

Before the United States Securities and Exchange Commission
Washington, D.C.

IN THE MATTER OF:
Release No. 34-88216, File No. S7-03-20
Market Data Infrastructure

Comments of the United States Department of Justice

I. Introduction

The United States Securities and Exchange Commission (“SEC”) has requested public comment on its proposed rule, *Market Data Infrastructure* (the “Proposal”), as described in its Federal Register Notice.¹ The SEC published its Request for Comment on the Proposal in the Federal Register on March 24, 2020.

The Department of Justice (“Department”) is the U.S. Government agency primarily responsible for promoting and protecting competition. In particular, the Department is entrusted with enforcing the federal antitrust laws, which prohibit certain business practices and transactions that have the potential to harm competition and consumers. Additionally, the Department also engages in competition advocacy. This advocacy seeks to promote competition and consumer welfare via comments on rulemakings and legislation, as well as court filings. The Department therefore welcomes the opportunity to share its assessment of the Proposal with the SEC.

Competition in free and open markets is a defining feature of America’s economy.² Vigorous competition gives consumers the benefits of lower prices, higher quality goods and services, better access to goods and services, and increased innovation.³ Participants in the financial services industry, like all consumers, benefit from competition.⁴ According to the SEC, the Proposal “should help ensure that all market participants have ready access to [...] market information in order to facilitate participation in today’s markets” and “would help ensure that consolidated market data is delivered to market participants in a more timely, efficient, and cost-effective manner than the current centralized consolidation model.”⁵ The widespread availability

¹ Market Data Infrastructure, 85 Fed. Reg. 16,726 (Mar. 24, 2020) (to be codified at 17 C.F.R. pt. 242) [hereinafter the “Proposal”].

² See, e.g., *N.C. State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494, 495 (2015) (“Federal antitrust law is a central safeguard for the Nation’s free market structures.”); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

³ See, e.g., *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978) (noting that the antitrust laws reflect a “legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. ... The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

⁴ This has been the consistent position of the Department when providing its assessments of SEC proposed rules. See, e.g., U.S. Dep’t of Justice, Comments on Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice (Feb. 5, 2020), <https://www.sec.gov/comments/s7-22-19/s72219-6772519-208112.pdf>.

⁵ Market Data Infrastructure, 85 Fed. Reg. at 16,730.

of timely market information not only promotes competition by reducing barriers to entry, but it also promotes fair and efficient markets. This should benefit both industry participants and the U.S. economy as a whole.

II. Current Market Data Infrastructure

Currently, under a centralized consolidation model, the national securities exchanges and the Financial Industry Regulatory Authority (“FINRA”) (collectively, self-regulatory organizations or “SROs”) act jointly under three national market system (“NMS”) plans to collect, consolidate, and disseminate information for NMS stocks.⁶

For each NMS stock, the SROs are required by SEC rules to provide specified market data (the “NMS Market Data”) to exclusive securities information processors (“SIPs”). The SIPs consolidate NMS Market Data from different SROs into one data feed, referred to as “SIP Data,” and make it available to the public for a fee.⁷ The exclusive SIPs do not compete with each other in the collection, consolidation, or dissemination of SIP Data.⁸ Separate from the SIP Data, the securities exchanges sell access to more granular and lower-latency data feeds, referred to as proprietary data or “Prop Data”.⁹ Prop Data is exchange-specific, and includes what is referred to as “depth of book” information.

The Department is aware that since the rules for the content and distribution of SIP Data were initially implemented in the late 1970s, technological progress and other innovations in the financial services industry have changed the needs of industry participants. For example, due to changes over time in both SEC rules and trading practices,¹⁰ there is an increased need for more granular market information provided using low-latency feeds. For the most part, SIP Data does not have this level of granularity or latency; on the other hand, Prop Data does. As a result of these developments, the Department is aware that industry participants could consider the differentials in granularity and latency between SIP Data and Prop Data significant enough that they affect participants’ ability to trade competitively and to fulfill their clients’ orders consistent with their best execution obligations.¹¹ In other words, participants that rely solely on SIP Data could be at a competitive disadvantage to those that rely on multiple sources of market information, including Prop Data. The Department therefore commends the SEC’s efforts to address these differentials, including through the Proposal.

⁶ See, e.g., *id.* at 16,729, 16,765.

⁷ *Id.*

⁸ *Id.* at 16,765 (citing Rule 603(b)).

⁹ *Id.* at 16,728-29.

