

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98271; File No. 4-757)

September 1, 2023

Amended Order Directing the Exchanges and the Financial Industry Regulatory Authority, Inc.,  
to File a National Market System Plan Regarding Consolidated Equity Market Data

Notice is hereby given that, pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> the Securities and Exchange Commission (“Commission”) orders the Cboe BYX Exchange, Inc. (“Cboe BYX”); Cboe BZX Exchange, Inc. (“Cboe BZX”); Cboe EDGA Exchange, Inc. (“Cboe EDGA”); Cboe EDGX Exchange, Inc. (“Cboe EDGX”); Cboe Exchange, Inc. (“Cboe”); Investors Exchange LLC; Long Term Stock Exchange, Inc.; MEMX LLC; MIAX PEARL, LLC; Nasdaq BX, Inc. (“Nasdaq BX”); Nasdaq ISE, LLC (“Nasdaq ISE”); Nasdaq PHLX LLC (“Nasdaq PHLX”); Nasdaq Stock Market LLC (“Nasdaq”); New York Stock Exchange LLC (“NYSE”); NYSE American LLC (“NYSE American”); NYSE Arca, Inc. (“NYSE Arca”); NYSE Chicago, Inc. (“NYSE Chicago”); NYSE National, Inc. (“NYSE National”); and Financial Industry Regulatory Authority, Inc. (each a “Participant” or a “Self-Regulatory Organization” (“SRO”) and, collectively, the “Participants” or the “SROs”) to act jointly in developing and filing with the Commission a proposed new single national market system plan (“Revised New Consolidated Data Plan”) regarding consolidated equity market data. The Revised New Consolidated Data Plan shall be filed with the Commission pursuant to Rule 608 of Regulation NMS<sup>2</sup> no later than [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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<sup>1</sup> 15 U.S.C. 78k-1(a)(3)(B).

<sup>2</sup> 17 CFR 242.608.

## I. BACKGROUND

On May 6, 2020, the Commission issued an order (“Governance Order”) directing the SROs to submit a new national market system plan (“NMS plan”) regarding consolidated equity market data to replace the three NMS plans (“Equity Data Plans”)<sup>3</sup> that govern the public dissemination of real-time consolidated market data for national market system stocks (“NMS stocks”).<sup>4</sup> The Governance Order, which explained the Commission’s justification for action, directed that the new NMS plan include specified provisions designed to, among other things, address concerns identified by the Commission and the public with respect to the governance of the Equity Data Plans.<sup>5</sup>

On August 11, 2020, the SROs filed a proposed NMS plan pursuant to the Governance Order, and the Commission published notice of the proposed plan (“CT Plan”) for comment in the Federal Register on October 13, 2020.<sup>6</sup> After instituting proceedings with respect to the

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<sup>3</sup> The three Equity Data Plans that currently govern the collection, consolidation, processing, and dissemination of consolidated equity market data via the exclusive securities information processors (“SIPs”) are: (1) the Consolidated Tape Association Plan; (2) the Consolidated Quotation Plan; and (3) the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis.

<sup>4</sup> See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (File No. 4-757).

<sup>5</sup> See Governance Order, *supra* note 4, 85 FR at 28729–31. Nasdaq, Nasdaq BX, Nasdaq PHLX, NYSE, NYSE American, NYSE Arca, NYSE Chicago, NYSE National, Cboe BYX, Cboe BZX, Cboe EDGA, Cboe EDGX, and Cboe filed petitions with the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”) for review of the Governance Order. These petitions were dismissed. See *The Nasdaq Stock Market, et al. vs. SEC*, 1 F.4th 34 (D.C. Cir. 2021). Nasdaq, Nasdaq BX, and Nasdaq PHLX also filed a motion with the Commission to stay the effect of the Governance Order while their petition was pending before the D.C. Circuit, and the Commission denied this motion. See Order Denying Stay, Securities Exchange Act Release No. 89066 (June 12, 2020), 85 FR 36921 (June 18, 2020) (File No. 4-757).

<sup>6</sup> See Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90096 (Oct. 6, 2020), 85 FR 64565 (Oct. 13, 2020) (File No. 4-757) (“CT Plan Notice”).

proposed CT Plan,<sup>7</sup> the Commission ultimately approved, as modified, the CT Plan on August 6, 2021.<sup>8</sup>

A group of SROs associated with Nasdaq, the NYSE, and Cboe petitioned the D.C. Circuit for review of the Commission’s action, challenging three aspects of the Governance Order and the CT Plan Approval Order: (1) the inclusion of non-SRO representatives as voting members of the CT Plan’s operating committee; (2) the grouping of SROs by corporate affiliation for voting; and (3) the requirement that the CT Plan’s administrator be independent of any SRO that sells its own proprietary equity market data.<sup>9</sup>

On July 5, 2022, the D.C. Circuit granted the exchanges’ petition with respect to the inclusion of non-SRO voting members on the CT Plan operating committee, but denied the petition with respect to the other challenged aspects of the Governance Order and the CT Plan Approval Order, upholding the Commission’s actions with respect to requiring voting by SRO group and requiring an independent administrator.<sup>10</sup> The court vacated the CT Plan Approval Order in full, but “sever[ed] only those parts of the Governance Order directing [the SROs] to include non-SRO representation in its proposed plan, leaving the remainder in place.”<sup>11</sup>

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<sup>7</sup> See Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90885 (Jan. 11, 2021), 86 FR 4142 (Jan. 15, 2021) (File No. 4-757).

<sup>8</sup> See Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 92586 (Aug. 6, 2021), 86 FR 44142 (Aug. 11, 2021) (File No. 4-757) (“CT Plan Approval Order”).

<sup>9</sup> See The Nasdaq Stock Market LLC, et al. v. Securities and Exchange Commission, 38 F.4th 1126, 1131 (D.C. Cir. 2022) (“Nasdaq v. SEC”). The petitioning exchanges were Nasdaq, Nasdaq BX, Nasdaq PHLX, NYSE, NYSE American, NYSE Arca, NYSE Chicago, NYSE National, Cboe BYX, Cboe BZX, Cboe EDGA, Cboe EDGX, and Cboe. The petitioning exchanges also filed a motion with the Commission seeking a stay of the effect of CT Plan Approval Order pending final resolution of their petitions before the D.C. Circuit, which the Commission denied. See Order Denying Stay, Securities Exchange Release No. 93051 (Sept. 17, 2021), 86 FR 52933 (Sept. 23, 2021) (File No. 4-757). The petitioning exchanges also filed for and, on Oct. 13, 2021, received a stay of the CT Plan Approval Order from the D.C. Circuit. See Nasdaq v. SEC, 38 F.4th at 1135.

<sup>10</sup> See Nasdaq v. SEC, 38 F.4th at 1131.

<sup>11</sup> Id. at 1145.

In light of the court's decision, the Commission now directs the SROs to file a Revised New Consolidated Data Plan, consistent with the provisions described below in this Amended Order. With the exception of the topics addressed in this Amended Order, the Commission finds that those provisions of the CT Plan approved in 2021 that were not challenged, as well as those that were challenged but found by the court to be permissible, continue to be appropriate. And, given the limited topics addressed by this Amended Order, the Commission believes that the SROs should be able to rely on a substantial portion of the proposed CT Plan previously filed pursuant to the Governance Order. As a result, the Commission believes that the SROs should be able to file a proposed Revised New Consolidated Data Plan within 45 days after publication of this Amended Order in the Federal Register.

## **II. DISCUSSION**

In accordance with the D.C. Circuit's ruling, the Commission is modifying the Governance Order to remove the provisions regarding the participation of non-SRO representatives as members of the operating committee of the Revised New Consolidated Data Plan and to make conforming changes. Additionally, the Commission is including further requirements that are appropriate to ensure that the Amended Order is consistent with the court's ruling.<sup>12</sup> Finally, based on its reconsideration of the public comments received regarding the CT Plan,<sup>13</sup> the Commission is requiring the SROs to include certain additional requirements for the Revised New Consolidated Data Plan.

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<sup>12</sup> The Commission has also added MIA X PEARL, LLC to the list of the SROs to which this Amended Order is addressed. Since the Governance Order was issued in May 2020, *see* Governance Order, *supra* note 4, MIA X PEARL, LLC became a national securities exchange that trades equity securities. *See* Order Approving a Proposed Rule Change, as Modified by Amendment No. 1, to Establish Rules Governing the Trading of Equity Securities, Securities Exchange Act Release No. 89563 (Aug. 14, 2020), 85 FR 51510 (Aug. 20, 2020) (File No. SR-PEARL-2020-03).

