S&P Global
Market Intelligence

SEC market data plan in limbo after court ruling

By Zoe Sagalow

July 28, 2022

The U.S. Securities and Exchange Commission needs to consider revamping its consolidated market data plan after a court decision vacated the agency's previous order.

The U.S. Court of Appeals for the District of Columbia Circuit ruled partly in favor of Nasdaq Inc., New York Stock Exchange LLC and Cboe Global Markets Inc. in their challenge of SEC orders to consolidate the national market system plans that govern dissemination of market data on equity quotations and transactions. This type of data is collected and disseminated by self-regulatory organizations, mostly the major national exchanges for equities. The orders involved changing the governance structure to mitigate conflicts of interest among exchanges, which are paid for their data, and facilitate more involvement from non-exchange stakeholders.

Requiring a new consolidated data plan is in the public interest, the SEC wrote.

"The Commission is concerned that a two-tiered system has developed in which certain market participants who are able to afford, and choose to pay for, the exchanges' proprietary DOB data feeds and associated connectivity and transmission offerings receive more content-rich data faster than those who do not receive these data feeds, such as market participants that face higher barriers to entry from data and other exchange fees," the SEC wrote in its final rule. DOB refers to the depth of an order book, which is a real-time list of buy and sell orders with prices for a security, and traders use it to see liquidity and time their trades.

The court vacated the SEC's entire consolidated plan order because the provision related to representation from non-self-regulatory organizations is not severable. An SEC spokesperson declined to comment on the agency's planned next steps. As part of the same decision, the court upheld the governance order in large part.

Next steps uncertain

Observers agreed the topic would be handled by the SEC's Division of Trading and Markets, but they disagreed on whether it would fit with the Chair Gary Gensler's agenda, since this project started before he took the helm at the agency.

"This is not necessarily a partisan issue one way or another," yet Gensler likely has his own priorities, Jennifer Schulp, director of financial regulation studies at the Cato Institute's Center for Monetary and Financial Alternatives, said in an interview.

Tyler Gellasch, executive director of Healthy Markets Association, an institutional investor trade group, disagreed. He said it is likely this topic of market data will be addressed with broader changes to equity market structure later this year.

"The loss threw a wrench into the works," he wrote in an email about the court decision. "It was something the SEC had hoped was done (so it could focus elsewhere), and now they can't."

However, Andrew Vollmer, a former deputy general counsel at the SEC, wrote in an email that the market data issue at the heart of the order and court case only fits with Gensler's market structure plans "at a high level," and they are "not closely related."

The SEC's next step is most likely to revise the order to try to resolve the court's objection, he added.

"If it can fix the order without too much time or difficulty, it will do that and re-issue the order," Vollmer, who is now a senior affiliated scholar at the Mercatus Center, wrote. "The securities exchanges then might go to court to challenge the new order. If the SEC does not see a way to fix the order quickly and simply, it might keep working to fix the order or it might just let the whole matter languish and fester until something forces them to act."