Securities Regulation Daily Wrap Up, TOP STORY—SEC refuses to stay new market data infrastructure rule, (Mar. 25, 2021)

Securities Regulation Daily Wrap Up

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According to the Commission, the exchanges did not make the case that the rule would cause irreparable harm and failed to challenge the rule on the merits.

The Securities and Exchange Commission has denied a request filed by several national exchanges to stay implementation of its Market Data Infrastructure rule (MDI rule). The exchanges, including NYSE, Nasdaq, and Cboe, filed a petition to stay the rule pending final resolutions of their petitions for review of the SEC's Consolidated Data Plan. In denying the motion for a stay, the Commission determined that the exchanges failed to meet their burden to demonstrate substantial harm resulting from the MDI rule and failed to challenge the merits of the rule itself (*In the Matter of Market Data Infrastructure*, Release No. 34-91397, March 24, 2021).

Market Data Infrastructure rule. In December 2020, the SEC voted unanimously to amend Regulation NMS to modernize the national market system for the collection and consolidation of information with respect to quotations for transactions. The new rules implement a decentralized consolidation model in which competing consolidators (instead of exclusive securities information processors (SIPs)) will be responsible for collecting, consolidating, and disseminating consolidated market data. Under these rules, self-regulatory organizations (SROs) are required to make available data that is necessary to generate consolidated market data for competing consolidators. In addition, the new rules expand the content of NMS market data.

Exchanges' petitions. On February 5, the exchanges filed a motion with the Commission to stay the effect of the MDI rule pending final resolution of their petitions for review challenging the SEC's order directing exchanges and FINRA to submit a new Regulation NMS plan on consolidated equity market data (the NMS Governance Order) as well as the SEC's approval of the new consolidated data plan filed in response to the NMS Governance Order. The exchanges also filed petitions for review of the MDI rule in the D.C. Circuit Court.

Stay not justified. In its order denying the exchanges' motion to stay the MDI rule, the SEC cited the "familiar four-factor framework" to consider whether a stay during litigation should be granted. These factors are:

- whether there is a strong likelihood that a party will succeed on the merits;
- whether the issuance of a stay would likely serve the public interest;
- whether there would be substantial harm to any person if the stay were granted; and
- whether, without a stay, a party will suffer imminent, irreparable injury.

The Commission's order stated that the exchanges made no attempt to challenge the actual merits of the MDI rule or its three-phase, multi-year transition period. As a result, the Commission does not have the opportunity to address whether a challenge to the merits of the rule would support an application for a stay.

The SEC also declared that the exchanges had not made the case that a stay would be in the public interest. The SEC noted that the exchanges did not contest the Commission's finding that the MDI rule would serve the public interest, such as providing widespread availability of critical and timely NMS information to market participants, adding that the current NMS information system was developed in the 1970s. The MDI rule would modernize NMS information for the benefit of investors and enhance content, reduce latency, and improve the dissemination of consolidated market data as detailed in the SEC's release, according to the Commission.

The SEC advised that the exchanges did not identify any irreparable "or even significant harm" to justify delaying the MDI rule. Instead, the SEC noted, the exchanges tethered their stay request to two different events: Commission approval of the new consolidated data plan and the resolution of their challenge to the

NMS Governance Order in the D.C. Circuit. In response, the SEC notes that the exchanges did not argue that without a stay they would suffer imminent injury and that they did not identify a date by which they would suffer irreparable harm.

Even if alleged harm from a different final agency action might justify a stay, the exchanges did not make this case, according to the Commission. While the SEC has explained that the NMS Governance Order and the MDI rule "work together" to address significant and overlapping issues in the national market system, it reiterated that neither initiative depends on the other being implemented before it takes effect.

The Commission also rejected the claim by the exchanges that the MDI rule has created uncertainty among regulated parties, including the proposed fee schedule for the data underlying the new expanded consolidated data. The Commission replied that the MDI rule reflects current defined terms and obligations under Regulation NMS and accommodates future changes to the national market system.

"Had we intended to link the implementation of the Governance and Market Data Infrastructure initiatives, we would have done so expressly," the Commission emphasized in its order denying the stay. "We included no requirement or expectation in the transition period discussion of the Market Data Infrastructure Adopting Release that any action on the proposed New Consolidated Data Plan must occur before the Market Data Infrastructure rule takes effect, and we decline to effectively transpose such a requirement onto the transition period now," the Commission declared.

The Commission briefly addressed the exchanges' concerns about the challenges posed by the ongoing pandemic, but concluded that these challenges did not merit a stay of the rule, and denied the exchanges' motion.

The release is No. 34-91397.

Companies: Nasdaq Stock Market LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc. and Cboe Exchange, Inc.

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