<sup>13</sup> The comment letters submitted in response to the NMS plan previously proposed by the SROs are available at: <https://www.sec.gov/comments/4-757/4-757.htm>.

**A. Modifications in Response to the D.C. Circuit’s Ruling**

First, the Commission is modifying the voting provision of the Governance Order.<sup>14</sup> The Governance Order provided that action by the operating committee of the new NMS plan would require an “augmented majority vote” that reflected the inclusion of non-SRO voting representatives on the operating committee of the new NMS plan.<sup>15</sup> The “augmented majority vote” would have required that all actions under the terms of the new NMS plan, except the selection of Non-SRO Members and decisions to enter into an SRO-only executive session, would be required to be authorized by a two-thirds vote of the new NMS plan’s operating committee, provided that this included a majority vote of the SRO members of the operating committee.<sup>16</sup> In light of the D.C. Circuit’s ruling, there will no longer be non-SRO members on the operating committee and the Commission is modifying the voting provisions of the Governance Order to require that action by the operating committee would require a two-thirds majority of the votes allocated to the SROs. For the same reasons as stated in the Governance Order,<sup>17</sup> the Commission believes that the requirement for a two-thirds majority strikes an appropriate balance between ensuring that plan action has broad support among members of the operating committee while also preventing a single SRO group or unaffiliated SRO from vetoing plan action. Moreover, requiring a two-thirds, rather than a simple, majority of SRO votes, in

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<sup>14</sup> As stated by the D.C. Circuit, the “augmented majority vote” provision of the Governance Order, absent revision, would require, in light of the court’s ruling regarding non-SRO participants on the operating committee, “both a two-thirds majority and a simple majority vote of approval by the SROs alone.” Nasdaq v. SEC, 38 F.4th at 1144 (emphasis in original).

<sup>15</sup> See Governance Order, supra note 4, 85 FR at 28720–22, 28730.

<sup>16</sup> See id.

<sup>17</sup> See id. at 28722.

conjunction with allocating votes by exchange group,<sup>18</sup> prevents a small number of SRO groups from dictating plan action without further support from other SRO members. It is therefore consistent with the Commission’s rationale that the exchange-group voting provisions would address the “disproportionate influence that the exchange groups have on the governance of the Equity Data Plans.”<sup>19</sup>

Second, because non-SRO representatives will no longer be required to be included as voting members of the operating committee of the Revised New Consolidated Data Plan, the Commission is modifying the Governance Order’s requirements to provide that the Revised New Consolidated Data Plan must provide for participation by non-SROs in the operation of the plan as members of an advisory committee. This is consistent with the current practice of the existing Equity Data Plans under Regulation NMS.<sup>20</sup> And the Commission finds that this modification is appropriate for the reasons discussed in the Regulation NMS Adopting Release regarding non-SRO advisory committees.<sup>21</sup> The Commission believes that the Revised New Consolidated Data Plan should provide for at least the same non-SRO involvement as the existing Equity Data Plans. But, for the same reasons stated in the Governance Order,<sup>22</sup> the composition of the advisory committee of the Revised New Consolidated Data Plan should reflect the same categories of market participants that, under the Governance Order, would have been the non-

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<sup>18</sup> The Governance Order provided that each exchange group and unaffiliated SRO shall have only one vote on the operating committee of the new NMS plan, with a second vote allocated to an exchange group or unaffiliated SRO whose market center(s) have consolidated equity market share of more than 15 percent during four of the six calendar months preceding a vote of the operating committee. See id. at 28714, 27829–30; see also Nasdaq v. SEC, 38 F.4th at 1139–42, 1145 (upholding provisions of the Governance Order that require the new NMS Plan to allocate votes by exchange group).

<sup>19</sup> See Governance Order, supra note 4, 85 FR at 28714.

<sup>20</sup> See, e.g., Regulation NMS, Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37610 (June 29, 2005) (File No. S7-10-04) (“Regulation NMS Adopting Release”).

<sup>21</sup> See id. at 37561.

<sup>22</sup> See Governance Order, supra note 4, 85 FR at 28717–18.

SRO voting representatives on the Operating Committee,<sup>23</sup> rather than the current composition of the non-SRO advisory committees of the Equity Data Plans.<sup>24</sup> The Commission continues to believe, as explained in the Governance Order,<sup>25</sup> that an operating committee that is exposed to views from this selection of non-SRO market participants “will reflect a more diverse set of perspectives from a range of market participants, including significant subscribers of SIP core data products.”<sup>26</sup>

And third, because non-SRO members will no longer be required to be included as voting members of the operating committee of the Revised New Consolidated Data Plan, the Commission is modifying the provision of the Governance Order regarding the use of executive session to refer to the exclusion of members of the advisory committee rather than of Non-SRO Voting Representatives, and to delete an example of an appropriate topic for executive session that anticipated that Non-SRO Voting Representatives would be members of the operating committee.<sup>27</sup> Additionally, because it will be important for non-SRO advisory committee members to have transparency into operating committee discussions as intended under the NMS plans, the Commission is requiring that the Revised New Consolidated Data Plan limit the use of executive sessions to identified circumstances in which it is appropriate to exclude members of

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<sup>23</sup> See id. at 28717–18, 28730.

<sup>24</sup> The Commission has stated that creation of the advisory committees for the Equity Data Plans was “a useful first step toward improving the responsiveness of Plan participants and the efficiency of Plan operations and that it would “continue to monitor and evaluate Plan developments to determine whether any further action is warranted.” Id. at 28722 (citing Regulation NMS Adopting Release, supra note 20, 70 FR at 37561). In the Governance Order, after considering recent developments in the equity markets, the Commission determined to, among other things, provide for representation of a different set of non-SRO representatives in the operation of the Equity Data Plans. See id. at 28717–18.

<sup>25</sup> See id. at 28717–18 (discussing the categories of non-SRO representatives).

<sup>26</sup> Id. at 28715.

<sup>27</sup> The Governance Order stated that executive session would be permitted for “discussions regarding matters that exclusively affect the SROs with respect to the Commission’s oversight of the New Consolidated Data Plan (including attorney-client communications relating to such matters).” Id. at 28726–27, 28730 (emphasis added).

the advisory committee. Finally, the SRO participants in the plan are obligated to comply with the terms of the Revised New Consolidated Data Plan.<sup>28</sup> Separately, we note that Commission staff would be able to attend executive sessions of the operating committee and thereby would have an opportunity to observe the use of executive session.

## **B. Further Requirements for the Revised New Consolidated Data Plan**

Based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs,<sup>29</sup> the Commission is also adding certain requirements for the Revised New Consolidated Data Plan. Specifically, the Revised New Consolidated Plan must include: (1) a date certain by which the Revised New Consolidated Data Plan will become fully effective, together with a prescribed timeline specifying the actions or steps necessary to fully implement the Revised New Consolidated Data Plan and the dates by which these actions and steps must be completed, as well as a requirement for providing periodic progress reports ; (2) a requirement that all persons who attend operating committee meetings on behalf of an SRO (whether or not they are voting representatives) be subject to the plan's conflicts-of-interest and confidentiality provisions or policies; (3) specified provisions regarding the sharing of protected information; and (4) specified provisions regarding the use of subcommittees.

### **1. Implementation**

The SROs shall include in their proposed plan a date certain by which the Revised New Consolidated Data Plan will become fully effective, together with a prescribed timeline specifying the actions or steps necessary to fully implement the proposed plan and the dates by which these actions and steps will be completed. The proposed CT Plan filed by the SROs

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<sup>28</sup> See Rule 608(c) of Regulation NMS, 17 CFR 242.608(c).

<sup>29</sup> See supra note 13.



contained no deadline or timeline for implementation, providing only that the plan would become operative on the first day of the month that is at least 90 days after a series of actions (which lacked their own deadlines) had taken place.<sup>30</sup> And, in response to the notice of the proposed CT Plan, the Commission received a number of comments calling for the Commission to modify the CT Plan to establish specified timeframes for actions necessary to render the CT Plan effective or operative.<sup>31</sup> These commenters stated that the absence of specified timeframes and deadlines in the CT Plan would cause the SROs to unduly delay its implementation.<sup>32</sup> A number of commenters also supported the Commission’s imposing a one-year deadline for the CT Plan to become fully operational.<sup>33</sup>

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<sup>30</sup> See CT Plan Notice, *supra* note 6, 85 FR at 64566.

