

MEMO# 32817

October 8, 2020

SEC Issues NMS Consolidated Equity Data Plan for Public Comment

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October 8, 2020 TO: Equity Markets Advisory Committee RE: SEC Issues NMS Consolidated Equity Data Plan for Public Comment

On October 5, the SEC published the proposed single National Market System (NMS) Consolidated Equity Data Plan (“CT Plan”) for public comment.^[1] Comments are due 30 days after publication in the Federal Register and we will discuss the proposed plan at the upcoming EMAC meeting on October 20. Although the SEC’s final order, which mandates the single CT Plan, is subject to a current legal challenge from the three major exchange groups in the DC Circuit,^[2] the SEC previously denied Nasdaq’s motion to temporarily stay the order.^[3] Therefore, as directed under the order, the SROs filed the CT Plan on August 11.

Consistent with the order,^[4] the CT Plan would consolidate the three existing Equity Data Plans and change the governance structure as follows:

- **Non-SRO Voting Representation:** The CT Plan’s operating committee will include voting representatives from entities unaffiliated with SROs, including a representative from an institutional investor such as an asset manager.
- **Voting Power:** SROs will be limited to one vote per exchange group, with the ability to obtain a second vote if they maintain a consolidated equity market share of at least fifteen percent for at least four of the six calendar months preceding a vote of the operating committee. SRO representatives will maintain two-thirds of the voting power on the operating committee, i.e., aggregate number of votes, and non-SRO representatives will have one-third of the voting power.
- **Independent Administrator:** The CT Plan will have an independent plan administrator that does not sell competing proprietary market data products.

We summarize several aspects of the CT Plan that may be of interest to members below.

Summary of CT Plan

The SROs propose to create a new limited liability company—CT Plan LLC—to administer the CT Plan, with each SRO as a “Member” of the company. As proposed, certain aspects of the plan that relate to the LLC’s operation (not including the consolidation and distribution

of equity market data) would be subject to an SRO majority vote only, rather than an augmented majority vote of the operating committee.^[5] The SEC seeks comment on whether this distinction would inappropriately dilute the non-SRO voting representatives' "participation and influence" on the operating committee.

CT Plan Operating Committee

The CT Plan specifies that the operating committee will have "full and complete discretion to manage and control the business and affairs of [the CT Plan], including (i) implementing policies and procedures to ensure the fairness and usefulness of the form and content of the consolidated data; (ii) selecting and overseeing the plan administrator; (iii) developing and maintaining fair and reasonable fees and consistent terms for distributing, transmitting, and aggregating core data; (iv) devising a fair and reasonable revenue allocation formula; and (v) interpreting the CT Plan agreement."^[6] The SEC notably seeks comment on whether the plan's definition of "fees" accurately captures all of the types of data available from the existing NMS equity data plans and other fees that the CT Plan may charge;^[7] and whether any interpretations of the agreement should be subject to public comment and/or approval by the SEC.

Pursuant to the final order, the CT Plan establishes procedures for selecting the initial non-SRO voting representatives and subsequent non-SRO voting representatives to serve on the operating committee.^[8] For the initial set of representatives, the plan proposes a staggered approach under which the institutional investor representative's term would begin after the first quarterly operating committee meeting.^[9] Each term would be two years in length and non-SRO voting representatives would be subject to a two-term limit. The SEC seeks comment on whether the two-term limit is appropriate and whether a similar limit should apply to SRO voting representatives as well.

The CT Plan also specifies that the operating committee may establish subcommittees, but the chair of a subcommittee would be selected from among the SRO voting representatives or the SRO's Member Observers, as described below. The SEC seeks comment on whether the plan should specify that non-SRO voting representatives are also eligible to serve as a subcommittee chair.

Further, the CT Plan would allow the SROs to select "Member Observers" to attend operating committee meetings, subcommittee meetings, and executive sessions, described further below.^[10] The SEC seeks comment on the necessity of SRO Member Observers and the scope of their role in operating committee matters, including whether they should be expressly subject to the plan's conflicts of interest and confidentiality policies.

Executive Session of Operating Committee

The CT Plan specifies that the SROs may vote to initiate an executive session of the operating committee that excludes non-SRO voting representatives. A request to create a session, and the reasons for that session, must be disclosed in an operating committee meeting agenda. While the plan lists some topics that may be discussed in an Executive Session,^[11] it also states that this list is "not dispositive of all [such] matters" that could be addressed in this limited setting. The SEC seeks comment on all aspects of this proposed approach, including whether a more detailed list of topics should be provided.

