

MEMO# 34215

July 11, 2022

DC Circuit Issues Ruling on the SEC's CT Plan and Governance Orders

[34215]

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TO: Equity Markets Advisory Committee RE: DC Circuit Issues Ruling on the SEC's CT Plan and Governance Orders

The US Court of Appeals for the DC Circuit issued its decision earlier this week on a petition filed by Nasdaq, the NYSE, and Cboe challenging the SEC's CT Plan Order and Governance Order.[\[1\]](#) Together, the orders would have consolidated the existing NMS plans governing the dissemination of equity market data into a single, consolidated plan (CT Plan) and modified the governance structure. The ICI filed an amicus brief in support of the SEC.[\[2\]](#) We therefore were disappointed that the Court found that the SEC lacked authority to include non-SROs as voting members on the CT Plan's operating committee. We were pleased, however, that the Court affirmed limiting SRO votes based on corporate affiliation and requiring that the administrator of the CT Plan be "independent" of any entity that sells proprietary-data products.

You will recall that the petitioners challenged the Commission's CT Plan Order and Governance Order on three grounds, arguing that the Commission:

- exceeded its authority under both Section 11A of the Exchange Act and Rule 608 of Regulation NMS by including non-SRO representatives on the CT Plan's operating committee as voting members;
- unlawfully grouped SROs based on corporate affiliation for voting purposes in violation of Section 11A in that it prevents SRO's from "acting jointly" to effectuate the CT Plan and is otherwise arbitrary and capricious; and
- impermissibly determined that the administrator of the CT Plan be "independent" of any entity that sells proprietary-data products in violation of the APA as arbitrary and capricious.

As to the CT Plan's inclusion of non-SRO representatives with voting power on the operating committee, the Court found that the Commission's construction of Section 11A of the Exchange Act is not reasonable under the Chevron test. In short, the Court relied on the text of the statute and found that because the statute specifically identified SROs to act jointly and was otherwise silent as to other participants that it was unlikely that Congress "left a gap for the Commission to fill with respect to what entities may act jointly." The Court went on to hold that nothing in the statutory context suggests that the inclusion of non-SRO representatives was contemplated by Congress.

The Court upheld the Commission allocating votes held by the SROs according to an SRO's corporate affiliation. Each "exchange group" (i.e., multiple exchanges operating under one corporate umbrella) and "unaffiliated SRO," meaning an SRO not affiliated with another SRO would be granted one vote on the operating committee. The Court found petitioners' arguments to be without merit, holding that there was nothing in the text of the statute to suggest that each SRO was to be given a particular level of involvement (i.e., one SRO, one vote). The Court also agreed with the Commission's argument that the fact that the Commission treats SROs as distinct and separate entities vis-à-vis their individual statutory and regulatory obligations does not necessarily mandate similar treatment of NMS plans where SROs act collectively to effectuate a market-wide plan.

Finally, the Court rejected petitioners' challenge to the CT Plan having an independent administrator. In doing so, the court found the Commission's articulated rationale for having an independent administrator - that unlike the exchanges that offer for sale their own proprietary equity market data products, an independent administrator would not have the competing objective of maximizing its own proprietary data products' profitability - was persuasive and not undermined by any of petitioners' arguments.

The court vacated the CT Plan Order in its entirety finding the plan as constructed to be unworkable if the non-SRO representation provision was severed. However, the court severed from the prior Governance Order only the provision requiring non-SRO representation on the operating committee of any plan and upheld the rest of the Governance Order.

Dorothy M. Donohue
Deputy General Counsel - Securities Regulation

endnotes

[1] The Nasdaq Stock Market LLC, et al v. SEC "Per Curiam Order Filed (Special Panel)" (SEC-Rel: 34-88827) (July 5, 2022), available at <https://www.ici.org/system/files/2022-07/22-nasdaq-v-sec-opinion.pdf> See also Order Directing the Exchanges and the Financial Industry Regulatory Authority To Submit a New National Market System Plan Regarding Consolidated Equity Market Data, 85 Fed. Reg. 28,702 (May 13, 2020) (Governance Order); Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, 86 Fed. Reg. 44,142 (Aug. 11, 2021) (CT Plan Order).

[2] The Nasdaq Stock Market LLC, et al v. SEC, Brief of Investment Company Institute as Amicus Curiae in Support of Respondent, summarized in ICI Memorandum No. 32453 (May 11, 2020), available at https://www.ici.org/my_ici/memorandum/memo32453

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