data would be affected. Instead, the direct cost savings envisioned by the Commission are likely to result from the reduction of existing redundancies, inefficiencies, and inconsistencies related to the operation of three separate Equity Data Plans.

158 The Commission does not anticipate that substantial revisions or re-negotiations of existing SIP subscriber contracts would be necessary to transition to the New Consolidated Data Plan. For example, the Commission understands that the SIP contracting process is automated (i.e., an online form that uses conditional logic to determine the data licensing requirements of a subscriber), which should ease the electronic transfer of existing SIP subscriber requirements to the New Consolidated Data Plan. The Commission did not receive comments on the level of burden to replace current contracts with the New Consolidated Data Plan.

C. Voting Rights on the New Consolidated Data Plan Operating Committee

In its Proposed Order, the Commission set forth specific governance provisions and the voting structure to be included in the New Consolidated Data Plan to help to address certain concerns it identified relating to the provision of consolidated equity market data under the existing Equity Data Plans. The proposed governance provisions include: (i) an allocation of voting rights to unaffiliated exchanges and exchange groups, along with the possibility of additional voting power based on market share, (ii) the inclusion of non-SRO voting members on the operating committee of the New Consolidated Data Plan, specifying the categories to be represented and a nomination and selection process, and (iii) the voting requirements for action under the New Consolidated Data Plan.

1. Voting Rights for SROs

(a) The need for the allocation of voting power by exchange group and market share

As it stated in the Proposed Order, the Commission believes that exchange consolidation has altered the relative voting power of SROs such that exchange groups under common management now have greater voting power with respect to plan governance. Exchanges that historically had only one vote on NMS plans have now been consolidated into exchange groups that can control blocks of four or five votes.[159] Consequently, any two exchange groups can now

[159] For example, for years the NYSE held a single exchange license and therefore had only one vote on the Equity Data Plans' operating committees, despite having approximately 80 percent of the trading volume in NYSE-listed securities. Today, the NYSE group of SROs as a whole has approximately 30 percent market share of trading in NYSE-listed securities, but because the NYSE group holds five exchange licenses, it has five votes and significantly more influence over Equity Data Plans' decisions than before. See Cboe U.S. Equities Volume Data, available at https://markets.cboe.com/us/equities/market_share/ (last accessed Apr. 17, 2020) (month-to-date volume summary as of Apr. 17, 2020).

command a majority of votes,[160] and the relative voting power of unaffiliated SROs has been diluted over time. Accordingly, the Commission continues to believe that changing the current voting structure would be beneficial and would promote the goals of Section 11A of the Act[161] with respect to equity market data.

To address the disproportionate influence that the exchange groups have had on the operation of the existing Equity Data Plans, in its Proposed Order, the Commission proposed that voting rights in the New Consolidated Data Plan should be allocated so that each unaffiliated SRO[162] and exchange group has one vote on the operating committee, with a second vote provided if the exchange group or unaffiliated SRO has a market center or centers that trade more than 15 percent of consolidated equity market share[163] for four of the six consecutive months preceding a vote of the operating committee.

A number of commenters share the Commission's concern about the concentration of voting power in exchange groups and support the Commission's proposal to rebalance the relative voting power on the New Consolidated Data Plan's operating committee.[164] One

---

160 Specifically, the three exchange groups currently represent 14 of the 17 votes on the operating committees of the Equity Data Plans, and any two exchange groups together command a minimum of 9 votes.

161 15 U.S.C. 78k-1.

162 For purposes of this Order, an "unaffiliated SRO" means an SRO that is not part of the same corporate ownership group as other SROs. The currently unaffiliated SROs are FINRA, IEX, LTSE, and MEMX.

163 As defined in the Proposed Order, and for purposes of this Order, the term "consolidated equity market share" means the average daily dollar equity trading volume of an exchange group or unaffiliated SRO as a percentage of the average daily dollar equity trading volume of all of the SROs, as reported by the Equity Data Plans or the New Consolidated Data Plan. See Proposed Order, supra note 4, 85 FR at 2175, n.141.

164 See, e.g., Citi Letter, supra note 85, at 3; Clearpool Letter, supra note 40, at 3–4; Fidelity Letter, supra note 80, at 4; ICI Letter, supra note 78, at 4–5; IEX Letter, supra note 113, at 2; MFA/AIMA Letter, supra note 142, at 3; Letter from Christopher Solgan, VP, Senior Counsel, MIAX Exchange Group (Mar. 3, 2020), at 2 ("MIAX Letter"); MEMX Letter, supra note 80, at 3; SIFMA Letter, supra note 13, at 4; Refinitiv Letter, supra note 80, at 2; Letter from Mehmet Kinak, Vice President & Global Head of Systematic Trading & Market Structure, and Jonathan D. Siegel, Vice President & Senior Legal Counsel, T. Rowe Price Associates, Inc. (Feb. 24, 2020), at 2 ("T. Rowe Price Letter"); Virtu Letter, supra note 80, at 2.

commenter argues that the current voting structure of the Equity Data Plans reduces incentives for SROs to "agree on changes that could impact the proprietary interests of one or two exchange groups."[165] Another commenter "strongly supports reducing the emphasis on voting based on individual exchange medallions," stating, "this aspect of the proposed order is key to addressing the inherent conflicts of interest that exist relating to SIP governance."[166] A third commenter supports the proposed voting allocation structure by noting that the proposal "would modernize the voting structure … while facilitating the fair representation of all participants on the operating committee."[167] One commenter agrees, stating that the proposal "importantly removes some of the perverse incentives for exchange groups to acquire or 'light up' new exchange medallions."[168] Another commenter adds that the proposal would "reward exchanges with market share while balancing potential fluctuations in market share and preventing further consolidation of voting power."[169]

Several commenters, however, oppose the Commission's proposal.[170] Specifically, these commenters argue that the Commission's proposal is inconsistent with the APA[171] and with the Commission's historical treatment of the exchanges, in which affiliated exchanges have been treated individually for regulatory purposes.[172] One of these commenters states that the

---

165 IEX Letter, supra note 113, at 2.

166 MEMX Letter, supra note 80, at 4.

167 MIAX Letter, supra note 164, at 2.

168 Citi Letter, supra note 85, at 3.

169 SIFMA Letter, supra note 13, at 4.

170 See, e.g., Cboe Letter, supra note 114; Nasdaq Letter, supra note 45; NYSE Letter, supra note 49.

171 See NYSE Letter, supra note 49, at 17–18 (arguing that the Commission's proposal lacks a reasonable basis and is therefore arbitrary and capricious).

172 See Cboe Letter, supra note 114, at 9–10; Nasdaq Letter, supra note 45, at 6–7; NYSE Letter, supra note 49, at 17–18; but see ICI Letter, supra note 78, at 4.

Commission's proposal "disenfranchises individual exchanges," arguing that, "[t]he concept of 'exchange group' is found nowhere in the statute or SEC rules, but operates to deprive SROs of the votes that they would otherwise have."[173] This commenter further asserts that "one can easily see a scenario in which a proposal could be adopted even though a majority of SEC licensed SROs disapproved of the proposal."[174] Another commenter states that the Commission "fails … to explain why the unified votes of multiple, independent SROs are less deserving or meaningful than the votes of unaffiliated SROs."[175] This commenter similarly argues that, "[e]ach SRO participating in the proposed New [Consolidated Data] Plan would have independent obligations under the Exchange Act and the Plan with respect to administering SIPs, irrespective of whether the SRO is affiliated with an exchange group. Yet the impact of the Proposed Order would be to curtail the independence of affiliated SROs by, in effect, requiring that they vote as a bloc."[176] This commenter further states that the proposal would result in "otherwise equal and independent SROs … [having] unequal voting power based on their corporate affiliations. And it assumes that the degree of voting power inequity should increase or decrease based on the SRO-affiliate group sizes."[177]

The Commission disagrees. The Commission continues to believe that there is a need to rebalance voting power in Plan governance to address the disproportionate influence of affiliated

---

173 Nasdaq Letter, supra note 45, at 7.

174 Id. (providing as an example, "a proposal supported by four unaffiliated SROs and one exchange group would garner a majority of the permitted SROs votes (six to four in favor) but would not be supported by a majority of SROs (nine to seven against).").

175 NYSE Letter, supra note 49, at 17.

176 Id.

177 Id. at 18.

exchange groups.[178] The Proposed Order described in detail the effects on Plan governance of the exchange groups' conflicts of interest arising from their sale of proprietary data products. The current governance structure provides voting power based on each exchange license and thereby concentrates voting power in a small number of exchange group stakeholders, which also have inherent conflicts of interest with respect to the operation of the Plans. The Commission believes that this has perpetuated disincentives for the Equity Data Plans to make improvements to the SIP data products. The Commission continues to believe that modernizing plan governance by reallocating votes by exchange group should help to ensure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information.

As the exchange group commenters accurately point out, however, the Commission has treated affiliated exchanges as separate entities for regulatory purposes in the past. The Commission believes, nonetheless, that a meaningful legal distinction exists between, on one hand, each SRO's individual responsibility pursuant to Sections 6, 15A, 17, and 19 of the Act[179] to comply with the statutory and regulatory requirements that apply to its operation and self-regulation of its market center, including the requirement that its rules "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]"[180]—and, on the other hand, the responsibility of the SROs to jointly operate the NMS plans pursuant to

---

[178] One commenter noted the relatively recent acquisition by NYSE's parent company of two exchanges that typically account for less than 3 percent of trading volume, yet represent 12 percent of voting power on the Equity Data Plans, allowing the NYSE to "command 29% of the operating committees vote…[rather than] the 18% voting power they had prior to acquiring these exchanges." ICI Letter, supra note 78, at 5.

[179] 15 U.S.C. 78f, 15 U.S.C. 78o-3, 15 U.S.C. 78q, and 15. U.S.C. 78s.

[180] Section 6(b)(8) and Section 15A(b)(9) of the Act, 15 U.S.C. 78f(b)(8) and 15 U.S.C. 78o-3(b)(9).

Section 11A of the Act[181] and to disseminate consolidated market data to which different SROs may contribute in varying degrees. The Commission believes that this legal distinction justifies treating affiliated exchanges under common management and control as one exchange group limited to one, or at most two, vote(s) in the context of NMS plan governance. And, as a practical matter, the Commission, in its oversight of the Equity Data Plans, is unaware of an individual affiliated exchange member of an exchange group having cast its vote differently than the votes cast by its affiliated exchanges. The Commission further believes that its authority under Section 11A of the Act[182] is broad and is not limited with respect to a determination as to the allocation of voting power to exchanges, either individually or in groups, based on common management or control.

Moreover, the Commission believes that treating affiliated SROs differently from non-affiliated SROs is justified in this context from a policy perspective because of the disproportionate influence affiliated exchange groups currently exercise in Plan matters by voting as a block and diluting the voting power of other Participants. Indeed, the Commission agrees with the commenter that points out that the augmented majority vote could result in a scenario in which a proposal is adopted with the support of a supermajority of votes on the operating committee and a majority of SRO votes, but without the support of a majority of the individual exchanges.[183] This is precisely the outcome that this Order is intended to achieve—plan action supported by a supermajority of the New Consolidated Data Plan's operating

---

181 15 U.S.C. 78k-1.

182 Section 11A of the Act, 15 U.S.C. 78k-1 ("having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority under this [Act] to facilitate … a national market system for securities … in accordance with the findings and to carry out the objectives set forth in paragraph (1) of [Section 11A(a)].").

183 See Nasdaq Letter, supra note 45 and accompanying text.

committee, which would include a majority of SRO votes along with sufficient non-SRO votes to achieve the supermajority, that is not constrained by the votes of one or two exchange groups under common management and control that currently command a majority of the votes on the Equity Data Plans. Similarly, while one commenter argues that the Commission's proposal would "curtail the ability of independent SROs to act independently in service of their own obligations,"[184] another commenter questions the independence of the affiliated exchanges, noting the lack of evidence that affiliated exchanges vote separately and observing that an exchange group commented in a unified voice on behalf of all affiliated exchanges.[185] Similarly, one commenter asserts that the Proposed Order assumes that "the degree of voting power inequity should increase or decrease based on the SRO-affiliate group sizes."[186] In the Commission's view, this assertion is incorrect, in that a second vote would be granted only on the basis of the exchange group's consolidated equity market share, not the size or number of exchange licenses of the affiliate group.

In addition, the fact that, as one commenter argues, the concept of an exchange group is not created by statute or rule does not, in the Commission's view, preclude the Commission from recognizing that affiliated exchanges act in some contexts as a collective organization. Instead, the Commission notes that, unlike the SROs' individual regulatory obligations, the one-vote-per-exchange governance model for NMS plans is not compelled by statute or regulation. Further, because of the inherent conflicts of interest that certain exchanges face in their operation of the existing Equity Data Plans, as detailed in the Proposed Order and discussed above, the Commission does not believe that permitting exchange SROs under common ownership to

184 NYSE Letter, supra note 49, at 17.

185 ICI Letter, supra note 78, at 4 (emphasis in original).

186 NYSE Letter, supra note 49, at 18.

exercise disproportionate influence through block voting over New Consolidated Data Plan decisions, including fees and technology updates, supports the reliability and affordability of consolidated market data.

Two commenters state that the Commission provides no adequate rationale for the decision to cap at two votes the number of votes that affiliated SROs would be granted.[187] One of these commenters questions why there could not be a third vote and advocates adding tiers so that the proposal would "align the number of votes allocated to exchange groups or unaffiliated SROs with meaningful market share to their overall significance in the market."[188] Several other commenters argue to the contrary that currently each exchange license obtained by an exchange group provides another vote on the Equity Data Plan's operating committee with "little incremental overhead expenses. Capping the number of SRO votes at two per exchange group removes this incentive."[189] Another commenter that generally supports the proposed voting structure suggests that the threshold for a second vote should be 10 percent of consolidated equity market share, as recommended by the Commission's Equity Market Structure Advisory Committee, rather than the 15 percent threshold proposed by the Commission.[190] This commenter argues that, "in the current fragmented market structure, 10 percent represents a very significant threshold that we believe would justify a slightly stronger voice in governance."[191]

---

187 Id.; Cboe Letter, supra note 114, at 10.

188 Cboe Letter, supra note 114, at 10 (advocating that instead there should be one vote for up to 5 percent consolidated market share, two votes for 5 percent to 15 percent consolidated market share, and three votes for more than 15 percent consolidated market share).

