[INITIAL BRIEF]

ORAL ARGUMENT NOT YET SCHEDULED
No. 21-1167, Consolidated with Nos. 21-1168, 21-1169

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NASDAQ STOCK MARKET LLC, et al.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Petitions for Review of Orders
of the United States Securities and Exchange Commission

BRIEF OF INVESTMENT COMPANY INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), amicus curiae Investment Company Institute certifies as follows:

A. Parties and Amici

All parties, intervenors, and amici appearing before this Court are listed in the Opening Brief for Petitioners at page i, with the exception of the Investment Company Institute ("ICI") which obtained the parties' consent to file an amicus brief on December 14, 2021.

ICI is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI carries out its international work through ICI Global, with offices in London, Brussels, Hong Kong, and Washington, D.C.

ICI has no parent company, and no publicly held company owns ten percent or more of its stock.

B. Rulings Under Review

The ruling under review is identified in the Opening Brief for Petitioners at pages i-ii.

C. Related Cases

The related cases are identified in the Opening Brief for Petitioners at page ii.

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GLOSSARY

CT Plan	The National Market System plan adopted by the Commission in the CT Plan Order that will replace the Existing Plans
CT Plan Order	Joint Industry Plan; Order Approving, as Modified, a National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-92586, 86 Fed. Reg. 44,142 (Aug. 11, 2021)
Exchange Act	Securities Exchange Act of 1934
Existing Plans	The three National Market System plans that currently govern the dissemination of core market data for equity securities
FINRA	Financial Industry Regulatory Authority, Inc.
ICI	Investment Company Institute
NMS	National Market System
NMS Governance Order	Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Exchange Act Release No. 34-88827, 85 Fed. Reg. 28,702 (May 13, 2020)
Orders	The CT Plan Order and NMS Governance Order
SEC	Securities and Exchange Commission
SRO	Self-regulatory organization

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in an addendum to the Opening Brief for Petitioners.

IDENTITY AND INTEREST OF AMICUS CURIAE AND SOURCE OF AUTHORITY TO FILE

The Investment Company Institute ("ICI") is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and advance the interests of funds and their shareholders, directors, and advisers. ICI's members manage total assets of $32.7 trillion in the United States, serving more than 100 million U.S. shareholders, and $9.9 trillion in assets in other jurisdictions.

The regulated funds represented by ICI have a significant interest in equity market data as contributors to, and consumers of, market data. Funds rely on that data to maximize returns on behalf of investors, including by monitoring market conditions, informing investment decisions, conducting transaction cost analysis, and fulfilling regulatory obligations. ICI has long advocated to reform the governance system for disseminating real-time data about equity market transactions, and it participated, by submitting comments, in the rulemaking process for the Orders. ICI believes that the Orders meaningfully address conflicts of interest in the current governance system that harm the entire investment community—including regulated funds, their brokers, and fund investors—and thereby the public interest.

All parties have consented to the filing of this brief. D.C. Cir. Rule 29(b). No counsel for a party authored this brief in whole or in part, and no person other than

ICI contributed any money that was intended to fund preparing and submitting this brief. Fed. R. App. P. 29(a)(4)(E).

BACKGROUND

This case concerns two orders issued by the Securities and Exchange Commission ("SEC" or the "Commission") that modernize and improve access to equity market trading data. The NMS Governance Order directed the national securities exchanges and the Financial Industry Regulatory Authority, Inc. ("FINRA") to propose a joint plan governing the public dissemination of real-time, consolidated data about securities trading in the equity markets, which the SEC approved in the CT Plan Order (collectively, "the Orders"). The Orders direct a new, consolidated National Market System ("NMS") plan governing dissemination of data concerning equity transactions (the "CT Plan") to replace the three existing plans (the "Existing Plans").

The data dissemination covered by the Orders is the lifeblood of the nation's equity markets. More than ever, millions of Americans invest and save in these markets, whether through trading individual stocks or investing in collective vehicles, such as mutual funds directly or through retirement plans. Simplified, those securities trade on the exchanges through a bid-and-ask structure: a potential buyer looking to acquire a stock offers a price (the "bid") that the buyer is willing to pay, and a potential seller sets the price (the "offer" or the "ask") that the seller is

willing to accept. When a seller's offer and buyer's bid match, the parties transact, transferring the security at the agreed-upon price. The information on the bids and offers for all equity securities traded on the various exchanges, along with data on the resulting trades, constitutes the securities information processor data (called "SIP data" in the Orders) governed by the NMS plans. Maximizing access to this data, and enabling access by the greatest number of participants, is critical to leveling the playing field in the markets. Today, more data is available than ever because technology has advanced, markets have evolved, and trading volume has increased, making broad access to that data even more critical.

