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November 12, 2020

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

Re: Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data (Release No. 34-90096; File No. 4-757)

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) welcomes the opportunity to comment on the Securities and Exchange Commission’s (“SEC’s” or “Commission’s”) notice soliciting comments on the proposed new single national market system (“NMS”) plan governing the public dissemination of real-time, consolidated equity market data for NMS stocks (the “CT Plan”),¹ which was filed by the national securities exchanges and FINRA (collectively, the “SROs”) on August 11, 2020 pursuant to the SEC’s May 6, 2020 order (the “Order”).² If approved, the CT Plan would replace the three current NMS plans (the “Current Plans”) that currently govern the public dissemination of real-time, consolidated equity market data through the securities information processors (“SIPs”). FINRA is writing to provide feedback on certain issues raised in the Commission’s request for comment where FINRA believes changes to the CT Plan, as it has been proposed by the SROs, could potentially result in negative unintended consequences that would impede FINRA’s ability to efficiently and effectively participate in the CT Plan.

I. Background

FINRA is the only national securities association registered with the Commission under Section 15A of the Securities Exchange Act of 1934 (the “Exchange Act”)³ and is organized as a not-for-profit corporation. FINRA is the SRO responsible for the regulation and oversight of the

¹ See Securities Exchange Act Release No. 90096 (October 6, 2020), 85 FR 64565 (October 13, 2020) (Joint Industry Plan; Notice of Filing of a National Market System Plan Regarding Consolidated Equity Market Data) (the “Proposing Release”).

² See Securities Exchange Act Release No. 88827 (May 6, 2020) 85 FR 28702 (May 13, 2020) (Order Directing the Exchanges and the Financial Industry Regulatory Authority To Submit a New National Market System Plan Regarding Consolidated Equity Market Data).

³ See 15 U.S.C. 78o-3.

over-the-counter (“OTC”) market in NMS stocks. Among FINRA’s responsibilities with respect to the OTC market is to provide FINRA members with a mechanism for reporting NMS stock transactions effected otherwise than on an exchange, which is generally effected through the three currently active FINRA Trade Reporting Facilities (“TRFs”). TRF data is provided to the SIPs for inclusion in the consolidated public equity market data feeds, which are overseen by the Operating Committees of the Current Plans and will, if approved, be governed by the Operating Committee of the new CT Plan. FINRA does not receive market data revenue for the transaction information provided to the SIPs via the TRFs⁴ and FINRA does not offer or sell any proprietary data products involving NMS stocks.⁵ Thus, FINRA has a unique role as an SRO participant in the proposed CT Plan, because FINRA is the sole SRO participant that is non-profit, is responsible for the OTC market in NMS stocks, and is not selling any competing proprietary data products.

II. Request for Comment on the CT Plan

A. Role of Member Observers

The proposed CT Plan defines a “Member Observer” as “any individual, other than a Voting Representative, that a Member, in its sole discretion, determines is necessary in connection with such Member’s compliance with its obligations under Rule 608(c) of Regulation NMS to attend Operating Committee and subcommittee meetings.”⁶ Essentially, Member Observers are all of the individuals representing the SRO participants in CT Plan matters, other than the single, designated SRO Voting Representative for each SRO Group or Non-Affiliated SRO. The concept of Member Observers was included in the proposed CT Plan to account for the practical realities involved with the day-to-day operation of, and the SROs’ participation in, the Current Plans, which will be equally as relevant for the CT Plan if it is approved.

FINRA’s commitment to collaboration as a core value across our organization carries through to FINRA’s participation in NMS plans, including the Current Plans and, if approved, the proposed CT Plan. FINRA approaches our participation in the Current Plans through a collaborative team effort, drawing on resources within our organization with differing views, skills sets, experience and areas of expertise. While FINRA may have one designated voting representative, that individual by necessity collaborates with many other people within FINRA to make the best and most informed decisions as possible in furtherance of FINRA’s mission and

⁴ FINRA operates the TRFs via the “Business Members,” Nasdaq, Inc. and NYSE Market (DE), Inc. The Business Members are entitled to the SIP revenues pursuant to the contractual arrangements establishing the TRFs and share a percentage of those revenues with FINRA member TRF participants in the form of transaction credits. See, e.g., FINRA Rules 7610A and 7610B.

⁵ TRF data is provided to the SIPs for consolidation and dissemination via the SIP data feeds. While TRF data is also offered as part of certain proprietary data products sold by the Business Members’ exchange affiliates, FINRA itself does not sell or offer the TRF data. FINRA has no role in developing or setting pricing for the products offered by the Business Members’ exchange affiliates and does not have access to any individual proprietary data customer information via the TRF relationships.