189 Citi Letter, supra note 85, at 3; see also IEX Letter, supra note 113, at 2; ICI Letter, supra note 78, at 5; Letter from RBC Capital Markets, LLC, Rich Steiner, Head of Client Advocacy and Market Innovation (Feb. 28, 2020), at 2 ("Royal Bank of Canada Letter"); T. Rowe Price Letter, supra note 164, at 2.

190 See IEX Letter, supra note 113, at 2.

191 Id.; but see MEMX Letter, supra note 80, at 4; Clearpool Letter, supra note 40, at 4 (stating it would not support lowering the 15 percent threshold).

The Commission continues to believe that it is appropriate to limit an SRO or affiliated exchange group to no more than two votes because providing more than two votes to any one SRO or affiliated exchange group would perpetuate the ability of two exchange groups to command a majority of votes on the operating committee, which would perpetuate the status quo. The Commission believes that this outcome would not address the disproportionate influence that the exchange groups have on the governance of the Equity Data Plans. Moreover, the Commission agrees with another commenter's assertion that the two-vote cap would serve to deter actions, such as establishing a new exchange or further consolidation of existing exchanges into groups, taken for the sole purpose of gaining additional voting power on the operating committee.[192]

In addition, the Commission continues to believe that the voting allocation set forth in the Proposed Order, which would provide a second vote only where an unaffiliated SRO or exchange group has a consolidated equity market share of more than 15 percent over a specified period of time, is appropriate. A 15 percent threshold signifies the importance to the national market system of those exchanges that, in their roles as SROs, therefore oversee trading activity that generates a significant amount of equity market data and, as noted below, each exchange group would have an additional vote. While one commenter argues instead for a 10 percent threshold and another advocates for a tiered approach, with the possibility of a third vote, the Commission, as discussed below, continues to believe that the 15 percent threshold is appropriate.

The Commission disagrees that 10 percent consolidated equity market share is sufficiently significant to warrant a second vote, particularly given the trend toward exchange

[192] See ICI Letter, supra note 78, at 5.

consolidation. The consolidated equity market share of the largest exchange groups is already well above 10 percent and continues to range from 17 percent to 22 percent.[193] Setting the threshold for a second vote at 10 percent consolidated equity market share would create the expectation that exchange groups should receive a third vote at the same interval threshold above 10 percent (e.g., 20 percent). However, the Commission is not permitting the exchange groups, regardless of their consolidated equity market share, to have a third vote as this would lead to a continuing concentration of voting power. For the same reason, the Commission is concerned that a 10 percent threshold may be too easy to achieve through consolidation, which would result in too low a threshold for obtaining an additional vote and could lead to a continuing concentration of voting power. Conversely, as discussed above, the Commission believes that it is appropriate to provide an extra vote for exchanges or exchange groups with a greater consolidated equity market share.

With respect to the proposed "look-back period" of four of the six consecutive months preceding a vote of the operating committee, the Commission notes that several commenters expressly supported the specified period, while none objected to it.[194] The Commission believes that using a look-back period of at least four of the six calendar months preceding a vote of the operating committee for determining whether an exchange group or an unaffiliated exchange has met the threshold for a second vote would allow the voting structure of the New Consolidated Data Plan to adapt over time to potential fluctuations in trading volume among exchanges, while

---

193 See Cboe U.S. Equities Volume Data, available at https://markets.cboe.com/us/equities/market_share/ (last accessed Apr. 20, 2020) (month-to-date volume summary as of Apr. 20, 2020). Specifically, the consolidated market shares for the Cboe, Nasdaq, and NYSE exchange groups were 16.63 percent, 17.84 percent, and 22.65 percent, respectively. Id.

194 See, e.g., SIFMA Letter, supra note 13, at 4; Clearpool Letter, supra note 40, at 4; MEMX Letter, supra note 80, at 4.

avoiding frequent changes in vote allocations resulting from short-term changes in trading activity.

(b) Prohibiting voting by nonoperational equity trading venues

The Commission proposed that the New Consolidated Data Plan should provide that if an exchange ceases operation as an equity trading venue, or has yet to commence operation as an equity trading venue, that exchange should not have a vote on Plan matters.[195] The Commission proposed this provision to ensure that only those SROs that are contributing to the generation or collection of the core data disseminated by the New Consolidated Data Plan have a vote on New Consolidated Data Plan decisions, and several commenters expressed their support for the Commission's view.[196] The Commission continues to believe that exchanges should have voting rights for New Consolidated Data Plan matters only if those exchanges actively operate equity market trading venues, and no commenters disagreed with this view. Accordingly, this Order requires that the New Consolidated Data Plan provide that if an exchange ceases operation as an equity trading venue, or has yet to commence operation as an equity trading venue,[197] that exchange will not be permitted to have a vote on Plan matters.

2. The Need for Non-SRO Participation in Plan Governance

A key provision in the Proposed Order was providing voting representation to non-SROs on the New Consolidated Data Plan's operating committee. Commenters express opinions on a range of issues relating to non-SRO voting, including the Commission's statutory authority, the

---

[195] Both ISE and Cboe have been inactive as equities exchanges for several years but continue to retain full voting rights on the Equity Data Plans. ISE ceased trading equities on December 23, 2008. See Securities Exchange Act Release No. 80873 (June 4, 2017), 82 FR 27094 (June 13, 2017). Cboe stopped trading equities on April 30, 2014. See Securities Exchange Act Release No. 71880 (Apr. 4, 2014), 79 FR 19950 (Apr. 10, 2014).

[196] See Clearpool Letter, supra note 40, at 4; ICI Letter, supra note 78, at 5; MEMX Letter, supra note 80, at 4.

[197] For purposes of this Order, operating a trading venue means trading NMS stocks on the venue as opposed to maintaining status as a national securities exchange without actually trading.

categories of non-SROs proposed to have representation on the operating committee, the process for selecting non-SRO members, as well as the number of terms and term length each non-SRO member should be permitted to serve.

(a) The Commission has statutory authority to require non-SRO voting power on the operating committee

The Commission believes that an operating committee that takes into account views from non-SRO members that are charged with carrying out the objectives of the New Consolidated Data Plan will have an overall improved governance structure that better supports the "prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information,"[198] because it will reflect a more diverse set of perspectives from a range of market participants, including significant subscribers of SIP core data products.

Some commenters, however, question the Commission's statutory authority to require an NMS plan to provide voting power to non-SROs.[199] These commenters state that Section 11A of the Act does not authorize the Commission to require the SROs to work with non-SROs in developing or administering NMS plans, and instead obligates SROs only to "act jointly" with other SROs to operate the national market system.[200] These exchange group commenters state that, because the statute does not directly provide for non-SRO participation, the Commission

198 15 U.S.C. 78k-1(c)(1)(B).

199 See NYSE Letter, supra note 49, at 14–15; Nasdaq Letter, supra note 45, at 5–6.

200 See NYSE Letter, supra note 49, at 14; Nasdaq Letter, supra note 45, at 5–6; see also Cboe Letter, supra note 114, at 7, n.13 (stating that it supports greater participation for non-SROs, but that the Commission should "ensure that any steps it takes to further this participation are within its statutory authority"). This commenter also suggests that non-SRO members of the operating committee be entities regulated by the Commission, rather than individual employees of the entities, and therefore, subject to the same obligations and responsibilities as SRO members. Id. at 7. For a full discussion of this comment, see infra Section II.E.1.

does not have the authority to require the SROs to coordinate with them in developing and maintaining an NMS plan.[201] One of these commenters argues that "because Congress only granted the Commission authority to empower SROs to develop and maintain the operation of the national market system, the Commission could not grant non-SROs voting authority over the SIPs under Section 11A even if the SROs wish the Commission to do so."[202] Another commenter states, "[w]here a statute or regulation contains express language limited only to a particular group, the negative implication is that other groups are not covered by the provision."[203] Thus, while it supports voting rights for non-SROs on the New Consolidated Data Plan's operating committee, this commenter believes that Section 11A of the Act[204] and Rule 608 of Regulation NMS[205] currently do not allow for non-SRO voting power on an NMS plan and this statute and regulation would need to be amended to permit such voting power on an NMS plan.[206]

The Commission disagrees. Section 11A of the Act[207] directs the Commission to "use its authority under this title"—including all of our authority over SROs —to facilitate the establishment of the national market system and further the objectives set forth in that section.[208] And Section 11A(a)(3)(B) of the Act provides the Commission the authority to require the SROs "to act jointly … in planning, developing, operating, or regulating a national market system (or a

---

201 See NYSE Letter, supra note 49, at 14–15; Nasdaq Letter, supra note 45, at 5–6.

202 NYSE Letter, supra note 49, at 14 (emphasis in original).

203 Nasdaq Letter, supra note 45, at 6.

204 15 U.S.C. 78k-1.

205 17 CFR 242.608.

206 See Nasdaq Letter, supra note 45, at 5–6.

207 15 U.S.C. 78k-1.

208 15 U.S.C. 78k-1(a)(2).

subsystem thereof)."[209] Thus, while Section 11A affirmatively authorizes the Commission to allow or require the SROs to act jointly, it does not prohibit non-SRO participation in developing and administering NMS plans. Rather, it is silent on this issue. And, as explained by the Commission in the Proposed Order, permitting non-SRO views to be more directly heard regarding Plan matters (while preserving joint SRO control of the New Consolidated Data Plan provided for by the plan voting structure discussed below[210]) would neither impede the SROs' ability to act jointly nor interfere with their ability to operate the national market system. Thus, pursuant to its authority over the national market system, the Commission is ordering the Participants to the New Consolidated Data Plan, as they act jointly, to include in the Plan voting rights for non-SROs.

The Commission disagrees with the commenter that believes that because the language of a statute or regulation expressly refers to a particular group, the negative implication is that other groups are not covered by the provision. To the contrary, in the context of a statute delegating rulemaking to an agency, statutory silence leaves discretion with the agency.[211] In this instance, the Commission believes it is appropriate to exercise that discretion to give non-SROs a vote on the New Consolidated Data Plan's operating committee.

While two commenters argue that the plain language of the statute provides that the Commission may do no more than authorize the non-SROs to act as advisory committees to the Equity Data Plans,[212] these arguments misconstrue the statutory language. The statute is silent on

---

209 15 U.S.C. 78k-1(a)(3)(B).

210 See infra Section II.C.2.

211 See NAM v. SEC, 748 F.3d 359, 368 (D.C. Cir. 2014); Catawba Cty, N.C. v. EPA, 571 F.3d 20, 36 (D.C. Cir. 2009).

212 See Nasdaq Letter, supra note 45, at 5–6; NYSE Letter, supra note 49, at 13–14.

the use of advisory committees with respect to the planning, developing, operating, or regulating of a national market system.[213] Even though the language of Section 11A(a)(3)(A) of the Act does not expressly address the creation of advisory committees to an NMS plan or the participation of non-SROs in Plan matters, the Commission has previously exercised its authority to provide non-SROs a role on the Equity Data Plans as advisors.[214] With this Order, the Commission is similarly exercising its statutory authority to require that the role of the non-SROs be expanded to include voting power on the operating committee of the New Consolidated Data Plan.[215] Notably, however, as discussed in greater detail below, the Commission is not granting the non-SRO members sufficient voting power to compel plan action or to block action agreed upon by a supermajority of the operating committee that includes a majority of the SROs.[216]

Moreover, several commenters agree that the Commission has the authority under Section 11A of the Act to provide for non-SRO participation on the New Consolidated Data Plan's operating committee as voting members.[217] One commenter, for example, states that an

---

213 While Section 11A(a)(3)(A) of the Act does refer to advisory committees, that provision provides for the creation by the Commission of committees pursuant to the Federal Advisory Committee Act to advise the Commission itself on the development of the national market system. See 15 U.S.C. 78k-1(a)(3)(A).

214 See Regulation NMS Release, supra note 7, 70 FR at 37561.

215 As discussed above, the Commission believes that changes in the markets over the last two decades (e.g., conversion from member-owned exchanges to for-profit exchanges, consolidation of exchange voting power, and exchanges offering for sale proprietary data products) have heightened these inherent conflict of interests between certain exchanges' commercial interests and their regulatory obligations under the Act and rules, as well as pursuant to the effective Equity Data Plans to produce and provide equity market data. The Commission believes that providing voting power on the New Consolidated Data Plan to non-SROs, including to individuals representing entities that have previously served in an advisory capacity to the operating committees of the Equity Data Plans, will serve to mitigate these conflicts and will result in improved governance over equity market data matters.

216 See infra Section II.C.3.

217 See Royal Bank of Canada Letter, supra note 189, at 3 ("One of the SROs has already provided comments arguing that this voting construct violates Section 11A because it would afford voting rights to entities not expressly identified in the law. We do not believe they are correct in this argument, and that the law is so limiting."); ICI Letter, supra note 78, at 2–4; Fidelity Letter, supra note 80, at 5–6 (stating, "[t]he Commission

interpretation of Section 11A that concludes the SEC lacks authority under Section 11A to force the SROs to act jointly with non-SROs in the operation of NMS plans is too narrow. The commenter states that Congress granted the SEC authority in Section 11A(c)(1) to prescribe rules and regulations as necessary or appropriate in the public interest to assure the prompt, accurate, reliable and fair collection, processing, distribution and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information.[218]

Some commenters also question the wisdom of granting votes to non-SROs, citing the conflicts of interests that non-SROs would bring to the operation of the New Consolidated Data Plan, as well as potential inefficiencies.[219] One commenter states that the non-SRO and SRO members of the New Consolidated Data Plan's operating committee may face challenges in working together for the benefit of the SIP data.[220] This commenter further opines that it does not believe there would be "many areas of likely agreement, and there may also be areas wherein there is agreement -- but that agreement may be in a direction that is contrary to the timely provision of essential market data at a reasonable cost through the public market data stream."[221] The Commission does not share these concerns.

---

has plenary authority to prescribe rules governing the collection and dissemination of equity market data."); Schwab Letter, supra note 74, at 4–5; SIFMA Letter, supra note 13, at 5 ("SIFMA believes that the SEC has the broad authority to instruct the SROs to take action to consolidate the existing Plans into a single new Plan and to incorporate its non-SRO representation and voting structure.").

218 Schwab Letter, supra note 74, at 4–5.

219 See NYSE Letter, supra note 49, at 16–17; Cboe Letter, supra note 114, at 7–9; Nasdaq Letter, supra note 45, at 9; Healthy Markets Letter, supra note 40, at 11–13.

