March 29, 2017

By Electronic Mail (rule-comments@sec.gov)

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Notice of Meeting of Equity Market Structure Advisory Committee Meeting (File No. 265-29); List of Rules to be Reviewed Pursuant to the Regulatory Flexibility Act (File No. S7-21-16)

Dear Mr. Fields:

SIFMA[1] appreciates the opportunity to submit comments in response to the notice of the Securities and Exchange Commission ("Commission") of a meeting of the Commission's Equity Market Structure Advisory Committee ("EMSAC").[2] In this letter, we provide our views on the Commission's Regulation NMS ("Reg. NMS"). We provide these comments in response to the Notice of the EMSAC meeting in addition to Acting Chairman Michael Piwowar's request that industry participants comment on Reg. NMS pursuant to its review under Rule 610 of the Regulatory Flexibility Act.[3] In particular, we welcome the opportunity to discuss the underlying intent and impact of Reg. NMS, and provide our initial feedback on a span of potential revisions that we believe should be reviewed by the Commission with significant opportunities for further input and discussion from the industry.

I. Executive Summary

Reg. NMS was originally intended to modernize and increase the efficiency of the equity markets by establishing various rules that sought to achieve a variety of goals as outlined by the

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[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] *See* Securities Exchange Act Release No. 80245 (March 14, 2017), 82 FR 14394 (March 20, 2017).

[3] *See* Securities Exchange Act Release No. 78845 (Sept. 15, 2017), 81 FR 64364 (Sept. 20, 2016); *see also* Michael S. Piwowar, Commissioner, Commission, Statement Regarding Publication of List of Rules to be Reviewed Pursuant to the Regulatory Flexibility Act (Sept. 15, 2016), *available at* https://www.sec.gov/news/statement/piwowar-statement-list-of-rules-regulatory-flexibility-act.html.

Commission. In particular, the Commission adopted the Order Protection Rule (Rule 611 of Reg. NMS, also known as the "OPR" or "Trade-Through Rule"), the Access Fee Cap/Fair Access Rule (Rule 610 of Reg. NMS), and revised various market data provisions in order to create an interlinked and automated market that encouraged the display of limit orders and assured that investors who submitted market orders received the best price possible. While consisting of separate rules, the success of Reg. NMS is dependent upon the interaction and reliance of each rule upon the others. For instance, for the OPR to be successful, the Commission needed to establish an access fee cap and create fair access rules in order to assure that market participants were able to efficiently and fairly access displayed quotations at each market center. Accordingly, when evaluating Reg. NMS, it is important to recognize that its rules, and the associated topics and issues, are very much interrelated.

Reg. NMS has been successful at creating an automated and interlinked market that provides investors with the benefits of top of book price protection and the assurance that they are receiving the best price available in the market for a given size at any given time.[4] However, Reg. NMS has been accompanied by a variety of unintended consequences. In particular, Reg. NMS has contributed to a complex and fragmented market. This fragmentation in turn has resulted in a bifurcated market that has placed a significant focus on the speed of execution, with broker-dealers facing escalating costs for essential connectivity and data services with little competitive constraint. Particularly problematic is that exchanges, which have demutualized since the time Reg. NMS was being debated and are now for-profit, publicly-traded companies, continue to hold a de facto monopoly on market data and connectivity. Thus, while Reg. NMS may have achieved many of the objectives set for it in 2005 in terms of promoting a more accessible, tighter priced and significantly more automated market, the equity markets have evolved considerably and Reg. NMS is overdue for review and modernization by the Commission.[5]

As discussed in more detail below, we provide a variety of alternatives for the Commission's consideration to improve the functioning of the National Market System. It is important to recognize that when evaluating Reg. NMS and potential alternatives, there are a multitude of market participants including retail and institutional investors, market makers and liquidity providers, each with varying investment objectives, time horizons and average order sizes. Some trade only for their own accounts, while others trade on behalf of customers and as such are bound by rigorous best execution obligations and subject to intense competitive pressures. Accordingly, the alternatives we discuss below look to assess the impact on the broad

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[4] That price is generally reflected in the "consolidated data stream" provided by Securities Information Processors or "SIPs." The consolidated data consists of the best buy and sell quote (known as the bid and offer) and the last sale price at any exchange or market in the overall system.