<sup>31</sup> See, e.g., Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Nov. 12, 2020) (“SIFMA Letter I”), at 3; Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, SIFMA (Feb. 18, 2021) (“SIFMA Letter II”), at 2; Letter from Michael Blasi, SVP, Enterprise Infrastructure, and Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Nov. 12, 2020) (“Fidelity Letter”), at 2–3; Letter from John Ramsay, Chief Market Policy Officer, IEX (Nov. 13, 2020) (“IEX Letter”), at 1–2; Letter from Rich Steiner, Head of Client Advocacy and Market Innovation, RBC Capital Markets (Nov. 12, 2020) (“RBC Letter”), at 4; Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (Nov. 11, 2020) (“Virtu Letter”), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Nov. 12, 2020) (“Schwab Letter I”), at 2; Letter from Jeffrey T. Brown, Senior Vice President, Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. (Feb. 11, 2021) (“Schwab Letter II”), at 5; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Nov. 18, 2020) (“BMO Letter I”), at 2–3; Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Feb. 19, 2021) (“BMO Letter II”), at 2; Letter from Anders Franzon, General Counsel, MEMX (Feb. 5, 2021) (“MEMX Letter”), at 2–3; Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Samantha DeZur, Director, Global Public Policy, BlackRock (Feb. 5, 2021) (“BlackRock Letter II”), at 2; Letter from Jennifer W. Han, Managing Director & Counsel, Regulatory Affairs, Managed Funds Association (Nov. 18, 2020) (“MFA Letter”), at 4–5.

<sup>32</sup> See, e.g., IEX Letter, *supra* note 31, at 1; MFA Letter, *supra* note 31, at 5; BMO Letter I, *supra* note 31, at 2; BMO Letter II, *supra* note 31, at 2; Fidelity Letter, *supra* note 31, at 3; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Nov. 12, 2020) (“ICI Letter I”), at 6–7; Letter from Dorothy Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute (Feb. 5, 2021) (“ICI Letter II”), at 2; RBC Letter, *supra* note 31, at 3; Letter from Kelvin To, Founder and President, Data Boiler Technologies, LLC (Nov. 12, 2020) (“Data Boiler Letter I”), at 20.

<sup>33</sup> See SIFMA Letter I, *supra* note 31, at 3; SIFMA Letter II, *supra* note 31, at 2; Fidelity Letter, *supra* note 31, at 4; IEX Letter, *supra* note 31, at 2; RBC Letter, *supra* note 31, at 4; Virtu Letter, *supra* note 31, at 2; Schwab Letter I, *supra* note 31, at 2; Schwab Letter II, *supra* note 31, at 5; BMO Letter I, *supra* note 31, at 2; MEMX Letter, *supra* note 31, at 2–3; BlackRock Letter II, *supra* note 31, at 2.

Other commenters argued that there is no reasonable way for the Commission to impose deadlines on any part of the process.<sup>34</sup> One commenter stated that the Commission was “vastly underestimating” the amount of time needed to implement the new CT Plan, particularly given the Commission’s requirements with respect to an Administrator and a new fee schedule.<sup>35</sup> One commenter argued that any deadline the Commission set would be “inherently arbitrary” and would do nothing to move the project forward, cautioning that, “rushing to complete an inherently complex project may result in costly errors.”<sup>36</sup> Another commenter discussed the complexity and uncertainty of determining fees, selecting an independent administrator through a request-for-proposal (“RFP”) process, and negotiating new contracts with processors, data vendors and subscribers.<sup>37</sup> This commenter stated that because the RFP process is “so specialized and idiosyncratic,” there is “no way to reasonably impose time limits on any part of that process, let alone a time limit for the entire process overall.”<sup>38</sup>

The Commission believes that requiring the SROs to include in the Revised New Consolidated Data Plan a date certain by which the plan will be fully implemented, together with a prescribed timeline specifying the actions or steps necessary to fully implement the Revised New Consolidated Data Plan and the dates by which these actions and steps must be completed,

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<sup>34</sup> See Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq, at 10 (Nov. 12, 2020) (“Nasdaq Letter I”); Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq, at 2 (Feb. 5, 2021) (“Nasdaq Letter II”); Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, at 33 (Nov. 16, 2020) (“NYSE Letter I”); Letter from Patrick Sexton, EVP, General Counsel & Corporate Secretary, Cboe Global Markets, Inc., at 5 (Nov. 12, 2020) (“Cboe Letter”).

<sup>35</sup> Cboe Letter, supra note 34, at 6.

<sup>36</sup> Nasdaq Letter I, supra note 34, at 11.

<sup>37</sup> See NYSE Letter I, supra note 34, at 33–35. This commenter further states that the 90-day period between the finalization of earlier actions and the operational date is “prudent” and is the current industry standard for announcing the implementation of changes to market data plans. See id. at 35–36.

<sup>38</sup> Id. at 35. This commenter stated that OPRA’s process to select a processor took two years even though OPRA ultimately decided to retain the same processor and cited the CAT NMS Plan for the risk that a selected administrator might be unable to perform the necessary functions, requiring that the RFP process be repeated. See id.

will facilitate implementation of the plan by providing clear direction to the operating committee of the Revised New Consolidated Data Plan and greater certainty for other industry participants.<sup>39</sup> The Commission further believes that requiring a date certain for implementation and a prescribed timeline is important because implementation of the Revised New Consolidated Data Plan is critical to reducing existing redundancies, inefficiencies, and inconsistencies in the current Equity Data Plans and to modernizing plan governance,<sup>40</sup> and because the Commission agrees with comments that the absence of specified deadlines would likely cause undue delay in implementing the new plan.<sup>41</sup> While the Commission recognizes the challenges associated with identifying and completing the actions or steps necessary for implementation of the Revised New Consolidated Data Plan, the Commission also believes that the SROs that will be the plan participants have the relevant expertise and experience—both with respect to operating NMS plans generally and with respect to the dissemination of equity market data specifically—to establish deadlines for fully implementing the Revised New Consolidated Data Plan within a reasonable, specified length of time.

In particular, the Commission found in the Governance Order that the SROs could provide “unique insight in formulating the terms and conditions of the New Consolidated Data Plan,”<sup>42</sup> even as it also highlighted the inherent conflicts of interest faced by SROs in the operation of the existing plans.<sup>43</sup> The Commission disagrees with the comments that there is no

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<sup>39</sup> See, e.g., CT Plan Approval Order, supra note 8, 86 FR at 44147, 44207 (specifying deadlines for the completion of intermediate steps and for the full implementation of the CT Plan), vacated on other grounds, Nasdaq v. SEC, 38 F.4th 1126.

<sup>40</sup> See, e.g., Governance Order, supra note 4, 85 FR at 28703–05, 28711.

<sup>41</sup> See, e.g., IEX Letter, supra note 31, at 1; MFA Letter, supra note 31, at 5; BMO Letter I, supra note 31, at 2; BMO Letter II, supra note 31, at 2; Fidelity Letter, supra note 31, at 3; ICI Letter I, supra note 32, at 6–7; ICI Letter II, supra note 32, at 2; RBC Letter, supra note 31, at 3.

<sup>42</sup> Governance Order, supra note 4, 85 FR at 28711.

<sup>43</sup> See, e.g., id. at 28713.

reasonable way to impose deadlines on any part of the process to implement the Revised New Consolidated Data Plan,<sup>44</sup> and instead believes—consistent with the views of other market participants,<sup>45</sup> including market participants that have experience with the operation of the current Equity Data Plans<sup>46</sup>—that the SROs should be able to draw from their experience in operating the existing Equity Data Plans, including supervising or serving as the administrators of the Equity Data Plans, to complete the specific actions or steps needed to implement the Revised New Consolidated Data Plan within a specified timeframe. Moreover, the proposed plan filed by the SROs will be published for comment, providing any interested persons, including users of consolidated equity market data, with the opportunity to comment on, among other things, the proposed timeline.

Finally, the Revised New Consolidated Data Plan shall include a requirement that the operating committee of the Revised New Consolidated Data Plan provide written progress reports to the Commission, and to make these reports publicly available on the Revised New Consolidated Data Plan’s website,<sup>47</sup> beginning three months after the formation of the operating committee and continuing every three months until the Revised New Consolidated Data Plan has been fully implemented.<sup>48</sup> These reports would be required to address the actions undertaken and provide a detailed description of the progress made toward completing each of the identified

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<sup>44</sup> See Nasdaq Letter I, supra note 34, at 10; Nasdaq Letter II, supra note 34, at 2; NYSE Letter I, supra note 34, at 33; Cboe Letter, supra note 34, at 5.

<sup>45</sup> See supra notes 31–33 and accompanying text.

<sup>46</sup> See IEX Letter, supra note 31, at 2; MEMX Letter, supra note 31, at 2–3.

<sup>47</sup> See 17 CFR 242.608(a)(8)(i).

