8011-01P

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89066 / June 12, 2020

[File No. 4-757]

In the Matter of

Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data

ORDER DENYING STAY

On June 1, 2020, Nasdaq Stock Market LLC, Nasdaq BX, Inc., and Nasdaq PHLX LLC filed a petition in the U.S. Court of Appeals for the District of Columbia Circuit seeking review of the Commission's Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System ("NMS") Plan Regarding Consolidated Equity Market Data (the "Governance Order"), which was approved by the Commission on May 6, 2020 and later published in the Federal Register. *See* 85 Fed. Reg. 28,702 (May 13, 2020). On June 3, 2020, petitioners filed with the Commission a motion to stay the effect of the Governance Order pending final resolution of their petition for review.

Pursuant to Section 25(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 705 of the Administrative Procedure Act, the Commission has discretion to stay its order directing the self-regulatory organizations ("SROs") to jointly develop, and file with the Commission by August 11, 2020, a single New Consolidated Data Plan that replaces the three current Equity Data Plans if it finds that "justice so requires." 15 U.S.C. § 78y(c)(2); 5 U.S.C. § 705. The Commission has determined, however, that petitioners have not met their burden to demonstrate that the extraordinary remedy of a stay of the Commission's Governance Order is warranted. Petitioners have not established sufficient irreparable harm, petitioners' legal challenges to the Order lack merit, and the public interest would be served by the SROs complying with the requirements of the Order.

1. The Commission finds that petitioners' stay request overstates the harm that will result from their compliance with the Governance Order. Petitioners assert that, in the absence of a stay, they "will incur immediate and significant upfront costs in drafting the New Consolidated Data Plan, seeking Commission approval of the plan, and, if approved, implementing the plan." Stay Mot. 16. But the Governance Order does not

establish a New Consolidated Data Plan. It requires the SROs to file a proposed plan with the Commission. Pursuant to Regulation NMS Rule 608, the New Consolidated Data Plan submitted in response to the Governance Order "will itself be published for public comment prior to any Commission decision to disapprove or to approve the plan with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment." 85 Fed. Reg. at 28,705; *see* 17 C.F.R. § 242.608. Through that process, interested parties will still be able to comment on the proposed plan, and the Commission will review the plan and may make changes or add conditions before issuing a subsequent order approving or disapproving a new plan. Petitioners thus err by claiming that they will incur significant upfront costs in implementing a plan if the Governance Order is not stayed.

Similarly, petitioners wrongly assert that there would be any actions taken pursuant to a New Consolidated Data Plan that would have to be unwound in the absence of a stay. Stay Mot. 16-17. As the Governance Order makes clear, the current Equity Data Plans will remain in place until a New Consolidated Data Plan has been approved by the Commission and implemented. *See* 17 C.F.R. § 242.608(b)(1); 85 Fed. Reg. at 28,705, 28,728. The proposed plan, moreover, must include provisions for the orderly transition of functions and responsibilities from the three existing Equity Data Plans. *Id.* at 28,729. And any approval order will be subject to judicial review at that time.

Petitioners also overstate the harm from compliance with the Governance Order itself, including drafting the New Consolidated Data Plan and seeking Commission approval. For example, the SROs will be able to use their extensive expertise and experience in NMS plan operation to efficiently formulate the specific terms and provisions of the proposed New Consolidated Data Plan. 85 Fed. Reg. at 28,711. The Commission anticipates that proposal costs will be further reduced because most of the detailed provisions relating to the operation of the existing Equity Data Plans could be imported into the New Consolidated Data Plan without substantial effort or great cost. *Id.* And to the extent governance provisions in the New Consolidated Data Plan would differ from those in the existing Equity Data Plans, the Governance Order prescribes the content of these provisions, further reducing the costs of preparing the new plan. *Id.* at 28,729. We therefore do not believe that any harm resulting from compliance with the Governance Order warrants a stay.

