

[Securities Regulation Daily Wrap Up, TOP STORY—D.C. Cir.—Exchanges incur another setback in crusade against SEC’s market data plan, \(Jun. 29, 2021\)](#)

Securities Regulation Daily Wrap Up

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By [Amanda Maine, J.D.](#)

The appellate panel sided with the SEC’s designation that its amended market data plan was an order, not a rule, and that the exchanges challenging the amendments to the plan had missed the deadline set by statute for Commission orders.

A panel of the Court of Appeals for the District of Columbia rejected arguments made by several national securities exchanges that the SEC’s equity data plans for the exchanges were actually "rules" and not "orders" as designated by the Commission. The exchanges had filed a challenge to the plans 65 days after the Commission’s action, falling outside of the Exchange Act’s deadline of 60 days for challenging Commission orders. The panel was unconvinced by the assertions made by the exchanges that the "order" was instead a "rule," which would be subject to different deadlines for filing challenges. In addition to giving weight to the SEC’s own designation that its actions did constitute an order, the panel disagreed with the exchanges’ protestations that the court should consider the substance of the Commission’s actions ([New York Stock Exchange v. SEC](#), June 29, 2021, Henderson, K.).

Market data plans. The exchanges had proposed amendments to their market data plans under Regulation National Market System (NMS) to govern the collection, processing, and distribution of stock and quotation information in 2019 to create new confidentiality and conflict-of-interest disclosure requirements. The SEC published notice of the proposed amendments in January 2020, inviting comments on the amendments themselves, as well as several questions posed by the SEC.

In May 2020, the SEC [published](#) four documents labeled "orders," which differed from the amendments proposed by the exchanges, using its authority under Regulation NMS. In addition to imposing certain disclosure obligations on third parties that interact with the exchanges, the new orders required certain SRO employees to recuse themselves from certain market data plan management duties if their compensation is tied to a proprietary data product offered by the exchanges. These changes, according to the exchanges, went "well beyond" their own proposals. The exchanges sought review in the D.C. Circuit 65 days after the entry of the four orders, seeking to vacate the amendments and requesting an injunction to prevent the SEC from implementing and enforcing the orders’ requirements.

Deadline—order or rule? Because the deadline for challenging Commission orders is 60 days, the SEC moved to dismiss the challenge as untimely. The exchanges maintained that the "orders" were not actual orders, but "rules," which would have given the exchanges several more days to file their challenge. The exchanges urged the court to look at the substance of the SEC’s actions, not the SEC’s own designation of the documents as "orders."

The D.C. Circuit panel found the exchanges’ arguments unpersuasive. It dismissed the exchanges’ assertion that the amendments "do not involve case-specific individual determinations" and are intended to "have only a future effect," which the exchanges had maintained made the amendments more consistent with rules than with orders. The panel instead took a "bright line" approach, holding that the SEC’s designation of "order" conclusively determined which filing deadline applies.

The panel rejected the exchanges’ attempt to examine the substance or the procedure used to effectuate an amendment to determine whether it is an order or a rule, instead favoring predictability and clarity. Regulated

parties, according to the panel, should be able to answer a simple procedural question such as "What is the filing deadline?" without having to wade through a complex merits calculation.

The panel also disagreed with the exchanges' reliance on cases where courts have looked beyond an agency's label to the substance of its action. According to the panel, the exchanges drew the wrong lesson from those cases because those instances pertained to when an agency label determined a substantive legal standard as opposed to the case at hand, which involves a dispute about when judicial adjudication is appropriate. If the exchanges met the filing deadline for challenging SEC orders, they would have been free to challenge the SEC's approval of the amendments by way of order rather than by rule. Deferring to the Commission's designation of its action as an "order" affects only the deadline for challenging the action, not the substantive legal standard applicable to its merits, the panel concluded.

Latest setback. The D.C. Circuit had recently dismissed on jurisdictional grounds another challenge to the SEC's foray into improving market data under Regulation NMS. A petition filed by Nasdaq challenging the Commission's requirement that exchanges submit to the SEC a new NMS plan for consolidated equity market data was "premature." According to the [panel](#) in that case, the Commission's purported action did not constitute a "final order" under Exchange Act Section 25(a) that could confer direct appellate jurisdiction on the D.C. Circuit. The exchanges also faced pushback from the Commission itself regarding its market data efforts when it [refused](#) to stay its Market Data Infrastructure rule in March.

The case is [No. 20-1242](#).

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