Investors are thus both the suppliers of the securities information processor data (through their trading activities) and its primary consumers (as they consider further trades). Anyone intending to trade an equity security, whether an individual or an institutional investor, depends on trade and quote data from the different securities exchanges. By regulation, investors must be shown a consolidated display of securities information processor data when ordering a stock trade or deciding how and on which exchange to carry out the trade (a process called "order routing"). Investment professionals also use securities information processor data to obtain critical regulatory information and to confirm that they are complying with their fiduciary duty to obtain "best execution" for their clients—*i.e.*, that they get "the

optimal combination of price, speed, and liquidity" for the trade. *Kurz v. Fidelity Mgmt. & Rsch. Co.*, 556 F.3d 639, 640 (7th Cir. 2009).

The SEC directed that the CT Plan include governance structure improvements to address conflicts of interest inherent in control of the Existing Plans by the exchanges and FINRA (together, "self-regulatory organizations" or "SROs"). These conflicts of interest arose from the exchanges' sale of proprietary data products that compete with the securities information processor data. Those products generate significant revenue for the exchanges. Unsurprisingly, the exchanges have focused on enhancing their proprietary offerings, by providing more data and delivering it faster than the securities information processor data—features of significant value to the investment community.

Investors have no formal role in the Existing Plans' oversight, and the exchanges routinely resist investors' recommendations—made through advisory bodies—for improvements to the securities information processor data available under the Existing Plans. While the exchanges enhanced their competing, proprietary data products by "deploy[ing] cutting edge technology to reduce latency" and including "greater content," they did not improve the Existing Plans' securities information processor data in a similar way, making the slower and less useful securities information processor data "meaningfully lag behind." JA_[85.Fed.Reg.28704]. As a consequence, institutional investors feel obligated to

purchase the exchanges' proprietary data feeds. Meanwhile, investors have no effective avenue to improve the situation.

The Existing Plans are administered by Petitioners Nasdaq and NYSE, but the Orders require that the CT Plan be administered by an entity that does not sell its own data products that compete with securities information processor data. The Orders also direct changes to the governance of the CT Plan's operating committee, which has oversight and decision-making authority for the equity market data system. In particular, the Orders direct inclusion of representatives of other types of market participants on the operating committee (called "non-SRO members"), such as representatives of individual and institutional investors, and gives those representatives minority voting rights.

On behalf of regulated funds and their investors, ICI participated in the rulemaking process for these Orders. ICI explained that expanding the operating committee, improving the voting structure, and hiring an independent administrator would substantially improve governance of securities information processor data.

SUMMARY OF ARGUMENT

This case concerns how to remedy a governance system that harms the investing public because the entities charged with overseeing it have a pervasive conflict of interest. Congress intended the plan governing securities information processor data to operate "in the public interest" and "for the protection of investors."

To date, however, it has been administered by for-profit stock exchanges that are motivated by self-interest in selling their own proprietary data products, which compete with the securities information processor data.

In promulgating the Orders, the SEC correctly recognized that the governance structure for equity market data needs improvement to address the exchanges' inherent and demonstrated conflicts of interest and to provide more representation to the market participants who provide and consume the data.

Currently, the SROs have complete control over the quality and cost of securities information processor data, even though they are for-profit entities that develop and offer proprietary data products in direct competition with the securities information processor data feeds, which they are charged to operate in the public's interest. This is a clear conflict that would be unacceptable in any context. The conflict has only increased over time, as these proprietary feeds became significant sources of revenue, and as consolidation of exchanges resulted in the three large affiliated exchange groups being able to control the operating committees under the Existing Plans. These exchanges have enhanced their own offerings, making them faster and offering more content, while offering inferior updates to the securities information processor data feeds.

Furthermore, a key constituency of the equity market data system—participants in those markets such as the members of the investment community

represented by ICI—has no meaningful voice in the system's operations. Congress intended securities information processor data to serve a public function for all market participants, and the market's technological advances and increased volume of trades have heightened the importance of widespread availability of such data. Yet the investment community's ability to provide input on the operation or administration of the Existing Plans is limited and ineffective.

The Orders address these problems head-on, including by introducing a meaningful, though not equal, role for other market participants, such as representatives of retail and institutional investors and broker-dealers, who would join the body that oversees the securities information processor data system. Importantly, those representatives will express the interests of investors who contribute and consume securities information processor data. They will bring a different perspective than the exchanges, not least because they do not sponsor products that compete directly with the securities information processor data feeds. The SEC also revamped the operating committee's voting structure, limiting to a two-vote maximum the power of any single affiliated group of exchanges. This enhancement should curb the trend of exchanges expanding voting power through acquiring competing exchanges, and it ensures that any single affiliated exchange group exercises proportional voting power.