[5] *See* Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS (June 9, 2005) ("Glassman/Atkins Dissent"), pp. 2-3: "We believe the wiser and more practical approach to improving the efficiency of the U.S. markets for all investors would have been to improve access to quotations, enhance connectivity among markets and market participants, clarify the broker's duty of best execution, and reduce barriers to competition."

array of market participants active in the equity markets, and identify where a potential solution may have disparate impacts on each type of market participant.

Our discussion focuses on the following provisions of Reg. NMS and is intended to encourage discussion between the Commission and market participants, including investors and issuers, about potential revisions to the status quo and the implications those changes may have on the market as a whole as well as individual classes of market participants.

- ***Order Protection Rule*****:** To address market fragmentation and complexity, the Commission should evaluate the OPR and consider whether modifications or exemptions are needed, potentially including a volume threshold for protected quotation status and a block exemption for orders of significant size. The Commission also could consider an elimination of the OPR coupled with enhanced best execution principles or maintaining the status quo.

- ***Access Fees:*** Since Reg. NMS was adopted, spreads have narrowed and commissions have decreased, making the existing cap of access fees outsized relative to today's market realities. To address this, the Commission should consider: (1) reducing the access fee cap to no more than $0.0005 for all securities; (2) implementing the Commission's Equity Market Structure Advisory Committee's access fee pilot recommendation; or (3) eliminating rebates and linkages between passive, posting of limit orders and transaction pricing.

- ***Market Data:*** To assure that market data is timely, comprehensive, non-discriminatory, and accessible to all market participants at a reasonable cost, the Commission should consider: (1) enhancing the SIP feeds with bid and offer quotes beyond the top of book data and providing that as the sole source of consolidated market data to meet regulatory obligations; and (2) replacing the single-consolidator SIP model of market data dissemination with a competitive construct, such as a Competing Market Data Aggregators ("CMDA") model.

- ***NMS Plan Governance:*** To address conflicts of interests and enhance the NMS Plans, the Commission should provide broker-dealers and asset managers with meaningful direct voting representation on the NMS Plan Operating Committees. In addition, the Commission should conduct a comprehensive review of the regulatory structure of broker-dealers and exchanges, as that structure is widely viewed to be outdated and in need of reconsideration and reform.[6]

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[6] Former Commissioner Daniel Gallagher previously called for the Commission and its staff to engage in a "comprehensive market and regulatory structure review, including a review of the self-regulatory paradigm as a whole." *See* Daniel M. Gallagher, Commissioner, Commission, Market 2012: Time for a Fresh Look at Equity Market Structure and Self-Regulation, Remarks to SIFMA's 15th Annual Market Structure Conference (Oct. 4, 2012), *available at* https://www.sec.gov/news/speech/2012-spch100412dmghtm.

II. Regulation NMS: Intent and Policy Goals

Adopted in 2005, Reg. NMS was intended to modernize and strengthen the regulatory structure of the equity markets. Reg. NMS was predicated on the need to foster more efficient markets by promoting fair competition among individual markets, while at the same time assuring that the markets were linked together to encourage the interaction of – and competition between – the orders of buyers and sellers.[7]

The centerpiece of Reg. NMS is Rule 611, the OPR, which provides intermarket price protection to “protected quotations.” In conjunction with the OPR, Rule 610 addresses fair access, access fees, and locked and crossed markets. Reg. NMS also implements Rule 612, the Sub-Penny Rule, to address concerns related to practice of “stepping ahead” of displayed limit orders by trivial amounts. In addition, the Commission considered alternative market data dissemination models, revised the market data revenue allocation formula, and made changes to NMS Plan governance by establishing non-voting Advisory Committees.

These key provisions of Reg. NMS were in response to specific policy goals that the Commission was looking to achieve. Specifically, the OPR sought to address market inefficiencies by further automating the markets and providing strong intermarket price protection in order to promote the display of limit orders, as well as to assure that those investors who submit market orders receive the best price available.[8] Further, in adopting Rule 610, the Commission recognized the importance of interlinking in a manner that provided market participants with the ability to efficiently and fairly access a trading center’s protected quotations. Additionally, by revising the market data revenue allocation formulas and increasing NMS Plan transparency, the Commission sought to preserve the integrity and affordability of consolidated market data.

