HEALTHY MARKETS
TRANSPARENCY & TRUST

December 12, 2019

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

Vanessa Countryman
Office of the Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments, File No. S7-15-19

Dear Ms. Countryman:

The Healthy Markets Association[1] appreciates the opportunity to offer our comments to the above-referenced proposal to rescind "effective-upon-filing" procedures for National Market System "NMS" Plan fee amendments.[2]

We urge the Commission to adopt this modest improvement to the NMS Plan governance process without delay.

However, we also urge the Commission to go further, and revisit the entire NMS Plan process -- which is fundamentally conflicted and severely outdated.[3] The NMS Plan process was devised over forty years ago at a time of fewer exchanges that were also mutually owned, not-for-profit entities. In stark contrast, today, these entities are for-profit publicly traded entities with third-party shareholders. While the proposed reforms would assert the Commission's ability to more effectively regulate NMS Plan fee filings, it would not directly address the conflicts of interest of having for-profit entities acting as both regulators and fee setters on essential capital market utilities. We ask the Commission to boldly address these bigger issues, and to the extent necessary, seek assistance from Congress.

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[1] The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets. To learn more about Healthy Markets or our members, please see our website at http://healthymarkets.org.

[2] *Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments*, Sec. and Exch. Comm'n, 84 Fed. Reg. 54794 (Oct. 11, 2019), *available at* https://www.govinfo.gov/content/pkg/FR-2019-10-11/pdf/2019-21770.pdf ("Rescission Proposal").

[3] See, e.g., Remarks of Hon. Dan Gallagher, before the 2014 SRO Outreach Conference, Sept. 16, 2014, *available at* https://www.sec.gov/news/speech/2014-spch091614dmg-sro

Background on NMS Plans Generally

In the early 1970s, it became clear that the government needed to step into the markets to provide a mechanism to consolidate information and accountability across a myriad of trading venue. The Commission began outlining the contours of a "central market system for listed securities."[4]

A key component of that system was the creation of a consolidated system for the provision of essential market data.[5] Then-SEC Chairman William J. Casey explained that the objective was to "give us truly nationwide disclosure of prices and volume in listed stocks, and provide the basis for a truly national market in which investors will know where they can get the best price."[6]

On March 2, 1973, the New York, American, Midwest, Pacific and PBW Stock Exchanges and the National Association of Securities Dealers, Inc. filed with the Commission a "consolidated tape plan."[7] The Commission responded with numerous recommended adjustments to the plan to ensure proper oversight,[8] particularly to ensure that the plan would have proper governance and provide transparency to public amendments. A revised plan was submitted to the Commission on April 17, 1974.[9]

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[4] *See, e.g.*, Interpretive Release Relating to the Securities Exchange Act of 1934 and General Rules and Regulations Thereunder, Sec. and Exch. Comm'n, 37 Fed. Reg. 5286 (March 14, 1972) *available at* https://cdn.loc.gov/service/ll/fedreg/fr037/fr037050/fr037050.pdf ("In order to maximize the depth and liquidity of our markets, so that securities can be bought and sold at reasonably continuous and stable prices, and to insure that each investor will receive the best possible execution of his order, regardless of where it originates, It Is generally agreed that action must be taken to create a single central market system for listed securities.").

[5] 37 Fed. Reg. at 5287 ("Implementation of a nationwide disclosure or market information system to make universally available price and volume in all markets and quotations from all market makers."); see also, *Id.*, at 5287 ("Technological means must be found to bring together promptly transactional information from all markets and, if feasible, to present it on a single tape."); see also *Id.*, at 5287 ("In addition to developing a composite transactional tape, steps must be taken to Implement a composite quotation system. The technology and hardware for such a system are said to be available, and any remaining regulatory problems should be promptly worked out so that the system can attain Its objective of providing quotations which are truly comparable, notwithstanding the different assumptions on which they may be based.").

[6] Remarks of Hon. William J. Casey, Sec. and Exch. Comm'n, before the Economic Club of New York, Mar. 8, 1972 (summarized at SEC News Digest, 72-45 (Mar. 9, 1972), *available at* https://www.sec.gov/news/digest/1972/dig030972.pdf). A copy of the remarks as prepared for delivery are *available at* https://www.sec.gov/news/speech/1972/030872casey.pdf.