The Orders also direct that the CT Plan's administrator must be independent, which will further ameliorate the exchanges' conflict of interest under the Existing Plans. The administrator is responsible for day-to-day management and operations but also has access to sensitive customer information that can be used to benefit proprietary data products. NYSE and Nasdaq, which sell such products, are the Existing Plans' administrators.

These improvements are, by design, self-reinforcing: a CT Plan, administered by an independent entity, the oversight of which represents a broader range of independent market participants, will be better able to make future adjustments to meet the needs of all constituents without regular SEC involvement. The principle of independence is fundamental in American corporate governance. Indeed, Petitioners require all listed companies to have a majority of independent directors. N.Y.S.E. Listed Company Manual § 303A.01, https://nyseguide.srorules.com/listed-company-manual; Nasdaq Rulebook, Rule 5605(b)(1), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/. As Nasdaq has itself recognized, a primary benefit of having independent directors is to "guard against conflicts of interest." Note, Nasdaq Rulebook, IM-5605-1. The involvement of independent voices in the CT Plan's operating committee will have the similarly salutary effect of ensuring the CT Plan operates in the public interest.

Petitioners' suggestion (Br. 33-34, 56-57) that non-SROs cannot provide effective oversight misses the mark. Especially in comparison to the SROs' *actual* conflicts of interests, the purported shortcomings of non-SRO participants to which Petitioners point are either nonexistent or, at most, purely speculative. In reality, non-SRO operating committee members will represent interests that are aligned with the public interest of having "prompt, accurate, reliable, and fair" public equity market data. 15 U.S.C. § 78k-1(c)(1)(B). In any event, the Orders contain effective procedural safeguards, such as conflict-of-interest requirements and a public nomination process, to address any possible conflicts that might arise for non-SRO participants.

Finally, while the SEC's brief sets forth in detail why the Orders are a proper exercise of the SEC's authority under Section 11A of the Exchange Act, it bears emphasis that Petitioners are mistaken in arguing (Br. 27-45) that the SROs can no longer "act jointly" in operating the NMS equity data plan, as Section 11A requires. Petitioners are wrong to suggest that non-SROs will have an "equivalent role" to that of the SROs. *Id.* at 29. The Orders require a *majority of SROs' votes* for "all actions" and further cap non-SRO participant voting power. The structure the SEC adopted thereby respects the statutory requirement of allowing joint SRO action while giving those who actually generate and use the securities information processor data the means to provide input into oversight of the equity market data feeds.

ARGUMENT

I. THE EXISTING PLANS ARE PLAGUED WITH INHERENT CONFLICTS OF INTEREST AND DENY MEMBERS OF THE INVESTMENT COMMUNITY MEANINGFUL INPUT

A. Conflicts of Interest Undermine the Current Governance Structure

The Existing Plans allow the SROs to exercise monopoly-like control over securities information processor data and do not provide the suppliers and primary users of that data with any effective input in the plans' administration or governance. Nasdaq and NYSE are the administrators of the Existing Plans, JA_[85.Fed.Reg.28722], which provide *only* SROs with voting power on the operating committee.

The exchanges dominate the system for disseminating securities information processor data under the Existing Plans even though they have an inherent conflict of interest that, in any other context, would be considered unacceptable: the exchanges, which operate as for-profit businesses, price and sell their own proprietary data products that compete directly with the securities information processor data but provide subscribers with more granular market data delivered at faster speeds. Put otherwise, the exchanges are supposed to be operating the Existing Plans to make securities information processor data available "in the public interest," JA_[85.Fed.Reg.28702], but they are simultaneously generating revenue from their

own competing data products. This is a "substantial, inherent conflict of interest." JA_[86.Fed.Reg.44195].

As the SEC observed, "most of the exchanges also offer proprietary data products for sale" that "are significant sources of revenues for exchanges that offer them." JA_[85.Fed.Reg.28702, 85.Fed.Reg.28704]; *see City of Providence v. Bats Glob. Mkts., Inc.*, 878 F.3d 36, 41 (2d Cir. 2017) (discussing importance of "the sale of market data" to certain exchanges' revenue). The SROs are incentivized to improve their own proprietary products and market them as superior because they "compete with one another to increase the trading volume on their particular exchanges." *Bats Glob.*, 876 F.3d at 41. In doing so, the SROs take advantage of their access "to confidential information of substantial commercial or competitive value, including, among other things, information about core data usage, the [securities information processors'] customer lists, financial information, and subscriber audit results." JA_[85.Fed.Reg.28723]. As one commenter noted, "[s]ome exchanges even overtly market their own data as a better alternative." JA_[85.Fed.Reg.28704] (quoting IEX Grp., Inc. Comment Letter 3 (Sept. 24, 2019) ("IEX Letter"), https://www.sec.gov/comments/4-729/4729-6190352-192448.pdf).