SIFMA believes that some of the Commission’s key goals have been achieved. However, Reg. NMS has not been without unintended consequences and certain shortcomings.[9] Accordingly, we discuss below the impacts of Reg. NMS and provide recommendations for the Commission to consider regarding the OPR, access fee cap, market data and NMS Plan governance reform. The goal of this discussion is to assure that the rules governing equity trading best serve investors in an evolving marketplace. SIFMA made several of these recommendations to the Commission in our 2014 Equity Market Structure Recommendations.[10]

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[7] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37498 (June 29, 2005).

[8] *Id.* at 37501; *see also* Glassman/Atkins Dissent, pp. 21-24: “The Trade-Through Rule will not augment market depth because it provides only incomplete protection of limit orders”; *see also* Glassman/Atkins Dissent, pp. 21-24: “The Trade-Through Rule will not augment market depth because it provides only incomplete protection of limit orders”.

[9] *See* Glassman/Atkins Dissent, pp. 27-37: “The rule will have negative repercussions…will limit competition and stifle innovation…”

[10] *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA to

III. Order Protection Rule

Overview

A primary objective for the Commission in adopting the OPR was to increase displayed depth and liquidity and reduce transaction costs, particularly for institutional investors that trade in large sizes.[11] Further, the Commission sought to address the weaknesses of the trade-through provisions of the then Intermarket Trading System ("ITS") by automating the markets and by protecting only those quotations that were immediately accessible, *i.e.*, "automated quotations."[12]

A benefit of the OPR is that top of book price protection has been reinforced and is a well-established principle for today's market participants. Additionally, the OPR, in combination with other technological developments, has resulted in a largely automated market. This automation has resulted in a variety of benefits for market participants, notably that the U.S. equity markets continue to be the most liquid and efficient in the world, with low transaction costs, narrow spreads and near instantaneous executions.

However, the OPR has not been without unintended consequences. It has increased market complexity, partly due to the fact that broker-dealers are effectively required to connect to all exchanges in order to meet their obligations under the rule – even if it is an existing exchange with minimal trading volume or is a new start-up venue with no volume on day one. While transaction costs have remained relatively stable since Reg. NMS was implemented, the operational costs and risks borne by market participants continue to rise as market participants are unnecessarily required to maintain connections to each individual exchange and are effectively required to purchase market data from all the exchanges in order to remain competitive. The complexity and increased operational risk inherent in today's markets has led to exaggerated dislocations and rapid escalation of issues when they arise.[13]

Alternatives for Consideration

We believe that at this stage of the market's evolution, the Commission should consider modifications to the OPR.

For instance, given today's trading and technological environment, the requirements of the OPR could be modified and best execution obligations that are more clearly defined by

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Mary Jo White, Chair, Securities and Exchange Commission dated October, 24, 2014 ("SIFMA Equity Market Structure Reform Letter").

[11] *See* 70 FR 37532.

[12] *Id.* at 37501*; see also* 242.600(b)(3).

[13] Examples include: the May 6, 2010 Flash Crash; the May 18, 2012 NASDAQ mishandling of the Facebook IPO; the August 2, 2012 Knight Capital Group trading error; the August 22, 2013 NASDAQ SIP outage; and the August 24, 2015 dislocations at the market open.

regulators would likely provide for top of book price protection for the handling of client orders, whether through routing or internalization.

In our view, there are three possible paths moving forward: (1) modifying the OPR, with an exploration of additional exemptions; (2) fully eliminating the OPR, coupled with a reestablishment a more detailed articulation of best execution practices; or (3) maintaining the status quo.

- **Modifications to the OPR:** As previously described, the OPR has contributed to increased market complexity, fragmentation, and operational risk. If the OPR were to be maintained but modified, two potential options include:

    - ***Volume Thresholds for Protected Quotation Status*.** The displayed quotations of a market center should be protected only if the market center executes a specified aggregate trading volume over a sustained period of time. The definition of "protected quotation" should be modified under Reg. NMS so that it applies only to the displayed quotations of a market center with one percent (1%) or more of the average daily dollar volume in all NMS stocks over a period of three consecutive calendar quarters. A market center would lose its protected quotation status if its volume fell below 1% for three consecutive calendar quarters.[14]

    - ***Block Exception*.** Amend the OPR to allow an exception from trade through protection for block transactions of significant size. A block exception would give broker-dealers more flexibility in handling large trades for institutional customers – which ultimately trade on behalf of retail customers invested in collective investments such as mutual funds and pension funds. Broker-dealers would remain subject to best execution requirements to assure overall execution quality. One implication of a block exemption would be that certain limit orders at the best price would be traded-through, potentially without executing.