220 See Healthy Markets Letter, supra note 40, at 12–13.

221 Id.

Broader representation on the New Consolidated Data Plan's operating committee, along with the Commission's continued oversight and supervision and the strengthened conflict of interest and confidentiality policies,[222] should help to ensure that plan governance facilitates the provision of consolidated market data consistent with Congressional goals. The Commission believes that including representatives from non-SROs alongside the SROs on the operating committee will enhance the ability of all relevant constituencies to work together to facilitate the goals of Section 11A of the Act. Although non-SROs members of the operating committee will themselves have conflicts of interests based on the type of business and constituency they represent, the Commission believes that the views of the non-SRO members, as data customers, will provide some balance with respect to the views of the exchanges, as data providers.[223] Further, the non-SRO members of the New Consolidated Data Plan's operating committee will be subject to the same conflict of interest policy as the SROs, which, as discussed below, will require disclosure of all material facts necessary for market participants and the public to understand any potential conflicts of interest and will require recusal in certain defined instances.[224] In addition, the New Consolidated Data Plan will include a confidentiality policy applicable to the non-SRO members that addresses sharing of information and data, which will also serve to manage conflicts of interest.[225]

---

222 See Conflicts of Interest Approval Orders, infra note 325, and Confidentiality Policy Approval Order, infra note 340 (both stating that the policies, as modified, further the goals set forth by Congress).

223 See infra Section II.C.3 regarding the augmented voting requirement. See also Royal Bank of Canada Letter, supra note 189, at 2 (stating, "This conflict can be mitigated by granting voting rights to other market participants, rather than exclusively to the exchanges….).

224 See infra Section II.E.1 and Conflicts of Interest Approval Orders, infra note 326.

225 See infra Section II.E.2

One commenter suggests that any non-SRO member on the operating committee should be a Commission-regulated entity and subject to the same obligations and responsibilities as SRO members.[226] This commenter believes that having a Commission-regulated entity participate on the operating committee would reduce individual conflicts of interests, treat non-SRO members similarly to SROs, and facilitate the Commission's ability to exercise its oversight of the operating committee.[227]

The Commission is now requiring a broader representation of market participants in the governance of the New Consolidated Data Plan by including non-SROs as voting members on the operating committee of the New Consolidated Data Plan. The Commission does not believe that it is necessary to require that non-SRO members of the operating committee be associated with a regulated entity in order for the Commission to be able to exercise its oversight of the operating committee.[228] As discussed below,[229] the Commission believes that the SROs should, by themselves, maintain sufficient voting power at all times to act jointly on behalf of the New Consolidated Data Plan, thus providing them with the ability to ensure that the New Consolidated Data Plan meets the requirements of Section 11A of the Act[230] and Rule 608 of Regulation NMS.[231] Further, any substantive amendment of the New Consolidated Data Plan would require Commission approval, and the Commission would be able, if it deemed it appropriate, to amend the terms of the New Consolidated Data Plan pursuant to Rule 608 of

---

226 See Cboe Letter, supra note 114, at 8–9.

227 See id. at 7–9.

228 Non-SRO members will be individuals that hold positions with firms or entities that satisfy a category of non-SRO members (e.g., a broker-dealer with a predominantly retail customer base).

229 See infra Section II.C.3 (describing the voting structure of the New Consolidated Data Plan).

230 15 U.S.C. 78k-1.

231 17 CFR 242.608.

Regulation NMS.[232] Thus, the Commission does not believe that the inclusion of non-SRO members on the operating committee, with insufficient votes to block plan action by themselves, would interfere with the Commission's ability to exercise its oversight over the New Consolidated Data Plan.

Nor does the Commission believe that potential disagreements between these members and the SROs will result in overall inefficiencies. The existence of different perspectives that result in additional discussion does not equate to inefficiency, but rather helps to ensure that more options for addressing an issue are considered by the operating committee. Adding non-SRO views to the discussions of the operating committee could therefore add to the range of solutions presented on issues and could, in fact, result in an ultimate resolution that is more beneficial to the market. In addition, as described below, the voting structure for the New Consolidated Data Plan will not require a unanimous vote for plan action. Therefore, even if all members of the operating committee do not agree on a matter, the operating committee can move forward with an augmented majority vote in favor of an action.[233]

(b) Categories of non-SRO members

As noted above, in the Proposed Order, the Commission proposed to require a broader representation of market participants in the governance of the New Consolidated Data Plan by including as voting members on the operating committee of the New Consolidated Data Plan a number of non-SRO market participants. The categories of non-SRO representatives proposed by the Commission included an institutional investor (e.g., an asset management firm), a broker-dealer with a predominantly retail investor customer base, a broker-dealer with a predominantly

---

232 17 CFR 242.608.

233 See infra Section II.C.3. An augmented majority vote is a supermajority vote of the New Consolidated Data Plan's operating committee, along with a majority vote of the SRO members of the operating committee. Id.

institutional investor customer base, a securities market data vendor, an issuer of NMS stock, and a retail investor, provided that the representatives of the securities market vendor, the issuer, and the retail investor, respectively, may not be affiliated with an SRO, a broker-dealer, or an institutional investor.

A number of commenters suggest modifications to the Commission's proposed categories of non-SRO voting representatives to the New Consolidated Data Plan's operating committee. Two commenters recommend the addition of a broker-dealer with a substantial wholesale customer base.[234] One of these commenters states that the vast majority of retail orders are routed to wholesale broker-dealers, and therefore these broker-dealers play a role in protecting investors through price and liquidity enhancement. The commenter believes that these firms have knowledge regarding market structure that would benefit the New Consolidated Data Plan.[235] Another commenter suggests that either a wholesale broker-dealer or a market-making broker-dealer would be a better representative of issues facing the industry than an issuer representative.[236]

The Commission disagrees with these commenters' suggestion. The Commission believes that the perspective and knowledge base of such a broker-dealer sufficiently overlaps with a broker-dealer that has a predominantly retail customer business as both have familiarity with the price and liquidity issues associated with retail trading. Further, the Commission believes that the interests of the constituencies that would be served by these representatives would be aligned, as ultimately they are both servicing the same end-user base, retail customers.

---

234 See Schwab Letter, supra note 74, at 5; TD Ameritrade Letter, supra note 74, at 4.

235 See TD Ameritrade Letter, supra note 74, at 4.

236 See Schwab Letter, supra note 74, at 5. This commenter argues that issuer representatives have a strong interest in how well their securities trade, but "lack the operational knowledge relevant to operating committee discussions." Id.

Therefore, the Commission does not believe it is necessary to add a broker-dealer with a substantial wholesale customer base to the operating committee. The Commission believes that the same is true for a market-making broker-dealer. The Commission believes that the interests specifically of market-making broker-dealers are sufficiently aligned with those of retail broker-dealers that adding a separate representative to the operating committee is warranted.

One commenter recommends including a representative of an alternative trading system ("ATS") as a voting member of the operating committee.[237] This commenter acknowledges that the views of ATSs could be represented by a broker-dealer with a predominantly institutional customer base, but notes that not all institutional broker-dealers operate an ATS and some ATSs exist that are not affiliated with large institutional broker-dealers, and therefore the commenter argues that ATSs should have separate representation on the operating committee.[238]

The Commission disagrees with this commenter. In the Proposed Order, the Commission stated that "ATSs and institutional broker-dealers serve similar roles in the markets, as both operate as over-the-counter trading venues" and concluded that "the New Consolidated Data Plan operating committee should not include a designated ATS representative."[239] The Commission continues to hold this view. The Commission does not believe that it is necessary for an ATS to be operated by an institutional broker-dealer in order for these two market participants to share opinions and perspectives on market data issues. Regardless of whether an institutional broker-dealer operates an ATS or an ATS is an affiliate of institutional broker-dealer, their business models are sufficiently aligned with respect to market data issues that the

---

237 See SIFMA Letter, supra note 13, at 4.

238 Id.

239 Proposed Order, supra note 4, 85 FR at 2179–80.

Commission continues to believe that an institutional broker-dealer representative on the operating committee is adequate to represent the interests of ATSs.

The Commission also disagrees with the commenter's suggestion to add an investment technology provider supporting the buy-side as a representative on the operating committee. While the Commission believes that input from technology providers on matters the operating committee will consider with respect to market data and its collection, consolidation, and dissemination will be valuable, there will be a market data vendor representative on the operating committee who should be able to provide input and guidance for New Consolidated Data Plan decision-making from a technological perspective.

The Proposed Order also provided for one representative of an institutional investor (e.g., an asset management firm) on the operating committee. One commenter argues that there should be at least two representatives from institutional investors, including at least one representative from a public pension plan.[240] However, because adding additional non-SRO members to the operating committee would dilute the votes of the other non-SROs members, and because the operating committee of the New Consolidated Data Plan would already include a representative for institutional investors, the Commission does not believe it is necessary to provide an additional slot on the operating committee exclusively for the representative of an institutional investor.

In the Proposed Order, the Commission also included a retail investor among the non-SRO members on the operating committee of the New Consolidated Data Plan to ensure that the interests of Main Street investors were represented in discussions regarding the equity data feeds. The interests of retail investors are central to the Commission's mission, and the Commission

[240] See CII Letter, supra note 74, at 6.

believes it is important that the operating committee of the New Consolidated Data Plan have a non-SRO member who can effectively represent the interests of individual investors with regard to the issues considered by the operating committee of the New Consolidated Data Plan. In particular, the Commission is ordering that the member of the operating committee representing retail investors shall have experience working with or on behalf of retail investors and have the requisite background and professional experience to understand the interests of retail investors, the work of the operating committee of the New Consolidated Data Plan, and the role of market data in the U.S. equity market. The Commission believes it is less important that this person simply be a "retail investor" and more important that this position be filled by a person with a combination of the background and experience described above so that he or she can effectively represent the interests of retail investors as a "retail representative." Accordingly, the Commission is modifying the language in the proposal to replace "retail investor" with "a person who represents the interests of retail investors ('retail representative')."

As proposed, the retail investor representative could not be affiliated with an SRO, broker-dealer, or institutional investor. However, as discussed above, the Commission is expanding the available group from which the "retail representative" could be chosen to a "person who represents the interests of retail investors." Because many retail investors gain exposure to the equities markets through various types of institutional investors, the Commission believes it is appropriate to permit (but not require) the "retail representative" to be associated with an institutional investor, provided that this person otherwise meets the requirements as set forth in this Order. The retail representative may not be affiliated with an SRO or broker-dealer, however, because, in the Commission's view, both SROs and broker-dealers will have adequate representation on the New Consolidated Data Plan's operating committee, including a broker-

dealer with a predominantly retail customer base. Thus, the Commission believes that prohibiting duplicative representation in this regard will help ensure that the non-SRO members reflect a diversity of perspectives.

Another commenter proposes adding voting representatives of a custodial bank, arguing that such a representative has unique insights into the needs of large institutional broker-dealers and has an interest in ensuring cost-effective access to market data.[241] This commenter also recommends adding an agency broker-dealer focused on institutional investors, and an investment technology provider supporting the buy-side to serve as additional voices representative of the "financial markets ecosystem."[242] The Commission disagrees with adding to the operating committee these additional non-SRO members that purport to represent the views or needs of institutional broker-dealers. The Order currently provides for an operating committee member that represents a broker-dealer with a predominantly institutional investor customer base. The Commission believes that the views of institutional broker-dealers will be adequately represented without the addition of a custodial bank or a designated agency broker.

Two commenters question the usefulness of an issuer as a voting member of the operating committee.[243] One of these commenters asserts that an issuer representative should not be eligible to serve under another non-SRO category,[244] while another commenter suggests that the Commission provide "certain objective requirements" to make sure that such representatives

---

241 See State Street Letter, supra note 76, at 3.

242 Id. at 5.

243 See Schwab Letter, supra note 74, at 5; TD Ameritrade Letter, supra note 74, at 4.

244 See TD Ameritrade Letter, supra note 74, at 4. The Commission notes that this Order is not intended to dictate all of the specific terms of the New Consolidated Data Plan, which the Commission will notice for public comment and consider when submitted by the SROs.

understand the technical aspects of equity market structure.[245] In addition, one commenter argues that the Commission's final order should specify that non-SRO members, to maintain their neutrality, should not be permitted to be representatives of an entity that "has an ownership interest in an SRO or its holding company beyond a specified level."[246]

The Commission disagrees with the commenters that believe a representative of an issuer should not have a vote on the operating committee. The Commission believes that an issuer representative has unique knowledge about a segment of the industry—the corporations that issue the stocks traded—that is not represented by the other representatives and should have a voice on matters relating to market data. However, the Commission agrees with a commenter that it is appropriate that the issuer representative should not also be eligible to serve as a representative of another category on the operating committee.[247] The Commission believes the representative who will serve as the issuer representative on the operating committee should serve to represent primarily the point of view of issuers, as views that support other categories of non-SRO members will have their own dedicated representative. If an issuer representative were also eligible to serve as another category of representative, questions could be raised as to whether the issuer representative is solely wearing his or her issuer "hat" in operating committee discussions or if he or she is actually advocating for views that are more aligned with another category on the operating committee. The Commission believes that it is important to ensure that the representative for the issuer constituency does not have business interests that significantly overlap with the interests of other non-SRO members on the operating committee such that the issuer representative's interests would be duplicative of other non-SRO members. To address

---

245 See SIFMA Letter, supra note 13, at 4.

246 IEX Letter, supra note 113, at 3.

247 See TD Ameritrade Letter, supra note 74, at 4.

these concerns, the Commission is ordering that the representative for the issuer category not be affiliated or associated with an SRO, a broker-dealer, or an investment adviser with third-party clients.

Another commenter objects to the restriction in the Proposed Order that vendors, issuers, and retail investors[248] may not be affiliated with an SRO, a broker-dealer, or an institutional investor. This commenter argues that the restriction could prevent otherwise qualified candidates with relevant industry experience or knowledge from serving on the operating committee.[249] The Commission anticipates that—notwithstanding the Order's restriction on affiliations for securities market data vendors and issuers with SROs, broker-dealers, and institutional investors, and the Order's restriction on a retail representative's affiliations with SROs and broker-dealers—the operating committee of the New Consolidated Data Plan will be able to attract knowledgeable representatives of securities market data vendors and issuers as the New Consolidated Data Plan will address issues and make important decisions that will impact these constituencies. The Commission believes that the opportunity to have a voice on the operating committee of a Plan responsible for issues related to market data will be highly coveted and there will be qualified nominees willing to serve as representatives from organizations that are not affiliated with SROs, broker-dealers, or institutional investors.

(c) Process for selecting non-SRO members and term limits

The Commission proposed that the non-SRO members of the New Consolidated Data Plan's operating committee should be selected solely by non-SROs and that the operating committee should provide for a process to publicly solicit, and make available for public

---

248 As discussed above, the Commission has modified the requirements relating to the retail investor category of non-SRO member.

