



December 17, 2021

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE., Washington, DC 20549

Re: SR-CTA/CQ-2021-02 (Release No. 34-93615); SR-CTA/CQ-2021-03 (Release No. 34-93625); S7-24-89 (Release No. 34-93618); S7-24-89 (Release No. 34-93620)

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ and its Asset Management Group² respectfully submit this letter to the Securities and Exchange Commission (“Commission”) to comment on the above-referenced proposals to amend the Consolidated Tape Association (“CT”) Plan and Consolidated Quotations (“CQ”) Plan (the “CT/CQ Plans”), and the Nasdaq Unlisted Trading Privileges Basis (“UTP”) Plan (collectively, the “Plans”).³ These proposals would amend the Plans to adopt fees (“Fee Proposals”) for the receipt of the expanded consolidated market data for national market system (“NMS”) stocks required to be disseminated under the Commission’s Market Data Infrastructure Rule (“Infrastructure Rule”) and to implement the non-fee-related aspects (“Non-Fee Proposals”) of the Infrastructure Rule (collectively, the “Proposals”).⁴

As discussed below, SIFMA strongly opposes the Proposals and urges the Commission to disapprove them as they contradict the Commission’s direction in the Infrastructure Release and

¹ SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. 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 SIFMA’s Asset Management Group (SIFMA AMG) brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG’s members represent U.S. and global asset management firms whose combined assets under management exceed \$45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit <http://www.sifma.org/amg>.

³ See Release No. 34-93615 (November 19, 2021), 86 FR 67800 (November 26, 2021) (SR-CTA/CQ-2021-02); 34-93625 (November 19, 2021), 86 FR 67517 (November 26, 2021) (SR-CTA/CQ-2021-03); 34-93618 (November 19, 2021), 86 FR 67562 (November 26, 2021) (S7-24-89); 34-93620 (November 19, 2021), 86 FR 67541 (November 26, 2021) (S7-24-89).

⁴ See Release No. 34-90610, 86 FR 18596 (April 9, 2021) (File No. S7-03-20) (“Infrastructure Release”).

otherwise fail to meet the standards under the Securities Exchange Act of 1934 (“Exchange Act”) for consolidated market data fee filings.⁵ The Fee Proposals are the latest in a series of steps certain for-profit, public company exchanges have utilized with their dominant market power as single source providers to undermine the Commission’s authority regarding market data. Coupled with their lawsuits seeking to overturn the Commission’s Infrastructure Rule and the Commission’s approval of the new single national market system plan governing the dissemination of consolidated equity market data (the “CT Plan”),⁶ these exchanges are engaged in a strategy to preserve and potentially significantly increase their existing, lucrative revenue stream from market data to the detriment of the investing public and all market participants who would not be treated fairly or reasonably. In connection with a Commission disapproval of the Proposals, we would welcome the opportunity to further discuss with the Commission ways to support the Commission’s efforts to ensure that the newly-expanded consolidated market data (i.e., new core data) under the Commission’s Infrastructure Rule is disseminated in a manner consistent with the Exchange Act standards to ensure that the investing public and all market participants have fair and reasonable access to it. This could include potential Commission action under Rule 608(a)(2) of Regulation NMS, which allows the Commission to directly propose amendments to effective national market system plans.

I. Background on Commission Market Data Actions

SIFMA has long supported the Commission’s efforts to update the governance of and infrastructure supporting the distribution of real-time consolidated equity market data for NMS stocks. By issuing the unanimously-approved governance order (“Governance Order”) in May 2020 directing the self-regulatory organizations (“SROs”) to ultimately adopt the CT Plan and the unanimously-approved Infrastructure Rule in December 2020 to modernize the distribution of equity market data, the Commission has made tremendous progress to ensure that the system governing the distribution of equity market data meets the needs of today’s investors and marketplace. Given the benefits these rulemakings will provide to investors and the marketplace, SIFMA believes that it is critical for them to be fully implemented.