- **Eliminate OPR.** If the OPR were to be eliminated, trading venues would be forced to compete on their own merit, rather than being supported by quote protection (which currently exists even for exchanges with virtually no market share). Those trading venues offering the highest quality execution services, fastest connections, most reliable quotes and data, strongest fill rates and price improvement, would be expected to rise to the top. Additionally, because of increased automation and its attendant benefits, intermarket price protection could be maintained through enhanced best execution principles without the artificial linkages proscribed by the OPR. Further, eliminating the OPR would remove the complexity, operational risk, and substantial costs (*e.g.*, connectivity, market data, registration fees, etc.) that result from the requirement to

[14] The one percent (1%) threshold has been previously suggested by SIFMA. *See* SIFMA Equity Market Structure Reform Letter at 6. Of course, other thresholds could also be established (*e.g.* 2.5%, .75%). SIFMA recommends studying the potential impacts of various thresholds for establishing a venue's quote as protected. Some commentators have suggested that this approach could raise barriers to entry for new competitive exchanges.

connect to – and trade with – multiple exchanges regardless of their liquidity, value proposition or execution quality.

- **Maintain Status Quo**. Reg. NMS has succeeded in bringing together the disparate trading centers into a more seamless whole, by incentivizing their investment in improvement of their technology capabilities. This has resulted in a greatly improved trading experience relative to the pre-NMS marketplace in terms of speed of execution, pricing transparency, investor confidence and bid/offer spreads. The benefits to market participants have been in part due to the OPR and the assurances that their orders will be represented and protected. Prior to adjusting any provisions of the OPR, significant consideration of the potential impacts to investor confidence must be undertaken.

IV. Access Fees

Overview

The Commission recognized that protecting the best displayed prices against trade-throughs via the OPR would be futile if broker-dealers and market participants were unable to access those prices fairly and efficiently.[15] To address this, Rule 610 was adopted enabling the use of private linkages to access the quotations of a trading center, and in turn prohibiting a trading center from imposing discriminatory terms that would inhibit access.[16]

The Commission was further cognizant that price protection, automation, and fair access would be frustrated if trading centers were to raise their fees substantially, taking advantage of the new OPR regime.[17] The Commission thus established an access fee cap under Rule 610, which limited the fees a trading center can charge to access its top of book quotes to $0.003 per share. This $0.003 number was chosen because it was generally "consistent with current business practices" in 2004 and 2005 when Reg. NMS was being finalized.[18]

Notably, when setting this fee cap, the Commission provided that it was necessary to address "outlier" trading centers. The Commission expressed concern that these markets would set high fees to access their quotations, knowing that they were likely the last market to which orders would be routed and that prices could not move until their displayed protected quotation was satisfied.[19]

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[15] *See* 70 FR 37502.

[16] *See* 242.610.

[17] *See* 70 FR 37543.

[18] *Id*. at 37545.

[19] *Id*.

However, as we noted in our 2014 Equity Market Structure Recommendations,[20] business practices have changed over time. Today, the $0.003 access fee cap is too high relative to today's narrower spreads and lower commission rates. While the net costs to execute a transaction have been largely contained since Reg. NMS was adopted, access fees have become and remain an outsized element of overall transactions costs and do not reflect today's business practices and market realities.

For instance, many trading centers have adopted a "maker-taker" pricing model in which it is common for exchanges to charge the full amount up to the access fee cap to those accessing liquidity, and then rebate most of the access fees back to liquidity providers. Thus, in today's trading environment, a significant portion of access fees are used to subsidize rebates with the exchanges' net capture reflecting today's market norms for accessing liquidity, which is approximately 3-5 cents per 100 shares traded ($0.0003-$0.0005), or 3-5 mils.[21] Therefore, the net effect of this has been an evolution to a ubiquitous fee model, wholly reliant on the provision of rebates back to market participants, which ultimately has resulted in set of market outcomes that were neither intended nor anticipated.

The current level of access fees has resulted in increased market complexity for both on- and off-exchange trading. Exchanges today offer order types that are primarily designed to avoid paying access fees; market participants regularly implement complex routing strategies, consistent with their best execution obligations, to avoid paying substantial access fees charged by exchanges in favor of venues such as alternative trading systems ("ATSs"), which typically charge lower access fees. Thus, the current maker-taker construct has contributed to perceived order routing conflicts for brokers and in turn incentivizes off-exchange trading.

