

MEMO# 35427

September 6, 2023

SEC Issues New Amended NMS Equity Data Governance Order

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TO: Equity Markets Advisory Committee RE: SEC Issues New Amended NMS Equity Data Governance Order

Last Friday, the SEC issued a new amended order to direct the SROs (exchanges and FINRA) to submit a new NMS governance plan for consolidated equity market data.[\[1\]](#) The SROs must submit the new proposed plan to the SEC within 45 days after the amended order is published in the Federal Register.

The SEC issued the original order in May 2020, which directed the SROs to submit a plan that would replace the existing three NMS equity data plans.[\[2\]](#) Although the SEC approved a plan (the "CT Plan") in August 2021 that was submitted pursuant to the May 2020 order, the DC Circuit Court of Appeals invalidated the entire plan and a part of the original order in July 2022 based on a legal challenge from NYSE, Nasdaq, and Cboe.[\[3\]](#) Specifically, the court vacated the mandatory inclusion of non-SRO representatives as voting members of the operating committee of the new governance plan.[\[4\]](#) The SEC's amended order eliminates that provision and makes conforming changes. These conforming changes:

- amend the "augmented majority vote" requirement to exclude non-SROs and specify that operating committee action requires a two-thirds majority of the votes allocated to the SROs;
- mandate non-SRO participation in the plan as members of an advisory committee, the composition of which should reflect the same categories of market participants that would have been non-SRO voting representatives;[\[5\]](#) and
- specify that an operating committee's executive session can meet in circumstances where it is appropriate to exclude advisory committee members.[\[6\]](#)

The amended order also maintains provisions challenged by the major exchange groups but upheld by the court, which include:

- allocating SRO operating committee votes according to an SRO's corporate affiliation, with each "exchange group" and "unaffiliated SRO" granted one vote; and
- appointing an independent administrator for the plan that does not offer or is not owned or controlled by another entity that offers proprietary equity market data

products for sale.

Further, the amended order includes several new provisions, including:

- requiring a mandatory implementation timeline that describes the relevant actions or steps and their dates of completion, along with written progress reports to the SEC every three months that will be publicly available;
- applying conflicts-of-interest policies to any SRO-designated person, including a member observer, etc., that attends operating committee and subcommittee meetings;^[7]
- clarifying that the prohibition on an SRO appointing a representative that is involved with "licensing" of proprietary data products for conflicts of interest-related reasons includes all functions related to monitoring or ensuring a subscriber's compliance with the terms of the license contained in its data subscription agreement and all functions relating to the auditing of subscriber data usage and payment;^[8]
- revising the requirements related to the plan's confidentiality policy to allow for additional sharing of restricted information and highly confidential information to certain parties under limited circumstances on a case-by-case basis;^[9] and
- requiring all subcommittees to prepare minutes of all meetings that are available to all members of the operating committee and the advisory committee and precluding subcommittees from carrying out administrative functions to be carried out by the independent administrator.^[10]

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Notes

^[1] Securities Exchange Act Release No. 98271 (Sept. 1, 2023), available at <https://www.sec.gov/files/rules/other/2023/34-98271.pdf>.

^[2] Securities Exchange Act Release No. 88827 (May 6, 2020), 85 Fed. Reg. 28702 (May 13, 2020) ("2020 NMS Equity Data Governance Order"), available at <https://www.sec.gov/rules/sro/nms/2020/34-88827.pdf>.

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

^[3] The Nasdaq Stock Mkt. LLC, et. al., v. SEC, 38 F.4th 1126 (DC Cir. 2022).

^[4] The court invalidated the entire CT Plan because it believed that vacating the non-SRO voting representation requirement would render the rest of the plan effectively inoperable as written. *Id.*

^[5] These categories include 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. 2020 NMS Equity Data Governance Order at 28730.

[6] The original order previously referred to the exclusion of non-SRO voting members of the operating committee. 2020 NMS Equity Data Governance Order. Id.

[7] This provision was previously approved under the now-vacated CT Plan.

[8] "Licensing" currently refers to those who directly market to, or negotiate licensing or subscription agreements with, subscribers of proprietary data products.

[9] The SEC states that access to "highly confidential information" should be limited to SRO officers who have a direct or supervisory responsibility for the SRO's plan participation, or with supporting agents for the SRO, and must not be used to advance proprietary data products. Further, the types of such information that can be disclosed would be (i) the plan's contract negotiations with the plan processor(s) or administrator; (ii) communications with, and work product of, counsel to the plan; and (iii) information concerning personnel matters that affect the employees of the SRO or of the plan. The SEC emphasizes, however, that SRO voting representatives should not be permitted to share with SRO officers or agents customer information or the intellectual property of other SROs or customers, nor should they share aggregated information about usage of and payment for consolidated market data.

[10] The SEC specifies that these functions involve administering vendor and subscriber contracts, performing audits, or assessing fees. They necessarily involve access to sensitive information of significant commercial or competitive value, thereby raising heightened concerns about conflicts of interest.