<sup>48</sup> See, e.g., CT Plan Approval Order, supra note 8, 86 FR at 44149, 44207 (requiring that the operating committee of the CT Plan provide quarterly written progress reports), vacated on other grounds, Nasdaq v. SEC, 38 F.4th 1126.

actions or steps with respect to implementation of the Revised New Consolidated Data Plan.<sup>49</sup> The Commission shares commenters' views that periodic reports would provide transparency with respect to the progress made to satisfy the requirements of the plan, which would benefit not only the Commission but also interested market participants.<sup>50</sup> The requirement to provide progress reports in writing to the Commission every three months and to make them publicly available on the Revised New Consolidated Plan's website is designed to help ensure that affected market participants are informed about the status of the actions or steps that are taken to implement the Revised New Consolidated Data Plan. Providing periodic updates to the Commission should also facilitate the operating committee's progress in completing the interim steps towards satisfying the longer-range requirements.

The Commission believes that the required frequency of the progress reports—one report every three months—should be sufficient to identify in a timely manner any notable delays in completing the specified interim actions or steps needed to satisfy the deadlines to be established for Revised New Consolidated Data Plan implementation without imposing unnecessary burdens on efforts to implement the plan. The Commission believes that this requirement should not be overly burdensome to the operating committee or distract from its performance of the specified actions required by the Revised New Consolidated Data Plan because the progress reports would

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<sup>49</sup> For each action or step in progress during a given three-month period, the progress report generally should include: (1) the date by which the action or step is scheduled to be completed; (2) the currently targeted completion date; and (3) a description of (a) the current status of the action or step, (b) any difference between the scheduled completion date and the currently targeted completion date, including the basis for making the adjustment on any other action or step, and (c) any other factual indicators that demonstrate the current level of completion with respect to the action or step.

<sup>50</sup> See Fidelity Letter, supra note 31, at 3; IEX Letter, supra note 31, at 2; BMO Letter I, supra note 31, at 3; BMO Letter II, supra note 31, at 2; ICI Letter I, supra note 32, at 7. While one of these commenters urged the Commission to provide financial incentives to the SROs either through fines or through not allowing the SROs to collect SIP fees for some period of time, see id. at 7, the Commission believes that the required progress reports and the involvement of the operating committee should be sufficient to ensure timely implementation of the Revised New Consolidated Data Plan.

essentially reflect the analysis the operating committee would need to undertake in any event for its diligent oversight of the implementation process.

2. Application of the Conflicts-of-Interest and Confidentiality Provisions or Policies to All SRO Personnel Who Attend Plan Meetings

The Revised New Consolidated Data Plan shall require that any persons designated by an SRO to attend meetings of the operating committee or any subcommittee will be subject to the same conflicts-of-interest and confidentiality provisions or policies that apply to voting SRO representatives.

Contemporaneously with issuing the Governance Order, the Commission issued two sets of orders approving, as modified, proposed amendments to the conflicts-of-interest policies of the Existing Data Plans (“Conflicts of Interest Policy Approval Orders”),<sup>51</sup> and proposed amendments to the confidentiality policies of the Existing Data Plans (“Confidentiality Policy Approval Orders”).<sup>52</sup> The Governance Order provided that the SROs must include in the new NMS plan (a) “provisions designed to address conflicts of interest ... as outlined in the Conflicts of Interest Policy Approval Orders”<sup>53</sup>; and (b) “provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders.”<sup>54</sup>

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<sup>51</sup> See Securities Exchange Act Release No. 88823 (May 6, 2020), 85 FR 28046 (May 12, 2020) (File No. SR-CTA/CQ-2019-01) (approving, as modified, proposed amendments to the conflicts-of-interest policies of the CTA/CQ Plans); Securities Exchange Act Release No. 88824 (May 6, 2020), 85 FR 28119 (May 12, 2020) (File No. S7-24-89) (approving, as modified, proposed amendments to the conflicts-of-interest policy of the UTP Plan).

<sup>52</sup> See Securities Exchange Act Release No. 88825 (May 6, 2020), 85 FR 28090 (May 12, 2020) (File No. SR-CTA/CQ-2019-04) (approving, as modified, proposed amendments to the confidentiality policies of the CTA/CQ Plans) (“CTA/CQ Confidentiality Order”); Securities Exchange Act Release No. 88826 (May 6, 2020), 85 FR 28069 (May 12, 2020) (File No. S7-24-89) (approving, as modified, proposed amendments to the confidentiality policy of the UTP Plan) (“UTP Confidentiality Order”).

<sup>53</sup> See Governance Order, *supra* note 4, 85 FR at 28730.

<sup>54</sup> *Id.*

In the proposed CT Plan, the SROs proposed that each SRO member of a CT Plan would be able to designate a “Member Observer,” meaning “any individual, other than a Voting Representative, that a Member, 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.”<sup>55</sup>

In response to the proposed CT Plan, several commenters supported extending the conflicts-of-interest policy to include Member Observers.<sup>56</sup> Specifically, these commenters recommended that all observers be subject to the conflicts of interest policy and procedures of the CT Plan.<sup>57</sup> In contrast, one commenter objected to the application of the conflicts of interest policy to Member Observers, stating that most Member Observers are employees of the SRO charged with that SRO’s compliance obligations under Rule 608(c), and as such are already included in the conflict-of-interest disclosures of the SRO.<sup>58</sup> The commenter further argued that the identity and affiliation of a Member Observer would be disclosed in meeting minutes and that reasonable questions regarding the Member Observer’s affiliation could be addressed at the operating committee meeting.<sup>59</sup>

The Commission believes that the provisions or policies of the Revised New Consolidated Data Plan regarding disclosures of potential conflicts of interest, as well as recusals, should apply to any person, including a “Member Observer” or the equivalent, who attends any meetings of the operating committee or any of its subcommittees on behalf of an

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<sup>55</sup> See CT Plan Notice, supra note 6, 85 FR at 64576 (emphasis added).

<sup>56</sup> See RBC Letter, supra note 31; ICI Letter I, supra note 32; Fidelity Letter, supra note 31.

<sup>57</sup> See RBC Letter, supra note 31, at 8–9; ICI Letter I, supra note 32, at 5; Fidelity Letter, supra note 31, at 5.

<sup>58</sup> See Nasdaq Letter I, supra note 34, at 27.

<sup>59</sup> See id.

SRO, because the potential conflicts of interests that apply to an SRO would apply equally to such a person.<sup>60</sup> The Commission does not agree with the view that all relevant information regarding such a person would necessarily be included in the disclosures of the related SRO, because, for example, the SRO disclosures under the proposed CT Plan would have required only the names of the voting representative and any alternate voting representative designated by the SRO.

Additionally, all persons who attend meetings of the Revised New Consolidated Data Plan on behalf of an SRO may have access to competitively sensitive and commercially valuable information related to the plan. Thus, a “Member Observer” or other exchange representative who is responsible for and has a financial interest (including compensation) in an exchange’s proprietary market data products would have an inherent conflict of interest.<sup>61</sup> For these reasons, the Commission believes that the conflicts of interest and recusals provisions and policies of the Revised New Consolidated Data Plan should explicitly apply to Member Observers or other persons who attend any meetings of the new plan on behalf of an SRO. In particular, this requirement is appropriate because it will prohibit an SRO from appointing as a voting representative, “Member Observer,” or other role with respect to the Revised New Consolidated Data Plan a person who is responsible for or involved with the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary data products offered to customers of the Revised New Consolidated Data Plan’s feeds if that person has a financial interest (including compensation) that is tied directly to the SRO’s market data business or the procurement of

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<sup>60</sup> See, e.g., CT Plan Approval Order, supra note 8, 86 FR at 44180–82, 44222 (modifying the proposed CT Plan to apply the provisions regarding disclosure of conflicts of interest and recusals to “Member Observers”), vacated on other grounds, Nasdaq v. SEC, 38 F.4th 1126.

<sup>61</sup> See CT Plan Approval Order, supra note 8, 86 FR at 44181, vacated on other grounds, Nasdaq v. SEC, 38 F.4th. 1126.



market data, and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.<sup>62</sup>

Finally, while the Commission, as it did in the Governance Order,<sup>63</sup> is requiring the SROs to include in the Revised New Consolidated Data Plan provisions designed to address conflicts of interest as outlined in the Conflicts of Interest Policy Approval Orders,<sup>64</sup> the Commission is also, based on its experience with the operations of the Equity Data Plans, requiring that the Revised New Consolidated Data Plan incorporate a modified version of one of those provisions. The Conflicts of Interest Policy Approval Orders contain the following requirement:

A Disclosing Party may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing, or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.<sup>65</sup>

The Commission believes that the term “licensing” with respect to proprietary data products should explicitly include all functions related to monitoring or ensuring a subscriber’s compliance with the terms of the license contained in its data subscription agreement, including the auditing of subscriber data usage and payment. The Commission believes that persons who are involved with regulatory compliance, auditing, or similar responsibilities with respect to subscriber data usage and payment for exchange proprietary data products are subject to the same conflicts of interest as persons who directly market to, or negotiate licensing or

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<sup>62</sup> See CT Plan Approval Order, *supra* note 8, 86 FR at 44181–82, vacated on other grounds, *Nasdaq v. SEC*, 38 F.4th. 1126.