⁶ Proposing Release at 64576.

the goals of the Current Plans, and often such other individuals participate in Current Plan meetings to obtain information and provide input as part of that process.

In its request for comment on the CT Plan, the Commission asks a number of questions regarding the role of Member Observers and whether various limitations on Member Observers may be appropriate. FINRA appreciates and agrees with the Commission's concerns regarding potential conflicts of interest that may arise with the involvement of individuals responsible for competing proprietary data products. However, we are concerned that some of the limitations suggested by the request for comment—if applied too broadly—could unnecessarily interfere with FINRA's ability to effectively staff its participation in the CT Plan and undermine our collaborative approach to reaching appropriate decisions as an SRO. Below are a few specific examples from the Commission's request for comment:

- *Question 5: "...should the proposed definition [of "Covered Persons"] specifically include Member Observers, as defined in Article I, Section 1.1(oo) of the proposed CT Plan?"*
 - FINRA notes that, for purposes of the Confidentiality Policy under the proposed CT Plan, "Covered Persons" includes "representatives of the Members" as well as "employees...of...a Member."⁷ We believe these categories already cover Member Observers, but have no objection to explicitly adding Member Observers to the definition of Covered Persons for clarity as we agree that individuals qualifying as Member Observers should be subject to the Confidentiality Policy.
- *Question 7: "...What are commenters' views on whether an SRO would reasonably find it necessary to select a Member Observer to comply with its obligations under Rule 608(c) of Regulation NMS? Under what circumstances, if any, would the representation of an SRO on the Operating Committee by its selected SRO Voting Representative be an insufficient means for the SRO to fulfill its obligations under Rule 608 of Regulation NMS? Should persons who hold certain positions within an SRO be prohibited from serving as Member Observers? For example, should a person who has direct responsibility for the management, marketing, sale, or development of proprietary equity data products offered separately be permitted to serve as a Member Observer? If Member Observers are necessary, should only persons who perform certain roles within an SRO (e.g., legal or compliance personnel) be able to serve as Member Observers? Should the CT Plan limit the number of Member Observers that each SRO would be permitted to name or the frequency with which the person serving as a Member Observer can be changed? If so, how?"*
 - As described above, FINRA staffs its participation in the Current Plans on a collaborative basis, with various individuals participating in specific plan matters based on the specific issues under discussion. While FINRA's voting representative formally casts votes on behalf of FINRA, staff and senior

⁷ See *id.* at 64575.

management from different FINRA departments, including, for example, Transparency Services, Office of General Counsel, Market Regulation, Finance and Technology, provide input into these decisions and may attend Operating Committee or subcommittee meetings, as needed. The ability of FINRA to effectively participate in the Current Plans depends on the flexibility provided by permitting individuals that would be considered “Member Observers” under the CT Plan to fully participate in Current Plan matters and for those individuals to be determined by FINRA in its discretion as an SRO.

FINRA is therefore concerned that placing potentially broad restrictions on an SRO’s ability to select Member Observers would unduly hinder FINRA’s ability to fulfill its obligations as an SRO and under the Plan, including the requirement to comply with the CT Plan pursuant to Rule 608(c) of Regulation NMS. In particular, FINRA does not believe that it would be appropriate to restrict Member Observers to persons who perform certain roles within an SRO, nor to limit the number of Member Observers that an SRO would be permitted to name or the frequency with which such personnel can be changed. These types of constraints would not provide any meaningful benefits to the governance of the CT Plan, but would inappropriately restrict the ability of SROs, including FINRA, to make their own decisions about how to fulfill their regulatory responsibilities. However, as noted above, FINRA understands the Commission’s concerns regarding potential conflicts of interest related to proprietary data products, and believes that more targeted restrictions on Member Observers to address such concerns would be appropriate and consistent with the CT Plan’s overall approach to conflicts of interest.

- *Question 20: “...Do commenters believe that permitting Member Observers to attend Executive Sessions is necessary? If so, under what circumstances do commenters believe Member Observers should attend? Should the CT Plan limit the ability of some or all Member Observers to attend Executive Session, Operating Committee, or subcommittee meetings? If so, under what circumstances should such attendance be limited and to what subset, if any, of Member Observers should such limitations apply?”*
 - For the same reasons discussed above, FINRA does not believe that it would be consistent with effective SRO participation in the CT Plan to restrict Member Observers from attending Executive Sessions, particularly if more targeted restrictions on Member Observers are in place, as noted above. While the use of Executive Sessions is intended to be limited to certain specified circumstances under the CT Plan, the matters discussed in such sessions may involve issues of critical importance to the SRO participants. An SRO should be permitted to make its own determinations as to the appropriate individuals to attend Executive Sessions based on the content of the matters to be discussed and the obligations of the SRO.