To achieve the best possible results for investors, funds must rely on brokers who can obtain as much information as quickly as possible to trade competitively. Therefore, brokers and other market participants have no choice *but* to pay the SROs

to access their superior proprietary data. *See* IEX Letter 3. Nevertheless, they still rely on securities information processor data for other purposes, including fulfilling regulatory obligations.[1]

Mergers among the exchanges, which are now for-profit entities, have exacerbated the structural conflict between the SROs' administration of the securities information processor data system in the "public interest" and their drive to enhance profits through their own products. JA_[85.Fed.Reg.28704] (discussing how "demutualization of the exchanges" has "heightened the conflicts" SROs face). Under the Existing Plans, exchanges hold one vote on the operating committees per exchange license, but consolidation has meant that four or five licenses—with the accompanying four or five votes—are under unified control. In one recent example, NYSE's parent, Intercontinental Exchange, Inc., acquired National Stock Exchange, Inc. in 2017 and Chicago Stock Exchange, Inc. in 2018, increasing NYSE's voting power on the operating committees from three votes to five—from 18% to 29%. As of January 2020 when the SEC created its record, three main exchange groups represented 14 of 17 votes, with any two able to command a nine-vote majority.[2]

[1] Notably, the SROs "charge hundreds of millions of dollars a year in fees" for the inferior securities information processor data, in addition to fees for their proprietary data. ICI Comment Letter 2 (Dec. 10, 2019), https://www.sec.gov/comments/s7-15-19/s71519-6522878-200390.pdf.

[2] Although the votes of three exchange groups may be required under current circumstances, the exchange groups align on issues where they are most conflicted. *See, e.g.*, infra pp. 23-24.

Resp't. Br. 15 (citing JA_[85.Fed.Reg.2174]). Those same three groups, NYSE, Nasdaq, and Cboe, have the largest interest in protecting their proprietary data products and accompanying revenue streams. It is no coincidence that they have been the Orders' biggest opponents.

B. Members of the Investment Community Have No Meaningful Input in Governance of the Existing Plans, and Recent Changes in Technology and Trading Make the Problem More Acute

With control consolidated among the biggest exchanges, investment community members have no real say in how the Existing Plans operate, even though they are the primary contributors to and users of securities information processor data. Evolutions in technology and securities trading have further underscored the inequity of that lack of input.

As discussed, members of the investment community represented by ICI are the primary contributors of securities information processor data. The trades on the various exchanges *are* the data governed by both the Existing Plans and the CT Plan. That trading data from various exchanges is consolidated and disseminated to the public as the securities information processor data feed, reflecting information like the national best bid and national best offer. 17 C.F.R. § 242.603(b).

Additionally, investors are the primary consumers of securities information processor data. Anyone intending to trade an equity security, whether an individual or an institutional investor, looks to and depends on trading and quote data from the

various securities exchanges. In fact, the SEC's regulations require display to investors of a consolidated set of stock market data when investors are making trading or order routing decisions. 17 C.F.R. § 242.603(c)(1). Additionally, because securities information processor data includes information on the best prices and available liquidity in the equity market at any moment, *see* Pet. Br. 11-12, investment professionals use securities information processor data to confirm that they are complying with their fiduciary duty to obtain "best execution" for their investors, by carrying out the trade in a way that gets "the optimal combination of price, speed, and liquidity." *Kurz*, 556 F.3d at 640. In adopting the Orders, the SEC recognized the importance of securities information processor data to investment professionals' efforts to ensure "best execution." JA_[85.Fed.Reg.28703].

Congress and the SEC have both recognized that accessible market data is essential for the equity markets to work as intended. "[I]t is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure the availability of information with respect to quotations for and transactions in securities." JA_[85.Fed.Reg.28702] (citing 15 U.S.C. § 78k-1(a)(1)(C)). As the Supreme Court recognized in *Basic Inc. v. Levinson*, the "market" acts "as the unpaid agent of the investor," processing available information and "informing him that given all the information available to it, the value of the stock is worth the market price." 485 U.S. 224, 244 (1988).