249 See BlackRock Letter, supra note 114, at 2.

comment, nominations for non-SRO members. Further, the Proposed Order would require that the initial non-SRO operating committee members be selected by the current members of the Equity Data Plans' advisory committees, excluding advisory committee members selected by a Participant to be its representative, and that subsequent non-SRO members be selected collectively by the then-serving non-SRO members of the New Consolidated Data Plan's operating committee. In addition, to facilitate continuity of membership of the Equity Data Plan's advisory committees (excluding exchange representatives) through the transition to the New Consolidated Data Plan, the Commission proposed, to the extent possible, that the SROs should renew the expiring terms of all members of the Equity Data Plans' advisory committees (other than those selected to represent an SRO) who remain willing to serve in that role.

A number of commenters support the Commission's proposal to have the current advisory committee members, excluding exchange representatives, select the initial non-SRO members of the New Consolidated Data Plan's operating committee.[250] One commenter states, "[t]o help promote independence of views, we agree that the Plan Participants should not select non-SRO members of the [o]perating [c]ommittee."[251] Several of these commenters also emphasize the importance of an independent and transparent nomination and selection process for non-SRO members of the New Consolidated Data Plan's operating committee.[252] These commenters agree that the operating committee should provide for a process to publicly solicit, and make available for public comment, nominations for non-SRO members.[253] Additionally, as

---

[250] See Fidelity Letter, supra note 80, at 5; IEX Letter, supra note 113, at 3; Royal Bank of Canada Letter, supra note 189, at 3; SIFMA Letter, supra note 13, at 4.

[251] Fidelity Letter, supra note 80, at 5.

[252] See Fidelity Letter, supra note 80, at 5; IEX Letter, supra note 113, at 3; SIFMA Letter, supra note 13, at 4.

[253] See Fidelity Letter, supra note 80, at 5; IEX Letter, supra note 113, at 3; SIFMA Letter, supra note 13, at 4.

discussed above, one commenter suggests that the Commission appoint the members of the operating committee.[254]

One commenter objects to the proposed mechanism by which the non-SRO representatives would be selected for service on the Plan stating that is clearly inconsistent with Section 11A of the Act and Rule 608 of Regulation NMS, as it would bar SROs from having any role in the selection of those representatives.[255] This commenter argues that such restriction cannot be reconciled with the clear requirement of the statute and rule that NMS plans be governed by the joint action of SROs.[256]

The Commission disagrees with this commenter's position. As discussed above, Section 11A of the Act[257] affirmatively authorizes the Commission to allow or require the SROs to act jointly to further the statutory objectives of a national market system, but it does not prohibit non-SRO participation in developing and administering NMS plans. Pursuant to its statutory authority "to facilitate the establishment of a national market system,"[258] the Commission believes that permitting non-SROs solely to select the non-SRO members of the New Consolidated Data Plan's operating committee will facilitate the governance of this Plan in that it will help ensure the independence of these members.

As the Commission discussed in the Proposed Order, the SROs currently select the members of the advisory committee, including both members representing specific categories of market participants and members chosen by individual exchanges to serve on the committee. The

---

254 See CII Letter, supra note 74, at 6.

255 See Nasdaq Letter, supra note 45, at 7–8.

256 Id. at 8 (stating, "[q]uite simply, an NMS plan in which SROs play no part at all in important aspects of plan governance is not an NMS plan at all.").

257 15 U.S.C. 78k-1.

258 15 U.S.C. 78k-1(a)(2).

Commission believes that this may deter advisory committee members from expressing views that might contradict the views of the exchanges. The Commission's decision to prohibit the SROs from having a role in selecting the non-SRO members who will serve on the operating committee is designed to address this concern. Non-SRO members must be wholly independent from the SROs in order to represent their constituency free from interference. The ability of SROs to fully participate in, and ultimately act jointly to control decisions made by the operating committee,[259] will not be compromised simply because they are not involved in the selection of certain other members of the operating committee. The Commission therefore continues to believes that, as proposed, the existing advisory committee members of the Equity Data Plans (excluding the exchange-selected representatives), rather than the SROs or the Commission, should select the initial group of non-SRO members of the New Consolidated Data Plan's operating committee and subsequent non-SRO members should be selected solely by the then-serving non-SRO members of the New Consolidated Data Plan's operating committee in order to help ensure the independence of the non-SRO members.

The Commission further believes that the current Equity Data Plans' advisory committee members' experience with the operation of the Equity Data Plans will assist in the selection of the initial non-SRO operating committee members and will thus support the stable transition of operations from the Equity Data Plans to the New Consolidated Data Plan. Therefore, until the initial non-SRO members have been selected, the Commission believes that it is important to maintain the current membership of the Equity Data Plans' advisory committees, to the extent possible when excluding exchange-selected representatives, through the transition to the New Consolidated Data Plan. Accordingly, to facilitate continuity, the Commission is ordering the

[259] See infra Section II.C.3.

SROs to renew the expiring terms of all members of the Equity Data Plans' advisory committees (other than those members selected by an individual SRO) who remain willing to serve in that role.

In the Proposed Order, the Commission also proposed that non-SRO members of the operating committee would serve for a term of two years and that the New Consolidated Data Plan should establish reasonable term limits. The Commission noted that advisory committee members of the Equity Data Plan currently serve two-year terms and stated its belief that a two-year term would enhance the ability of non-SRO members to obtain sufficient experience with the operation of the New Consolidated Data Plan, and to make informed contributions as members of the operating committee.

Several commenters, expressing concern about individual members becoming "de facto permanent members" of the operating committee, specifically recommend term limits as an antidote to non-SRO member inertia.[260] Other commenters agree, stating that the benefits of limiting the number of terms a non-SRO representative could serve on the operating committee would include obtaining diverse perspectives.[261] Two commenters support a two-year term for non-SRO members, as proposed by the Commission, and these commenters recommend a two-term limit for representation on the operating committee.[262]

Certain other commenters, however, suggest alternative terms and term limits for non-SRO members' tenure on the New Consolidated Data Plan's operating committee. For example, a number of commenters recommend that the non-SRO members serve on the operating

---

260 See Fidelity Letter, supra note 80, at 5; IEX Letter, supra note 113, at 3; SIFMA Letter, supra note 13, at 4.

261 See Royal Bank of Canada Letter, supra note 189, at 3; T. Rowe Price Letter, supra note 164, at 2.

262 See MFA/AIMA Letter, supra note 142, at 2; SIFMA Letter, supra note 13, at 3.

committee for a three-year term with a two-term limit.[263] Another commenter suggests one four-year term, but argues that "the need for institutional knowledge specific to the New Plan and the need for new perspectives … can be accomplished by rotating out one half of the members every two years."[264] Finally, one commenter argues that the Commission should have the opportunity to object to the slate of nominees.[265]

With respect to terms of service and term limits for non-SRO members, the Commission believes that it is appropriate that the New Consolidated Data Plan balance the advantages of institutional knowledge with the potential benefits to be derived from new perspectives on Plan governance. Moreover, the Commission notes that the commenters' varied suggestions highlight the diversity of views with respect to the appropriate term and term limits to achieve this goal. The Commission believes a term of two years will provide non-SRO members with sufficient time to become familiar with the operations and issues affecting the New Consolidated Data Plan and to make informed contributions. The Commission believes that a term less than two years could result in a member being removed from the operating committee before he or she had an adequate opportunity to get familiar with the issues before the operating committee at that time and could result in a significant amount of disruptive turnover, resulting in inefficiencies on the operating committee. However, the Commission believes that a term of two years, with the potential for additional terms to be determined in the New Consolidated Data Plan, would provide sufficient time for a member to become familiar with the issues dealt with by the operating committee.[266]

---

263 See Fidelity Letter, supra note 80, at 5; Schwab Letter, supra note 74, at 5; State Street Letter, supra note 76, at 3; T. Rowe Price Letter, supra note 164, at 2.

264 TD Ameritrade Letter, supra note 74, at 5; see also Royal Bank of Canada Letter, supra note 189, at 3.

265 See Royal Bank of Canada Letter, supra note 189, at 3.

266 See supra note 262.

The Commission further believes that the New Consolidated Data Plan should provide a maximum term limit for non-SRO members to ensure that new and diverse viewpoints are reflected among the non-SRO members of the operating committee. The Commission is not dictating in this Order what the maximum term limit must be. The Commission believes that the SROs, as current members of numerous NMS plan operating committees, may have useful insights into balancing the value of having long-standing members on an operating committee with the potential detriment of allowing a membership to become stale and no longer useful or engaged and are thus well positioned to propose what the maximum term limit should be in the first instance. Accordingly, as proposed, the Commission is ordering that the New Consolidated Data Plan provide that non-SRO members of the operating committee serve for a term of two years and that the New Consolidated Data Plan set forth a maximum term limit for non-SRO members.

One commenter raises concerns that the non-SRO members on the New Consolidated Data Plan's operating committee would not "adequately and fairly" represent the views of the constituencies that the member was selected to represent.[267] This commenter further asserts that the nomination process outlined by the Commission is inadequate to address these concerns.[268]

To the contrary, the Commission believes that the requirement that the non-SRO members of the operating committee will collectively select replacement non-SRO members will help to ensure that the individuals selected will represent their constituencies' views on important market data issues, and will help to ensure that the most effective and knowledgeable advocates for their views serve on the operating committee. Further, because the then-serving

---

[267] See Healthy Markets Letter, supra note 40, at 13.

[268] Id.

non-SRO members, and not the SROs, will select non-SRO members, the Commission does not believe that individuals may be blocked from serving on the New Consolidated Data Plan's operating committee because they are perceived by the Participants as "anti-exchange,"[269] as the commenter suggests.

In addition, the New Consolidated Data Plan will require that the process for soliciting nominations for non-SRO members to serve on the operating committee be transparent. The Commission is requiring in this Order that the New Consolidated Data Plan must specifically include a process for publicly soliciting and making available for public comment nominations for non-SRO members and the public will be permitted to submit nominees for consideration and to provide comment on the pool of nominees.[270] Therefore, if the non-SRO members select a new member to serve on the operating committee who is less qualified than other nominees to represent a particular constituency, the decision will face public scrutiny.

Finally, the Commission also disagrees that providing some discretion to the SROs to propose a transparent nomination process and reasonable term limits for non-SRO member service renders its proposal "facially inadequate." Instead, the Commission believes that the requirements set forth in this Order, coupled with the Rule 608 process under which the New Consolidated Data Plan will be considered by the Commission, which includes public notice and comment, should help to assure that the nomination and selection process is fair, transparent, and public.

---

269 Id.

270 See Proposed Order, supra note 4, 85 FR at 2180 ("The Commission believes that the operating committee should provide for a process to publicly solicit, and make available for public comment, nominations for non-SRO members.").

3. Voting Structure under the New Consolidated Data Plan

In its Proposed Order, the Commission proposed that the New Consolidated Data Plan provide the SROs in aggregate with two-thirds of the voting power on the operating committee—and non-SRO members of the operating committee in aggregate with one-third of the voting power—with proportionate fractional votes allocated to non-SRO members of the operating committee as necessary to preserve this ratio at all times. Further, the Commission proposed that action by the operating committee of the New Consolidated Data Plan on all matters, including amendments to the New Consolidated Data Plan, should require an "augmented majority vote," meaning a two-thirds majority of all votes on the operating committee, provided that this vote also includes a majority of the SRO votes. The requirement for an augmented majority vote was intended to ensure that at all times the SROs have sufficient voting power to act jointly on behalf of the plan pursuant to the requirements of Section 11A of the Act[271] and Rule 608 of Regulation NMS.[272]

Commenters express opinions on several aspects of the Proposed Order's voting structure. Notably, several commenters support that the Proposed Order does not permit a requirement for a unanimous vote for plan action, as is currently required for certain actions of the Equity Data Plans.[273] As one commenter points out, unanimous voting is not a requirement for NMS plans and, in fact, the most-recently approved NMS plan required by Rule 613 of

---

271 15 U.S.C. 78k-1.

272 17 CFR 242.608.

273 See NYSE Letter, supra note 49, at 10 ("Adopting such a structure here would eliminate the ability of any single SRO to impose roadblocks to innovation, and would further encourage collaboration among the participants to the Plans."); SIFMA Letter, supra note 13, at 4–5; IEX Letter, supra note 113, at 4; MEMX Letter, supra note 80, at 4; Royal Bank of Canada Letter, supra note 189, at 2–3; Clearpool Letter, supra note 40, at 4; Fidelity Letter, supra note 80, at 5; Virtu Letter, supra note 80, at 2; Refinitiv Letter, supra note 80, at 2.

Regulation NMS ("CAT NMS Plan") requires the affirmative vote of a two-thirds supermajority of all members of the operating committee for plan amendments.[274] Another commenter, however, states that unanimous voting "can help protect individual SRO participants that may have divergent structures or interests from otherwise dominant SROs."[275] This commenter recommends that, if unanimous voting requirements in the SIP plan governance structure are eliminated, plan participants should be "permitted and encouraged" by the Commission to communicate dissenting views and concerns to the Commission about New Consolidated Data Plan actions that they believe may be "discriminatory, contrary to the public interest or improperly influenced by commercial interests."[276]

The Commission agrees with commenters who support not including a unanimous voting requirement in the new plan and believes that the New Consolidated Data Plan should provide that plan action, including amendments to the plan, will be approved by less than a unanimous vote. Further, the Commission believes that expanding the voting membership of the operating committee of the New Consolidated Data Plan, limiting the voting power of exchange groups, and providing for augmented majority voting—coupled with the existing requirement that NMS plan amendments must be published for comment and (except those put into effect upon filing) subject to approval by the Commission to become effective—should help to address concerns that the views of individual SRO participants will not be given adequate consideration. Additionally, consistent with its decision to expand the membership of the operating committee

---

274 See NYSE Letter, supra note 49, at 10.

275 Letter from Robert Colby, Executive Vice-President & Chief Legal Officer, FINRA (May 1, 2020) ("FINRA Letter").

276 Id.

governing the SIPs, the Commission encourages open debate of issues within the operating committee and the communication of dissenting views to the Commission.