- *Question 26: "...What are commenters' views on whether Member Observers should be permitted to serve as a subcommittee chair?... Should Member Observers be permitted to participate in subcommittee deliberations?"*
 - For the same reasons discussed above, and similar to Executive Sessions, FINRA is concerned that limiting the ability of Member Observers to participate in, or chair, subcommittees of the CT Plan Operating Committee would unnecessarily interfere with the effective administration and operation of the CT Plan. Subcommittee are often convened to focus on specific projects or subject matter areas. It is therefore particularly critical that Member Observers representing different skill sets and expertise be permitted to fully participate in subcommittee deliberations, including to chair such subcommittees when appropriate (e.g., by necessity, technology personnel must be permitted to attend technical subcommittee meetings, regardless of whether such individuals are an SRO's voting representative).

- *Question 27: "Section 4.7(c) provides that SRO Voting Representatives, Member Observers, and other persons as deemed appropriate by the SRO Voting Representatives may meet in a subcommittee to discuss an item subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan. What are commenters' views on the scope of the "other persons" who may be deemed appropriate by the SRO Voting Representatives to discuss an item subject to attorney-client privilege of the CT Plan or that is attorney work product of the CT Plan? Should there be any limitations? If so, what limitations would be appropriate?"*
 - While this question does not specifically address the role of Member Observers, FINRA notes that the same considerations discussed above with respect to subcommittee deliberations generally would also apply to subcommittee discussions that may be subject to attorney-client privilege or the attorney work product doctrine.

- *Question 33: "Article IV, Section 4.11(a) of the proposed CT Plan states that the SROs and the Non-SRO Voting Representatives are subject to the Confidentiality Policy set forth in Exhibit C to the CT Plan. Do commenters believe that Section 4.10(a) should be modified to expressly apply to Member Observers? Do commenters believe that the definition of Member Observer should be more narrowly tailored to limit the individuals within an SRO that have access to Highly Confidential or Confidential Information? Should Member Observers be prohibited from receiving Restricted or Highly Confidential Information, or be excluded from being present when such information is discussed? Should Member Observers be required to demonstrate a legitimate or particularized need for specific Restricted or Highly Confidential Information before being granted access? Are there other confidentiality provisions that should expressly apply to Member Observers?"*
 - As noted above, FINRA believes that Member Observers are already subject to the Confidentiality Policy, and has no objection to modifying Section 4.11(a) of the CT Plan to provide clarity on that point. However, for similar

reasons as discussed above, FINRA does not believe that narrowing the scope of Member Observers able to have access to information under the Confidentiality Policy, or placing additional restrictions or conditions on the receipt of certain types of information by Member Observers, is necessary or appropriate. As Covered Persons, Member Observers would already be fully subject to the stringent protections set forth in the Confidentiality Policy. Under the generally applicable provisions of the Confidentiality Policy, Restricted Information would not be available to SRO Member Observers in any case. Access to Highly Confidential and Confidential Information would be subject to the strict limitations generally applicable to those categories of information, which were already reviewed, modified and approved by the Commission.⁸ Restricting access to CT Plan information further would unnecessarily impede FINRA's ability to effectively participate in CT Plan matters through our Member Observers without any correspondent benefits. As a practical matter, FINRA personnel that are involved in CT Plan matters on FINRA's behalf must have access to this information in order for FINRA to fulfill its regulatory responsibilities.

B. Representative Term Limits

Under the proposed CT Plan, and in accordance with the Order, Non-SRO Voting Representatives would be selected to represent six specified categories of non-SRO persons with interests in the operations of the SIP data feeds. In the Order, the Commission required that the CT Plan provide for two-year terms for Non-SRO Voting Representatives with a "maximum term to be set forth" in the CT Plan, as determined by the SROs.⁹ Accordingly, under Section 4.2(b) of the CT Plan, Non-SRO Voting Representatives would serve for two-year

⁸ See Securities Exchange Act Release No. 88826 (May 6, 2020), 92 FR 28069 (May 12, 2020) (Joint Industry Plan; Order Approving the Forty-Seventh Amendment to 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, as Modified by the Commission, Concerning a Confidentiality Policy); Securities Exchange Act Release No. 88825 (May 6, 2020), 85 FR 28090 (May 12, 2020) (Consolidated Tape Association; Order Approving the Thirty-Third Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Fourth Substantive Amendment to the Restated CQ Plan, as Modified by the Commission, Concerning a Confidentiality Policy).

