

**MEMO# 33754**

September 3, 2021

## **SEC Approves Final NMS Plan for Equity Data Governance**

[33754]

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TO: Equity Markets Advisory Committee RE: SEC Approves Final NMS Plan for Equity Data Governance

On August 6, the SEC issued an order approving a modified NMS plan governing consolidated equity market data ("Final CT Plan").[\[1\]](#) The CT Plan implements the SEC's May 2020 order to the SROs to provide non-SRO representation on the Operating Committee and other enhancements.[\[2\]](#) ICI previously filed two comment letters that recommended modifications to the proposed plan, many of which the SEC incorporated into the approved version.[\[3\]](#) These modifications:

- require that conflict of interest provisions apply to SRO Member Observers;
- provide indemnification for Non-SRO Representatives;
- monitor the SROs' progress towards implementation; and
- limit ability for SROs to invoke Executive Sessions to the exclusion of non-SRO Representatives.

The Final CT Plan, however, is now subject to new litigation from the major exchange groups (NYSE, Nasdaq, Cboe). On August 9, the exchanges filed petitions in the DC Circuit Court of Appeals to overturn the plan. The exchanges filed these petitions because the DC Circuit had dismissed their earlier suit to overturn the SEC's May 2020 order because it was deemed to not be a "final order."

Below is a summary of relevant provisions of the CT Plan as proposed, ICI's key recommendations, and the Final CT Plan.

Proposed CT Plan

ICI Recommendation

Final CT Plan

## Term Start

Six-month staggered approach between start of Non-SRO Representatives' terms. Three terms to begin at first quarterly Operating Committee meeting, with three other terms to begin after third quarterly operating meeting.

Permit Non-SRO Representatives' terms to begin simultaneously with first quarterly Operating Committee meeting. Permit three non-SRO Representatives to serve for a two-year term and the other three to serve for three-year terms.

Approved as proposed.[\[4\]](#)

## Term Limits

Two-year terms, with Non-SRO Representatives subject to term limits after serving two terms, even if not served consecutively.

Permit Non-SRO Representative to serve more than two terms so long as there is a sufficiently long cooling off period (e.g., two years).

Partially adopts ICI's recommendation. Non-SRO Representatives may not serve more than two consecutive three-year terms, but they may serve additional terms provided there is a three-year cooling off period following every set of two 3-year terms of service.[\[5\]](#)

## Member Observers

Only SROs may appoint Member Observers to attend CT Plan meetings. Appointment must be "necessary with an [SRO's] compliance with its obligations under Rule 608(c)."[\[6\]](#) "Other persons" deemed appropriate by the Operating Committee may also attend CT Plan meetings.

Permit non-SRO Representatives to invite Member Observers to attend Operating Committee meetings. Do not prescribe a limit on number of Member Observers but require a reasonable basis for invitation.

Approved as proposed.[\[7\]](#) No hard limit on the number of Member Observers an SRO may appoint, but appointment must be based on the standard as proposed.

Confidentiality and conflict of interest plan policies do not apply to Member Observers.

Provide that the conflict of interest and confidentiality policies apply to all Member Observers. Prohibit any SRO employee (or independent contractor) that is or has been involved with SRO proprietary data operations from serving as Member Observer.[\[8\]](#) Require SROs to adopt and implement written policies and procedures to ensure compliance with conflicts of interest and confidentiality policies.

Adopts ICI's recommendations but does not discuss requiring SROs to adopt and implement policies and procedures to ensure compliance with confidentiality and conflict of interest provisions.

## Executive Sessions

SRO Representatives may hold Executive Sessions "notwithstanding any other provision" of

the CT Plan. SROs may exclude non-SRO Representatives from an Executive Session if it entails discussion of an item "for which it is appropriate to exclude non-SRO Representatives."

Eliminate SROs' ability to broadly exclude non-SRO Representatives from Executive Sessions.

Allows SROs to exclude non-SRO Representatives from Executive Sessions but eliminates SROs' broad discretion to hold such sessions and determine additional topics for discussion. Also specifies that all provisions of the CT Plan (especially the conflicts of interest and confidentiality provisions) apply to Executive Sessions.

"Other persons" as deemed appropriate by the SRO Representatives may participate in Executive Sessions.

No specific recommendation.

Majority vote of the SRO Representatives must determine the "other persons" authorized to attend Executive Sessions.

Matters appropriate for discussion "should be limited" to three specified topics but may also include other "matters that may by their nature require discussion in an Executive Session."

No specific recommendation.

Topics appropriate for discussion must be topics for which it is appropriate to exclude non-SRO Representatives and must fall within the list of enumerated topics, which includes originally proposed topics and additional topics.[\[9\]](#)

## Subcommittees

Operating Committee may delegate "administrative functions" to a subcommittee entirely consisting of SRO Representatives, or to one consisting of both SRO and non-SRO Representatives.

Provide that subcommittees generally include both SRO Representatives and non-SRO Representatives.

Partially adopts ICI's recommendation. Non-SRO Representatives may be excluded from certain legal subcommittee meetings.[\[10\]](#)

Only SRO Representatives or Member Observers may serve as chairs of subcommittees. Chair of Operating Committee selects the chair of each subcommittee.