A number of commenters express support for the Commission's proposal to require an augmented majority vote for action of the New Consolidated Data Plan.[277] Other commenters, however, suggest variations on the voting requirements. One commenter suggests imposing a supermajority requirement for plan amendments and a majority vote for all other actions, similar to the requirements of the CAT NMS Plan.[278] Another commenter expresses concern that the augmented majority vote proposal would require that "a majority of SROs must support any proposal before it can be adopted."[279] This commenter suggests that the Commission's proposal for the augmented majority vote, designed to address the SROs' statutory and regulatory obligations under the Act, should be limited to apply only to "those decisions tied to statutory SRO responsibilities."[280] Another commenter argues that the definition of augmented majority vote should be "expanded to include, at a minimum, a required one-third total vote of the non-SRO members in support of any amendment," noting that this would recognize the needs of those subject to regulatory requirements to display consolidated market data.[281] A number of commenters state that non-SRO members of the New Consolidated Data Plan's operating committee should have greater voting power than that proposed by the Commission.[282] Some

---

277 See, e.g., SIFMA Letter, supra note 13, at 4–5; IEX Letter, supra note 113, at 4; MEMX Letter, supra note 80, at 4; Royal Bank of Canada Letter, supra note 189, at 2–3; Clearpool Letter, supra note 40, at 4; Fidelity Letter, supra note 80, at 5; Virtu Letter, supra note 80 at 2; Refinitiv Letter, supra note 80, at 2.

278 See NYSE Letter, supra note 49, at 10.

279 Royal Bank of Canada Letter, supra note 189, at 3.

280 Id.

281 TD Ameritrade Letter, supra note 74, at 6.

282 See, e.g., IEX Letter, supra note 113, at 3; CII Letter, supra note 74, at 6; State Street Letter, supra note 76, at 3; SIFMA Letter, supra note 13, at 4; BlackRock Letter, supra note 114, at 2.

commenters advocate for an even distribution of voting power between SROs and non-SROs,[283] while one argues for non-SRO members of the operating committee to have majority voting power, noting that independent directors outnumber other directors on SRO boards today.[284]

The Commission disagrees with these variations on the voting requirements. First, rather than adopting, as one commenter suggests, the particular voting requirements established in the CAT NMS Plan, the Commission has elected to require an "augmented majority vote," which requires a supermajority vote of the operating committee, as well as a majority vote of the SRO members of the operating committee.[285] The Commission notes that, among other distinctions between the two plans,[286] here the Commission has determined that it is appropriate to include non-SRO members on the New Consolidated Data Plan's operating committee. Because all votes on the CAT NMS Plan are allocated to SROs, the concern about whether SROs retain sufficient voting power is not present for the CAT NMS Plan.

Second, the Commission disagrees with the commenter's suggestion that the augmented majority vote should apply only to decisions of the New Consolidated Data Plan relating to the SROs' statutory responsibilities. While the Commission acknowledges the commenter's concern about requiring a majority of SRO votes, the Commission believes that any attempt to identify and separate statutory-related items to come before the operating committee would likely require

---

283 See IEX Letter, supra note 113, at 3; Schwab Letter, supra note 74, at 5; SIFMA Letter, supra note 13, at 4; State Street Letter, supra note 76, at 3.

284 See CII Letter, supra note 74, at 6. In addition, CII advocates that all actions of the New Consolidated Data Plan be approved by a simple majority vote. Id.

285 All plan action, including amendments to the New Consolidated Data Plan, will require an augmented majority vote, with two exceptions. First, the selection of non-SRO members will require a majority vote of non-SROs. Second, the decision to enter into an executive session, discussed below, will require a majority vote of the SRO members.

286 Other differences between the two plans include, among other things, their distinct purposes and different impact on market participants.

more of the operating committee's time and attention than the potential benefits could justify. In addition, the Commission believes non-SRO members would offer informed views on statutory-related matters given their expertise.

Finally, the Commission does not agree that the proposed definition of augmented majority should be modified to require, in addition to the two-thirds majority of the operating committee and the majority of SRO votes, the vote of one-third of all non-SRO members eligible to vote, as suggested by a commenter. While this approach would further help to ensure that no proposed amendments to the New Consolidated Data Plan could be filed with the Commission without some level of non-SRO member concurrence, the Commission believes that creating a governance structure that would not, at a minimum, provide the SROs alone with the voting power necessary to effectuate action by the New Consolidated Data Plan[287] does not appropriately recognize the SROs' regulatory responsibilities to act jointly to operate the Plan.

For the same reason, the Commission does not agree that non-SRO members should have greater voting power than that proposed by the Commission. The Commission continues to believe that broader representation than currently exists on the Equity Data Plans would help to ensure that decisions relating to operations facilitate the regulatory goals of the New Consolidated Data Plan, and the Commission believes that providing non-SROs a vote for the first time furthers this goal. Increased representation, however, must be balanced against the SROs' statutory regulatory responsibilities under the Act and Rule 608 of Regulation NMS with respect to operation of the Plans. The Commission believes that the distribution of voting power, as proposed, appropriately strikes this balance by providing for meaningful input from a broad

[287] The augmented majority vote would allow a measure to pass with support of only the SRO votes on the operating committee, which would satisfy the requirements of a supermajority vote of the operating committee and a majority of the SRO votes.

range of stakeholders while also ensuring that the SROs retain sufficient voting power to act jointly on behalf of the plan pursuant to their regulatory responsibilities.[288] Therefore, the Commission disagrees with the commenters' calls for greater non-SRO voting power than that proposed.

Nonetheless, the Commission believes that permitting non-SRO stakeholders to have voting power on the New Consolidated Data Plan should facilitate discussion and encourage the SROs to more carefully consider the anticipated effects of plan action. Moreover, in the Commission's view, this approach represents a logical step in the evolution of NMS plan governance.[289] As noted in the Proposed Order, the Commission explained in Regulation NMS that the creation of advisory committees to the Equity Data Plans was "a useful first step toward improving the responsiveness of Plan participants and the efficiency of Plan operations."[290] And in adopting Regulation NMS, the Commission stated that it would "continue to monitor and evaluate Plan developments to determine whether any further action is warranted."[291] The Commission believes that further action, in the form of the governance measures discussed in this Order, including the exchange group voting allocation, the provision of voting power to non-SROs, and the augmented majority voting requirement, is warranted at this time and should help to ensure that New Consolidated Data Plan decisions and action relating to consolidated market data result in improved governance that will benefit the equity markets as a whole.

---

288 15 U.S.C. 78k–1 and 17 CFR 242.608.

289 See Regulation NMS Release, supra note 7.

290 Id., 70 FR at 37561.

291 Id.

D. The Need for an Independent Plan Administrator

In the Proposed Order, the Commission included a requirement that the New Consolidated Data Plan use an independent plan administrator that could not be owned or controlled by a corporate entity that offers for sale its own proprietary market data product, either directly or via another subsidiary.[292] Commenters reflecting a broad range of market participants (including one exchange) express support for the Commission's requirement of an independent plan administrator.[293] In contrast, two commenters question the rationale for requiring an independent plan administrator and express concern with the potential burdens imposed by changing the existing framework, in which plan administrators are SRO-affiliated.[294] One commenter states that the Proposed Order failed to identify "any shortcomings or problems" in the current approach and highlights the existence of information control policies and procedures that are designed to safeguard the confidential information handled by the plan administrator.[295]

---

[292] See Proposed Order, supra note 4, 85 FR at 2187. NYSE and Nasdaq currently act as administrators of the Equity Data Plans. Under the independence provision, NYSE and Nasdaq would be excluded from operating as plan administrators, although they would not be excluded from continuing to act as SIPs.

[293] See, e.g., T. Rowe Price Letter, supra note 164, at 2; Refinitiv Letter, supra note 80, at 2; ICI Letter, supra note 78, at 5; Wellington Letter, supra note 77, at 2; MFA/AIMA Letter, supra note 142, at 5; Bloomberg Letter, supra note 40, at 2; State Street Letter, supra note 76, at 2; Fidelity Letter, supra note 80, at 3; Schwab Letter, supra note 74 at 6; Royal Bank of Canada Letter, supra note 189, at 4; MEMX Letter, supra note 80, at 5; Clearpool Letter, supra note 40, at 5; Citi Letter, supra note 85, at 4; IEX Letter, supra note 113, at 3. One commenter recommends that the independence requirement also apply to the SIP processors for all the same reasons. See Schwab Letter, supra note 74, at 6. The Commission acknowledges that independence of the plan processors may mitigate some concerns regarding conflicts of interest. In this regard, the Proposed Order, as recognized by this commenter, requires the operating committee to review the performance of the plan processors and ensure the public reporting of plan processor's performance and other metrics and information about the plan processors. Furthermore, as discussed above, the Commission has proposed rule amendments related to the SIP processors in the Infrastructure Proposal. See supra Section II.B.2(b).

[294] See Nasdaq Letter, supra note 45, at 13; NYSE Letter, supra note 49, at 20. Nasdaq also expresses support for a single administrator and processor for the SIPs. See Nasdaq Letter, supra note 45, at 13. Nasdaq believes that the Commission should consider a single consolidated tape for all exchange-listed equities. See id. As discussed above, this Order is taking an incremental approach to the governance issues related to the Equity Data Plans and is at this time not addressing the production, aggregation, or distribution of consolidated market data.

[295] See NYSE Letter, supra note 49, at 20. Similarly, Nasdaq states that the Commission cited "no actual evidence as justification for impairing the functioning of the administrator, only 'concerns.'" See Nasdaq Letter, supra note 45, at 13.

Another commenter requests clarification on the scope of activity that would disqualify an entity from acting as the independent plan administrator.[296] This commenter believes that the prohibition on an entity offering its own proprietary market data products should be "expressly limited to data products that compete with the SIP—in other words, data with content that includes NMS stock quotations or transactions."[297]

The Commission continues to believe that, as stated in the Proposed Order, 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.[298] As discussed further below, the Commission has separately approved amendments to the Equity Data Plans establishing policies, as modified by the Commission, designed to address conflicts of interest and protect confidential information from misuse.[299] The Commission continues to believe that the conflicts of interest faced by a non-independent administrator are so great that these conflicts cannot be sufficiently mitigated. Unlike the exchanges, an independent plan administrator would not have as a competing objective maximizing the profitability of its own proprietary data products.[300] The Commission agrees that, as one commenter states, "[t]rue separation or independence is necessary to mitigate

---

296 See FINRA Letter, supra note 275.

297 Id.

298 See Proposed Order, supra note 4, 85 FR at 2183.

299 See infra Section II.E.1 and 2. The new conflicts of interest policy will require the administrators of the Equity Data Plans to disclose any employment or affiliation with an SRO and a narrative description of functions performed. See Conflicts of Interest Approval Orders, infra note 326. After the Participants have transitioned to the New Consolidated Data Plan and adopted a conflicts of interest policy as outlined in the Conflicts of Interest Approval Orders, the Commission believes that the administrator's disclosure requirements would continue to provide transparency with respect to the independence of the plan administrator.

300 See, e.g., Clearpool Letter, supra note 40, at 5; ICI Letter, supra note 78, at 5; IEX Letter, supra note 113, at 5; Fidelity Letter, supra note 80, at 3; MFA/AIMA Letter, supra note 142, at 5; Schwab Letter, supra note 74, at 6; State Street Letter, supra note 76, at 2; T. Rowe Price Letter, supra note 164, at 2.

the conflicts of controlling the SIP data products while selling proprietary products."[301] Similarly, another commenter states that an independent administrator "would eliminate any potential conflict of interest and allow the administrator to focus efforts on improved technology and reduced latency."[302] The Commission agrees, as the independence requirement would separate the independent administrator from an exchange's commercial interests and allow it to focus on the regulatory objectives of Section 11A of the Act. Additionally, because the relevant conflict of interest for an administrator would arise from administration of the SIPs while selling overlapping proprietary data products, the Commission believes that the independence requirement for the administrator must prohibit an entity from serving as administrator of the New Consolidated Data Plan if it is owned or controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own proprietary market data products for NMS stocks.

As stated in the Proposed Order, Participants and Participant representatives have been privy to confidential information of substantial commercial or competitive value, including, among other things, information about core data usage, the SIPs' customer lists, financial information, and subscriber audit results.[303] A particular area of heightened sensitivity with an exchange-affiliated administrator relates to the audit function. As one commenter points out, "the audit function creates special conflicts when it is managed by an affiliate of a Participant (which is presently the case for all the [Equity Data] Plans) because it is directly involved in raising revenue for the [P]lans, which benefits the affiliated Participants directly through distributions of

---

301 Schwab Letter, supra note 74, at 6.

302 Refinitiv Letter, supra note 80, at 2.

303 See Proposed Order, supra note 4, 85 FR at 2185.

Plan revenue (almost all revenue collected is distributed to Participants)."[304] This commenter further states that "there is the potential for the audit function to be used to advance the business objectives of one or more Participants, in cases where they compete in one or more businesses with an entity that is the subject of an audit."[305] The Commission believes that the proposed independent plan administrator requirement would address concerns regarding the potential use of SIP subscriber audit data to pursue commercial interests outside of the New Consolidated Data Plan.

However, two commenters state that employing an independent administrator would disrupt the administration of the Plans.[306] One commenter states that the independence requirement "may impair the eventual functioning of the administrator as having separate firms responsible for administration and processing may slow coordination and response time during a possible market event."[307] Another commenter emphasizes that the current SRO-affiliated administrators have specialized experience, established relationships with SIP customers, and familiarity with the practices and systems of the SIP.[308] This commenter states that the SROs would incur costs in the process of identifying, negotiating with, and hiring a new

---

304 IEX Letter, supra note 113, at 4–5.

305 IEX Letter, supra note 113, at 5. This commenter recommends that the Commission specify that the New Consolidated Data Plan "require strict independence of the audit function." See id. Under the terms of the proposal, the independent plan administrator would help to ensure that the audit process is fair and reasonable. Another commenter states that confidential information received by exchanges under the Equity Data Plans may have been used to further the exchanges' commercial interests. See Healthy Markets Letter, supra note 40, at 20.

306 See Nasdaq Letter, supra note 45, at 13; NYSE Letter, supra note 49, at 20. One commenter states that the Commission failed to consider in the Proposed Order the potential disruption to the administration of the Equity Data Plans by switching to an independent administrator. See NYSE Letter, supra note 49, at 20.