[7] *New York, American, Midwest, PBW, and Pacific Coast Stock Exchanges and NASD: Notice of Receipt of Plan*, Sec. and Exch. Comm'n, 38 Fed. Reg. 6443, *available at* https://cdn.loc.gov/service/ll/fedreg/fr038/fr038046/fr038046.pdf.

[8] See *Notice of Commission Comments on Consolidated Tape Plan Filed Pursuant to Rule 17a-15 Under the Securities Exchange Act of 1934*, Sec. and Exch. Comm'n, Rel. No. 10218, June 13, 1973.

[9] See Letter from Michael Tobb, Midwest Stock Exchange to George Fitzsimmons, SEC, Apr. 17, 1974 (attaching *Plan Submitted Pursuant to Rule 17a-15 of the Securities and Exchange Commission Under Securities Exchange Act of 1934*, April 17, 1974).

On May 17, 1974, the SEC declared the revised CTA Plan effective.[10] Shortly thereafter, Congress adopted the 1975 Amendments to the Securities Exchange Act of 1934 to enshrine into law the "national market system."[11] Although the Commission had already initiated and deemed effective the CTA Plan by 1975, the Congressional action was deemed by some as necessary to remove ambiguities and clearly outline the roles and authorities of the Commission and Plan Participants.

In particular, the Commission was explicitly empowered to oversee the governance and costs associated with the provision of this governmental function.[12] This authorization ran directly counter to assertions made by some Plan Participants at the time that their intellectual property rights over the data would otherwise grant them exclusive, unfettered control (including pricing power) over the data. Congress rejected that assertion, instead ensuring that the Commission had broad authority to regulate - including overseeing the costs for - the provision of data by exchanges.

Under this "national market system," Plan Participants were required to act jointly to provide "the public [with] access to a highly reliable source of information that is fully consolidated from all the various market centers that trade a particular security."[13] Today, the CTA, CQ, and UTP Plans govern all aspects of how that market data is collected, packaged, and distributed. The Plans also govern:

(1) fees that can be charged to fulfill the requirements of the plans (commonly referred to as "tape fees") and the revenues that are then redistributed back out to the exchanges (commonly referred to as "tape revenues"); and
(2) the ownership of the information distributed pursuant to the Plans.[14]

Essentially, "tape fees" are costs borne by market participants for the receipt of market data. Tape fees in excess of the costs of operations are then divided up amongst the exchanges on the basis of a complex formula.

Over the years, in addition to these data plans, NMS Plans have been established to:

- Create and oversee the Consolidated Audit Trail;
- Oversee the tick size pilot;
- Address extraordinary volatility;
- Oversee the Intermarket Symbol Reservation Authority; and

[10] 39 Fed. Reg. 17799.
[11] Pub. L. No. 94-29, 89 Stat. 97 (1975), *available at* https://www.gpo.gov/fdsys/pkg/STATUTE-89/pdf/STATUTE-89-Pg97.pdf; see also H.R. Rep. No. 94-229, 94th Cong., 1st Sess. 93 (1975).
[12] *Concept Release: Regulation of Market Information Fees and Revenues*, Sec. and Exch. Comm'n, 64 Fed. Reg. 70613 (Dec. 17, 1999), *available at* https://www.gpo.gov/fdsys/pkg/FR-1999-12-17/pdf/99-32471.pdf ("1999 Concept Release"). The CQ Plan was established in 1980. 45 Fed. Reg. 6521.
[13] See, 1999 Concept Release, at 70615.
[14] See, e.g., 1999 Concept Release, at 70615 (noting that the Commission has determined that "the practical effect of comprehensive federal regulation of market information is that proprietary interests in this information are subordinated to the Exchange Act's objectives for a national market system.").

- Establish procedures overseeing Rule 605 statistics reporting.

Today, all but one of the voting Plan Participants are for-profit exchanges.

Background on NMS Plan Fees

Some NMS Plans permit the assessment of fees on market participants. For these NMS Plans, for-profit exchanges have the ability to effectively set as regulators prices that can materially benefit them as for-profit entities. In these scenarios, the Commission should exercise particular diligence. Unfortunately, as a result of historical accident, these are precisely the filings over which the Commission seems to exercise the least oversight powers.