The NMS equity data plans, which govern securities information processor data, serve a critical public function to the investment community by conveying that "market" information. The very purpose behind the Existing Plans was "facilitat[ing] the required collection and dissemination of core data so that the public has ready access to a 'comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time.'" JA_[85.Fed.Reg.28702] (quoting Concept Release on Equity Market Structure, Exchange Act Release No. 61358, 75 Fed. Reg. 3594, 3600 (Jan. 21, 2010)). The availability of this data "is the principal tool for enhancing the transparency of the buying and selling interest in a security, for addressing the fragmentation of buying and selling interest among different market centers, and for facilitating the best execution of customers' orders by their broker-dealers." Regulation of Market Information Fees and Revenues, Exchange Act Release No. 42,208, 64 Fed. Reg. 70,613, 70,614 (Dec. 17, 1999).

Given technological advances, changes in securities trading, and increased trade volumes, however, better and more readily available market data is more important than ever to investors. "[T]he current market is vastly different from when the national market system was established in the 1970s," including because "technology has fundamentally altered market operations." Market Data Infrastructure, Exchange Act Release No. 90,610, 86 Fed. Reg. 18,596 ("Market Data Infrastructure Rule"), 18,606-07 (Apr. 9, 2021). "Today, markets rely on

highly sophisticated electronic trading systems that can consume many points of data at speeds measured in sub-second increments." *Id.* at 18,603. Market participants themselves have "incorporated sophisticated, latency-sensitive, and data dependent electronic trading technologies for their trading needs." *Id.* at 18,600.

Additionally, trading takes place in new and different ways that were unanticipated even in 2005, when the SEC last reformed the equity market data system. For example, trading now occurs at the penny level instead of fractions. *Id.* at 18,606. As another example, a significant amount of equity trading now takes place at closing auctions, but closing auction data is not included in securities information processor data under the Existing Plans. *See* ICI Comment Letter ("May 26 ICI Comment Letter") 9-10 (May 26, 2020), https://www.ici.org/pdf/32486a.pdf. Market participants therefore need the securities information processor data for their trading to keep pace. Simply put, more and better data that truly reflects how equity trading occurs today is essential to maintain "fair and efficient markets." JA_[85.Fed.Reg.28703].

Despite Congress's recognition of the public importance of securities information processor data, the investment community's limited ability to provide input in the governance of the Existing Plans has impeded the evolution of that data. Since 2005, non-SRO market participants' only pathway for influence has been to join advisory committees that, theoretically, could be platforms to share views with,

and provide feedback to, the SROs. Unsurprisingly, the system under the Existing Plans is ineffective at ensuring that the investment community's needs are actually represented in the plans' operations; the exchanges, whose revenues are derived from their proprietary products, can and do prioritize enhancements to their proprietary data products over the securities information processor data or, at worst, simply ignore input they receive about possible improvements. As market participant T. Rowe Price explained, input from the advisory committees under the Existing Plans has not "ultimately influenced exchanges' decisions on market data issues." T. Rowe Price Comment Letter 2 (Feb. 24, 2020), https://www.sec.gov/comments/4-757/4757-6862130-210610.pdf.

C. The Misaligned Incentives of the SROs Led to Deleterious Effects on Members of the Investment Community

The SROs' misaligned incentives, coupled with the lack of independent representatives in NMS equity data plan governance, led to tangible negative effects on the securities information processor data available to the investment community.

As administrators under the Existing Plans, with control of the operating committees, the SROs have dictated the scope of securities information processor data content, the means by which that data is delivered, and the prices market participants must pay for it. While doing so, they also designed and marketed the competing infrastructure for their proprietary data products, giving them every incentive to focus efforts on enhancing their own offerings instead of the securities

information processor data. As commenters made clear, for "proprietary data products . . . , exchanges have deployed cutting edge technology to reduce latency and made other enhancements to improve content." JA_[85.Fed.Reg.28704]. Meanwhile, the SROs did not enhance securities information processor data despite non-SRO representatives on the advisory committees advocating for improvements. Instead, they enhanced their own proprietary data products. As a result, securities information processor data has "continued to meaningfully lag behind the proprietary data products and their related infrastructure with respect to content and speed." *Id.*