No specific recommendation.

Non-SRO Representatives are also eligible to serve as chairs of subcommittees as selected by the Operating Committee.

Operating Committee can determine the duties, responsibilities, powers, and composition of subcommittees.

Provide that a subcommittee cannot take any actions that require approval of the Operating Committee.

Emphasizes that subcommittees may make recommendations but have no decision-making authority, i.e., all CT Plan actions are subject to the vote of the Operating Committee.

#### Indemnification and Insurance

Broad liability, exculpation, and indemnification protections only for SRO Representatives.

Provide indemnification for non-SRO Representatives against claims related to his/her role on the Operating Committee (with typical common law exceptions). Provide insurance for all Operating Committee members, including non-SRO Representatives.

Adopts ICI's recommendation. LLC is also primarily responsible for advancement of expenses or for providing insurance to Operating Committee members, including non-SRO representatives.

#### Effective Date and Operational Date

CT Plan becomes effective on the latter of the SEC's approval of the LLC agreement (and the plan) or the formation of the LLC. After the effective date, CT Plan becomes operational on the first day of the month that is at least ninety days after the last of five enumerated actions has occurred.

Until CT Plan is fully operational, SEC should monitor the progress closely and require SROs to submit periodic progress reports. Potentially penalize SROs for unwarranted delays (e.g., fines or prohibit SROs from collecting SIP fees).

Partially adopts ICI's recommendation. "Effective Date" is the date of SEC approval of the Final CT Plan. SROs are required to file the documents needed to create the LLC within ten business days of the Effective Date and LLC agreement must become operative within 12 months of the Effective Date ("Operative Date"). Adds a specific deadline for each of the actions that must be completed to ensure that the Final CT Plan is fully operational by the Operative Date.<sup>[11]</sup> Operating Committee to provide quarterly written progress reports to the SEC that are publicly available.

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#### endnotes

<sup>[1]</sup> Securities and Exchange Act Release No. 34-92586 (Aug. 6, 2021) ("Approval Order" or "Final CT Plan"), available at <https://www.sec.gov/rules/sro/nms/2021/34-92586.pdf>. The SEC published the CT Plan last October for public comment. 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>. In January, the SEC instituted proceedings to determine whether to approve the CT Plan. Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data (Jan. 15, 2021), available at <https://www.sec.gov/rules/sro/nms/2021/34-90885.pdf>.

[2] See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market Data System Plan Regarding Consolidated Equity Market Data (May 6, 2020), available at <https://www.sec.gov/rules/sro/nms/2020/34-88827.pdf>.

[3] ICI's November 2020 and February 2021 comment letters are *available, respectively* at <https://www.sec.gov/comments/4-757/4757-8011771-225420.pdf> and <https://www.sec.gov/comments/4-757/4757-8343741-228938.pdf>.

[4] Final CT Plan, Section 4.2(b)(iii). The SEC declined to adopt the proposed recommendation because it noted, among other reasons, that all non-SRO Representatives participate in, and have votes on, the Operating Committee as of the first quarterly meeting, even though the official terms for half of them do not begin to run until the third quarterly meeting.

[5] Final CT Plan Section 4.2(b).

[6] 17 C.F.R. § 242.608(c) (requiring SROs to "comply with the terms of any effective NMS plan of which it is a sponsor or a participant").

[7] Final CT Plan Section 4.4(a) permits "other persons" as deemed appropriate by the Operating Committee to attend Operating Committee meetings and Section 4.7(b) permits "other persons" as deemed appropriate by the Operating Committee to attend subcommittee meetings. The SEC reasoned that non-SRO Representatives do not need a similar observer provision because they do not have regulatory obligations paralleling those of the SROs.

[8] ICI stated that it would not object to the CT Plan providing an exception from the conflicts of interest provisions for the most senior SRO executives who have overall responsibility for both the CT Plan and the SRO's proprietary data feeds. The Final CT Plan, however, does not discuss providing such an exception.

[9] The CT Plan as proposed specified three topics: (i) any topic that requires discussion of "Highly Confidential Information"; (ii) Vendor or Subscriber Audit Findings; and (iii) Litigation matters. The Final CT Plan retains these three topics and adds two more topics: (iv) discussion of responses to regulators regarding inquiries, examinations, or findings; and (v) other discrete matters approved by a vote of the Operating Committee. The SEC, however, explicitly stated that these limitations do not cover matters related to contract negotiations with Processors or Administrators.

[10] This exclusion applies only to the extent that those meetings bear on matters that exclusively affect the SROs regarding: (i) litigation matters or responses to regulators with respect to inquiries, examinations, or findings; and (ii) other discrete legal matters approved by the Operating Committee. The SEC reasoned that modification was appropriate given that litigation matters or responses to regulators affect SROs uniquely due to their express regulatory obligation as SROs for operation of the CT plan and their

financial responsibility for the CT Plan itself. Further, the SEC stated that modification would help keep the Operating Committee sufficiently informed and allow it to make reasonable decisions about unforeseen matters that may arise and exclusively affect the SROs.

[\[11\]](#) See Final CT Plan Recitals, Paragraph (d).

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