¹⁰ These changes include the switch from fractions to decimals in equity security quotations, the increasing importance of individual odd-lot quotations, especially for stocks with share prices that have risen substantially, and the increasing proportion of total trading volume being executed during opening and closing auctions. *Id.* at 16,735.

¹¹ The SEC preliminarily believes that the expanded set of proposed core data, including the proposed depth of book data, provides additional information that in many circumstances would be useful to a broker-dealer's best execution analysis. *Id.* at 16,754.

III. The Proposal

The Proposal intends to improve the current market data infrastructure by reducing the current disparity in content and latency between SIP Data and Prop Data products.¹² Specifically, under the Proposal, SIP Data would be required to include:

- i. Information about orders in sizes smaller than the current round lot size for certain higher priced stocks;
- ii. Information about certain orders that are outside of the best bid and best offer (i.e., certain depth of book data); and
- iii. Information about orders that are participating in opening, closing, and other auctions.¹³

The Proposal also intends to introduce a “decentralized consolidation model” under which competing consolidators would assume responsibility for the collection, consolidation, and dissemination functions currently performed by the exclusive SIPs. Specifically, under the Proposal, each SRO would be required to make more-granular SIP Data required under the Proposal directly available, using the same manner and methods as it uses for Prop Data, to two new categories of entities:

- i. Competing consolidators, i.e., either SEC-registered SROs or SIPs that collect, consolidate, and disseminate consolidated market data to the public; and
- ii. Self-aggregators, i.e., brokers or dealers that collect and generate consolidated market data for their own internal use.¹⁴

The three existing NMS plans would continue to govern the SROs’ provision of the data necessary to generate consolidated market data, including setting fees for the provision of such SRO data to competing consolidators and self-aggregators.¹⁵

IV. Competitive Issues Raised by the Proposal

The Department acknowledges the SEC’s specific solicitation of comments on the Proposal’s likely effect on competition in the provision of market data.¹⁶ The Department agrees with the SEC’s belief that, “by introducing competition and market forces into the collection, consolidation, and dissemination process, the decentralized consolidation model would help

¹² The Proposal is not intended to eliminate all differences between SIP Data and Prop Data. *Id.* at 16,734 n.89.

¹³ *Id.* at 16,729-30.

¹⁴ *Id.* at 16,730.

¹⁵ On May 6, 2020 the SEC issued an order directing the equity exchanges and FINRA to submit a new NMS plan with a “modernized governance structure for the production of public consolidated equity market data and the dissemination of trade and quote data from trading venues.” The purpose of this order is to address potential conflicts of interest by limiting the decision-making power of the equity exchanges over the fees charged for SIP Data. Sec. & Exch. Comm’n, *SEC Directs Equity Exchanges and Financial Industry Regulatory Authority to Improve Governance of Market Data Plans* (May 6, 2020), <https://www.sec.gov/news/press-release/2020-103>.

¹⁶ Market Data Infrastructure, 85 Fed. Reg. at 16,861-62.

ensure that consolidated market data is delivered to market participants in a more timely, efficient, and cost-effective manner than the current centralized consolidation model.”¹⁷

If implemented, the Proposal likely will lower barriers to entry by expanding access to less expensive, more granular data. Access to data is necessary to compete in today’s financial services industry. SIP Data currently do not have the depth-of-book information, speed, or connectivity that certain classes of participants need; such information can only be accessed currently via Prop Data feeds.¹⁸ As the SEC observes, Prop Data feeds supply information exclusive to the exchange where that data originates, so other data vendors are not able to compete against it for a particular data feed.¹⁹ Further, the SEC notes that Prop Data feeds are more expensive than SIP Data, and indicates that it has identified evidence of increases in data fees for Prop Data that outpace increases in data fees for SIP Data.²⁰ These characteristics would tend to indicate that Prop Data products lack substitutes, which would in turn enable the exchanges to exercise market power in determining their pricing of these products because they are the only data provider in their own markets.²¹ In addition, it may be necessary to pay fees to access both SIP Data and Prop Data in order to compensate for the deficiencies in current SIP Data.²² The Department thus recognizes the Proposal’s potential to reduce participants’ reliance on Prop Data. The Department’s understanding is that creating alternative options to Prop Data could lower costs to market participants, which would in turn eliminate barriers to participation in the financial services industry.