The Commission’s Governance Order directed the SROs to consolidate the three current equity market data plans (i.e., the CTA/CQ Plans and the UTP Plan) into a single plan governing the distribution of equity market data and to update the governance structure of the data plans to, among other things, allow non-SRO market participants to participate in the governance of the new plan. The Governance Order is designed to reduce unnecessary duplication among the three current market data plans and to address the exchanges’ conflict of interests as operators of the securities information processors (“SIPs”) under the plans and sellers of proprietary market data products that compete with SIPs. The Governance Order resulted in the SROs adopting the CT Plan, which the Commission approved in August 2021.⁷

⁵ See Sections 11A(c)(1)(C) and 11A(c)(1)(D) and Rule 603(a) of Regulation NMS.

⁶ See Release No. 34-92586 (August 6, 2021), 86 FR 44142 (August 11, 2021).

⁷ *Id.*

The Commission's Infrastructure Rule modernizes the national market system for the collection, consolidation, and dissemination of information with respect to quotations for and transactions in NMS stocks. The rule expands the content of core data that is required to be disseminated under Regulation NMS to include odd-lot data, depth of book data and auction imbalance information. The rule also establishes new round lot quantities of less than 100 shares for certain higher-priced securities that would be publicly disseminated to provide investors with more information about better-priced orders in high-priced stocks. Further, the rule decentralizes the distribution of consolidated market data currently performed by the exclusive SIPs and instead rely on Competing Consolidators that would be responsible for collecting, consolidating, and disseminating consolidated market data products to the public.

II. The Proposals

A. The Fee Proposals

As specified in the Infrastructure Release, the Operating Committees of the CT/CQ Plans and the UTP Plan were required to propose new fees regarding the receipt and use of new core data required to be disseminated under the Commission's Infrastructure Rule by November 5, 2021. In response to this requirement, certain SRO Participants of the Plans (i.e., the Cboe, NYSE and Nasdaq exchange families) authorized the filing of the Fee Proposals ("Submitting Exchanges"). The Fee Proposals include a footnote stating that they were filed with the Commission over the objections of other SRO Participants of the Plans as well as the Advisory Committee to the Plans.⁸

The Fee Proposals would establish fees for three categories of market data that, collectively, are the newly expanded consolidated market data components required to be disseminated under the Infrastructure Rule: (1) Level 1 Core Data, which would include Top of Book Quotations, Last Sale Price Information and odd-lot information, (2) depth of book data, and (3) auction information. The Fee Proposals generally retain the existing fee structures from the current Plans. In this regard, the Fee Proposals would establish a Professional Subscriber Charge and a Nonprofessional Subscriber Charge for each of the three new data categories established by the Plans. The Fee Proposals also would establish Non-Display Use fees for each

⁸ The Fee Proposals include the following statement from the objecting SRO Participants and the Advisory Committee:

FINRA, IEX, LTSE, MIAX, and MEMX have not joined in the decision to approve the filing of the proposed amendment, and Nasdaq BX is also withholding its vote at this time. Additionally, the Advisory Committee requested that the following statement be inserted into the filing: The Advisory Committee has actively participated in the rate setting process with the SROs and has provided the SROs with opinion and guidance on rate setting appropriate to the interests of consumers throughout the process. The Advisors collectively believe that SIP data content fees should be universally lower to align with the un-coupling of SIP data content from the SIP exclusive processor, a function to be performed by Competing Consolidators. The Advisors believe that while their input was important in the process, the core principle of fees being fair and reasonable was not achieved.

of the three new data categories established by the Plans. Finally, the Fee Proposals would establish Access Fees regarding the use of the three new categories of data established by the Plans.