<sup>63</sup> See Governance Order, *supra* note 4, 85 FR at 28730.

<sup>64</sup> See Conflicts of Interest Policy Approval Orders, *supra* note 51.

<sup>65</sup> See Conflicts of Interest Policy Approval Orders, *supra* note 51, 85 FR at 28056–57, 85 FR at 28129.

subscription agreements with, subscribers of proprietary data products. Therefore, the Commission is requiring that the Revised New Consolidated Data Plan contain a provision that a person subject to the new plan's disclosure and recusal provisions may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing (including 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), or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that compensation would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.

### 3. Sharing of Protected Information

As noted above,<sup>66</sup> in the Governance Order, the Commission required the SROs to submit an NMS plan that included “provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders.”<sup>67</sup>

In response to the proposed CT Plan, some commenters opposed language in the required confidentiality policy that they said limited a Covered Person's ability to disclose to others, including agents, Restricted Information and Highly Confidential Information.<sup>68</sup> Generally, these commenters stated that the restriction was broad and would impede the ability of the plan

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<sup>66</sup> See supra note 54 and accompanying text.

<sup>67</sup> See Governance Order, supra note 4, 85 FR at 28730.

<sup>68</sup> See NYSE Letter I, supra note 34, at 15, 23; Nasdaq Letter I, supra note 34, at 4–6. The terms Covered Person, Restricted Information, Highly Confidential Information, and Confidential Information were defined in the confidentiality policies approved for the Existing Data Plans, as modified, in the Confidentiality Policy Approval Orders. See supra note 52.

administrator and processors to perform tasks—such as hiring independent auditors and outside counsel to perform administrative functions—necessary for an SRO to comply with its obligations pursuant to Rule 608.<sup>69</sup> For example, these commenters argued that for the administrator to provide services to the CT Plan, such as audited financial statements, the administrator must be able to provide Restricted Information and Highly Confidential Information to an independent auditor, but would be restricted from doing so under the CT Plan’s confidentiality policy.<sup>70</sup> One commenter argued that the policies are impermissibly vague.<sup>71</sup> Another commenter recommended that the Commission eliminate or substantially modify the prohibition on providing confidential information to agents.<sup>72</sup>

After considering these comments, the Commission believes that it is appropriate for the Revised New Consolidated Data Plan to provide for additional sharing of protected information in certain circumstances beyond those specifically provided for in the Confidentiality Policy Approval Orders, as discussed below.<sup>73</sup>

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<sup>69</sup> See NYSE Letter I, supra note 34, at 23–24; Letter from Elizabeth K. King, Chief Regulatory Officer, ICE, General Counsel and Corporate Secretary, NYSE, at 5 (Feb. 4, 2021) (“NYSE Letter II”); Nasdaq Letter I, supra note 34, at 5–6; Cboe Letter, supra note 34, at 8 (stating that policy could be read to prohibit the sharing of certain types of confidential information with outside legal counsel, auditors, or other service providers that have a need to access that information).

<sup>70</sup> See NYSE Letter I, supra note 34, at 23–24. See also Nasdaq Letter I, supra note 34, at 6 (stating that its auditors have expressed concerns about whether the policy is consistent with professional obligations that require them to subject their work to peer review and that may therefore require making Restricted or Highly Confidential Information available to persons who are not Covered Persons).

<sup>71</sup> See Cboe Letter, supra note 34, at 7–8 (arguing that the policies would limit access to certain confidential information to the particular individual who is representing an SRO and would further limit the ability of an individual SRO representative to share information and consult with other employees of the SRO that is the actual plan participant).

<sup>72</sup> See NYSE Letter I, supra note 34, at 24; NYSE Letter II, supra note 69, at 5.

<sup>73</sup> See Confidentiality Policy Approval Orders, supra note 54.

(a) Restricted Information

As discussed above, commenters on the CT Plan raised concerns that the confidentiality policy improperly limits the plan administrator's and processors' ability to share Restricted Information with others, including agents, impeding the ability of an agent to perform its specific services to the plan. The Commission has reconsidered these commenters' concerns and believes that it is appropriate to permit such disclosure when the operating committee of the Revised New Consolidated Data Plan, consistent with the purposes and goals of the plan, determines that it is appropriate to do so, because there may be instances in which Restricted Information would be required to be disclosed to a Covered Person or third party in the service of the plan.<sup>74</sup> Accordingly, the Revised New Consolidated Data Plan shall provide that the operating committee may authorize the disclosure of specified Restricted Information to identified Covered Persons or third parties, if it determines that doing so is in furtherance of the interests of the plan. Further, the Revised New Consolidated Data Plan shall provide that such authorization will be granted on a case-by-case basis, unless the operating committee grants standing approval to allow disclosure of specified recurring information to identified Covered Persons. This requirement is appropriate because it is responsive to comments about the appropriate limits regarding such information and promotes efficiency by allowing for the disclosure of Restricted Information to identified Covered Persons on an ongoing basis, where appropriate, without having to continually seek operating committee approval.

Finally, the Revised New Consolidated Data Plan shall require that Covered Persons and third parties that receive or have access to Restricted Information pursuant to authorization from

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<sup>74</sup> The requirements discussed in this section regarding Restricted Information are consistent with the modifications the Commission made to the confidentiality policy of the CT Plan. See CT Plan Approval Order, supra note 8, 86 FR at 44185, 44223–24, vacated on other grounds, Nasdaq v. SEC, 38 F.4th. 1126.

the operating committee must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality policy. The Commission continues to believe that “Restricted Information, including personally identifiable information, customer-specific financial information, and audit information, is highly sensitive to such a degree that its possession and use should be tightly controlled.”<sup>75</sup> This requirement is appropriate because limiting access to and the use of Restricted Information will reduce the risk that highly sensitive customer and personally identifiable information is misused.

(b) Highly Confidential Information

As noted above, some commenters stated that the Confidentiality Policy would preclude SROs from fulfilling their obligations under the securities laws. Specifically, commenters argued that the SROs—not the individual voting representatives—have responsibilities under the Act and rules of the Commission and must be able to determine what information is available to individuals within an SRO in order to satisfy the SRO’s regulatory obligations.<sup>76</sup> Another commenter stated that under the proposed confidentiality policy an SRO’s senior management would not be able to access information that may be necessary to make informed decisions related to the CT Plan if that information is determined to be Highly Confidential Information or Confidential Information.<sup>77</sup> This commenter stated that, for example, an SRO’s senior management would be denied access to privileged information, which is classified as Highly Confidential Information, and therefore prevented from participating in decisions regarding legal

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<sup>75</sup> CTA/CQ Confidentiality Order, supra note 52, 85 FR at 28099; UTP Confidentiality Order, supra note 52, 85 FR at 28077.

<sup>76</sup> See NYSE Letter I, supra note 34, at 16–17; NYSE Letter II, supra note 69, at 4–5; Nasdaq Letter I, supra note 34, at 3.

<sup>77</sup> See NYSE Letter I, supra note 34, at 17.

strategy and litigation involving the CT Plan or regulatory interactions with the Commission.<sup>78</sup>

Thus, these commenters stated that the Commission may not approve an NMS plan that prohibits SROs' senior management from having access to information that may be necessary to their informed decision-making related to regulatory obligations.<sup>79</sup>

In response to commenters' concerns regarding the provisions governing disclosure of Highly Confidential Information, the Commission stated in the CT Plan Approval Order that the proposed language of the CT Plan was too general to provide a meaningful limitation on the sharing of commercially sensitive information or to provide useful guidance regarding what disclosures would be permissible, and the Commission continues to believe that the Revised New Consolidated Data Plan must clearly specify the instances in which Highly Confidential Information is permitted to be shared.<sup>80</sup> The Commission believes that a general prohibition on sharing, paired with specific instances of permissible sharing, which are discussed below, would establish clear and limited circumstances for appropriate permitted disclosure of Highly Confidential Information.