Rule 608(b) of Regulation NMS establishes the procedures for amending NMS Plans. Generally speaking, NMS Plans have to submit their filings to the Commission, which then sends them out for public comment. After comments are received, the Commission then approves or disapproves the amendments. Pursuant to this process, the vast majority of NMS Plan amendments are approved.[15]

However, outside of this general process, NMS Plans are currently permitted to begin charging revised fees upon filing those changes with the Commission.[16] Thus, unlike other NMS Plan amendments, changes to NMS Plan fees can be changed (and collected) prior to any public comment and any Commission action. However, the Commission thereafter has up to 60 days to summarily abrogate the filing

> if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.[17]

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[15] In part, the presumption is towards approval. As explained in the Rescission Proposal,

> The Commission is required to approve an NMS plan amendment within 120 days of the date of publication of notice of the filing, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest. See Rule 608(b)(2). The Commission may extend this review period up to 180 days if it finds such a longer review period to be appropriate and publishes its reasons for so finding, or if the sponsors of the proposal consent to a longer review period. Rescission Proposal, at 54796.

According to our reviews of these filings over decades, the vast majority of NMS Plan filings receive no comments, and the vast majority are approved.

[16] Rule 608(b)(3).

[17] See Rescission Proposal, at 54795.

This general process has been in place since 1981.[18]

Proposal

The Commission has proposed rescinding the fee filing exception contained in Rule 603(b)(3)(i), which would thus require all NMS Plan fee amendments to be subject to the standard process, including that the filings receive public comment and Commission approval before going into effect.[19]

Healthy Markets' Concerns with NMS Plan Fees

The current NMS Plan governance model demands the impossible: executives of for-profit entities must subjugate their obligations to their shareholders to the public interest. Simply tweaking their governance or procedures will never cure this irreconcilable conflict of interest.[20]

Other market participants, including broker-dealers, investment advisers, and asset owners are not given any votes in NMS Plan governance.[21] And while the Advisory Committees seemed like good steps when created, they have not led to any notable improvements in the Plans' governance[22], nor aided in achieving consensus, as the Commission had originally hoped.[23]

Perhaps in light of these realities, there is significant interest in expanding the roles of

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[18] Rescission Proposal, at 54796.
[19] Rescission Proposal, at 54798.
[20] This tension appears to play out in numerous contexts involving several NMS Plans. For example, as we have detailed in our November 2017 testimony before Congress, the conflicted nature of for-profit regulators has resulted in significant delays and complications in the effort to develop another important regulatory tool, the consolidated audit trail ("CAT"). Statement of Tyler Gellasch, Healthy Markets Association, *Hearing on Implementation and Cybersecurity Protocols on the Consolidated Audit Trail Before the House Financial Services Committee, Subcommittee on Capital Markets, Securities and Investment*, Nov. 30, 2017, *available at* https://financialservices.house.gov/uploadedfiles/hhrg-115-ba16-wstate-tgellasch-20171130.pdf.
[21] See, e.g., *Regulation NMS*, Sec. and Exch. Comm'n, 70 Fed. Reg. 37496, at 37561, n.591 (June 29, 2005), *available at* https://www.sec.gov/rules/final/34-51808fr.pdf ("Reg NMS Adoption").
[22] Notably, Advisory Committee members are selected by the Plan Participants and thus their interests may be generally aligned with those of the conflicted Plan Participants. Further, some members do not appear to accurately reflect the designated role.
[23] See Reg NMS Adoption, at 37561 ("In many respects, the Commission agrees with the concerns expressed by commenters regarding administration of the Plans. Nevertheless, it is reluctant at this point to require more intrusive changes to Plan governance that might interfere with effective Plan operations. The Plans fulfill significant operational functions with respect to the systems that deliver consolidated data to the public on a daily basis. Moreover, improved governance structures at the SRO level also should contribute to improved governance of the Plans through their selection and guidance of SRO representatives on the Plan operating committees. The Commission therefore believes that the Governance Amendment represents a useful first step toward improving the responsiveness of Plan participants and the efficiency of Plan operations."). It's past time for the Commission to take the second step towards addressing this issue.

other market participants in the governance of NMS Plans.[24] However, simply adding more for-profit market participants to an already conflicted process is unlikely to result in the provision of high-quality, timely, and low-cost market data.

The Commission has expressly acknowledged that one of its "most important responsibilities is to preserve the integrity and affordability of the consolidated data stream."[25] If measured by the complexity and costs associated with public market data, the Commission has struggled to fulfill this responsibility. In the decades since the Plans were adopted, over the course of dozens of amendments, the complexity and costs of market data have skyrocketed.