307 Nasdaq Letter, supra note 45, at 13.

308 See NYSE Letter, supra note 49, at 20.

administrator.[309] This commenter also states that "[a]ll of that experience and shared institutional knowledge would be lost in a transition to an unaffiliated [a]dministrator, and SIP customers would have to shoulder the burden of familiarizing the new Administrator with their practices and systems."[310] The commenter further states that the Proposed Order "failed to consider substantial benefits enjoyed by SIP customers as a result of the Administrators' affiliation with SROs [and that] … [c]ustomers generally appreciate that administrators can concurrently audit the customer's use of the SRO's proprietary data feeds when auditing the customer's SIP usage…."[311] Finally, this commenter asserts that under the independent plan administrator framework, each SIP customer that is also a customer of NYSE and Nasdaq proprietary data feeds would be audited three times—by the new independent plan administrator, by NYSE, and Nasdaq—instead of only by NYSE and Nasdaq.[312]

The Commission acknowledges that the current plan administrators' significant experience and familiarity with the SIPs' practices and systems facilitate the continuity of the administration of the SIPs, and that there will be a transition period with additional costs to onboard the new independent plan administrator, including system infrastructure (e.g., network connectivity to exchanges, hosting, and database upgrades) and human capital (e.g., contract management, hiring personnel, service support, and consolidating policies). In addition, depending on the level of experience and knowledge in the operation of the SIPs, the Commission anticipates that there will be a transition period for the new independent

309 See id. at 19.

310 Id. at 20.

311 Id.

312 See id.

administrator, as would be anticipated in any new role involving the New Consolidated Data Plan. On balance, however, the Commission believes that eliminating the conflict of interest justifies the requirement. Other NMS plans, moreover, have the roles of administrator and processor performed by different entities.[313] The Commission also disagrees with one commenter's statement that employing separate firms responsible for administration and processing would slow coordination and response time to market events because the roles of administrator and processor are functionally different, as prescribed by the Plans, and operate independently of one another (e.g., do not share the same personnel, shared systems, monitoring systems or databases).

The Commission acknowledges commenters' concerns regarding the transition to an independent administrator, including the burden of familiarizing the new administrator with subscriber practices and systems. With respect to one commenter's statement regarding the benefits of established relationships and familiarity with SIP customers and their systems, the Commission understands that administrators receive confidential and competitively sensitive information from broker-dealers about their products, systems, and operations, when engaging in the contracting process. This access to information and familiarity of SIP customers is the exact concern raised by commenters, some representing those same SIP customers, regarding conflicts of interest in the current administrator framework.[314] For example, the Commission understands that the administrators have significant latitude with respect to the information they may request during contract approval process for use of SIP market data, some of which may be highly sensitive.

---

313 Under the OPRA Plan, for example, Cboe Exchange, Inc. serves as the plan administrator and the Securities Industry Automation Corporation ("SIAC"), an NYSE affiliate, serves as the processor.

314 See supra notes 304–305 and accompanying discussion.

With respect to concerns regarding loss of expertise and shared institutional knowledge, the Commission believes this expertise would be leveraged in a different manner under the New Consolidated Data Plan because the Participants currently acting as administrators would continue to be active members of the operating committee and could advise and facilitate the onboarding process of the new administrator. As stated in the Proposed Order, the New Consolidated Data Plan shall provide for the orderly transition of functions and responsibilities from the three existing Equity Data Plans, which generally would include administrator functions, thereby helping to ameliorate the risk for disruption to the SIP administration process. Furthermore, the Commission highlights that any industry experience loss would be specific to the previous administrative policies and procedures under the Equity Data Plans instead of the New Consolidated Data Plan (e.g., two auditing teams under the Equity Data Plans instead of only one team under the New Consolidated Data Plan).

The Commission disagrees with the commenter's assertion that SIP customers generally appreciate that administrators can concurrently audit the customer's use of the SRO's proprietary data feeds when auditing the customer's SIP usage. In 2018, during the Commission's Division of Trading and Markets Roundtable on Market Data and Market Access ("Market Data Roundtable"), panelists stated there are substantial burdens associated with the Equity Data Plans' audits of their firms' subscriber data usage and fee payment.[315] The Commission also

[315] See, e.g., Transcript of Day One, Market Data Roundtable, at 112:21-24 and 114:2-9 (statements of Matt Billings, TD Ameritrade) ("The plans regularly audit brokers for compliance with their overly complex rules, which are not harmonized across the CTA and UTP Plans, and are a cause for misinterpretation. … The question ultimately becomes, at what point does a retail broker move away from the NMS plans … to avoid … the audit risk liability that currently exists under the plans."); Transcript of Day Two, Market Data Roundtable, at 196:20–197:7 (statement of Marcy Pike, Fidelity Investments) ("Most large brokerage firms or asset managers that are consuming this data have significant staffs that are counting and reporting the usage of this data…. There is a whole group of folks that have entered into the industry to help facilitate audits for the exchanges….").

understands that firms must engage in a burdensome approval process with the administrators each time the firms add a new market data product and also upon the request of an administrator at any time.[316] The Commission believes that such burdens identified by these commenters reflect the sort of concerns about the fairness and reasonableness of the audit and contract administration process that the new independent plan administrator is intended to address by completely separating the New Consolidated Data Plan's audit function from the commercial interests of members of the operating committee and their employers and affiliates. Additionally, as discussed above, a single New Consolidated Data Plan would provide the foundation for the application of consistent policies and procedures, which generally would include the audit function.[317] Furthermore, the Commission acknowledges the commenter's example that a joint SIP and NYSE/Nasdaq proprietary data feed customer would be audited three times under the proposal; however, the Commission believes that a consolidated SIP audit under one independent administrator would promote independence of the audit staff of the New Consolidated Data Plan from exchange personnel and directly address concerns related to cross-selling exchange proprietary data products for NMS stocks to the same market participants that are SIP subscribers.

The Commission believes that, despite the implementation costs of selecting an independent administrator, it is a necessary step to ensure that the Plans further the objectives of Section 11A. Further, based on its oversight experience and as described by commenters, the Commission believes that these costs are justified because the inherent conflicts of interest identified by the Commission, whereby an entity acts as a plan administrator while also offering

316 For example, an administrator may view something on a firm's website and seek further explanation from the firm.

317 See supra Section II.B.4 (describing the need for a single New Consolidated Data Plan).

its own competing products to the SIPs, either directly or via a subsidiary, raises significant concerns regarding access to confidential subscriber information. Access to such confidential subscriber information and its use for purposes outside the scope of the Plans by an SRO-affiliated administrator undermines the fair administration of equity market data in the public interest.

Additionally, two commenters argue that the independent plan administrator requirement would constrain the administrator selection process.[318] One of these commenters asserts that the independence requirement would eliminate all firms that have experience in managing a SIP and "necessarily diminish the quality of the competition among potential administrators."[319] Rather than adopt the independence requirement, this commenter states that the operating committee tasked with selecting an administrator is in the best position to weigh the conflicts of interest issues against the risk of hiring an administrator without experience.[320]

The Commission disagrees with commenters' concerns that the independence requirement will prevent the New Consolidated Data Plan from employing an administrator capable of managing the SIPs and inappropriately constrain the selection process.[321] The Commission believes that there is a broad range of financial service firms, unaffiliated with an SRO, with specialized capabilities to oversee market data administrative functions, such as licensing, billing, contract administration and client relationship management, and record keeping. Finally, the Commission disagrees with one commenter's statement that the operating committee is currently in the best position to weigh administrator conflicts of interest issues in

---

318 See Nasdaq Letter, supra note 45, at 13; NYSE Letter, supra note 49, at 20.

319 Nasdaq Letter, supra note 45, at 13.

320 See id.

321 See Nasdaq Letter, supra note 45, at 13; NYSE Letter, supra note 49, at 20.

selecting an administrator because members of the operating committee would face their own conflict of interest concerns related to any affiliated bidders. Rather, the Commission believes that the independence requirement will ameliorate the burden on the operating committee of deliberating over administrator's conflicts of interest concerns by eliminating conflicted parties at the outset.

One commenter also argues that the termination of contracts of the existing Equity Data Plans' administrators as a result of the transition to a single New Consolidated Data Plan would result in an unconstitutional taking in violation of the Fifth Amendment of the U.S. Constitution.[322] This commenter believes that the Commission should mandate in the Proposed Order that "no action may be taken that alters the administrators' or processors' rights under current contractual provisions."[323]

The Commission disagrees with the commenter's argument that the Commission's proposal would constitute a Fifth Amendment "taking." As discussed in the Proposed Order, the New Consolidated Data Plan's terms should provide for the orderly and predictable transition of functions and responsibilities from the three existing Equity Data Plans to the New Consolidated Data Plan. The commenter fails to explain how that legally authorized transition in this highly regulated field could upset a protected property interest for purposes of the Fifth Amendment's takings clause. Moreover, the operation of the Equity Data Plans is a fundamental component of the national market system, and Congress has given the Commission broad authority to regulate that system. Indeed, the role of administrator exists solely in response to the regulatory requirements of Section 11A of the Act and Regulation NMS. Here, the Commission has

322 See Nasdaq Letter, supra note 45, at 13–14.

323 Id. at 14.

determined that it is appropriate, in response to changes in the market, to alter the existing regulatory structure pursuant to this authority. In a highly regulated industry such as the national market system for securities, the Commission does not believe that such a change impermissibly interferes with an administrator's reasonable investment-backed expectations.[324]

E. New Consolidated Data Plan Policies and Procedures

1. Conflicts of Interest Policy

The Proposed Order provided that the New Consolidated Data Plan shall include provisions designed to address the conflicts of interest of SRO members and non-SRO members. On January 8, 2020, the Commission issued for notice and comment the Participants' proposal to amend the Equity Data Plans to make mandatory the current voluntary conflicts-of-interest disclosure regime.[325] Simultaneously with this Order, the Commission is approving the Conflicts of Interest Amendments to the Plans, as modified by the Commission.[326]

The Commission received a number of comments in response to the Proposed Order that address the appropriate scope of conflicts-of-interest policies for the New Consolidated Data Plan, including some comments directly referring to the Conflicts of Interest Amendments. Most commenters acknowledge the conflicts that exchanges face between their regulatory obligations to produce and provide core data and their commercial interests, and support including a robust

---

[324] See, e.g., Ruckleshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984); District Intown Properties Ltd. P'ship v. District of Columbia, 198 F.3d 874, 884 (D.C. Cir. 1999).

[325] See Securities Exchange Act Release Nos. 87907 (Jan. 8, 2020), 85 FR 2193 (Jan. 14, 2020) and 87908 (Jan. 8, 2020), 85 FR 2202 (Jan. 14, 2020) (together, the "Conflicts of Interest Amendments").

[326] See Securities Exchange Act Release Nos. 88823, 88824 (May 6, 2020) ("Conflicts of Interest Approval Orders").

conflicts-of-interest policy in the New Consolidated Data Plan.[327] However, one commenter states that it believes that the Conflicts of Interest Amendments reduce or eliminate many of the concerns that the Commission raised in the Proposed Order about the governance of the Equity Data Plans, and, in particular, potential conflicts of interests.[328]

The Commission agrees with the commenters that the Conflicts of Interest Amendments, as proposed, attempt to address some of the conflicts inherent in the current market data structure where exchanges can offer proprietary market data products while also sharing responsibility for the public SIP data stream. In fact, the Commission believes that full disclosure of all material facts necessary for market participants and the public to understand the potential conflicts of interest is one important approach to dealing with those potential conflicts. As the Commission states today in its separate approval order, detailed, clear, and meaningful disclosures that provide insight into otherwise non-transparent structures and operations can raise awareness of potential conflicts of interest inherent in the current equity market data structure and increased access to information can facilitate public confidence in Plan operations.[329] However, the Commission believes that broader market developments, such as exchanges converting from being mutually owned to demutualized entities that serve their shareholders, and the emergence of exchange groups, have heightened the potential for competing interests to affect the governance of the Equity Data Plans to a degree that simply cannot be addressed solely by

---

[327] See CII Letter, supra note 74, at 6; T. Rowe Price Letter, supra note 164, at 2; Refinitiv Letter, supra note 80, at 3; MEMX Letter, supra note 80, at 6; MFA/AIMA Letter, supra note 142, at 5; SIFMA Letter, supra note, 13 at 6; Citi Letter, supra note 85, at 4; Clearpool Letter, supra note 40, at 5; IEX Letter, supra note 113, at 4–5.

[328] See NYSE Letter, supra note 49, at 10. See also Cboe Letter, supra note 114, at 4 (stating that the Conflicts of Interest Amendments would constitute meaningful improvements to Equity Data Plan governance).

[329] See Conflicts of Interest Approval Orders, supra note 326, at 6.

enhanced disclosures.[330] As such, the Commission believes that the Conflicts of Interest Amendments are by themselves insufficient to address these issues.

Some of the exchange groups raise concerns that non-SRO members of the New Consolidated Data Plan's operating committee would favor their own business interests, and that the Proposed Order included neither obligations on non-SRO members nor a mechanism to enforce compliance with the terms of the New Consolidated Data Plan.[331] Another commenter states it would not object to a provision in the New Consolidated Data Plan explicitly providing that non-SRO members have a duty to act in good faith and in the public interest in furtherance of the purposes of Section 11A of the Act.[332]

The Commission recognizes that non-SRO members also face conflicts of interest as both voting members of the operating committee and employees of businesses that utilize core data or proprietary data feeds. Thus, the Commission believes that the New Consolidated Data Plan should include conflicts-of-interest provisions for both SRO and non-SRO representatives of the operating committee, and as approved, the Conflicts of Interest Amendments will apply equally to SRO and non-SRO representatives. The Commission believes that each of the disclosing parties will be required to disclose conflicts of interest, and will be guided by the goals of the New Consolidated Data Plan to ensure the "prompt, accurate, reliable, and fair collection, processing, distribution and publication of information with respect to quotations for and

---

330 See Proposed Order, supra note 4, 85 FR at 2173–75.

331 See NYSE Letter, supra note 49, at 15; Nasdaq Letter, supra note 45, at 8–9 (arguing that the Proposed Order does not impose any obligations on non-SRO members of the New Consolidated Data Plan, nor even a clear means to enforce their compliance with the terms of the New Consolidated Data Plan); Cboe Letter, supra note 114, at 7–9 (stating that it is critical that the Commission take steps to ensure that it can exercise appropriate oversight over any non-SRO members).

332 See ICI Letter, supra note 78, at 4.

transactions in such securities and the fairness and usefulness of the form and content of such information."[333] Additionally, because the recusal process outlined in the Conflicts of Interest Amendments as approved is applicable not only to non-SRO members, but to all disclosing parties, it is designed to address these conflicts-of-interest concerns as well.

As stated in the Conflicts of Interest Approval Orders, the Commission believes that those policies, as approved, will enhance the governance of the existing Equity Data Plans and would similarly help the New Consolidated Data Plan address the conflicts of interest that its expanded set of operating committee members would face. The Commission therefore orders the SROs to incorporate into the New Consolidated Data Plan provisions consistent with the Conflicts of Interest Amendments as modified by the Commission.

