

November 12, 2020

Ms. Vanessa Countryman
Secretary
US Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (“CT Plan”) (File No. 4-757)

Dear Ms. Countryman:

The Investment Company Institute¹ welcomes the self-regulatory organizations’ filing of the CT Plan.² Doing so is an important step towards reforming governance of the national market system (“NMS”) equity data plans, which the Institute long has strongly supported.³ We recommend several changes to the CT Plan to foster a more effective Operating Committee, which has complete discretion to manage the business of the CT Plan. We also recommend that the Commission closely monitor the SROs’

¹ The [Investment Company Institute](http://www.ici.org) (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$26.1 trillion in the United States, serving more than 100 million US shareholders, and US\$7.7 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in London, Hong Kong, and Washington, DC.

² Securities Exchange Act Release No. 34-90096, 85 Fed. Reg. 64565 (Oct. 13, 2020). The CT plan implements the Commission’s May 2020 order to the SROs to submit a new consolidated equity market data plan. Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827, 85 Fed. Reg. 28702 (May 13, 2020) (“May Order”).

³ See, e.g., Letter from Dorothy Donohue, Deputy General Counsel – Securities Regulation, Investment Company Institute to Vanessa Countryman, Secretary, US Securities and Exchange Commission, on Notice of Proposed Order Directing the Exchanges and FINRA to Submit a New National Market System Plan Regarding Consolidated Equity Market Data (Feb. 28, 2020), *available at* <https://www.sec.gov/comments/4-757/4757-6886599-210792.pdf>; see also Letter from Dorothy Donohue, Deputy General Counsel – Securities Regulation, Investment Company Institute to Vanessa Countryman, Secretary, US Securities and Exchange Commission on Market Data Infrastructure (May 26, 2020) (“ICI Market Data Infrastructure Letter”), *available at* <https://www.sec.gov/comments/s7-03-20/s70320-7246790-217250.pdf>.

progress towards implementation. NMS governance reform serves a strong public interest and implementing it should proceed as expeditiously as possible.⁴

Registered investment companies managed \$26.1 trillion in total net assets as of November 2020 on behalf of more than 100 million US shareholders. The share of household assets in funds stands at 22% as of year-end 2019, growing from 18% in 2001.⁵ Over the past two decades, not only have fund assets increased, but so have the variety of investment objectives and strategies that funds pursue to promote the needs of investors who are seeking ways to save for their most important financial goals.

Funds have a significant interest in the governance of the CT Plan both as contributors to, and consumers of, market data. Many funds currently rely on equity market data in the consolidated feed to monitor market conditions, inform investment decisions, conduct transaction cost analysis, and fulfill regulatory obligations. Despite the consolidated feed's importance to funds, however, its relative usefulness has diminished over time. For example, the content and delivery speed of the feed lags that of the competing proprietary market data feeds offered by the exchanges.⁶ The feed nevertheless remains the most accessible source of equity market data across all investors and, more importantly, can serve as one of the tools that firms utilize as part of determining order execution quality and whether they are obtaining best execution for their shareholders.

The Commission, the exchanges, the fund industry, and other market participants have been considering how best to oversee the many facets of NMS equity data for some time. The CT Plan reflects these efforts and would go a long way towards addressing the exchanges' inherent conflicts of interest in overseeing NMS equity data. The plan, which would allow for non-SRO voting representation and implement other important reforms, could improve the content and delivery of the

⁴ On June 1, Nasdaq filed a petition with the US Court of Appeals for the DC Circuit requesting a review of the SEC's May 2020 order. Petition for Review, *The Nasdaq Stock Market LLC, et. al v. SEC*, No. 20-1181 (DC Cir. June 1, 2020). Nasdaq also submitted to the SEC a motion to stay the final order pending resolution of the petition for review. Motion for Stay of NMS Governance Order by the Nasdaq Stock Market LLC, Nasdaq BX, Inc. and Nasdaq PHLX LLC (June 3, 2020), available at <https://www.sec.gov/rules/sro/nms/2020/34-88827-motion-for-stay-060320.pdf>. On June 12, the SEC denied Nasdaq's motion to stay the final order pending resolution of Nasdaq's petition for review, SEC Order Denying Stay, Release No. 89066, 85 Fed. Reg. 36921 (June 12, 2020) ("June Order").