In January of 2018, Healthy Markets petitioned the Commission to revise its regulation of market data.[26] We subsequently began objecting to NMS Plan fee changes.[27] In particular, we questioned whether NMS Plan fee changes were consistent with the Exchange Act and Commission Rules. Ultimately, the Commission abrogated those filings.[28] A couple other NMS Plan fee filings were withdrawn amidst Commission scrutiny.[29]

Prior to these recent Commission actions, however, the vast majority of NMS Plan fee filings had been generally implemented without any observable scrutiny. And while we appreciated the Commission's work to stop a small handful of NMS Plan fee filings, the NMS Plan process remains deeply flawed.[30]

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[24] See., e.g., Sec. and Exchange Commission, Equity Market Structure Advisory Committee, Subcommittee on Trading Venues Regulation, Recommendations Related to Trading Venues Regulation, Apr. 19, 2016, *available at* https://www.sec.gov/spotlight/emsac/emsac-trading-venues-subcommittee-recommendations-041916.pdf.

[25] Reg NMS Adoption, at 37503.

[26] Letter from Tyler Gellasch, Healthy Markets Association, to Hon. Jay Clayton, Sec. and Exch. Comm'n, Jan. 17, 2018, *available at* https://www.sec.gov/rules/petitions/2018/petn4-717.pdf.

[27] See, e.g., Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, Apr. 11, 2018, *available at* https://healthymarkets.org/wp-content/uploads/2018/05/04-11-18-HM-letter-Market-Data-Reforms.pdf.

[28] *Order of Summary Abrogation of the Forty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 83149, May 1, 2018, *available at* https://www.sec.gov/rules/sro/nms/2018/34-83149.pdf and *Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 83148, May 1, 2018, *available at* https://www.sec.gov/rules/sro/nms/2018/34-83148.pdf.

[29] See, e.g., Notice of Withdrawal of Amendment No. 4 to the National Market System Plan Governing the Consolidated Audit Trail, Sec. and Exch. Comm'n, Exch. Act Rel. No. 82892, Mar. 16, 2018, available at https://www.sec.gov/rules/sro/nms/2018/34-82892.pdf.

[30] We recognize that abolishing all NMS Plans would require legislative action, and we urge the Commission to notify Congress of its concerns with the NMS Plan process and seek such action. In the interim, the Commission could, within its existing authority, reduce the number of NMS Plans (e.g., eliminate the CAT Plan), revise the governance of the plans, and reform the amendment process (e.g., adopt the Recission Proposal). The Commission should take direct responsibility for all activities

Commission Review of NMS Plan Filings

The Commission is obligated to review NMS Plan filings and determine that they are consistent with the Exchange Act, which requires, *inter alia*, that fees be "reasonable", "equitably allocated," not unduly burdensome on competition, and non-discriminatory. Furthermore, Commission Rules stipulate that the SROs are obligated to provide sufficient evidence to affirmatively establish a rule's compliance with those obligations. Unfortunately, the "effective upon filing" process for NMS Plan fees has made it difficult for the Commission or market participants to review and evaluate proposed changes for compliance with the Exchange Act and Commission Rules.

In fact, many of the the already-in-place fees associated with some NMS Plans fail to meet these standards. Absent a holistic review of such fees, we urge the Commission to at least ensure that it and market participants have the opportunity to evaluate proposed NMS Plan fee changes prior to their implementation. The Rescission Proposal does that and we strongly encourage the Commission to approve it.

Answers to Specific Questions in the Rescission Proposal

1. *Do commenters agree that the Commission should rescind the Fee Exception? Why or why not?*

Yes. See discussion above.

2. *Are there positive or negative implications, in addition to those discussed above, of the Commission's proposal to rescind the Fee Exception?*

We anticipate no negative implications to the industry at large for providing a *de minimis* amount of time for the public and Commission to contemplate proposed changes, including their compliance with the Exchange Act's requirements, prior to fees taking effect.

3. *Is the procedure for notice, comment, and Commission approval or disapproval under existing Rule 608(b)(1) and (2) appropriate for Proposed Fee Changes? Should there be an opportunity for public comment before Proposed Fee Changes can become effective? Should Commission approval be required before Proposed Fee Changes can become effective? Should the time periods set forth in Rule 608(b)(2) be longer or shorter if applied to Proposed Fee Changes? Should any other aspects of paragraphs (b)(1) or (b)(2) of Rule 608 be altered in their application to Proposed Fee Changes?*

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delegated to the SROs through the various NMS Plan processes, and, to the extent delegation is warranted (such as to FINRA), the Commission should make that decision carefully, and with the appropriate protections against unnecessary conflicts of interest, complexity, and costs.