2. Confidentiality Policy

The Proposed Order provided that the New Consolidated Data Plan shall include provisions designed to protect confidential and proprietary information from misuse. On January 8, 2020, the Commission issued the notice of the Equity Data Plans' proposal to adopt a confidentiality policy to provide guidelines for the operating committee and the advisory committee of the Plans, and all subcommittees thereof, regarding the confidentiality of any data or information generated, accessed, or transmitted to the operating committee, as well as discussions occurring at a meeting of the operating committee or any subcommittee.[334]

The Commission received a number of comments in response to the Proposed Order that address the appropriate confidentiality policy for the New Consolidated Data Plan, including

---

333 15 U.S.C. 78k-1.

334 See Securities Exchange Act Release Nos. 87909 (Jan. 8, 2020), 85 FR 2207 (Jan. 14, 2020) and 87910 (Jan. 8, 2020), 85 FR 2212 (Jan. 14, 2020) (together, the "Confidentiality Policy Amendments").

comments that addressed the Confidentiality Policy Amendments submitted by the Participants to the Equity Data Plans. Most commenters support a robust confidentiality policy in the New Consolidated Data Plan that would apply to both SRO and non-SRO members of the operating committee.[335] One commenter believes that the Confidentiality Policy Amendments reduced or eliminated many of the concerns expressed in the Proposed Order.[336] Another commenter states that the proposed Confidentiality Policy Amendments would improve the handling of confidential information and are designed to both protect confidential information from misuse and facilitate the sharing of confidential information with the advisory committee.[337]

In the Proposed Order, the Commission stated its concerns about the possibility of an exchange or its representative obtaining confidential data subscriber information of potentially significant commercial value, as they are privy to information about core data usage, the SIPs' customer lists, financial information, and subscriber audit results via their position on the operating committee.[338] The conflicts resulting from such access could influence decisions as to the Equity Data Plans' operations and thereby impede their ability to achieve the goals of the Plans to ensure the "prompt, accurate, reliable, and fair collection, processing, distribution and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information." Thus, the Commission agrees with the commenters that the Confidentiality Policy Amendments, as initially proposed,

---

335 See Refinitiv Letter, supra note 80, at 3; Wellington Management Letter, supra note 77, at 2; MEMX Letter, supra note 80, at 6; MFA/AIMA Letter, supra note 142 at 5; SIFMA Letter, supra note 13, at 6; Royal Bank of Canada Letter, supra note 189, at 4; Clearpool Letter, supra note 40, at 5; Citi Letter, supra note 85, at 4.

336 See NYSE Letter, supra note 49, at 10.

337 See Cboe Letter, supra note 114, at 5.

338 See Proposed Order, supra note 4, 85 FR at 2185.

are a necessary first step towards implementing a policy to address the commercial use of confidential or proprietary information.

Another commenter recommends that any adopted confidentiality policy included in the New Consolidated Data Plan be sufficiently robust and implemented in a manner to ensure that topics in any executive session are appropriately handled in a secure manner by SRO members, so that non-SRO members may participate in executive sessions.[339]

Simultaneously with the issuance of this Order, the Commission is approving the Confidentiality Policy Amendments to the Equity Data Plans, as modified by the Commission.[340] In approving the Confidentiality Policy Amendments, the Commission modified a provision so that classification of information would be based on the content and sensitivity of the information, rather than on whether it is shared in an executive session, resulting in a more vigorous confidentiality policy.[341]

The Commission believes that the Confidentiality Policy Amendments, as approved by the Commission, will enhance the governance of the existing Equity Data Plans and would similarly help the New Consolidated Data Plan appropriately identify and treat confidential information. The Commission therefore orders the SROs to incorporate into the New Consolidated Data Plan, provisions consistent with the Confidentiality Policy Amendments as modified by the Commission.

---

339 See TD Ameritrade Letter, supra note 74, at 7–8.

340 See Securities Exchange Act Release Nos. 88825, 88826 (May 6, 2020) ("Confidentiality Policy Approval Orders").

341 See Confidentiality Policy Approval Order, supra note 340.

3. Executive Session Policy

The Proposed Order provided that the New Consolidated Data Plan should include an executive session policy that permits the SROs to hold executive sessions only in circumstances when it is appropriate to exclude non-SRO members.[342] The Commission further proposed that a request to enter into an executive session be included on the written agenda along with a clearly stated rationale for each matter to be discussed and subsequently approved by a majority vote of the SRO members of the operating committee.[343]

The Commission received several comments regarding the proposed executive session policy.[344] Most commenters were supportive of the Commission's proposal, reiterating that executive sessions should be severely limited to certain circumstances.[345] However, one commenter believes that the executive session policy should be limited to "necessary" circumstances, and not merely "appropriate" as proposed by the Commission, and states that coupled with the Confidentiality Policy Amendments, the need for executive sessions should be minimal.[346] The exchange groups contend that the Equity Data Plans' operating committee had already limited the use of executive sessions and implemented a process of disclosing potential topics for executive sessions in advance and voting on them in the presence of the advisory committee.[347]

---

342 See Proposed Order, supra note 4, 85 FR at 2184–85.

343 See id. at 2185.

344 See NYSE Letter, supra note 49; TD Ameritrade Letter, supra note 74; Virtu Letter, supra note 80; Refinitiv Letter, supra note 80; MEMX Letter, supra note 80; Cboe Letter, supra note 114; Royal Bank of Canada Letter, supra note 189; Clearpool Letter, supra note 40.

345 See TD Ameritrade Letter, supra note 74, at 7; Virtu Letter, supra note 80, at 2; MEMX Letter, supra note 80, at 7; Clearpool Letter, supra note 40, at 5; Refintiv Letter, supra note 80, at 3.

346 See Royal Bank of Canada Letter, supra note 189, at 3.

347 See NYSE Letter, supra note 49, at 8; Cboe Letter, supra note 114, at 5.

One commenter suggests that, instead of approving an executive session by a majority vote of the SRO members, an executive session request should be approved by the augmented majority voting procedures (as discussed above) and the votes should be reflected in the meeting minutes.[348] Specifically, the commenter is concerned that limiting non-SRO members' voting rights, in determining whether to move into executive session or not, could potentially cause topics outside the stated policy to be approved for executive session. The commenter further recommends that the policy should provide a process by which decisions to close meetings can be challenged by any operating committee member with cause.[349] Another commenter proposes that non-SRO members should be able to participate, but not vote, in executive sessions, arguing that non-SRO participation would still allow SROs to effect solely SRO business, while providing non-SRO members with the necessary context to inform their positions.[350] Regarding non-SRO member participation in executive sessions, the commenter further suggests that one non-SRO member voted on by peers be permitted to participate without a vote in the executive session, or, alternatively, that a non-conflicted legal counsel be in attendance.[351]

As reflected in the Proposed Order,[352] the Commission recognizes that there may be circumstances in which deliberations by the SROs alone may be appropriate. Because this Order provides that the New Consolidated Data Plan shall confine executive sessions to circumstances in which it is appropriate to exclude non-SRO members—such as, for example, discussions regarding matters that exclusively affect the SROs with respect to the Commission's oversight of

---

348 See TD Ameritrade Letter, supra note 74, at 7.

349 See id. at 8.

350 See TD Ameritrade Letter, supra note 74, at 8.

351 Id.

352 See Proposed Order, supra note 4, 85 FR at 2184–85.

the New Consolidated Data Plan (including attorney-client communications relating to such matters)—the Commission believes that it is appropriate that the request to enter into an executive session require a majority vote of the SRO members of the operating committee. The Commission further believes that requiring only a majority vote of the SROs is balanced by the requirement that a request to enter into an executive session be included on a written agenda, along with a clearly stated rationale for each matter to be discussed.[353] Non-SROs, as voting members of the operating committee, would have access to this agenda and be present for the vote to enter into executive session, providing an opportunity to discuss or inquire about the basis for the requested session.

4. Responsibilities of the Operating Committee

The Proposed Order set forth several responsibilities of the operating committee under the New Consolidated Data Plan.[354] The Commission received several comments regarding the role of the operating committee, with most commenters supporting the enunciated functions.[355] One commenter agrees that the New Consolidated Data Plan should make explicit that the operating committee is responsible for taking action to meet the statutory goals of assuring the "prompt, accurate, reliable, and fair collection, processing, distribution, publication of information with respect to quotations for and transactions in NMS stock and the fairness and usefulness of the form and content of that information."[356]

---

353 See id. at 2185.

354 See id. at 2186–87.

355 See Clearpool Letter, supra note 40, at 5; Letter from John L. Thornton, Co-Chair, Hal S. Scott, President, and R. Glenn Hubbard, Co-Chair, Committee on Capital Markets Regulation (Feb. 28, 2020), at 6 ("Capital Markets Letter"); IEX Letter, supra note 113, at 3–4; Virtu Letter, supra note 80, at 2; MEMX Letter, supra note 80, at 5–6; TD Ameritrade Letter, supra note 74, at 6–7; Bloomberg Letter, supra note 40, at 3–5; MFA/AIMA Letter, supra note 142, at 4–5.

356 See IEX Letter, supra note 113, at 3. See also Virtu Letter, supra note 80, at 2 (supporting implementation of governance reforms and mandating new policies and procedures to ensure transparency and accountability for

Several commenters support the operating committee's responsibility to select, oversee, specify the role and responsibilities of, and evaluate the performance of, an independent plan administrator, plan processors, and auditor, and other professional service providers.[357] Commenters also express support for the operating committee's role to review the performance of the plan processors, and ensure the public reporting of plan processors' performance and other metrics and information about the plan processors and believed it would allow industry participants to provide meaningful input to the operating committee and the Commission.[358]

However, one commenter contends that the Equity Data Plan administrators and processors operate pursuant to service contracts and that terminating the contracts without regard to the administrators' or processors' rights would violate the Fifth Amendment prohibition against takings without just compensation. The commenter asserts that the Commission should mandate that the operating committee not take any action that would alter the administrators' or processors' rights under their current contractual provisions.[359]

The Commission does not agree that the Proposed Order would mandate the termination of the current contract with the processors, because the Proposed Order contemplated that the New Consolidated Data Plan may incorporate the current operational provisions of the Equity Data Plans and that therefore the existing processors for the Equity Data Plans would become the processors for the New Consolidated Data Plan. Thus, the Proposed Order would not impermissibly interfere with a protected property interest and does not represent a "taking"

---

actions taken by the operating committee); TD Ameritrade Letter, supra note 74, at 8 (supporting adoption and inclusion of all other provisions of the Equity Data Plans necessary for the operation and oversight of the SIPs under the New Consolidated Data Plan).

357 See Clearpool Letter, supra note 40, at 5; MEMX Letter, supra note 80, at 5–6.

358 See Capital Markets Letter, supra note 355, at 6; Clearpool Letter, supra note 40, at 5; MEMX Letter, supra note 80, at 6.

359 See Nasdaq Letter, supra note 45, at 14.

within the meaning of the Fifth Amendment. Indeed, the Proposed Order should not result in any economic harm to the processors. Currently under the Equity Data Plans, the SIAC is the exclusive processor for Tapes A and B and Nasdaq is the exclusive processor for Tape C. While the Commission is ordering a single New Consolidated Data Plan, it is not imposing requirements or taking a position as to whether the three Tapes will continue to exist. Upon commencement of the New Consolidated Data Plan, the operating committee may determine to select new processors, however, such selection will be subject to the augmented voting structure and subsequent review, pursuant to Rule 608, by the Commission.

In any event, even if contractual arrangements with processors would have to be altered, no commenter has presented any identifiable and protected property interest. Nor has any commenter explained how such arrangements would alter any reasonable investment-backed expectations in this highly regulated field.

The Commission also received comments regarding the proposed requirement about terms and fees for the distribution, transmission, and aggregation of core data.[360] Some commenters recommend that the operating committee clarify the terms "fair and reasonable."[361] Commenters alternatively suggest that the Commission use its rulemaking authority to codify its "Staff Guidance on SRO Rule Filings Relating to Fees" to assist in the review of prices or that the Commission introduce additional rulemaking to include clear and specific cost-based

---

[360] See Capital Markets Letter, supra note 355, at 6 (stating that cost transparency is crucial to ensuring that consolidated market data fees are "not unreasonably discriminatory" and "fair and reasonable"); MFA/AIMA Letter, supra note 142, at 4 (stating that the New Consolidated Data Plan should make clear that fees should be related to the cost of production, aggregation and distribution, rather than to user value).

[361] See TD Ameritrade Letter, supra note 74, at 6; Bloomberg Letter, supra note 40, at 4–5; NYSE Letter, supra note 49, at 11.

requirements to support SIP data fees.[362] One commenter argues that the current SIP fees have already gone through the required regulatory review process and as such, should remain in place unless the new operating committee determines to change them.[363]

As the Commission stated in the Proposed Order, the existing Equity Data Plans will continue to be responsible for the consolidation and dissemination of SIP data and the fees for SIP data will continue to be governed by the provisions of the Equity Data Plans, until the New Consolidated Data Plan is ready to assume responsibility for the dissemination of SIP data and fees of the New Consolidated Data Plan have become effective.[364] Thus, the Equity Data Plans will continue to function, with their existing fees, until those Plans are decommissioned and are no longer responsible for the consolidation and dissemination of equity market data. This Order creates a new NMS plan for equity market data, and the Commission believes that any new SIP data fees, including consideration of what would be "fair and reasonable," should be discussed among and developed by the new operating committee and would need to be voted and approved by an augmented vote pursuant to the terms of the New Consolidated Data Plan. Consistent with the requirements of Rule 608, all of the terms of the New Consolidated Data Plan, both those filed as part of the initial plan itself, or those submitted as later amendments to address products or fees, would be subject to public notice and comment and Commission review.

The Commission also received comments regarding the operating committee's responsibility to design a fair and reasonable revenue allocation formula for allocating plan revenues to be applied by the independent plan administrator, and overseeing, reviewing, and

---

362 See TD Ameritrade Letter, supra note 74, at 6–7; NYSE Letter, supra note 49, at 11.

363 See Cboe Letter, supra note 114, at 11.

364 See Proposed Order, supra note 4, 85 FR at 2186.

revising that formula as needed.[365] One commenter recommends that the Commission revisit the current revenue allocation formula now, with the goal of arriving at a new formula that better rewards displayed liquidity resulting in price discovery.[366] Another commenter concurs, stating that the revenue allocation formula should be modified to reward displayed quotes where investors receive an execution.[367]

The Commission believes that the SROs as operators of the SIPs are well suited to determine how the revenues are distributed among the SROs. Consistent with any other plan actions, once the operating committee determines a fair and reasonable allocation and files a proposed amendment with the Commission, the Commission will publish such an amendment for notice and comment pursuant to Rule 608, and will have an opportunity to review the provisions, consider the operating committee's rationale, and at that time make a determination as to whether the proposal is fair and reasonable.