⁵ See Investment Company Institute, *2019 Investment Company Fact Book, A Review of Trends and Activities in the Investment Company Industry*, available at https://www.icifactbook.org/ch1/20_fb_ch1.

⁶ Funds technically trade through broker-dealers that use market data to route orders on their behalf. To optimize order routing and obtain favorable trading results in today's marketplace, some funds typically require their broker-dealers to subscribe to all available proprietary exchange market data feeds as a prerequisite to engaging their services, which cost is passed through to the fund and its shareholders. Funds therefore have become increasingly reliant on proprietary data feeds. See ICI Market Data Infrastructure Letter at 2.

consolidated feed and lead to more equitable market data costs. Market participants, including funds, consequently, may place greater, or even sole, reliance on a sufficiently enhanced feed for trading.

We recommend that the CT Plan be altered in a few respects to ensure a more objective and balanced Operating Committee with adequate protection for all committee members.⁷ In particular, we recommend that the CT Plan be modified:

- with respect to term limits, Member Observers, Executive Sessions, and subcommittees; and
- to require that conflict of interest provisions that apply to SRO Voting Representatives also apply to SRO Member Observers with limited exception for only the most senior exchange officials.

The CT Plan Should Provide for a More Objective and Balanced Operating Committee

As described in more detail below, the CT Plan establishes procedures for selecting non-SRO Voting Representatives to serve on the Operating Committee, including limits on the length and number of terms, Member Observers,⁸ Executive Sessions, and the scope of exculpation from liability.

Term Limits. For the initial set of non-SRO representatives, the plan proposes a staggered approach under which the representative's term would begin after the first quarterly operating committee meeting. Each term would be two years in length, and non-SRO voting representatives would be subject to a lifetime ban after serving two terms (even if they are not consecutive).

We recommend permitting the non-SRO representatives' terms to begin simultaneously with the first quarterly operating committee meeting and that three of those representatives initially serve for a two-year term and the other three for three-year terms. The recommended staggered approach would provide for smoother transitions, allowing the more seasoned non-SRO representatives to share their knowledge and experience with the newer committee members. This, and allowing non-SRO representatives to be included in the meetings from the start, should foster the development of a more efficient and effective committee. We also recommend permitting a non-SRO representative to serve

⁷ 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, among other matters, (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) maintaining fair and reasonable fees; (iv) assessing the marketplace for equity market data products; (v) ensuring SIP data fees are fair and reasonable and available; and (vi) designing a fair and reasonable allocation formula. CT Plan at Section 4.1(a).

⁸ The CT Plan defines Member Observers as "any individual, other than a Voting Representative, that a [SRO], in its sole discretion, determines is necessary in connection with such [SRO's] compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings." CT Plan at Section 1.1.

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more than two terms provided that the CT plan provides for a sufficiently lengthy (*e.g.*, two years) cooling off period for that individual and the firm employing that individual. We understand and share the concern of appointing a representative or a particular firm for a perpetual term but, at the same time, the pool of firms and pool of qualified candidates from those firms is limited. The cooling off period should provide a check on any single firm's or individual's influence and foster a sufficiently deep pool of candidates.

Member Observers. The CT Plan would allow only the SROs to select Member Observers to attend Operating Committee meetings, subcommittee meetings, and executive sessions, and neither the confidentiality nor the conflicts of interest policy would apply to them. We support the concept of including Member Observers but strongly recommend that the CT Plan be amended in certain important respects described below.

The CT Plan should be amended to permit non-SRO committee members to invite Member Observers to attend Operating Committee meetings, subcommittee meetings, and executive sessions. The Operating Committee likely will take up matters that require various areas of expertise (*e.g.*, market data administration related issues). Better informed colleagues could advise non-SRO committee members before, during, and after Operating Committee meetings, which should lead to richer and more informed discussions. Further, applying the plan's conflicts of interest and confidentiality policies to all Member Observers should promote more knowledgeable and frank discussion among committee representatives.⁹

