

SEC Orders SROs to Implement Changes to NMS Plan Governance

May 11, 2020

The Securities and Exchange Commission (“SEC”) has acted on the first of its proposals to substantially revamp the regulations concerning equity market data. On May 6, 2020, the SEC voted unanimously to issue an [order](#) (the “Governance Order”) directing the national securities exchanges and the Financial Industry Regulatory Authority (“FINRA”) (collectively, “Self-Regulatory Organizations” or “SROs”) to, within 90 days, propose a new National Market System (“NMS”) equity market data plan relating to the collection, processing, and dissemination of equity market data (the “New Plan”). The New Plan would replace the three existing NMS Plans (the “Current Plans”) that govern the operation of the securities information processor (“SIP”) data feeds and implement various changes to the way the plans are governed. The Governance Order is intended to address what the SEC perceives as SRO conflicts of interest in managing, and undue concentration of control of, the SIPs under the Current Plans.

As noted in our [April 2, 2020 memo](#), the SEC also recently proposed a rule to extensively overhaul the NMS market data infrastructure by, among other things, changing the role of the Current Plans from operating the exclusive SIPs to instead governing the SROs’ distribution of market data to “competing consolidators” and “self aggregators.” In issuing the Governance Order, the SEC dismissed commentators’ concerns about the interconnection between the Governance Order and the proposed market data infrastructure rule, despite potential overlapping purposes and inconsistencies between the two.

Voting Rights and Representation on the Operating Committee

1. Reallocation of Voting Rights

Voting rights on the Current Plans’ operating committees are allocated among SROs, with each SRO that is a member of the Current Plans appointing one operating committee member with one vote. Because many equity exchanges are affiliated with other exchanges under common ownership, certain groups of commonly-owned exchanges—when viewed on a consolidated basis—have greater combined voting power than exchanges that are not affiliated with others. The Governance Order requires that the New Plan instead allocate voting rights such that each exchange *group*—regardless of the number of its licensed SRO subsidiaries—appoint one operating committee member with one vote, with a second vote provided if the exchange group represents more than 15 percent of the total consolidated equity market share during four of the last six months.

2. Representation of Non-SRO Members

The Current Plans provide that only the plans’ SRO participants are represented and have voting rights on the Current Plans’ operating committees, while non-SROs participate on advisory committees. The Governance Order requires that the New Plan provide operating committee membership and voting rights to members representing the following non-SRO categories:

- an institutional investor;
- a broker-dealer with a predominately retail investor customer base;
- a broker-dealer with a predominately institutional investor customer base;

- a securities market data vendor;¹
- an issuer of NMS stock;² and
- a person who represents the interests of retail investors.³

The Governance Order also requires that the New Plan identify the limited circumstances in which SRO representatives may meet in executive sessions without participation by non-SRO representatives.

3. Selection of Non-SRO Representatives

Under the Governance Order, the New Plan's initial non-SRO members will be selected by a majority vote of the current members of the Current Plans' advisory committees.⁴ Subsequently, the New Plan will provide a public nomination process for non-SRO members who will be selected by the then-serving non-SRO members of the operating committee.

4. Allocation of Voting Rights between SRO and Non-SRO Representatives

The Governance Order requires that the New Plan allocate voting rights amongst the SRO and non-SRO operating committee members such that the number of non-SRO representative votes will, at all times, be equal to half of the total number of SRO representative votes, including by assigning fractional votes. This ratio would be required to be maintained at all times, with non-SRO representatives' voting rights increased or decreased as SROs join or leave the New Plan.

5. Requirement of an Augmented Majority Vote for Most Actions

The New Plan must require that most actions taken by the New Plan be approved by its operating on an "augmented majority" basis—defined as two-thirds of all members of the operating committee, as well as a majority of SRO representatives. A simple majority vote will only be sufficient for the selection of non-SRO members and a decision to enter into an SRO member-only executive session.

Other Key Provisions

The Governance Order requires that the New Plan's operating committee be responsible for:

- proposing and implementing policies and procedures necessary for the proper collection, processing, distribution, and publication of market data related to NMS stocks;
- selection and oversight of the independent plan administrator, plan processor, auditor, and other professional service providers;
- providing public reporting of the plan processor's performance;
- establishing and maintaining appropriate terms for the distribution, transition, and aggregation of core data;

¹ The representative of the securities market data vendor is not permitted to be affiliated or associated with an SRO, broker-dealer, or investment adviser with third-party clients.

² The representative of the NMS stock issuer is not permitted to be affiliated or associated with an SRO, broker-dealer, or investment adviser with third-party clients.

³ The representative of the interests of retail investors must have appropriate professional experience, work with or on behalf of retail investors, and may not be affiliated with an SRO or a broker-dealer.

⁴ Equity Data Plan advisory committee members who were selected by SROs as their representatives.

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- ensuring that SIP data offerings are fairly and reasonably priced and designed to ensure widespread availability of SIP data to market participants; and
- instituting a fair and reasonable revenue allocation formula for allocating plan revenues.

Notably, under the Governance Order, the New Plan administrator may not be owned or controlled by a corporate entity that, either directly or via a subsidiary, offers for sale its own proprietary market data products for NMS stocks. The administrators of the Current Plans are exchanges that do separately offer proprietary market data products.

Finally, the Governance Order requires that the New Plan also include policies and procedures to:

- address conflicts of interest of SRO members and non-SRO members;
- protect confidential and proprietary information from misuse;
- ensure the orderly transition of functions and responsibilities from the three Current Plans to the New Plan and continued operation of the Current Plans until the New Plan is effective; and
- incorporate all other provisions of the Current Plans necessary for the operation and oversight of the SIPs under the New Plan.

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