By enhancing granularity, reducing latency, and improving dissemination, the Proposal would tend to reduce information asymmetries, and also could provide some purchasers of Prop Data a potentially less expensive alternative – enhanced SIP Data.²³ The Proposal also may benefit SIP-Data-only purchasers by reducing disparities, which would facilitate their ability to trade competitively and improve their execution quality, as well as facilitate best execution.²⁴ At the same time, the SEC acknowledges that expanding the content of SIP Data could impose costs, including on those participants who previously benefitted from the information asymmetries that existed between participants due to the types of data purchased.²⁵ The possibility that the expansion of SIP Data content could disadvantage certain participants while simultaneously enhancing

¹⁷ *Id.* at 16,730.

¹⁸ For example, many broker-dealers have stated that even in the face of increasing proprietary data fees they feel compelled to buy proprietary data to be able to provide competitive trading strategies for their clients. *Id.* at 16,819. “In the context of the Division of Trading and Markets’ Roundtable on Market Data and Market Access in October 2018, some market participants commented that, in their view, they need the more content-rich proprietary data feeds and low latency connectivity to provide best execution to their clients and to competitively participate in the markets.” *Id.* at 16,731-32.

¹⁹ *Id.* at 16,731, 16,811, 16,819.

²⁰ *Id.* at 16,816, 16,839.

²¹ *Id.* at 16,819.

²² *Id.* at 16,811.

²³ *Id.* at 16,809-10. Under the current regime, it is necessary to purchase both SIP Data and additional Prop Data to get substantially the same coverage as what would be included in SIP Data under the Proposal. *Id.* at 16,839.

²⁴ *Id.* at 16,809-10.

²⁵ *Id.* at 16,828-29.

competition in the market is consistent with the Department’s antitrust mission of protecting competition, rather than individual competitors.²⁶

In addition to lowering entry barriers through reduced data costs, the Proposal also introduces competition in the provision of SIP Data via the decentralized consolidation model. Currently, SIPs are the only providers of SIP Data. Because SIPs are not constrained by competition, the Department agrees with the SEC’s statement that they “have lower incentives to reduce their costs.”²⁷ On the other hand, if SIPs faced competition, the SEC’s expectation that “competition among competing consolidators would put downward pricing pressure on [...] fees”²⁸ is consistent with the Department’s philosophy about antitrust enforcement, i.e., competition typically results in lower prices and higher quality products and services.

Considering the likelihood that the Proposal’s decentralized consolidation model will in fact result in lower data costs, the SEC acknowledges the implementation and regulatory costs new SIP Data consolidators could incur when attempting to establish themselves. The Department finds no fault with the SEC’s preliminary determination that the risk is low that either no new SIP Data consolidators enter or only very few enter.²⁹ While the Department acknowledges SEC’s preliminary determination based on its expertise that the fees for consolidated market data could be lower than fees that market participants pay for equivalent data today, it also concurs with the SEC that there is significant uncertainty around this preliminary determination.³⁰ The Department recognizes—consistent with the SEC’s assessment—that requiring the data fees to be fair and reasonable and not unreasonably discriminatory is a factor that contributes to this uncertainty.³¹ This uncertainty should not be an impediment to establishing the general structure of the decentralized consolidation model as described in the Proposal; further refinements to the pricing and structure of data fees to advance the goals of the Proposal can be addressed in future rulemakings.

V. Conclusion

The Department commends the SEC’s goal of introducing greater competition and market forces into the collection, consolidation, and dissemination of market data for equities. The Department also appreciates the SEC’s intention to better understand how the Proposal might

²⁶ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

²⁷ Market Data Infrastructure, 85 Fed. Reg. at 16,840.

²⁸ *Id.*

²⁹ *Id.* at 16,836-38. Factors assessed by the SEC include the ability to offer differentiated products, barriers to entry, data fees, and connectivity fees.

³⁰ *Id.* at 16,839. This is particularly the case given that the fees must be proposed by effective national market system plan(s), which, separate from the changes that would be implemented by the Proposal, are already undergoing changes to alter the governance structures that have a material impact on fee setting. See *supra* note 16. At the same time, the SEC states that “[t]he effective national market system plan(s) for NMS stocks would be unlikely to implement fees for the proposed SIP Data that are higher than the current fees for equivalent data unless it is demonstrated that the higher proposed fees are justified under the applicable legal standard.” Market Data Infrastructure, 85 Fed. Reg. at 16,840.

³¹ *Id.* at 16,837-38.

further this goal. As the rulemaking process progresses, the Department encourages the SEC to continue to rely on sound policy and analysis in order to ultimately achieve its goal.

Respectfully submitted,

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