In addition, as a general matter, any SRO employee (or any independent contractor) that is, or has been, involved with SRO proprietary data operations should *not* be permitted to serve as a Member Observer. The SROs have proprietary data feeds that compete with the Securities Information Processor (SIP) consolidated feed. No single person reasonably may be expected to represent two diametrically opposed objectives: maximizing the profitability of SROs' proprietary data products and

⁹ Because the CT Plan's definition of "Covered Person" would not include any "Member Observer," he or she would not be subject to the plan's confidentiality or conflict of interest provisions. We also recommend that the Commission, per its May 2020 order, ensure that the CT Plan's confidentiality and conflicts of interest provisions are fully consistent with the provisions that the Commission previously modified and approved under the existing NMS equity data plans. *See* [May Order, 85 Fed. Reg. at 28726](#). With respect to the confidentiality policy, for example, the Commission previously modified Section 3(d)(i) to the CTA Plan and the CQ Plan to provide that a Covered Person "may *only* disclose Confidential Information to other persons who *need* to receive such information to fulfill their responsibilities to the Plan." (emphasis added). Consolidated Tape Association; Order Approving the Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Fourth Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning a Confidentiality Policy, Release No. 34-88825, 85 Fed. Reg. 28090, 28100 (May 12, 2020). In contrast, the confidentiality policy under the CT Plan provides a less restrictive standard by specifying that a Covered Person "may disclose Confidential Information to other persons to allow such other persons to fulfill their responsibilities to the Company." CT Plan at Exhibit C, section (b)(iv)(A).

overseeing the functioning of its competitor (the SIP). The SROs have amply demonstrated that when put in this position, they favor the speed and functioning of their proprietary products over the SIP. The SROs have developed feeds superior to the SIP that provide more granular market data delivered with lower latencies for which they can charge high rates for access.¹⁰ In fact, the Commission estimates that the SROs derived nearly half of their 2018 market data products revenue – \$269 of \$596 million – from the sale of proprietary data feeds.¹¹

The CT Plan effectively addresses this conflict of interest for SRO Voting Representatives, and we recommend that applying these provisions to SRO Member Observers.¹² We recognize, however, that it may be necessary for the most senior exchange executives who have overall responsibility for both the CT Plan and the exchanges' proprietary data feeds to be privy to Operating Committee activities and decision making. We therefore would not object to the CT Plan providing a carefully circumscribed exception for such individuals. To mitigate this and other potential and actual conflict of interests, we recommend that the SROs be required to adopt and implement written policies and procedures to help assure that conflict of interest and confidentiality policies are followed. The Commission could examine the SROs for adherence to the policies and procedures.¹³

Finally, we recommend that the CT Plan not prescribe any hard limit on the number of Member Observers; rather the SEC should state in any approval order that SRO and non-SRO committee members should be required to have a reasonable basis for inviting Member Observers taking into account such matters as the person's area of expertise, potential or actual conflicts of interest, and the Operating Committee's meeting agenda.¹⁴

¹⁰ See, e.g., ICI Market Data Infrastructure Letter at 3 n.13; and June Order at 3, where the Commission recognized that the “critical developments in the equities markets—including the heightening of an inherent conflict of interest between the for-profit and regulatory roles of the exchanges and the concentration of voting power in the Equity Data Plans among a few large exchange groups—have demonstrated the need for an updated governance model.” The CT Plan addresses this with respect to SRO voting representatives, but not with respect to SRO selected Member Observers.

¹¹ Market Data Infrastructure, Securities Exchange Act Release No. 88216, 85 Fed. Reg. 16726, 16817 (Mar. 24, 2020).

¹² These provisions are similar to amendments that the Commission previously approved to the existing equity data plans. See, e.g., Consolidated Tape Association; Order Approving the Thirtieth Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Second Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning Conflicts of Interest, Release No. 34-88823, 85 Fed. Reg. 28046 (May 6, 2020).

¹³ The policies and procedures could, for example, how to mitigate the conflicts of interest when an SRO senior executive attends Operating Committee meetings. Cf. Rule 38a-1 under the Investment Company Act (requiring registered investment companies to adopt and implement policies and procedures reasonably designed to prevent violation of the federal securities laws).

¹⁴ We note that the SROs' advisory committees already permit both “official” and “unofficial” members (*i.e.*, member observers) to attend, and ICI members view this structure as beneficial for the industry and markets alike.