Lastly, access fees also contribute to the high level of fragmentation that we have in our marketplace today, with 13 exchanges. This number is in part driven by each of the exchange group's desire to provide a variety of pricing models within the wide pricing range between 0 and 30 mils.

Alternatives for Consideration

In many instances, eliminating or reducing the access fee cap would decrease the economic incentives to route orders away from exchanges due to their high access fees, or to route to an exchange to simply capture a rebate. Further, reducing access fees should lead to a reduction in order types that are simply designed to avoid those high exchange fees. A change to the current maker-taker construct could also help to reduce the need for so many exchanges with

[20] *See* SIFMA Equity Market Structure Reform Letter at 3.

[21] The Commission in the adopting release raised concerns with the practice of rebating of access fees, noting that access fees tend to be highest when markets use them to fund substantial rebates to liquidity providers, rather than merely to compensate for agency services. The Commission at the time was concerned that if outlier markets were permitted to charge high fees and pass most of them through as rebates, the published quotations of those markets would not reliably indicate the true price that is actually available to investors or that would be realized by liquidity providers. *See* 70 FR 37545.

multiple pricing variations. It could additionally increase investor confidence by simplifying the market and increasing transparency into fundamental pricing. That said, a reduction in rebates which would likely accompany a reduction in access fees may also lead to an increase in spread, likely greater for lower liquidity names, as liquidity providers adjust their trading strategies to account for the reduced rebate. For each of these alternatives, the impact on spreads and therefore on cost of execution must be weighed against the status quo.

Taking into account the impact of the access fee cap since it was established when Reg. NMS was adopted in 2005, we provide a several alternatives for the Commission's consideration:

- **Adopt EMSAC Fee Pilot Recommendation**. Adopt the EMSAC's access fee pilot recommendation, with the results of the pilot used to reset the access fee cap.[22] The EMSASC Access Fee Pilot would be designed as a two-year program to test varying access fee caps for a select number of symbols with an individual market capitalization greater than $3 billion. A random sample of 100 common stocks and ETFs would be placed into the following buckets:
    - Bucket 1 – Control bucket
    - Bucket 2 – $0.0020 access fee cap
    - Bucket 3 – $0.0010 access fee cap
    - Bucket 4 – $0.0002 access fee cap

- **Reduce the Access Fee Cap**. Lower the access fee cap to no more than $0.0005 for all securities, or at least to those NMS stocks with an average daily volume greater than those stocks in the Tick Size Pilot (>1MM ADV). It should be noted that this option differs from an access fee pilot, as a reduction in the access fee cap would be a complete rule change that applies to all securities, whereas a pilot would only apply to a subset of securities for a limited period of time. In addition, a reduction in access fees should not materially affect any exchange's revenues because the exchanges generally rebate all but a small portion of the access fees they receive when they charge at the maximum allowed under the current cap.

- **Eliminate Rebates.** A prohibition of rebates could result in several benefits, including: (1) fostering the elimination of order types designed for rebate capture; (2) reducing perceived order routing conflicts for broker-dealers; and (3) helping to reduce market fragmentation by eliminating the need for so many pricing models across so many exchanges. In addition, if rebates were eliminated, it could potentially eliminate the need

[22] *See* https://www.sec.gov/spotlight/emsac/recommendation-access-fee-pilot.pdf; *see also* Committee on Capital Markets Regulation report, "The U.S. Equity Markets: A Plan for Regulatory Reform" (July 2016) ("CCMR Report"): "The SEC should implement a pilot program to evaluate the impact of a reduction in access fees and liquidity rebates on market quality and trading behavior. The structure of the pilot should generally conform to the framework proposed by the Equity Market Structure Advisory Committee Regulation NMS Subcommittee…"

for the Commission to be responsible for setting access fee caps enabling market competition to be re-established as the primary driver of exchange transaction pricing. Eliminating rebates also could obviate the need for the regulatory ban on locked and crossed markets.

- **Maintain Status Quo**. The U.S. equity markets are recognized as the world's most liquid and efficient. Execution quality, in particular for retail investors, has steadily improved since the introduction of Reg. NMS.