2. Petitioners have not shown a likelihood of success on the merits. Exchange Act Section 11A permits the Commission "to authorize or require" SROs "to act jointly" with respect to "matters as to which they share authority under this chapter in planning, developing, operating, or regulating a national market system." 15 U.S.C. § 78k-1(a)(3)(B). Rule 608 likewise provides that "[a]ny two or more self-regulatory organizations, acting jointly, may file a national market system plan" and that "[s]elf-regulatory organizations are authorized to act jointly in" "[p]lanning, developing, and operating any national market subsystem or facility contemplated by a national market system plan," "[p]reparing and filing a national market system plan," and "[i]mplementing or administering an effective national market system plan." 17 C.F.R. § 242.608(a). In petitioners' view, the statutory and regulatory references to "acting

jointly" mean that SROs—and only SROs—may have voting power on an NMS operating committee.

The Commission has already considered and rejected that argument. In the Governance Order, the Commission determined that granting non-SROs voting power is consistent with Section 11A and Rule 608(a). Despite petitioners' challenge, nothing in the text of either Section 11A or Rule 608(a) demonstrates that "acting jointly" means "acting jointly *and exclusively*." Rather, paragraph (2) of Section 11A(a) contains a broad grant of authority to the Commission, directing it "to use its authority" under the Exchange Act "to facilitate the establishment of a national market system for securities" in accordance with certain broad congressional findings and objectives. 15 U.S.C. § 78k-1(a)(2). Paragraph (3) then references the Commission's ability to authorize or require SROs to act jointly, and nothing in the text or structure of paragraph (3) undermines the Commission's grant of authority in paragraph (2) or compels the conclusion that joint SRO action must mean exclusive SRO action. The Commission's grant of authority to SROs in Rule 608(a)(3) likewise authorizes SROs to act jointly but, in doing so, does not by implication limit the Commission's authority to set forth a governance structure that includes non-SROs with some measure of voting power on an NMS plan operating committee. Rather, as the Governance Order notes, both Section 11A and Rule 608 are silent as to the participation of non-SROs in the operation of the plan. 85 Fed. Reg. at 28,715. The Governance Order's allocation of voting power to non-SROs is thus consistent with Section 11A and Rule 608(a).

The Governance Order does not discount the important role SROs play in plan governance. But it balances that role against the need for, among other things, more viewpoints on plan operating committees. The Commission has determined that "the distribution of voting power" described in the Governance Order "appropriately strikes th[e] balance" between broader representation and the SROs' statutory and regulatory responsibilities, "by providing for meaningful input from a broad range of stakeholders while also ensuring that the SROs retain sufficient voting power to act jointly on behalf of the plan pursuant to their regulatory responsibilities." 85 Fed. Reg. at 28,722.

Petitioners' other challenges presented in their stay motion were already rejected in the Governance Order.

3. The Governance Order serves a strong public interest. The governance model for the Equity Data Plans was established in 1970s. Since then, critical developments in the equities markets—including the heightening of an inherent conflict of interest between the for-profit and regulatory roles of the exchanges and the concentration of voting power in the Equity Data Plans among a few large exchange groups—have demonstrated the need for an updated governance model. The public interest will be served by the enhanced decisionmaking and innovation in the provision of equity market data that will result from the governance changes outlined in the Governance Order. And the governance of the consolidated data feeds can be improved by consolidating the three existing, separate Equity Data Plans into a single New Consolidated Data Plan that will reduce existing redundancies, inefficiencies, and inconsistencies between and among the Equity Data Plans. *See* 85 Fed. Reg. at 28,711;

Proposed Order, 85 Fed. Reg. 2164, 2166-74 (Jan. 14, 2020). Moreover, as the Order explains, "[a]ddressing the issues with the current governance structure of the Equity Data Plans discussed in this Order is a key step in responding to broader concerns about the consolidated data feeds." 85 Fed. Reg. at 28,702 & n.11. Any further delay in taking this first step toward establishing a new governance structure will impede the achievement of these benefits.

Accordingly, it is ORDERED, pursuant to Section 25(c)(2) of the Exchange Act and Section 705 of the Administrative Procedure Act that petitioners' motions for a stay be denied.

By the Commission.

Eduardo A. Aleman,
Deputy Secretary.

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