The Fee Proposals also would add clarifying language regarding the applicability of various current fees to the new core data. In direct contravention of Commission language in its Infrastructure Release, the Fee Proposals include language that treat Competing Consolidators the same as market data vendors and applies Redistribution Fees to them.⁹

B. The Non-Fee Proposals

The Non-Fee Proposals were submitted on behalf of the Plans to implement the non-fee-related aspects of the Infrastructure Rule. Unlike the Fee Proposals, the Non-Fee Proposals include a footnote noting that they were approved by all SRO Participants of the Plans. With regard to Competing Consolidators and Self-Aggregators, the Non-Fee Proposals would, among other things, amend the Plans to state that, on an annual basis, the Operating Committees will assess the performance of Competing Consolidators, prepare an annual report containing such assessment, and furnish the report to the Commission prior to the second annual quarterly meeting of the Operating Committee. The Non-Fee Proposals also would define the “monthly performance metrics” that Competing Consolidators are required to publish. In addition, the Non-Fee Proposals would amend the Plans to require that each SRO collect and report last sale price information to Competing Consolidators and Self-Aggregators in the same way as they do for other persons. The Non-Fee Proposals also would clarify that the current market data contracts regarding the receipt of market data will be applicable to the Competing Consolidators and Self-Aggregators. Further, the Non-Fee Proposals would require that each SRO make available to all Competing Consolidators and Self-Aggregators its information with respect to quotations for and transactions in NMS stocks as such SRO makes available to any other person.

III. Discussion

Rather than addressing many of the reasons why the Proposals should be disapproved, many of which are addressed in other comment letters, SIFMA’s comments focus on two very problematic aspects of the Proposals that clearly demonstrate why the Commission should disapprove them. In particular, the Fee Proposals fail to meet the Exchange Act standards for consolidated market data fees, which requires such fees to be fair, reasonable and not unreasonably discriminatory.¹⁰ Instead of providing a cost-based analysis of the proposed fees, the Submitting Exchanges rely on an arbitrary ratio comparing the exchanges’ charges for their proprietary depth-of-book feeds with their charges for their proprietary top-of-book feeds. In addition, both the Fee and Non-Fee Proposals directly contradict the Commission’s directive in

⁹ See Infrastructure Release at 18685.

¹⁰ See Sections 11A(c)(1)(C) and 11A(c)(1)(D) and Rule 603(a) of Regulation NMS.

the Infrastructure Rule that Competing Consolidators not be treated the same as market data vendors.

A. Fee Proposals' Failure to meet Exchange Act Fee Standards

The Submitting Exchanges fail to show that the Fee Proposals meet the Exchange Act standards for consolidated market data fee filings. In their filings, the Submitting Exchanges disregard the Commission's historic reasonably related to costs standard for assessing consolidated market data fees and instead create a completely unreasonable standard to justify the proposed fee. In particular, the Submitting Exchanges have created a ratio in which they compare the exchanges' charges for their proprietary depth-of-book feeds with their charges for their proprietary top-of-book feeds. This ratio is completely arbitrary and in no way shows that the proposed fees are fair, reasonable, and not unreasonably discriminatory as required under the Exchange Act.

As the Commission discusses at length in the Infrastructure Release, fees charged by monopolistic providers such as the exclusive SIPs need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low. The Commission further notes that "a reasonable relation to costs has ... been the principal method discussed by the Commission for assessing the fairness and reasonableness of ... fees for core data."¹¹ The Submitting Exchanges completely disregard this standard in the Fee Proposals, even going so far as to state that they do not know what the costs of providing market data are in the Competing Consolidator model. This argument is without merit as each SRO Participant knows exactly how much it costs them to collect and disseminate market data from their market,¹² and collectively as members of the Operating Committee of the Plans, the SRO Participants can use that information to determine a cost-based fee for the use of consolidated market data under the Plans. The Submitting Exchanges, however, have chosen not to follow this path because it would highlight the excessive nature of their current fees for market data.

Aside from being arbitrary, one of the most problematic aspects of the Submitting Exchanges' ratio is that it presupposes that the fees they charge for their proprietary market data are fair and reasonable, which the exchanges assert in the Fee Proposals are constrained by direct and platform competition. The exchanges' "platform competition" argument that competition for order flow constrains pricing for market data does not demonstrate that the fees are reasonable. SIFMA has shown several times over the years that an exchange's decision to offer multiple products (trading services and market-data products) does not constrain market data prices. A study we have provided previously noted that while trading on various exchanges is

¹¹ See Infrastructure Release at 18685.