V. Market Data

Overview

Market data is at the core of equity market structure and Reg. NMS. Broker-dealers are required to report their bids and offers and last sales for securities to self-regulatory organizations ("SROs"), which are required to participate in an NMS plan for consolidating and distributing that data. When Reg. NMS was adopted, the Commission acknowledged that one of its most important responsibilities was to preserve the integrity and affordability of the consolidated data stream.[23] In this regard, the Commission stated its intent to make market data more widely available, and to permit the SROs to compete with respect to the provision of non-core data, by authorizing markets to distribute their own data independently as long as their core data (*i.e.*, best quotations and execution data) was provided to the SIPs for consolidation.

In the adopting release, the Commission stated that one of the strengths of the current consolidated market data model was that it benefited investors, particularly retail investors, by enabling them to assess the best market prices and evaluate best execution of their orders by obtaining data from a single, consolidated source that is highly reliable and comprehensive.[24] The Commission noted, however, that the most significant drawback to the current model was that it offered little opportunity to assure that the price for consolidated data was fair and reasonable, as required by Section 11A of the Securities Exchange Act of 1934 ("Exchange Act") by, for example, having for market forces to determine fees for that data. As a result, the Commission invited comment on alternative data dissemination models.

One of the models discussed was the competing consolidator model, which at the time would have retained the consolidated display requirement, but would have rendered the Plans and networks that currently consolidate the data unnecessary.[25] Rather, each SRO would have established its own independent data streams, and accompanying data fees. Each exchange would have administered its own market data contracts, and operated its own data distribution

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[23] *See* 70 FR 37503.

[24] *Id*. at 37558.

[25] *Id*. at 37559.

facility, as well. In turn, any number of data vendors or broker-dealers could have purchased the data from the SROs, consolidated it, and then distributed it to other data users. Market participants would then be free to choose whichever vendor's product it believed best suited their needs (so long as it met the minimum data display standards).

In assessing the competing consolidator model, the Commission raised numerous concerns and ultimately opted to not move forward with it.[26] In particular, the Commission stated that for the benefits of a fully consolidated data feed to be preserved, the consolidators would have to purchase the data of each SRO to assure that the consolidator's feed included the best quotations and most recent trade reports in all NMS stocks so that they could provide core data. Further, the Commission stated that in order to comply with the OPR, each trading center would be required to have the quotation data from every other trading center in a security to know whether a better price existed on another market.

The Commission stated that the result of the competing consolidator model would be that, as a practical matter, payment of every SRO's fees would be mandatory, thereby affording little room for competitive forces to influence the level of fees. Further, the Commission noted that it would be unlikely that any of the SROs would voluntarily propose to lower their own fees and in turn reduce their current revenues. Rather, the Commission was concerned that some SROs might well propose higher fees to increase their revenues, particularly those with dominant market shares whose information is most vital to investors.[27]

Unfortunately, contrary to the strengths of the consolidated market data at the time when Reg. NMS was adopted, the consolidated SIP data today is not usable for any kind of sophisticated or competitive trading platforms. In addition to disseminating core data through the SIPs, the exchanges have largely focused on offering non-core at sharply escalating fees. These proprietary feeds are distributed directly through upgraded connections (rather than via the SIP infrastructure) and contain much more detailed information about the exchanges' trading books, including depth of book information, thus providing substantially enhanced views of the market to any market professional. Consequently, the lack of depth of book data in the SIP feeds and the general inferiority of the SIPs' infrastructure have rendered the SIPs' consolidated core data effectively useless for accurate price discovery. They are now used primarily for informational purposes, administrative messages and to provide stale (from the perspective of computerized trading) price information to retail customers who rely on the SIPs as their primary market data source. As a result, due to evolution of the markets and technology, many institutional customers and broker-dealers cannot use an executing or routing broker, or alternative trading system (ATS), with trading systems that rely solely on SIP data and expect to remain competitive.