The difference is evident with a proprietary exchange product called a depth-of-book offering that "provide[s] greater content at lower latencies." JA_[85.Fed.Reg.28704]. As the SEC explained, "a diverse array of market participants" confirmed that "the differentials between [securities information processor] data and [depth-of-book products] ha[ve] reduced the usefulness of the form and content of [securities information processor] data." *Id.* The primary exchange groups publicly resisted the SEC's efforts to expand securities information processor data content, "question[ing] the need to add new information elements." *See* Market Data Infrastructure, 86 Fed. Reg. at 18,607. Similarly, although a significant volume of equity trading now takes place at closing auctions and is thus critical to the investment community, the exchanges have resisted efforts to include

auction data in securities information processor data under the Existing Plans. *See* May 26 ICI Comment Letter 9-10. Nasdaq, in particular, expressly opposed adding auction data, saying that doing so was "anti-competitive." Nasdaq Comment Letter 31 (May 26, 2020), https://www.sec.gov/comments/s7-03-20/s70320-7235187-217094.pdf. As of January 2020, opposition by one major exchange group was enough to veto this type of proposal, making SEC action necessary to achieve this enhancement. Indeed, the Market Data Infrastructure Rule *requires* the exchanges to add more types of data to the securities information processor data, including closing auction data. *See* Market Data Infrastructure, 86 Fed. Reg. at 18,601-05.

II. THE ORDERS INCLUDE SIGNIFICANT GOVERNANCE ENHANCEMENTS THAT GIVE A VOICE TO MEMBERS OF THE INVESTMENT COMMUNITY

The Orders greatly improve on the existing system, in which SROs with a conflict of interest administer a key aspect of equity market structure while being permitted to ignore input from key market participants. Under the CT Plan, the investment community will be able to offer its perspectives, serving as a check on the conflicts of interest that infect the current system, leading to inferior market data. Because more constituencies will have input in governance, the system will be more likely to self-improve, keeping pace with changing technology and trading practices, without requiring repeated SEC intervention to compel changes. Additionally, the exchanges are incorrect in asserting that other market participants should be denied

a role because of their own purported conflicts of interest; unlike the exchanges' extensive and actual conflicts discussed above, non-SROs' supposed conflicts are at best theoretical and, in any event, adequately counterbalanced by the CT Plan.

A. The Long-Overdue Governance Improvements in the Orders

The Orders significantly modernize the management of the NMS plan for equity market data, responding to developments in how the exchanges are structured and equity securities are traded. We focus on the governance enhancements that seek to remediate the SROs' conflicts of interests under the Existing Plans. Remediating these conflicts is a critical step to enhancing the utility of securities information processor data for all market participants.

To that end, including non-SRO representatives on the New Plan's operating committee, giving them voting power, and rebalancing the committee's voting structure will improve meaningfully the governance of the NMS equity data system and create a check on the SROs' conflicts of interest. The committee will now include "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." JA_[85.Fed.Reg.28730]; *see also* JA_[86.Fed.Reg.44212]. The Orders ensure that these non-SRO representatives will

be well-informed and offer useful, practical perspectives. They are to be selected initially from members of the advisory committees for the Existing Plans. JA_[86.Fed.Reg.44212]. The Orders also provide, for example, that "[t]he 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 CT Plan], and the role of market data in the U.S. equity market." JA_[85.Fed.Reg.28730]. Including the views of the suppliers and users of the very data in question makes eminent sense. As the SEC explained, non-SROs' representation on the operating committee will "ensur[e] that a broader range of relevant opinions and perspectives have voting representation on the operating committee, which the Commission believes will help to facilitate enhanced decision-making and innovation in the provision of equity market data." JA_[85.Fed.Reg.28707].

Moreover, through their inclusion, non-SRO representatives will have oversight of the precise areas in which the existing system falls short, which should reduce future need for Commission intervention. The operating committee is charged with proposing amendments, policies, or procedures "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."

JA_[86.Fed.Reg.44191]. It is also empowered to "assess[] the marketplace for equity market data products and ensur[e] that [data feeds] are priced in a manner that is fair and reasonable, and designed to ensure the widespread availability of [securities information processor] data to investors and market participants." JA_[86.Fed.Reg.44212].

In response to dramatic exchange consolidation, the Orders restructure the operating committee's votes, allocating votes by affiliated exchange *group* instead of individual licenses, with exchange groups having at most two votes. JA_[86.Fed.Reg.44213]. The Orders peg non-SROs' votes at one-half of the SRO member votes and requires that all committee actions, with limited exceptions, be approved by an "'augmented majority vote,' meaning a two-thirds majority of all votes on the Operating Committee, provided that this vote also includes a majority of the SRO Voting Representative votes." JA_[86.Fed.Reg.44165]. This approach reasonably reduces the disproportionate influence of the affiliated exchange groups while still ensuring that the SROs have fair representation and remain able to "act jointly," without non-SRO involvement.

Petitioners challenge the Orders' exchange group vote allocation concept (*e.g.*, Br. 50-52), but limiting the votes of consolidated exchanges to a maximum of two is essential to the new framework. Without it, the three primary exchange groups would control a requisite majority of the operating committee votes. The new

approach also could mitigate the effects of any further consolidation of equity exchanges (or creation of a new exchange solely to gain a vote), thereby preserving representative balance among affiliated and non-affiliated exchanges. In turn, that balance is likely to benefit all market participants through better products and pricing.