In general, the Commission is obligated to ensure that NMS Plan filings are consistent with the Exchange Act's requirements that they be, inter alia, "reasonable," "equitably allocated," not undue burdens on competition, and non-discriminatory. It seems wholly inappropriate for market participants to absorb fees prior to any such determination by the Commission. Accordingly, the imposition of any NMS Plan fees should be permitted only after public comment and express Commission approval.

4. *Does the current effective-upon-filing procedure detract from the willingness of commenters to submit their views on Proposed Fee Changes, given that the proposed fee is already in effect when commenters may submit their views? Would market participants be more likely to comment on Proposed Fee Changes if they knew that the fees at issue were not yet effective and could not become effective without Commission action after consideration of comments? If so, do commenters believe that the proposed approach would lead to a more diverse and rich comment process and thereby promote a more informed evaluation of Proposed Fee Changes than is currently provided by the Fee Exception? If commenters do not believe the change would promote a more informed evaluation, why not?*

Yes. The vast majority of fee changes have been implemented with little to no public input or significant Commission review. Furthermore, there is nothing preventing the Plans from posting proposed filings on their associated websites to seek public comment in anticipation of a filing. To that end, we note that the CTA and UTP Plans recently posted on their websites a proposal to include odd-lot quotations within the Securities Information Processor.[31]

5. *Instead of rescinding the Fee Exception altogether, should the Commission modify the abrogation procedure in Rule 608(b)(3)(iii) such that Proposed Fee Changes are not effective immediately upon filing, but become automatically effective some time period (e.g., 60 or 90 days) after filing if the Commission does not abrogate the filing? This alternative would assure that commenters had an opportunity to comment prior to being charged a new or altered fee, as well as provide the Commission an opportunity to review the comments in deciding whether to abrogate the filing. If this new period between the date of filing and automatic effectiveness expired without Commission abrogation, the Proposed Fee Change would become effective without Commission action. Do commenters believe this alternative is preferable to the proposed rescission of the Fee Exception? What, if any, additional aspects of this potential alternative should be considered?*

No. An NMS Plan filing should be effective only upon a determination by the Commission that the filing is compliant with both Commission Rules and the Exchange

[31] See, e.g., Odd Lot Proposal, CTA, *available at* https://www.ctaplan.com/oddlots.

Act. That determination, in turn, should be informed by public comment and such other information as the Commission deems necessary and appropriate.

Commission inaction being "deemed approved," as the legal counsel for the CTA, CQ, UTP, and OPRA Plans have proposed,[32] would be both facially inconsistent with the law and public policy. The Plan Counsel Letter seems to attempt to reconstruct a process similar to the current, deeply flawed 19b filing process, but without the same legal authority. The statute for 19b filings expressly permits that process. The statute regarding NMS Plan oversight does not. The court in *Susquehanna International Group, Inc. v. SEC* was abundantly clear that the Commission is obligated to review and affirmatively determine that SRO filings are compliant with the Exchange Act. "Deemed approval" is not permitted.

Further, if the Commission were to permit "deemed approval," it would be effectively siding with the Plan Participants over all other market participants. There are typically more than 1500 SRO rule filings each year for the Commission to review and evaluate, making it extremely difficult for the Commission to take speedy action. This problem has been further exacerbated through the enactment of Section 916 of the Dodd-Frank Act, which expedited the 19b filing process and dramatically increased the number of SRO filings. The SROs should not be permitted overwhelm their regulator with filings (which, incidentally, are free to file), and then increase fees based on their regulator's inability to promptly address the deluge.

While we always hope the Commission will act in a timely manner to all SRO proposals, the reality is that the Commission may be burdened by other priorities, lack adequate resources to make a timely determination, or not have adequate information to make an informed decision in a relatively short period of time. There is no reason why the negative consequences of any potentially delayed Commission action should fall on the broader markets and market participants, as opposed to the Plan Participants seeking to change the rules. Simply delaying automatic effectiveness is not an appropriate solution.