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[26] *Id.*

[27] *Id.*

With the SIPs no longer as critical to the market data distribution model, the concerns expressed by the Commission in the adopting release have, ironically, come to fruition.[28] Today, market participants are in effect required to subscribe to and consolidate each of the exchanges' so-called competitive proprietary data feeds in order to assure that the price information they are receiving is the most fulsome (*e.g.*, depth of book & odd lot quotes), accurate and timely. Thus, while the proprietary products could give the illusion of competition, the reality is that they are more monopolistic in nature. After all, because the data streams from each of the exchanges contain unique sets of data, they are not fungible, and each stream is therefore essential for market participants to see in order to understand the complete and accurate picture of the market. Moreover, due to the expansion of market data products, market data has become an increasingly important source of revenue for the exchanges. As such, there is no incentive for exchanges to curb the associated fees for the proprietary feeds and the SIP.[29] Additionally, there is little incentive for the exchanges to optimize the SIPs.

Nevertheless, market participants continue to be required to consume market data consistent with their best execution and other regulatory obligations and trading objectives. FINRA recently stated that firms using depth-of-book data for proprietary trading are "expected to also be using these data feeds to determine the best market under prevailing market conditions when handling customer orders to meet its best execution obligations."[30] In light of their best execution obligations, broker-dealers may understandably feel they face significant regulatory risk if they do not buy depth-of-book data in addition to SIP data.

At the same time, market data fees continue to increase, with market participants offered little competitive recourse. This evolution has not only resulted in costs that are squeezing smaller broker-dealers out of being able to offer competitive trading platforms, but is also resulting in a multi-tiered landscape where some market participants are receiving trading information before others. It remains unresolved whether competitive forces alone can actually set a fair and reasonable price for market data.

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[28] *See also* Glassman/Atkins Dissent, p. 41: "We have concerns about the market data reforms in Regulation NMS, even though they are limited, and a particular concern with respect to the codification of the single consolidator model. By entrenching the single consolidator model, the majority grants a monopoly for the consolidation of market data, which erects another barrier to encouraging competitive solutions for market data consolidation."

[29] *See* Glassman/Atkins Dissent, pp. 41-42: "We are also concerned about the majority's failure to address the level of market data fees. The size of market data revenues and lack of accountability for the use of these revenues by the SROs creates market distortions and inefficient allocation of resources." *See also* CCMR Report: "The SEC should require exchanges to publicly disclose revenues from the [SIPs], the allocation of market data revenues among SIP Plan Participants and revenues from proprietary data feeds."

[30] *See* FINRA Regulatory Notice 15-46, at 13, note 2, November 2015.

Alternatives for Consideration

As we have stated previously, market pricing information from all sources – including the SIPs, exchange proprietary feeds, and pricing that can be derived from execution data – should be distributed to users that are located in the same location at the same time (or as close to the same time as is possible under the laws of physics).[31] Therefore, significant changes are required to the existing distribution models to assure that timely and comprehensive market data continues to be accessible and affordable to all investors. Accordingly, we offer several alternatives for the Commission's consideration and welcome the opportunity to discuss these further:

- **SIP Feeds with Depth of Book**. Consistent, accurate, consolidated market data is essential to the fair operation of the securities markets. One option to achieve this end is to require the SIP feeds be optimized with significant enhancements, such as depth of book, and be the sole source of market data to meet regulatory obligations. This will assure that all market participants are able to engage in the market on the same footing, with the same information.

- **Competing Market Data Aggregators**. Replace the single-consolidator SIP model of market data dissemination with a disbursed model, in which Competing Market Data Aggregators ("CMDAs") would compete to provide requisite market data feeds using the fastest, direct sources of market data. CMDAs would be subject to specific and consistent performance and transparency standards. The ultimate goals would be to introduce competition, reduce latency, provide redundancy, promote fairness and address conflicts of interest. And, importantly, the CMDA model would assure that competition among market data providers could thrive, which would foster innovation while assuring competitive controls against unconstrained price escalation.[32]

VI. NMS Plan Governance

Overview

As part of the market data reform under Reg. NMS, the Commission adopted amendments that were intended to enhance the transparency and operation of the National Market System (NMS) Plans, through which the SROs manage market-wide utilities by broadening participation in NMS Plan governance. Reg. NMS mandated the creation of non-voting Advisory Committees to be composed of non-SRO representatives. The Advisory Committees were intended to provide the non-SRO members with an opportunity to be heard on Plan business, particularly that of the Plan Operating Committees.

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[31] *See* SIFMA Equity Market Structure Reform Letter at 2.

[32] See CCMR Report: "After requiring disclosure of exchange market data revenues, the SEC should adopt a 'Competing Consolidator' model for data dissemination. As a first step to implementing this framework, the SEC should promote reforms in the governance and transparency of the current SIPs."