A recent public example illustrates the necessity of governance enhancements. The affiliated SROs have filed with the SEC proposed fees relating to the additional types of data to be provided under the Market Data Infrastructure Rule. *See* CTA/CQ/UTP Plan Fee Amendments, 86 Fed. Reg. 67,517 n. 4 (Nov. 19, 2021). The advisory committee collectively opposed the proposed fees. *Id.* at 67,519 n. 14. The advisory committee expressed concerns about the proposed fees and, in particular, about whether the fees were fair and reasonable to investors and reflected the SROs' lessened role in processing the data. *Id.* The non-affiliated SROs also declined to vote in support. *Id.* Under the existing system, however, the affiliated SROs exercised their control over a majority of operating committee votes to adopt the proposed fees, notwithstanding the uniform opposition of the non-affiliated exchanges and other interested parties. *Id.* By contrast, the augmented majority vote requirement under the CT Plan would have provided the necessary practical check against the affiliated SROs' self-interested approach to data governance.

Another provision of the Orders further reduces conflicts of interest by providing that the CT Plan's independent administrator "may not be owned or

controlled by a corporate entity that, either directly or via another subsidiary, offers for sale its own [proprietary market data products]." JA_[86.Fed.Reg.44217]. The two current administrators—NYSE and Nasdaq—sell competing proprietary data products; transitioning those roles to entities that do not sell products that compete with securities information processor data will eliminate what the Commission correctly termed "a substantial, inherent conflict of interest." JA_[86.Fed.Reg.44195].

The record reflects the strong belief of a range of market participants that these governance improvements will lead directly to tangible enhancements in the securities information processor data system, thus fulfilling the public purpose of making valuable market data available. JA_[85.Fed.Reg.28706] (collecting comments). The commenters believe, as does ICI, that minimizing structural conflicts of interest will incentivize further innovation in securities information processor data, closing the gaps with the exchanges' proprietary data products in areas like content and latency. *Id.* Additionally, these improvements will help the system run itself, limiting the structural obstacles that previously hampered progress. As one commenter noted, the changes "will establish a solid, new foundation through which future enhancements to the [securities information processor data], as necessary, can be more efficiently and fairly made." *Id.*

B. There Is No Merit to Petitioners' Suggestion That Non-SROs Will Themselves Suffer from Conflicts of Interest

Petitioners (Br. 33) make the ironic and misguided assertion that the non-SROs are likely to provide ineffective oversight because "[i]ndividual non-SRO representatives have no general obligation to protect investors, to further the public interest, or to comply with the terms of the CT Plan." According to Petitioners, "there would be nothing to prohibit those individuals from acting entirely out of self-interest, and in disregard of the public interest, when casting votes." *Id.* at 34.

Petitioners' warning is based on pure conjecture and is ironic when evaluated in light of the SROs' *actual* conflict of interest in administering the Existing Plans while simultaneously marketing their own proprietary data products. The outcome of wearing these two hats has been predictable—Petitioners devoted insufficient attention and resources to the securities information processor data they were charged with administering.

It is insincere for the SROs to claim that other market participants cannot have input in governance of the CT Plan because, unlike the SROs, they "would not even have an obligation to further the non-SROs' interests—let alone the public interest—when voting." Pet. Br. 34. Investment advisers—persons or companies paid to manage investments for others, including the companies that sponsor mutual funds—are bound by fiduciary duties to the funds they advise and clients whose money they manage. *See, e.g.*, 15 U.S.C. § 80b-6. "Under the Advisers Act, an

adviser is a fiduciary whose duty is to serve the best interests of its clients, which includes an obligation not to subrogate clients' interests to its own." Amendments to Form ADV, Advisers Act Release No. IA-3060, 75 Fed. Reg. 49,234, 49,234 (Aug. 12, 2010). And, to the extent some non-SRO members of the operating committee are not technically fiduciaries, they will be subject to other constraints described below, and their interests—as members of constituencies that will gain representation on the operating committees under the CT Plan—will be aligned with the public interest in having equity market data that is "prompt, accurate, reliable, and fair." 15 U.S.C. § 78k-1(c)(1)(B).

Indeed, Petitioners are unable to even hypothesize what self-interest the non-SRO operating committee members, especially institutional investors, would have that would be contrary to the public interest. Improved securities information processor data would allow these new members to make more informed investment decisions to the benefit of their clients. Thus, while Petitioners face actual inherent conflicts of interest under the current regime, they offer nothing beyond mere supposition to support their assertion that the non-SRO committee members will disregard the public interest when casting votes. Pet. Br. 34.