6. *Are there other alternative approaches that the Commission could adopt for achieving the goal of providing an opportunity for public comment on and Commission review of Proposed Fee Changes prior to the time they become effective and new or altered fees are charged to market participants?*

No. Furthermore, we urge the Commission to take actions to ensure a similar process for all SRO filings, including those by individual exchanges.

[32] Letter from Howard Kramer and James P. Dombach, Murphay & McGonigle and Robert Wilcox, Jr. and Chris Bollinger, Schiff Hardin LLP, to Vanessa Countryman, Sec. and Exch. Comm'n, Dec. 9, 2019, *available at* https://www.sec.gov/comments/s7-15-19/s71519-6520115-200368.pdf ("Plan Counsel Letter").

7. *Do commenters believe that the fact that nearly all exchange SROs are public companies that have demutualized raises concerns about immediate effectiveness of Proposed Fee Changes? Do commenters believe that, currently, investors and other market participants that are not plan participants do not have a meaningful opportunity to influence Proposed Fee Changes before they become effective under the Fee Exception? Do commenters believe that such an opportunity is provided under the Rule 608(b)(1) and (2) procedures?*

Yes, as discussed above. In reality, the vast majority of market participants -- other than Plan Participants -- have little to no warning of the proposed changes, and have little opportunity to influence them.

8. *What issues or improvements relating to Rule 608 procedures would you recommend the Commission address or undertake to ensure Proposed Fee Changes are not unduly delayed if the immediate effectiveness procedure were eliminated?*

This is not an appropriate factor in the Commission's analysis. The law does not direct the Commission to be concerned with whether the handful of Plan Participants are somehow disadvantaged by an "undue delay" in the approval of a sought change to a NMS Plan. Rather, the Exchange Act expressly directs the Commission to determine that each such change is compliant with the Act, including that fees are "reasonable" and "equitably allocated," and that the rules are "non-discriminatory" and are not unduly burdensome on competition. Again, we would ideally like the Commission to act in a timely manner for all filings, but we see no reason why these types of filings are of a nature that would mandate special protections for Plan Participants at the expense of all other market participants.

9. *Do commenters believe that additional guidance on the content of Proposed Fee Changes would help improve the process for handling such filings?*

Yes.

While Commission Rules make it clear that the burden of establishing compliance with the Exchange Act falls on the SROs seeking to amend the NMS Plan, there are several often relevant details that are often missing.

First, as demonstrated by one recent NMS Plan fee filing (which was subsequently abrogated), some changes appear to be custom-designed to apply to a single firm. If a NMS Plan change is intended to address a single firm or class of firms, those details should be provided.

Second, if the Plan Participants have communications with other market participants regarding proposed changes to an NMS Plan in advance of the filing, those communications (whether written or oral) should be detailed in the filing.

Third, as the Commission staff recently outlined in its Staff Guidance on SRO Rule Filings Related to Fees,[33] SROs should be required to detail, very specifically, the justifications for their fee changes, including whether the changes are a result of changed costs for Plan Participants, and if so, the details of such changes. Further, the filing should also clearly outline the expected costs on different types of market participants. The determination of what is "reasonable" and "equitably allocated" can only be done with this information. Similarly, the information should also include expected impacts on various market participants (e.g., large versus small broker-dealers, data vendors of different types, etc.), which is essential to evaluating any impacts on competition or whether such fees are discriminatory in nature.

10. *Does the availability of proprietary data products sold by some SROs mitigate the Commission's preliminary concerns about subjecting market participants to new fees prior to any review by the Commission or opportunity for comment? Do those proprietary data products represent viable, competitively-priced alternatives to the core data distributed by the NMS plan processors?*

No. The fact that market participants may be subject to another distinct set of fees imposed by the exchanges does not alleviate them of their NMS Plan burdens. Put simply, the Commission should revise its procedures for all types of SRO-imposed fees to ensure that all such fees are compliant with Commission Rules and the Exchange Act.

[33] *Staff Guidance on SRO Rule Filings Relating to Fees*, Sec. and Exch. Comm'n, May 21, 2019, *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

Conclusion

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact Chris Nagy at [redacted] or me at [redacted].

Sincerely,

Tyler Gellasch
Executive Director

Cc:

The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson, Jr., Commissioner
The Honorable Hester M. Peirce,Commissioner
The Honorable Elad L. Reisman, Commissioner
The Honorable Allison Herren Lee, Commissioner
Brett Redfearn, Director, Division of Trading and Markets