¹² See, e.g., "The Cost Of Exchange Services - Disclosing the Cost of Offering Market Data and Connectivity as a National Securities Exchange," from IEX (<https://iextrading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf>).

substitutable, trade data from various exchanges is not.¹³ Another study we have provided shows that the prices for trading data have in some cases increased significantly in the past several years with no apparent competition-based reason.¹⁴ Moreover, the Commission has expressed its concern that proprietary top-of-book data products are not subject to competition.¹⁵ Similarly, Commission staff have stated that the “platform competition” theory is not an adequate basis to conclude that data prices are competitive.¹⁶

For these reasons, the Commission should disapprove the Fee Proposals. SIFMA has historically sought transparency in market data fees.¹⁷ The current proposals lack this transparency and propose fees that are not fair or reasonable and are unreasonably discriminatory for all investors and market participants. SIFMA previously voiced concerns about the ability of exchanges to use de facto monopolies over their own market data to disadvantage market participants and believe that the Submitting Exchanges are employing similar tactics in connection with the Fee Proposals.

B. Proposals’ Treatment of Competing Consolidators

As discussed, the Infrastructure Rule and the CT Plan are designed to ensure that consolidated equity market data is distributed fairly and reasonably and provides the content needed to facilitate best execution in today’s market. Notwithstanding the clear public benefit these rulemakings will provide, the Submitting Exchanges are engaged in a strategy to undermine the Commission’s authority over market data to preserve their current revenues from both proprietary and SIP data. This strategy is evidenced by the lawsuits they have filed seeking to overturn the Infrastructure Rule and the Commission’s approval of the CT Plan. The near-term goal of these lawsuits is to narrow the Commission’s statutory authority over market data, with the long-term goal being to protect and increase the lucrative revenue they receive from market data. Their latest actions in the Fee Proposals further demonstrate this strategy and are another example demonstrating why the conflicted SRO model should be reformed.

¹³ See, e.g., Lawrence R. Glosten, “Economics of the Stock Exchange Business: Proprietary Market Data,” p.4 (Jan. 2020); Tr. of the Roundtable on Market Data Products, Market Access Services and Their Associated Fees, pp. 62-65 (comments of Brad Katsuyama and Mehmet Kinak) (Oct. 25, 2018) (“Market Data Roundtable”).

¹⁴ See Expand Study, “An Analysis of Market Data Fees” (Aug. 2018) (<https://www.sifma.org/wp-content/uploads/2019/01/Expand-and-SIFMA-An-Analysis-of-Market-Data-Fees-08-2018.pdf>).

¹⁵ “Indicia that exchanges may not be subject to robust competition include that many broker-dealers state 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.” See Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020).

¹⁶ See “Staff Guidance on SRO Filings Related to Fees,” Division of Trading and Markets, Commission (May 21, 2019), available at (<https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>).

¹⁷ See Letter from Theodore R. Lazo, SIFMA to Vanessa Countryman, SEC (September 18, 2019); Letter from Ellen Greene, SIFMA to Vanessa Countryman (May 26, 2020).

In the Fee Proposals, the Submitting Exchanges have taken the position that Competing Consolidators should be charged Redistribution Fees just like any other market data vendor. Such a position completely undermines the Commission's efforts in the Infrastructure Rule to change the method by which market data for NMS stocks is consolidated and disseminated through the introduction of a decentralized consolidation model where competing consolidators and self-aggregators replace the exclusive SIPs. Under the Infrastructure Rule, Competing Consolidators are required to create a consolidated market data product that contains all the new core data but also have the flexibility to develop other market data products that meet the needs of their subscriber customers. As we noted in our comment letter supporting this aspect of the Infrastructure Rule, increasing competition in the dissemination of market data should enhance investor choice and provide another means for competition to impose downward pressure on the cost of market data.¹⁸