In addition to disclosures that are required by applicable law,<sup>81</sup> the Commission believes that SRO voting representatives on the operating committee of the Revised New Consolidated Data Plan should be permitted to share Highly Confidential Information with officers or agents

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<sup>78</sup> See id. at 17.

<sup>79</sup> See id.; NYSE Letter II, supra note 69, at 5; see also Nasdaq Letter I, supra note 34, at 3.

<sup>80</sup> See CT Plan Approval Order, supra note 8, 86 FR at 44186, vacated on other grounds, Nasdaq v. SEC, 38 F.4th. 1126. The requirements discussed in this section regarding Highly Confidential Information are consistent with the modifications the Commission made to the confidentiality policy of the CT Plan. See id. at 44186–87, 44223–24.

<sup>81</sup> As defined in the proposed CT Plan in Article I, Section 1.1(e), “Applicable Law” would mean “all applicable provisions of (a) constitutions, treaties, statutes, laws (including the common law), rules, regulations, decrees, ordinances, codes, proclamations, declarations or orders of any Governmental Authority; (b) any consents or approvals of any Governmental Authority; and (c) any orders, decisions, advisory or interpretative opinions, injunctions, judgments, awards, decrees of, or agreements with, any Governmental Authority.” CT Plan Notice, supra note 6, 85 FR at 64575.

of their SRO under certain circumstances. Specifically, SRO voting representatives should be able to share certain types of Highly Confidential Information with officers of their SRO who have direct or supervisory responsibility for the SRO's participation in the Revised New Consolidated Data Plan, or with agents for the SRO supporting the SRO's participation, provided that such information may not be used in the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary data products. This requirement is appropriate because it recognizes that certain officers and agents of an SRO may require relevant plan information in order to comply with regulatory obligations. However, the Commission remains "concerned about the possibility of a Participant exchange obtaining commercially valuable data and information through its affiliates and employees that have responsibilities to the Plans, and then using that information and/or sharing it with employees or affiliates of the Participant exchange to benefit the exchange's proprietary data businesses."<sup>82</sup> In particular, because Highly Confidential Information contains highly sensitive and entity-specific information,<sup>83</sup> the Commission believes that both access to and use of such information should be limited to reduce the likelihood that Highly Confidential Plan Information will be used to promote the commercial interests of an SRO participant. Therefore, the Commission believes that access to Highly Confidential Information should be limited to officers of an SRO who have a direct or supervisory responsibility for the SRO's participation in the plan, or with agents for the SRO that support the SRO's participation in the plan, and that the information shared must not be used in

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<sup>82</sup> CTA/CQ Confidentiality Order, supra note 52, 85 FR at 28093; UTP Confidentiality Order, supra note 52, 85 FR at 28071.

<sup>83</sup> See, e.g., CTA/CQ Confidentiality Order, supra note 52, 85 FR at 28098; UTP Confidentiality Order, supra note 52, 85 FR at 28077.

the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary data products.

Additionally, the Commission believes that it is appropriate to identify the types of Highly Confidential Information permitted to be disclosed by the SRO voting representative as: (i) the plan's contract negotiations with the 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 Commission believes that an SRO voting representative should be permitted to share the contract negotiations with the processor(s) or administrator because the SRO will directly interact with the processor(s) and administrator pursuant to such contracts and would need to know the terms and conditions to ensure that it complies with the requirements of the plan. Similarly, the Commission believes that SRO voting representatives should be permitted to share communications and work product of counsel to the plan with officers of their SRO because counsel would be representing the SROs, and SRO officers who have a direct or supervisory responsibility for the SRO's participation in the plan would need to be informed in order to provide relevant information to counsel or to make decisions related to plan matters. The Commission further believes that information regarding personnel matters that affect the employees of an SRO should be permitted to be shared with officers of that SRO and for information regarding personnel matters that affect the employees of the plan to be shared with officers of all of the SROs, because the SROs are responsible for the oversight of their own employees, and they will collectively be responsible for the operations of the plan, including oversight of plan employees.<sup>84</sup> Therefore,

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<sup>84</sup> For example, if the operating committee of the plan became aware that the employee of an SRO had improperly disclosed or made use of customer-specific financial information, the Commission believes that the voting



officers of an SRO responsible for compliance with the terms of the Revised New Consolidated Data Plan and Rule 608 would need to be aware of the personnel information described above.

The Commission, however, does not believe that SRO voting representatives should be permitted to share with officers or agents of their SRO information concerning customers or the intellectual property of other SROs or customers. The Commission does not believe that SRO officers or agents require detailed audit information regarding individual customers' use of and payment for consolidated data—highly sensitive information that may be commercially valuable—to comply with the provisions of the Revised New Consolidated Data Plan or with their regulatory obligations under the plan. In addition, the Commission believes that such aggregated information about usage of and payment for consolidated market data (for example, information about the number of users, amount of usage, and fees received for individual consolidated data products) should not be shared because, while it would not disclose the usage and payment of individual users, it would contain valuable information about demand for and profitability of consolidated data products, which could be used to market competing proprietary market data products to individual subscribers. Further, as the Commission has stated, personally identifiable information, customer-specific financial information, and audit information is highly sensitive to such a degree that its possession and use should be tightly controlled.<sup>85</sup> Additionally, the Commission does not believe that officers or agents of an SRO would require information concerning the intellectual property of another SRO to fulfill its obligations under the plan.

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representative of that SRO should be permitted to inform officers of that SRO of the relevant facts. Similarly, if the operating committee became aware that a plan employee had engaged in similar conduct, the Commission believes that the officers of all the SROs should be permitted to be informed of the relevant facts.

<sup>85</sup> See, e.g., CTA/CQ Confidentiality Order, *supra* note 52, 85 FR at 28099; UTP Confidentiality Order, *supra* note 52, 85 FR at 28077.

SROs are in competition with each other, and sharing such information would not be in furtherance of the purposes of the Revised New Consolidated Data Plan.

The Commission also believes that Covered Persons who receive or have access to Highly Confidential Information as described above should be required to segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality provisions or policies of the Revised New Consolidated Data Plan. The Commission believes that these requirements would help to ensure that Highly Confidential Information is not made available to persons who are not authorized to have access to the information and that Highly Confidential Information that has been shared in a permissible manner is not misused (such as in the development or marketing of an SRO's proprietary market data products).

Further, the Commission believes that an SRO voting representative who discloses Highly Confidential Information as described above should be required to maintain a log documenting each instance of such disclosure, including the information shared, the persons receiving the information, and the date the information was shared. The Commission believes that the requirement to log the sharing of Highly Confidential Information would provide greater transparency and accountability regarding the sharing of this information because the log would assist compliance personnel at the SRO in ensuring that the SRO is complying with the terms of the plan that limit the sharing of Highly Confidential Information.<sup>86</sup>

The Commission similarly believes that the Revised New Consolidated Data Plan should allow the operating committee of the plan to authorize the disclosure of specified Highly

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<sup>86</sup> Under Rule 608(c), 17 CFR 242.608(c), an SRO is required to comply with the terms of NMS plans of which it is a participant. Additionally, as a record of the SRO under Rule 17a-1, 17 CFR 240.17a-1, the log would also be available to the Commission and its staff in the context of an examination or investigation of, for example, the SRO's compliance with the terms of the Revised New Consolidated Data Plan.

Confidential Information to identified third parties that are acting as agents of the plan. The Commission believes that this provision is appropriate because certain agents of the plan may at times require protected information to make informed decisions regarding the plan and to assist a SRO's compliance with its regulatory obligations. The Commission believes that such authorization should be permitted only on a case-by-case basis, unless the operating committee grants standing approval to allow disclosure of specified recurring information to identified third parties. The Commission further believes that the Revised New Consolidated Data Plan should require that third parties that receive or have access to Highly Confidential Information segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality provisions or policies.<sup>87</sup> The Commission believes that these requirements are appropriate because they are designed to ensure that the disclosed information is properly protected and not misused and because they would promote an efficient process by allowing for the ongoing disclosure of Highly Confidential Information to an identified agent without having to continually seek operating committee approval.

(c) Confidential Information

One commenter on the proposed CT Plan stated that the confidentiality policy would imply that "Confidential Information cannot be shared at all, or at a minimum, casts substantial doubt on what can be shared."<sup>88</sup> The commenter stated that the proposed provision impedes the functioning of the national market system and asked the Commission to eliminate or substantially modify the restriction and solicit comment.<sup>89</sup>

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<sup>87</sup> For example, the operating committee, when granting access to Highly Confidential Information to a third party (other than the Commission), could accomplish this by requiring the recipient to sign an agreement to abide by these requirements for storage and restrictions on use.