Potential SRO Conflicts of Interest

The CT Plan specifies that the CT Plan and the SROs may engage in certain transactions and business activities that could implicate a conflict of interest. For example, the CT Plan

would be allowed to employ or deal with persons with which an SRO or any of its affiliates has a connection or has a direct or indirect interest.^[12] The SROs would also be allowed to engage in business activities outside the scope of the CT Plan, including through investments or relationships with businesses that compete with the CT Plan.^[13] The plan further states that none of the SROs would be obligated to recommend or take action that prioritizes the CT Plan over their own respective interests, including notifying the CT Plan of any opportunity, relationship, or investment.^[14] The SEC seeks comment on whether these provisions are appropriate, including whether any limits should be imposed; and whether the CT Plan's conflicts of interest provisions would provide adequate disclosure of such potential conflicts.

Plan Processor and Plan Administrator

The CT Plan sets forth the processes for selecting and overseeing a plan processor and plan administrator, including a description of their general functions. The SEC seeks comment on these proposed processes and functions, including whether non-SRO voting representatives should be specifically allowed to provide input on the selection of a new processor.

Plan Effective Date

The CT Plan establishes a separate effective date and operative date. The plan would become effective on the later of the SEC's approval of the LLC agreement (and the plan) or the formation of the LLC. After the effective date, the plan would become operative on the first day of the month that is at least 90 days after the last of five specific actions has occurred.^[15] The SEC seeks comment on this approach, including whether the plan should prescribe specific deadlines for any or all of these actions to avoid implementation delays.

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endnotes

^[1] Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (Oct. 6, 2020), *available at* <https://www.sec.gov/rules/sro/nms/2020/34-90096.pdf>.

^[2] See ICI Memorandum No. 32513 (June 5, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32513.

^[3] See ICI Memorandum No. 32537 (June 18, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32537.

^[4] See ICI Memorandum No. 32453 (May 11, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32453.

^[5] These actions include, for example, selecting the officers of the LLC, if needed, and making certain decisions concerning the LLC's operation, including indemnification, dissolution, and tax matters. CT Plan Section 4.3(c)(iii) at A-21.

^[6] CT Plan Section 4.1(a) at A-16.

[7] The CT plan defines “fees” as fees charged to vendors and subscribers for transaction reports and quote information. CT Plan Section 1.1(bb) at A-5.

[8] While the CT Plan specifies when the terms for non-SRO voting representatives would begin, the SEC notes that the plan does not prescribe specified periods of time for the nomination, initial selection of, and selection of replacement non-SRO voting representatives. Accordingly, the SEC seeks comment on whether the plan should specify deadlines for these processes.

[9] The CT Plan proposes a staggered approach to allow continuity of representation on the operating committee, i.e., not all non-SRO voting representatives would be up for re-election or replaced at the same time. While these representatives would all be selected at the same time, three of them would begin serving after the first quarterly meeting: issuer representative, retail representative, and institutional investor representative. The other three non-SRO voting representatives—the securities market data vendor representative, retail broker-dealer representative, and institutional investor broker-dealer representative—would begin serving after the third quarterly meeting. This latter group of representatives, however, would still be allowed to serve on a temporary basis prior to the official start of their term and could still serve another two-year term. CT Plan Section 4.2(b)(ii) at A-18.

[10] The CT Plan defines “Member Observer” as any individual that an SRO determines may attend operating committee and subcommittee meetings to facilitate the SRO’s compliance with the plan. CT Plan Section 1.1(oo) at A-6.

[11] These specified topics include any topic that requires discussion of highly confidential information, vendor or subscriber audit findings, and litigation matters. CT Plan Section 4.4(g)(i) at A-23.

[12] CT Plan Section 4.5 at A-24.

[13] CT Plan Section 4.6 at A-24.

[14] *Id.*

[15] These actions are (i) determination of the SRO and non-SRO voting representatives; (ii) establishment and implementation of the plan’s fees; (iii) consummation of an agreement with the existing plan processors; (iv) consummation of an agreement with a plan administrator; and (v) the operating committee’s and/or SEC’s approval of all plan policies and procedures. CT Plan Recitals at A-1 to A-2.

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