In seeking to justify the proposed fees, the Submitting Exchanges in the Fee Proposals address the Commission's statement in the Infrastructure Release that, "imposing redistribution fees on data content underlying consolidated market data that will be disseminated by competing consolidators would be difficult to reconcile with statutory standards of being fair and reasonable and not unreasonably discriminatory in the new decentralized model." However, the exchanges fail to include the Commission's full discussion of the topic from the Infrastructure Release. To remedy this omission, we are including that discussion below:

the Commission believes that the fees for the data content underlying consolidated market data should not include redistribution fees for competing consolidators. Competing consolidators will take the place of the exclusive SIPs in the dissemination of consolidated market data, which today do not pay redistribution fees for the consolidation and dissemination of SIP data. The Commission believes imposing redistribution fees on data content underlying consolidated market data that will be disseminated by competing consolidators would be difficult to reconcile with statutory standards of being fair and reasonable and not unreasonably discriminatory in the new decentralized model. Under the new decentralized consolidation model, self-aggregators also will directly receive the data content necessary for generating consolidated market data from the SROs and, because by definition they are limited to using the data for internal purposes, would not be subject to fees for redistributing such consolidated market data. If the plan(s) proposed to impose redistribution fees on the data content underlying consolidated market data, the Commission would be concerned that competing consolidators could be subject to unreasonable discrimination as they would be required to pay higher fees for such data than self-aggregators would pay for the same data. The Equity Data Plans have not imposed redistribution fees on the exclusive SIPs and the Commission believes that such plan(s) should not impose such fees on the entities that will distribute consolidated market data in the decentralized consolidation model, i.e., competing consolidators.
[Footnotes Omitted]

¹⁸ See Letter from Ellen Greene, SIFMA to Vanessa Countryman (May 26, 2020).

As the Commission clearly states in this release, imposing Redistribution Fees on Competing Consolidators would be unreasonably discriminatory toward them as they would have to pay fees that self-aggregators do not have to pay.

Under the Commission's Infrastructure Rule, the exclusive SIPs are being replaced by Competing Consolidators, and thus it is entirely appropriate that Competing Consolidators be treated in the same manner as the exclusive SIPs are today. By treating the Competing Consolidators differently, the Submitting Exchanges are acting in an unreasonably discriminatory manner, effectively disregarding these Exchange Act mandates in addition to the Commission's directive in the Infrastructure Rule. Similarly, the Submitting Exchanges' action to impose Redistribution Fees on Competing Consolidators imposes an undue burden on competition in contravention of the standards under Section 3(f) of the Exchange Act that the Commission must consider in connection with any Commission rulemaking or review of SRO rules.

While it may be inadvertent, we also have concerns about the treatment of Competing Consolidators in the Non-Fee Proposals. The proposals treat Competing Consolidators the same as market data vendors despite Commission instruction to the contrary. In this regard, the Non-Fee Proposal appears to continue to contain the concept of a single processor and treats Competing Consolidators the same as market data vendors from a definitional perspective. In taking this approach, the Non-Fee Proposals also contravene the Commission's Infrastructure Release.

It is possible that the Submitting Exchanges would welcome a Commission disapproval of the Fee Proposals since it would allow them to maintain the status quo and/or provide another avenue to challenge the Commission's authority. Despite this possibility, for the reasons above, we strongly believe the Commission should disapprove the Proposals.

* * *

We recommend for the foregoing reasons that the Commission disapprove the Proposals. In addition, given the importance of the new core data to the marketplace, we would welcome the opportunity to further discuss with the Commission ways to support the Commission's efforts to ensure that the Infrastructure Rule is fully implemented. SIFMA greatly appreciates the Commission's consideration of the issues raised above and would be pleased to discuss these comments in greater detail. If you have any questions or need any additional information, please contact Ellen Greene (at [REDACTED]).

Sincerely,

Ellen Greene

Ellen Greene
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