<sup>88</sup> NYSE Letter I, supra note 34, at 24.

<sup>89</sup> See id.

In response to this commenter’s concern and consistent with the discussion above, as well as the CT Plan Approval Order,<sup>90</sup> the Commission continues to believe that the Revised New Consolidated Data Plan should permit Covered Persons to disclose Confidential Information only to other persons who need to receive that information to fulfill their responsibilities pursuant to the Revised New Consolidated Data Plan, including oversight of the plan.<sup>91</sup> The Commission believes that this requirement is appropriate because, consistent with the current practices of the Equity Data Plans, financial information necessary for the leadership of an SRO to make decisions regarding the SRO’s participation in the Revised New Consolidated Data Plan—namely, information regarding plan expenses and revenues—would be designated as Confidential and thus permitted to be shared. Consistent with other confidentiality provision requirements discussed above, the Commission also believes that the Revised New Consolidated Data Plan should be required to ensure that recipients of Confidential Information segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the confidentiality provisions or policies of the Revised New Consolidated Data Plan.

Consistent with the CT Plan Approval Order, the Commission continues to believe that the operating committee should also be permitted to authorize the sharing of Confidential Information.<sup>92</sup> The Commission believes that such authorization should be permitted only on a case-by-case basis, unless the operating committee of the Revised New Consolidated Data Plan grants standing approval to allow disclosure of specified recurring information to identified Covered Persons. These requirements are appropriate because expressly including these

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<sup>90</sup> See CT Plan Approval Order, supra note 8, 86 FR at 44188.

<sup>91</sup> The requirements discussed in this section regarding Confidential Information are consistent with the modifications the Commission made to the confidentiality policy of the CT Plan. See CT Plan Approval Order, supra note 8, 86 FR at 44188, 44223–24, vacated on other grounds, Nasdaq v. SEC, 38 F.4th 1126.

<sup>92</sup> See CT Plan Approval Order, supra note 8, 86 FR at 44188.

requirements for handling Confidential Information would provide additional safeguards regarding disclosure of Confidential Information and help to guard against misuse of this information for commercial or other purposes.

#### 4. Use of Subcommittees

One commenter on the CT Plan stated that the activities of subcommittees under the CT Plan would lack transparency and accountability.<sup>93</sup> The Commission continues to believe that, as it stated in the CT Plan Approval Order, “the activities of the CT Plan’s Operating Committee’s subcommittees, if any, should be transparent to the Operating Committee,”<sup>94</sup> and that transparency “should help to ensure that the subcommittee furthers the objectives of” the Revised New Consolidated Data Plan.<sup>95</sup> The Commission believes that this transparency would both facilitate a meaningful role for members of the advisory committee and support Commission oversight of the Revised New Consolidated Data Plan’s operations.

Therefore, the Revised New Consolidated Data Plan shall require that all subcommittees prepare minutes of all meetings and make those minutes available to all members of the operating committee and the advisory committee.<sup>96</sup> The Commission believes that this requirement would provide for transparency and accountability to members of both the operating committee and the advisory committee regarding the operation of subcommittees. In addition, for each meeting of a legal subcommittee, the Commission believes that the plan should require that the minutes include (i) attendance at the meeting; (ii) the subject matter of each item discussed;

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<sup>93</sup> See RBC Letter, supra note 31, at 8.

<sup>94</sup> CT Plan Approval Order, supra note 8, 86 FR at 44177, vacated on other grounds, Nasdaq v. SEC, 38 F.4th 1126.

<sup>95</sup> Id.

<sup>96</sup> See, e.g., id. at 8 (calling for the CT Plan to keep minutes and distribute them to the Operating Committee of the CT Plan to increase transparency and accountability).

(iii) sufficient non-privileged information to identify the rationale for referring the matter to the legal subcommittee, and (iv) the privilege or privileges claimed with respect to that item. The Commission believes that including in the minutes of legal subcommittee meetings these elements of information—similar to those required for privilege logs—would provide for transparency and accountability to members of both the operating committee and the advisory committee regarding the use of the legal subcommittee, while including features designed to help preserve, to the extent appropriate, the SROs’ attorney-client privilege with respect to discussions at legal subcommittee meetings by making the information required to be included in the minutes consistent with what might be required to be contained in a privilege log.

The Commission also believes that the Revised New Consolidated Data Plan’s use of subcommittees should not be permitted to undermine the role of the independent administrator. Therefore, the Commission is requiring that the terms of the Revised New Consolidated Data Plan exclude from the functions that may be delegated to a subcommittee those administrative functions to be performed by the independent administrator. The functions delegated to the independent administrator—particularly those that involve administering vendor and subscriber contracts, performing audits, or assessing fees—necessarily involve access to sensitive information of significant commercial or competitive value and therefore raise heightened concerns about conflicts of interest. These functions should therefore be retained by the independent administrator, which will be subject to enhanced isolation from those conflicts of interest—namely, the requirement that the independent administrator be independent of any SRO that sells its own proprietary equity market data.<sup>97</sup>

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<sup>97</sup> The Commission continues to believe, as it stated in the CT Plan Approval Order, that the independence requirement “separate[s] the independent Administrator from an exchange’s commercial interests and allow[s]

### III. THE REVISED NEW CONSOLIDATED DATA PLAN

The Commission hereby orders the Participants in the Equity Data Plans to jointly develop and file with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,<sup>98</sup> a single Revised New Consolidated Data Plan that replaces the three current Equity Data Plans and that includes, at a minimum, the terms and conditions set forth below:

- The Revised New Consolidated Data Plan shall provide for the orderly transition of functions and responsibilities from the three existing Equity Data Plans and shall provide that dissemination of, and fees for, SIP data will continue to be governed by the provisions of the Equity Data Plans until the Revised New Consolidated Data Plan is ready to assume responsibility for the dissemination of SIP data and fees of the Revised New Consolidated Data Plan have become effective.
- The Revised New Consolidated Data Plan shall provide a date certain by which it will be fully implemented and shall include a timeline specifying the actions or steps necessary to implement the Revised New Consolidated Data Plan, including the dates by which these actions and steps will be completed.<sup>99</sup>
- The operating committee of the Revised New Consolidated Data Plan shall—beginning three months after the formation of the operating committee and continuing every three months until the Revised New Consolidated Data Plan has been fully

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it to focus on the regulatory objectives of Section 11A of the Act.” CT Plan Approval Order, supra note 8, 86 FR at 44196 (quoting Governance Order, supra note 4, 85 FR at 28723), vacated on other grounds, Nasdaq v. SEC, 38 F.4th 1126.

<sup>98</sup> 17 CFR 242.608(a). The Revised New Consolidated Data Plan, or any amendment thereto, must comply with the requirements of Rule 608 of Regulation NMS, including the requirement in Rule 608(a) to include an analysis of the impact on competition. Id.

<sup>99</sup> The Commission has added this new requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission’s rationale for this new requirement is discussed above in Section II.B.1.

implemented—provide written progress reports to the Commission every three months regarding the actions undertaken and provide a detailed description of the progress made toward completing each of the identified actions or steps required to fully implement the Revised New Consolidated Data Plan and shall make these reports publicly available on the Revised New Consolidated Plan’s website.<sup>100</sup>

- The Revised New Consolidated Data Plan shall provide that each exchange group and unaffiliated SRO will be entitled to name a member of the operating committee who will be authorized to cast one vote on all operating committee matters pertaining to the operation and administration of the Revised New Consolidated Data Plan, provided that a member representing an exchange group or an unaffiliated SRO whose market center(s) have consolidated equity market share of more than 15 percent during four of the six calendar months preceding a vote of the operating committee will be authorized to cast two votes, and provided that a member representing an exchange that has ceased operations as an equity trading venue, or has yet to commence operation as an equity trading venue, will not be permitted to cast a vote on Revised New Consolidated Data Plan matters.
- The Revised New Consolidated Data Plan shall include provisions to address circumstances in which a member is unable to attend an operating committee meeting or to cast a vote on a matter.
- The Revised New Consolidated Data Plan shall provide that all actions under the terms of the Revised New Consolidated Data Plan, except the selection of Advisory

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<sup>100</sup> The Commission has modified this requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission’s rationale for this amended requirement is discussed above in Section II.B.1.



Committee members and the decision to enter into an executive session, will be required to be authorized by a two-thirds majority of the votes allocated to the operating committee.