Executive Sessions. The CT Plan provides that SROs may exclude non-SRO voting representatives from any Executive Session of the Operating Committee in three specified circumstances and for any other “matters that may by their nature require discussion in an Executive Session.”¹⁵ We strongly recommend eliminating the unbridled latitude that SROs seemingly have retained to exclude non-SRO representatives from Executive Sessions. Otherwise, there is a danger that SRO-only executive sessions may be used to circumvent the policy underlying the NMS equity data governance reforms.

Subcommittees. The CT Plan would allow the Operating Committee to delegate “administrative functions” to a subcommittee entirely consisting of Members or one consisting of both Members and Non-SRO Voting Representatives. We recommend that subcommittees generally include both Non-SRO Voting Representatives and SRO Voting Representatives. We recognize that there may be circumstances where the Non-SRO Voting Representatives’ participation is not essential, but the term “administrative functions” is fairly broad, and we are concerned that an SRO-only subcommittee could discuss the details of an important administrative matter without input from Non-SRO Voting Representatives. In addition, we strongly support the element of the CT Plan that provides that a subcommittee cannot take any actions that require approval of the Operating Committee. This is an important limitation that should be preserved.

Indemnification and Insurance. The CT Plan should provide that each Non-SRO Voting Representative would be indemnified against any claims related to his or her role on the Operating Committee (with typical common law exceptions). We also recommend that the CT Plan provide that insurance will be provided and maintained for all Operating Committee members, including non-SRO voting representatives. These are important protections typically providing for the members any governing body.

The CT Plan Should Be Operationalized Without Delay

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 enumerated actions has occurred.

¹⁵ CT Plan Section 4.4(g) provides that “[i]tems for discussion within an Executive Session should be limited to topics such as: (A) any topic that requires discussion of Highly Confidential Information; (B) Vendor or Subscriber Audit Findings; and (C) Litigation matters. [This] list . . . is not dispositive of all matters that may be their nature require discussion in an Executive Session.” CT Plan Section 4.1(a) also specifies that there shall be a “generality” to the scope of situations in which the SROs are required to approve matters outside of the Operating Committee.

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We share Commissioner Lee's concerns about the delays that may arise in implementing these essential governance reforms.¹⁶ We therefore recommend that until the plan is fully operational, the Commission monitor closely the progress and potentially penalize the SROs for unwarranted delays. The SROs should be required to provide a detailed plan outlining how they will implement the CT plan, timeframes for each implementation phase, and the rationale for each of those timeframes (particularly for the 90-day delay that the SROs propose for the plan to be operationalized after all of the steps needed to operationalize the plan have been completed). The Commission also could require the SROs to submit periodic progress reports and financially incent them to timely operationalize the plan (through fines or not allowing the SROs to collect SIP fees for some time period).¹⁷

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We appreciate the opportunity to comment and urge the Commission to act expeditiously to approve a CT Plan with a robust Operating Committee that serves the public interest. If you have any questions, please contact me at ddonohue@ici.org or Nhan Nguyen at nhan.nguyen@ici.org.

Regards,

/s/ Dorothy Donohue
Deputy General Counsel, Securities Regulation

¹⁶ See Commissioner Allison Herren Lee, [Statement on Proposed Order for Creation of a New Consolidated Market Data Plan for Equity Market Data](#) (Jan. 8, 2020) (“I am very concerned that we may never see a full package of necessary reforms implemented. Today we issue a proposed order related to governance ... to seek future proposals from the stock exchanges, which proposals may or may not be sufficient or finalized”).

¹⁷ We urge the Commission to foster efficient and timely implementation of the CT Plan using its recent experience overseeing implementation of the Consolidated Audit Trail (CAT) NMS Plan. See, e.g., Amendments to the National Market System Plan Governing the Consolidated Audit Trail, Release No. 34-88890, 85 Fed. Reg. 31322 (May 22, 2020) (where the Commission imposed public transparency requirements on the SROs, including requiring them to publish and file with the Commission a complete implementation plan for the consolidated audit trail, quarterly progress reports, and financial accountability provisions).

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cc: The Honorable Jay Clayton
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Allison Herren Lee
The Honorable Caroline Crenshaw

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