F. Transition from Equity Data Plans to New Consolidated Data Plan

The Proposed Order stated that the New Consolidated Data Plan shall provide for the orderly transition of functions and responsibilities from the three existing Equity Data Plans and shall provide that the dissemination of, and fees for, SIP data continue to be governed by the provisions of the Equity Data Plans until the New Consolidated Data Plan is ready to assume responsibility for the dissemination of SIP data and fees of the New Consolidated Data Plan has

365 See NYSE Letter, supra note 49, at 11; MEMX Letter, supra note 80, at 6.

366 See NYSE Letter, supra note 49, at 11.

367 See Nasdaq Letter, supra note 45, at 4–5.

been approved.[368] The Commission received several comments on the proposed transition to the New Consolidated Data Plan.[369]

One commenter argues that the proposed allocation of 90 days for the SROs to file the New Consolidated Data Plan with the Commission was unreasonable, stating that the current operating committee would have to resolve numerous issues, such as (1) developing comprehensive conflicts-of-interest provisions for both SRO and non-SRO representatives of the operating committee, (2) reconciling inconsistencies between the Equity Data Plans, (3) designing processes for selection and evaluation of an independent plan administrator, auditor, and other professional service providers, and (4) setting parameters for a revision to the revenue allocation formula.[370] Alternatively, this commenter suggests a 180-day deadline for an initial progress report, followed by progress reports every 90 days until completion.[371]

Conversely, another commenter asserts that a shorter period of time, for example 45 days after the Order is issued, would be sufficient for the SROs to file the New Consolidated Data Plan with the Commission, and suggests that the Commission be more prescriptive in providing the terms for the New Consolidated Data Plan to avoid implementation delay.[372]

The Commission continues to believe that it is appropriate and in the public interest for the Participants to submit the New Consolidated Data Plan to the Commission within 90 days to ensure timely implementation of the enhanced governance structure. As discussed above, the

---

368 See Proposed Order, supra note 4, 85 FR at 2186.

369 See ICI Letter, supra note 78; Nasdaq Letter, supra note 45; TD Ameritrade Letter, supra note 74; Royal Bank of Canada Letter, supra note 189; Fidelity Letter, supra note 80; SIMFA Letter, supra note 13; State Street Letter, supra note 76; IEX Letter, supra note 113.

370 See Nasdaq Letter, supra note 45, at 14–15.

371 See id. at 15.

372 See IEX Letter, supra note 113, at 2.

Participants have significant experience to draw upon in developing the New Consolidated Data Plan. And the Commission anticipates that the Participants may incorporate many, if not most, of the operational provisions of the Equity Data Plans into the New Consolidated Data Plan filed with the Commission, substantially reducing the work required to prepare and file the New Consolidated Data Plan. Further, through this Order, the Commission is prescribing, in substantial detail, most of the governance provisions that would differ between the Equity Data Plans and the New Consolidated Data Plan, further reducing the work required of the Participants to prepare the new plan. In addition, as stated above, the Commission is simultaneously issuing the Conflicts of Interest Approval Orders and the Confidentiality Policy Approval Orders, and the conflicts of interest and confidentiality policies, as approved by the Commission, can be incorporated into the New Consolidated Data Plan.

Notwithstanding the above, the Commission understands the challenges associated with the current global pandemic. As the impact of the pandemic unfolds, the Commission continues to monitor market developments, including as they may relate to this initiative.

Commenters also express concerns that SROs may unnecessarily delay implementing the New Consolidated Data Plan and recommend that the Commission prescribe specific milestones, and establish timetables for the completion of such milestones to compel an expedient transition to the New Consolidated Data Plan.[373] Specifically, one commenter suggests that the New Consolidated Data Plan be implemented and the new independent administrator be selected within 180 days of the date of the Order, with the ability for the Commission to grant an

[373] See ICI Letter, supra note 78, at 6; Fidelity Letter, supra note 80, at 6; TD Ameritrade Letter, supra note 74, at 8; Royal Bank of Canada Letter, supra note 189, at 2; SIFMA Letter, supra note 13, at 5–6; State Street Letter, supra note 76, at 4.

extension.[374] Another commenter recommends that the Order either impose immediate reforms on the SROs or alternatively require that the New Consolidated Data Plan have a rolling implementation schedule specifying that some reforms take effect immediately, such as including non-SRO members on the operating committee, implementing the augmented voting structure, and adopting the Conflicts of Interest and Confidentiality Amendments.[375] Separately, several commenters suggest penalizing the SROs for any unwarranted delays or failures to meet a milestone deadline.[376] Commenters also recommend that the Commission impose a fine on SROs for delays or prohibit the SROs from receiving market data revenues from the SIP data fees for a certain period of time to incentivize timely implementation.[377]

For the reasons discussed above, the Commission continues to believe that 90 days is an appropriate amount of time for the SROs to file the New Consolidated Data Plan. The Commission is not imposing, beyond the 90-day requirement to file the New Consolidated Data Plan, specific timetables, milestones or implementation schedules because the Commission expects that the SROs will be able to act expeditiously based on their experience as operators of the SIP, coupled with their statutory requirement to ensure the "prompt, accurate, reliable and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information."[378]

---

374 See TD Ameritrade Letter, supra note 74, at 8.

375 See Royal Bank of Canada Letter, supra note 189, at 2.

376 See ICI Letter, supra note 78, at 6; Fidelity Letter, supra note 80, at 6; SIFMA Letter, supra note 13, at 5–6.

377 See ICI Letter, supra note 78, at 6; Fidelity Letter, supra note 80, at 6.

378 15 U.S.C. 78k-1(c)(b).

G. Other Comments

Comment letters also addressed financial disclosures regarding New Consolidated Data Plan operations,[379] the calculation of SIP fees,[380] the timing of financial disclosures,[381] the information such disclosures should include,[382] and concerns raised by high speed trading.[383] Ultimately, however, this Order focuses on certain critical aspects of the governance structure of the Plans. These additional topics fall outside the scope of this Order.

* * * * *

As noted above, Section 11A(a)(2) of the Act[384] directs the Commission, having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to facilitate the establishment of a national market system for securities. Section 11A(a)(3)(B) of the Act provides the Commission the authority to require the SROs, by order, "to act jointly … in planning, developing, operating, or regulating a national market system (or a subsystem thereof)."[385]

For the reasons discussed above, the Commission believes that it is in the public interest to require the Participants in the Equity Data Plans to jointly develop and file with the

---

379 See Bloomberg Letter, supra note 40, at 3–4; Capital Markets Letter, supra note 355, at 6; IEX Letter, supra note 113, at 5; Schwab Letter, supra note 74, at 6–7; Virtu Letter, supra note 80, at 5; TD Ameritrade Letter, supra note 74, at 6 (suggesting that the Commission codify explicit requirements regarding what is "fair and reasonable.").

380 See MFA/AIMA Letter, supra note 142, at 4.

381 See Bloomberg Letter, supra note 40, at 3–4; Schwab Letter, supra note 74, at 6–7; IEX Letter, supra note 113, at 5; Virtu Letter, supra note 80, at 5.

382 See Bloomberg Letter, supra note 40, at 3–4; IEX Letter, supra note 113, at 5; Virtu Letter, supra note 80, at 5; Schwab Letter, supra note 74, at 6–7.

383 See Letter from Kermit R. Kubitz, Individual Consumer, San Francisco, CA (Mar. 20, 2020).

384 15 U.S.C. 78k-1(a)(2).

385 15 U.S.C. 78k-1(a)(3)(B).

Commission a New Consolidated Data Plan as an NMS plan pursuant to Rule 608(a) of Regulation NMS.[386]

III. THE NEW CONSOLIDATED DATA PLAN

The Commission hereby orders the Participants in the Equity Data Plans to jointly develop and file with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,[387] a single New Consolidated Data Plan that replaces the three current Equity Data Plans and that includes, at a minimum, the following terms and conditions:

- The New Consolidated Data Plan shall provide for the orderly transition of functions and responsibilities from the three existing Equity Data Plans and shall provide that dissemination of, and fees for, SIP data will continue to be governed by the provisions of the Equity Data Plans until the New Consolidated Data Plan is ready to assume responsibility for the dissemination of SIP data and fees of the New Consolidated Data Plan have become effective.
- The New Consolidated Data Plan shall provide that each exchange group and unaffiliated SRO will be entitled to name a member of the operating committee ("SRO member"), who will be authorized to cast one vote on all operating committee matters pertaining to the operation and administration of the New Consolidated Data Plan, provided that an SRO member representing an exchange group or an unaffiliated SRO whose market center(s) have consolidated equity market share of more than 15 percent during four of the six calendar months preceding a vote of the operating committee will be authorized to

386 17 CFR 242.608(a).

387 17 CFR 242.608(a). The New Consolidated Data Plan, or any amendment thereto, must comply with the requirements of Rule 608 of Regulation NMS, including the requirement in Rule 608(a) to include an analysis of the impact on competition. 17 CFR 242.608(a).

cast two votes, and provided that an SRO member representing an exchange that has ceased operations as an equity trading venue, or has yet to commence operation as an equity trading venue, will not be permitted to cast a vote on New Consolidated Data Plan matters.

- The New Consolidated Data Plan shall provide that the operating committee will include, for a term of two years, and for a maximum term to be set forth in the New Consolidated Data Plan, individuals representing each of the following categories: an institutional investor, a broker-dealer with a predominantly retail investor customer base, a broker-dealer with a predominantly institutional investor customer base, a securities market data vendor, an issuer of NMS stock, and a person who represents the interests of retail investors ("retail representative") (collectively, "Non-SRO Members"), provided that the representatives of the securities market data vendor and the issuer are not permitted to be affiliated or associated with an SRO, a broker-dealer, or an investment adviser with third-party clients. The retail representative shall have experience working with or on behalf of retail investors and have the requisite background and professional experience to understand the interests of retail investors, the work of the operating committee of the New Consolidated Data Plan, and the role of market data in the U.S. equity market. The retail representative shall not be affiliated with an SRO or a broker-dealer.
- The New Consolidated Data Plan shall provide that the initial Non-SRO Members will be selected by a majority vote of those current members of the Equity Data Plans' advisory committees, excluding advisory committee members who were selected by a Participant to be its representative, and that subsequent Non-SRO Members be selected solely by the then-serving Non-SRO Members of the New Consolidated Data Plan's operating

committee, and, further, that until the initial Non-SRO Members have been selected, the Participants shall renew the expiring terms of all members of the Equity Data Plans' advisory committee (other than those selected to represent a Participant) who remain willing to serve in that role.

- The New Consolidated Data Plan shall provide for a fair, transparent, and public nomination process for Non-SRO Members and shall specify a process for publicly soliciting and making available for public comment nominations for Non-SRO Members.
- The New Consolidated Data Plan shall provide that the aggregate number of votes provided to Non-SRO Members will, at all times, be one half of the aggregate number of SRO member votes and the number of Non-SRO Member votes will increase or decrease as necessary to ensure that the ratio between the number of SRO member votes and the number of Non-SRO Member votes is maintained, with Non-SRO Member votes equally allocated, by fractional shares of a vote as necessary, among the Non-SRO Members authorized and eligible to vote.
- The New Consolidated Data Plan shall include provisions to address circumstances in which a member is unable to attend an operating committee meeting or to cast a vote on a matter.
- The New Consolidated Data Plan shall provide that all actions under the terms of the New Consolidated Data Plan, except the selection of Non-SRO Members and decisions to enter into an SRO-only executive session, will be required to be authorized by an augmented majority vote, i.e., a supermajority vote of the New Consolidated Data Plan's operating committee, along with a majority vote of the SRO members of the operating committee.

- The New Consolidated Data Plan shall provide that the responsibilities of the operating committee will include:
    - proposing amendments to the New Consolidated Data Plan or implementing other policies and procedures as necessary to ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information;
    - selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of, an independent plan administrator, plan processors, an auditor, and other professional service providers, provided that any expenditures for professional services that are paid for from New Consolidated Data Plan revenues must be for activities consistent with the terms of the New Consolidated Data Plan and must be authorized by the operating committee;
    - developing and maintaining fair and reasonable fees and consistent terms for the distribution, transmission, and aggregation of core data;
    - reviewing the performance of the plan processors; and ensuring the public reporting of plan processors' performance and other metrics and information about the plan processors;
    - assessing the marketplace for equity market data products and ensuring that SIP data offerings are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of SIP data to investors and market participants; and

    - designing a fair and reasonable revenue allocation formula for allocating plan revenues to be applied by the independent plan administrator, and overseeing, reviewing and revising that formula as needed.
- The New Consolidated Data Plan shall provide that the independent plan administrator will not be 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 New Consolidated Data Plan shall include provisions designed to address the conflicts of interest of SRO members and Non-SRO Members as outlined in the Conflicts of Interest Approval Orders.
- The New Consolidated Data Plan shall include provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders.
- The New Consolidated Data Plan shall identify the circumstances in which SRO members may meet in executive session and shall confine executive sessions to circumstances in which it is appropriate to exclude Non-SRO Members, such as, for example, discussions regarding matters that exclusively affect the SROs with respect to the Commission's oversight of the New Consolidated Data Plan (including attorney-client communications relating to such matters).
- The New Consolidated Data Plan shall provide that requests to enter into an executive session of SRO members must be included on a written agenda, along with a clearly stated rationale for each matter to be discussed, and that each such request must be approved by a majority vote of the SRO members of the operating committee.

- To the extent that those provisions are in furtherance of the purposes of the New Consolidated Data Plan as expressed in this Order and not inconsistent with any other regulatory requirements, the New Consolidated Data Plan shall adopt and include all other provisions of the Equity Data Plans necessary for the operation and oversight of the SIPs under the New Consolidated Data Plan, and the New Consolidated Data Plan should, to the extent possible, attempt to harmonize and combine existing provisions in the Equity Data Plans that relate to the Equity Data Plans' separate processors.

* * * * *

IT IS HEREBY ORDERED, pursuant to Section 11A(a)(3)(B) of the Act,[388] that the Participants act jointly in developing and filing with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,[389] a New Consolidated Data Plan, as described above. The Participants are ordered to file the New Consolidated Data Plan with the Commission no later than [insert date 90 days after publication in the Federal Register].

By the Commission.

Vanessa A. Countryman
Secretary

388 15 U.S.C. 78k-1(a)(3)(B).

389 17 CFR 242.608(a).