

MEMO# 33055

January 20, 2021

ICI Files Amicus Brief Supporting the SEC's Order to Reform NMS Equity Data Plan Governance

[33055]

January 20, 2021 TO: ICI Members
Equity Markets Advisory Committee SUBJECTS: Litigation & Enforcement
Trading and Markets RE: ICI Files Amicus Brief Supporting the SEC's Order to Reform NMS Equity Data Plan Governance

The Investment Company Institute (ICI) recently filed the attached amicus curiae (“friend of the court”) brief in *The Nasdaq Stock Market LLC, et al. v. Securities and Exchange Commission*. The case concerns the SEC’s May 2020 final order that directs the SROs—the equity exchanges and FINRA—to submit a new Consolidated National Market System (NMS) Equity Data Plan (“Consolidated NMS Plan”) that consolidates the three existing plans and requires non-SRO voting representation on the new plan’s operating committee.^[1] This past summer, three major stock exchange groups (Nasdaq, NYSE, and Cboe) petitioned the DC Circuit Court of Appeals to vacate the pilot.^[2]

ICI’s amicus brief supports the SEC’s order. This memorandum summarizes ICI’s brief as well as the briefs of the petitioning exchanges and the SEC.

Exchange Brief

The exchanges petitioning the court to vacate the order argue that the SEC lacks the authority to require the specified governance reforms. They make the following primary arguments to support their petition:

- The Exchange Act and Rule 608 do not authorize non-SRO voting representation on the plan operating committee;
- Limiting the SROs’ voting power, especially by requiring affiliated SROs to vote in blocs, prevents them from “acting jointly” to carry out the new consolidated plan;
- The SEC has not proven that an actual exchange conflict of interest exists, *i.e.*, that an exchange administrator has used subscriber data from the consolidated feeds to benefit its own proprietary data business. Rather, non-SROs themselves may be conflicted and could act out of self-interest; and
- The requirement that the Consolidated NMS Plan have an independent plan

administrator is not justified by actual SRO conflicts of interest.

SEC Brief

The SEC has responded that the order should stand and makes the following arguments:

- The SEC reasonably exercised its authority under the Exchange Act and SEC regulations in requiring governance reforms, which include the mandate for non-SRO voting representation on the new operating committee and reallocation of affiliated exchange votes into blocs;
- The SEC was reasonably justified in treating affiliated SROs differently from non-affiliated SROs based on the disproportionate voting influence of the former on the existing plan operating committees; and
- The SEC acted reasonably in requiring an independent plan administrator based on the “substantial, inherent conflict of interest” that exists if an administrator also offers its own proprietary data products.

ICI Brief

ICI filed an amicus brief in support of the SEC, urging the court to deny the exchanges’ petition. The brief explains that ICI’s members have a significant interest in NMS equity data governance reform as contributors to, and consumers of, consolidated market data. The brief notes that the investment community’s ability to provide input that would enhance the existing feeds has been limited and ineffective. Therefore, the governance reforms are “self-reinforcing” and would allow for future improvements without regular SEC intervention. Further, the brief emphasizes that non-SRO representatives would not have the same inherent conflicts as the affiliated SROs; rather, they represent interests aligned with the public interest of having “prompt, accurate, reliable, and fair” public equity market data.

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[Attachment](#)

endnotes

[1] ICI Memorandum No. 32453 (May 11, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32453.

[2] ICI Memorandum No. 32513 (June 5, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32513. After Nasdaq filed its petition for review, NYSE and Cboe filed their own respective petitions. The DC Circuit subsequently consolidated these petitions into a single case.

should not be considered a substitute for, legal advice.