⁹ See Order at 28730; see also *id.* at 28720 ("The Commission further believes that the New Consolidated Data Plan should provide a maximum term limit for non-SRO members to ensure that new and diverse viewpoints are reflected among the non-SRO members of the operating committee. The Commission is not dictating in this Order what the maximum term limit must be. The Commission believes that the SROs, as current members of numerous NMS plan operating committees, may have useful insights into balancing the value of having long-standing members on an operating committee with the potential detriment of allowing a membership to become stale and no longer useful or engaged and are thus well positioned to propose what the maximum term limit should be in the first instance. Accordingly, as proposed, the Commission is ordering that the New Consolidated Data Plan provide that non-SRO members of the operating committee serve for a term of two years and that the New Consolidated Data Plan set forth a maximum term limit for non-SRO members.").

terms for a maximum of two terms total, whether consecutive or non-consecutive.¹⁰ By contrast, SRO Voting Representatives would be designated by each SRO Group or Non-Affiliated SRO to vote on behalf of the SRO Group or Non-Affiliated SRO, and such individuals would not be subject to any specific term limits. In its request for comment on the CT Plan, the Commission asks several questions related to these term limit provisions, and in particular asks whether “similar term limits [as apply to Non-SRO Voting Representatives] should apply to SRO Voting Representatives.”¹¹

The Commission required the SROs to propose a maximum term limit for Non-SRO Voting Representatives, but did not specify such maximum in the Order, so that the SROs could use their “useful insights” to balance “the value of having long-standing members on an operating committee with the potential detriment of allowing a membership to become stale and no longer useful or engaged.”¹² While the two-year, two-term maximum term limit was proposed to strike this balance, FINRA would support longer maximum term limits to ensure that Non-SRO Voting Representatives are able to gain knowledge and experience with the specifics of SIP operations, which can be very technical in nature, and allow them to provide more meaningful input into the CT Plan’s operations.

However, FINRA does not believe that term limits of any length are necessary or appropriate for SRO Voting Representatives. Non-SRO Voting Representatives and SRO Voting Representatives will serve fundamentally different roles on the CT Plan’s Operating Committee. Non-SRO Voting Representatives will be selected to represent specific market segments or other constituencies in order to provide input on SIP-related issues and decisions that will impact those constituencies.¹³ Since Non-SRO Voting Representatives represent the interests of groups, which may include diverging and evolving views, periodic change may be beneficial. As the Commission recognized in the Order, maximum term limits would therefore ensure that “new and diverse viewpoints are reflected among the non-SRO members of the operating committee.”¹⁴

SRO Voting Representatives, on the other hand, are the individuals designated to formally vote on behalf of the SRO participants in the CT Plan. Unlike the Non-SRO Voting Representatives, it is the SROs themselves, not these individuals, that will be the participants in the CT Plan. SROs have unique regulatory responsibilities and obligations, and are subject to consequences for not fulfilling those obligations.¹⁵ An SRO Voting Representative must vote

¹⁰ See Proposing Release at 64580.

¹¹ See *id.* at 64569 (Question 18).

¹² See Order at 28780.

¹³ See, e.g., *id.* at 28718 (“The Commission anticipates that...the operating committee of the New Consolidated Data Plan will be able to attract knowledgeable representatives of securities market data vendors and issuers as the New Consolidated Data Plan will address issues and make important decisions that will impact these constituencies.”).

¹⁴ See *id.* at 28720.

¹⁵ For example, FINRA is required under the Exchange Act to have rules “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,


based on the collective position of the SRO that he or she represents, in furtherance of the SRO's regulatory obligations. For example, as discussed above, FINRA participates in the Current Plans, and would participate in the CT Plan, through a collaborative effort of a number of individuals within FINRA with the shared goal of fulfilling FINRA's regulatory responsibilities as an SRO and as a participant in the Current Plans.

Given this distinction in roles, FINRA does not believe there is a need or benefit to imposing term limits on SRO Voting Representatives. In fact, since FINRA employs a limited number of individuals with day-to-day responsibilities related to the SIPs—as opposed to the broader pool of potential applicants for Non-SRO Voting Representative positions—arbitrarily imposing term limits would create inefficiencies and could negatively impact FINRA's ability to effectively participate in CT Plan matters. Therefore, FINRA believes that term limits would be inappropriate for SRO Voting Representatives.

III. Conclusion

FINRA thanks the Commission for its attention to these matters. Should you have any questions or wish to further discuss FINRA's views, please contact Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, at [REDACTED].

Very truly yours,



Marcia E. Asquith
Executive Vice President,
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to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest..." See 15 U.S.C. 78o-3(b)(6). National securities exchanges are subject to similar requirements. See 15 U.S.C. 78f(b)(5).