- The Revised New Consolidated Data Plan shall provide for a non-voting Advisory Committee to be selected by majority vote of the operating committee. The Advisory Committee shall consist of individuals representing each of the following categories: 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 (“retail representative”), provided that the representatives of the securities market data vendor and the issuer are not permitted to be affiliated or associated with an SRO, a broker-dealer, or an investment adviser with third-party clients. The retail representative shall have experience working with or on behalf of retail investors and have the requisite background and professional experience to understand the interests of retail investors, the work of the operating committee of the Revised New Consolidated Data Plan, and the role of market data in the U.S. equity market. The retail representative shall not be affiliated with an SRO or a broker-dealer.
- The Revised New Consolidated Data Plan shall provide that the responsibilities of the operating committee will include:
  - Proposing amendments to the Revised New Consolidated Data Plan or implementing other policies and procedures as necessary to ensure prompt, accurate, reliable, and fair collection, processing, distribution, and publication of

information with respect to quotations for and transactions in NMS stocks and the fairness and usefulness of the form and content of that information;

- Selecting, overseeing, specifying the role and responsibilities of, and evaluating the performance of, an independent plan administrator, plan processors, an auditor, and other professional service providers, provided that any expenditures for professional services that are paid for from Revised New Consolidated Data Plan revenues must be for activities consistent with the terms of the Revised New Consolidated Data Plan and must be authorized by the operating committee;
  - Developing and maintaining fair and reasonable fees and consistent terms for the distribution, transmission, and aggregation of core data;
  - Reviewing the performance of the plan processors; and ensuring the public reporting of plan processors' performance and other metrics and information about the plan processors;
  - Assessing the marketplace for equity market data products and ensuring that SIP data offerings are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of SIP data to investors and market participants; and
  - Designing a fair and reasonable revenue allocation formula for allocating plan revenues to be applied by the independent plan administrator, and overseeing, reviewing and revising that formula as needed.
- The Revised New Consolidated Data Plan shall provide that the independent plan administrator will not be owned or controlled by a corporate entity that, either directly

or via another subsidiary, offers for sale its own proprietary market data product for NMS stocks.

- The Revised New Consolidated Data Plan shall include provisions designed to address the conflicts of interest of members as outlined in the Conflicts of Interest Policy Approval Orders.<sup>101</sup> These disclosure and recusal provisions shall apply to any person designated by an SRO to attend meetings of the operating committee or any of its subcommittees, and they shall include a provision that a person subject to the disclosure and recusal provisions may not appoint as its representative a person that is responsible for or involved with the development, modeling, pricing, licensing (including 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), or sale of proprietary data products offered to customers of a securities information processor if the person has a financial interest (including compensation) that is tied directly to the exchange's proprietary data business and if that financial interest would cause a reasonable objective observer to expect the compensation to affect the impartiality of the representative.<sup>102</sup>

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<sup>101</sup> The term “Conflicts of Interest Policy Approval Orders” refers to Securities Exchange Act Releases Nos. 88823 (May 6, 2020), 85 FR 28046 (May 12, 2020) (File No. SR-CTA/CQ-2019-01); and 88824 (May 6, 2020), 85 FR 28119 (May 12, 2020) (File No. S7-24-89). See Governance Order, *supra* note 4, 85 FR at 28725 & n.326.

<sup>102</sup> The Commission has modified this requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs and on its experience with the operations of the Equity Data Plans. The Commission’s rationale for the amendments to this requirement is discussed above in Section II.B.2.

- The Revised New Consolidated Data Plan shall include provisions designed to protect confidential and proprietary information from misuse as outlined in the Confidentiality Policy Approval Orders,<sup>103</sup> with the following requirements:<sup>104</sup>
  - These provisions shall apply to any person designated by an SRO to attend meetings of the operating committee or any of its subcommittees.
  - The Revised New Consolidated Data Plan shall provide that the operating committee may authorize the disclosure of specified Restricted Information to identified Covered Persons or third parties, if it determines that doing so is in furtherance of the interests of the plan, and that such authorization shall be granted on a case-by-case basis, unless the operating committee grants standing approval to allow disclosure of specified recurring information to identified Covered Persons.
  - The Revised New Consolidated Data Plan shall provide that Covered Persons and third parties that receive or have access to Restricted Information pursuant to authorization by the operating committee must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the plan’s confidentiality provisions and policies.
  - The Revised New Consolidated Data Plan shall permit SRO voting representatives on the operating committee to share the only following types of Highly Confidential Information, and only with officers of their SRO who have

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<sup>103</sup> The term “Confidentiality Policy Approval Orders” refers to Securities Exchange Act Release Nos. 88825 (May 6, 2020), 85 FR 28090 (May 12, 2020) (File No. SR-CTA/CQ-2019-04); and 88826 (May 6, 2020), 85 FR 28069 (May 12, 2020) (File No. S7-24-89). See Governance Order, *supra* note 4, 85 FR at 28726 & n.340.

<sup>104</sup> The Commission has modified this requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission’s rationale for the amendments to this requirement is discussed above in Section II.B.3.

direct or supervisory responsibility for the SRO's participation in the new plan, or with agents for the SRO that support the SRO's participation in the plan, provided that such information may not be used in the procurement for, or development, modeling, pricing, licensing, or sale of, proprietary equity market data products: (i) the plan's contract negotiations with the 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.

- The Revised New Consolidated Data Plan shall provide that an SRO voting representative that discloses Highly Confidential Information shall maintain a log documenting each instance of such disclosure, including the information shared, the persons receiving the information, and the date the information was shared. The Revised New Consolidated Data Plan shall require that that Covered Persons who receive or have access to Highly Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the plan's confidentiality provisions and policies.
- The Revised New Consolidated Data Plan shall provide that Covered Persons may disclose Confidential Information only to other persons who need to receive such information to fulfill their responsibilities pursuant to the plan, including oversight of the plan.
- The Revised New Consolidated Plan shall provide that the operating committee may authorize the disclosure of confidential information and that such authorization shall be made on a case-by-case basis, unless the operating

committee grants standing approval to allow disclosure of specified recurring information to identified Covered Persons.

- The Revised New Consolidated Data Plan shall provide that recipients of Confidential Information must segregate the information, retain it in confidence, and use it only in a manner consistent with the terms of the plan's confidentiality provisions and policies.
- The Revised New Consolidated Data Plan shall identify the circumstances in which members may meet in executive session and shall confine executive sessions to circumstances in which it is appropriate to exclude members of the Advisory Committee.
- The Revised New Consolidated Data Plan shall provide that requests to enter into an executive session must be included on a written agenda, along with a clearly stated rationale for each matter to be discussed, and that each such request must be approved by a majority vote of the operating committee.
- The Revised New Consolidated Data Plan shall require that all subcommittees prepare minutes of all meetings and make those minutes available to all members of the operating committee and the advisory committee, and, with respect to any legal subcommittee, the Revised New Consolidated Data Plan shall require that the minutes include (i) attendance at the meeting; (ii) the subject matter of each item discussed; (iii) sufficient non-privileged information to identify the rationale for referring the

matter to the legal subcommittee, and (iv) the privilege or privileges claimed with respect to that item.<sup>105</sup>

- The Revised New Consolidated Data Plan shall exclude from the functions that may be delegated to a subcommittee of the operating committee those administrative functions to be performed by the independent Administrator.<sup>106</sup>
- To the extent that those provisions are in furtherance of the purposes of the Revised New Consolidated Data Plan as expressed in this Amended Order and not inconsistent with any other regulatory requirements, the Revised New Consolidated Data Plan shall adopt and include all other provisions of the Equity Data Plans necessary for the operation and oversight of the SIPs under the Revised New Consolidated Data Plan, and the Revised New Consolidated Data Plan should, to the extent possible, attempt to harmonize and combine existing provisions in the Equity Data Plans that relate to the Equity Data Plans' separate processors.

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<sup>105</sup> The Commission has added this new requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission's rationale for this new requirement is discussed above in Section II.B.4.

<sup>106</sup> The Commission has added this new requirement for the Revised New Consolidated Data Plan based on its reconsideration of the comments received regarding the CT Plan that was previously filed by the SROs. The Commission's rationale for this new requirement is discussed above in Section II.B.4.

IT IS HEREBY ORDERED, pursuant to Section 11A(a)(3)(B) of the Act,<sup>107</sup> that the Participants act jointly in developing and filing with the Commission, as an NMS plan pursuant to Rule 608(a) of Regulation NMS,<sup>108</sup> a Revised New Consolidated Data Plan, as described above. The Participants are ordered to file the Revised New Consolidated Data Plan with the Commission no later than [INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

By the Commission.

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>107</sup> 15 U.S.C. 78k-1(a)(3)(B).

<sup>108</sup> 17 CFR 242.608(a).