However, broker-dealer and asset manager participation in NMS Plan governance must now be enhanced because the Advisory Committee structure has proven to be wholly unsuccessful. Advisory Committee members are given no substantive voice in the operation of the NMS Plans, their role is without authority, and there is no mechanism for them to elicit or report feedback from the broad constituencies that depend on the utilities operated by NMS Plans. In addition, the SROs have a long history of conducting the most meaningful NMS Plan business in executive sessions or "executive subcommittee meetings", both of which exclude Advisory Committee members. The Commission's EMSAC has considered this issue as well and has issued recommendations largely consistent with the NMS Plan governance reform recommendations we discuss below.[33]

It is important to recognize that the issue of Plan governance is tied to the larger issue of SRO reform. Following the adoption of Reg. NMS, exchanges demutualized and became for-profit companies. However, the structure in which the NMS Plans are governed, as well as the regulatory structure of the SROs themselves, is reflective of an era when the exchanges were member-owned organizations rather than for-profit, publicly traded enterprises. Today, exchanges act as both for-profit, publicly-traded companies with obligations to their shareholders, while simultaneously acting as regulators to the companies that they either list or member firms (broker-dealers) with whom they compete. This dynamic is rife with conflicts of interest, as evidenced by the exchanges' decisions via the SIP NMS Plan governance provisions related to competing products such as the SIPs and their unwillingness to directly include market participants in NMS Plan decision-making.

Alternatives for Consideration

The creation of the Advisory Committees was intended by the Commission to be a useful first step toward improving the responsiveness of the Plan participants and the efficiency of the Plan operations.[34] Further, the Commission stated in the Reg. NMS adopting release that it would continue to monitor and evaluate Plan developments to determine whether any further action is warranted. We believe SRO and NMS Plan governance reform is warranted, particularly in light of business structure changes at the for-profit exchanges and the experience of market participants with the Advisory Committees. Accordingly, we offer the following recommendations below for the Commission's consideration and welcome the opportunity to discuss these further:

- **NMS Plan Governance Reform.** NMS Plans should include direct representation by the industry (both broker-dealers and asset managers) and the public, and those independent representatives should have voting power on the operating committees of the Plans. The

[33] *See* https://www.sec.gov/spotlight/emsac/recommendations-enhanced-industry-participation-sro-reg-matters.pdf

[34] *See* 70 FR 37561.

representatives of the industry and the public should be selected in an open process independent from the exchanges. Consistent with this governance reform, the NMS agendas, meetings, and minutes should be open to the public. These changes would make the governance of NMS Plans consistent with the statutory "fair representation" requirements governing the SROs themselves, and assure transparency in governance to further the public interest and the protection of all investors. There is nothing in the Exchange Act, or the applicable rules thereunder, that would prohibit industry members from fully participating in the governance of NMS Plan or from making the proceedings more transparent. Unless and until that happens, the governance of NMS Plans will continue to be rife with conflicts of interest, inherently unfair and inefficient.[35]

- **SRO Reform**. The Commission should conduct a comprehensive review of the regulatory structure of broker-dealers and exchanges, as that structure is widely viewed to be outdated and in need of reconsideration and reform.[36] Included among this review should be the self-regulatory structure of for-profit exchanges, applicability of regulatory immunity for for-profit exchanges, and exchange liability limits.

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[35] *See* CCMR Report: "The NMS Plan process should be revised so that exchange SROs do not have outsize influence in the rulemaking process. Representatives of exchanges, broker-dealers and investors should be permitted to vote on any NMS Plans."

[36] *See* CCMR Report: "The surveillance and enforcement regulatory responsibilities currently assigned to SROs should be centralized to the extent practicable…Exchange legal immunity should only be available for exchange regulatory functions unique to exchanges that cannot be effectively centralized."

SIFMA greatly appreciates the Commission's consideration of the issues raised above and would be pleased to discuss these comments in greater detail with the Commission and the Staff. If you have any questions, please contact either me (at [redacted] or [redacted] or Timothy Cummings (at [redacted] or [redacted]).

Sincerely,

Theodore R. Lazo
Managing Director and
Associate General Counsel

cc: The Honorable Michael S. Piwowar, Acting Chairman
The Honorable Kara M. Stein, Commissioner

Heather Seidel, Acting Director, Division of Trading and Markets
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