In any event, the SEC implemented a number of guardrails to address Petitioners' ostensible concerns. The CT Plan requires operating committee members to make "full disclosure of all material facts necessary to identify the nature

of a potential conflict of interest" so that "all parties, including the Commission and the public, will be better positioned to evaluate competing interests among any of the parties involved." JA_[86.Fed.Reg.44174]. Operating members will also need to follow recusal procedures, JA_[86.Fed.Reg.44215], and all non-SRO members must agree to comply with these procedures in writing. JA_[86.Fed.Reg.44162]. Further, as noted above, the initial non-SRO representatives will be selected from existing advisory committees; thereafter, non-SRO representatives will be nominated through a "fair, transparent, and public" process, including a public comment period. JA_[85.Fed.Reg.28730]; *see also* JA_[86.Fed.Reg.44162]. And, as a final backstop, the SEC will retain plenary authority over the new governance structure. These measures are more than reasonable to guard against Petitioners' alleged fears about a lack of "meaningful authority over the individuals representing non-SROs." Pet. Br. 34.

III. THE SEC HAD AUTHORITY TO IMPLEMENT THE GOVERNANCE ENHANCEMENTS IN THE ORDERS

For the reasons the SEC sets forth, (Br. 24-42), ICI submits that the Orders were a proper exercise of the SEC's statutory authority under the Exchange Act, 15 U.S.C. § 78k-1. Consistent with the broad authority Congress gave the Commission under Section 11A to operate the national market system for the benefit of all market participants, the Orders strike a careful balance between ensuring that the SROs may act jointly while giving the primary suppliers and users of the securities information

processor data a meaningful voice for the first time. ICI briefly highlights why Petitioners are wrong to assert that, under the Orders, SROs will no longer be able to "act jointly with respect to . . . planning, developing, operating, or regulating a national market system." 15 U.S.C. § 78k-1(a)(3)(B), *see also* 17 C.F.R. § 242.608(a)(3).[3]

Petitioners variously characterize the governance structure under the Orders as authorizing non-SROs to take "joint action" (Pet. Br. 31), giving non-SROs an "equivalent role," *id.* at 29, and letting non-SROs "exercis[e] direct control over the national market system," *id.* at 32. None of these characterizations is accurate, and Petitioners' assertion that SROs are being deprived of their statutory authority is belied by the fact that other SROs supported this change. *E.g.*, Members Exchange Comment Letter (Feb. 28, 2020), https://www.sec.gov/comments/4-757/4757-6891479-210924.pdf. The SEC calibrated the CT Plan operating committee's composition and voting provisions to ensure that the SROs may still, with respect to any decision, "act jointly." Preserving the SROs' primary role is precisely why "the aggregate number of votes attributed to the Non-SRO Voting Representatives . . . shall at all times equal one half of the aggregate number of votes attributed to the votes of the SRO Voting Representatives," with non-SRO votes "increas[ing] or

[3] The key phrase that Petitioners claim the Orders violate—"act jointly"—is identical in both Section 11A and Rule 608(a)(3). *Compare* Pet. Br. 27-41 *with id.* at 41-43.

decreas[ing] as necessary to maintain the ratio." JA_[86.Fed.Reg.44213]. Further protecting the SROs, the Orders require an "augmented majority vote" *and* "a majority" vote of the SRO members for "*all actions*." *Id.* (emphasis added). The difference is that, due to the number of licenses under common control, the three affiliated exchange groups (or just two of those three in January 2020, when the SEC assembled its record), could command a majority vote without the support of any other non-affiliated SRO. JA_[85.Fed.Reg.28712]. Now, the affiliated exchanges must work with the other non-affiliated exchanges and FINRA to form a majority of the SRO votes to take action. That is true joint action, entirely consistent with Section 11A. As the SEC explains (Br. 36-38), the "act jointly" language does not convey exclusive authority to any subset of exchanges; rather, it enables the SROs to collaborate in administering the consolidated market data system without raising antitrust concerns. Petitioners' argument boils down to nothing more than a self-interested complaint that they can no longer control the votes by themselves.

At the very least, the administrative record makes plain that the Commission made a reasonable determination, supported by the evidence, that "permitting non-SRO views to be more directly heard regarding Plan matters (while preserving joint SRO control of the [CT] Plan provided for by the plan voting structure . . .) would neither impede the SROs' ability to act jointly nor interfere with their ability to operate the national market system." JA_[85.Fed.Reg.28715] (footnote omitted).

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2022, I electronically filed the foregoing with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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