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Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Proposed Fifty-Second Amendment to the Joint SRO Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privilege basis, Securities Exchange Act Release No. 93618 (November 19, 2021), 86 FR 67562 (November 26, 2021) (File No. S7-24-89)

Proposed Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan, Securities Exchange Act Release No. 93625 (November 19, 2021), 86 FR 67517 (File No. SR-CTA/CQ-2021-03)

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE"), on behalf of the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE National, Inc., and NYSE Chicago, Inc. (together, the "NYSE Exchanges"), appreciates the opportunity to comment on the proposed Fifty-Second Amendment to the Joint SRO Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privilege basis ("UTP Plan"),¹ and the proposed Twenty Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan ("CTA/CQ Plan")² (collectively, the "Fee Proposals").

¹ See Securities Exchange Act Release No. 93618 (November 19, 2021), 86 FR 67562 (November 26, 2021) (File No. S7-24-89).

² See Securities Exchange Act Release No. 93625 (November 19, 2021), 86 FR 67517 (File No. SR-CTA/CQ-2021-03). The UTP Plan and the CTA/CQ Plan are referred to collectively herein as the "Equity Data Plans" or "Plans."

NYSE opposed the Market Data Infrastructure (“MDI”) Rule³ in its comment letters⁴ and is challenging its adoption in federal court⁵ because NYSE believes that the MDI Rule is an arbitrary and capricious departure from the current, well-tested national market system. Nevertheless, NYSE worked diligently with the other Participants to meet the Commission’s requirement that the Plans submit a proposed fee schedule for expanded core data under the MDI Rule.

The resulting Fee Proposals meet the Exchange Act’s standard of being fair and reasonable and not unreasonably discriminatory.⁶

A Demonstration of Costs Is Not Required

Some commenters have urged the Commission to disapprove the Proposed Fees because the Participants did not support them with reference to the Participant exchanges’ costs in producing the data.⁷

In the release supporting the MDI Rule, the Commission indicated its belief “that *one method* for demonstrating that such fees are fair and reasonable and not unreasonably discriminatory is by demonstrating that they are reasonably related to costs.”⁸ The Commission then went on to contend, multiple times, that it “has historically assessed fees for data such as the data content

³ See Securities Exchange Act Release No. 90610 (December 9, 2020), 86 FR 18596 (April 9, 2021) (the “MDI Rule”).

⁴ See, e.g., Letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, Securities and Exchange Commission (“SEC”), regarding Proposed Rule on Market Data Infrastructure (File No. S7-03-20) (June 1, 2020), available at <https://www.sec.gov/comments/s7-03-20/s70320-7261548-217665.pdf>.

⁵ See The Nasdaq Stock Market LLC v. Securities and Exchange Commission, Case No. 21-1100 (D.C. Cir.).

⁶ See 15 U.S.C. 78k-1(c)(1)(C) and (D); 17 CFR 242.603(a)(1) and (2).

⁷ See, e.g., Letter from Ellen Greene, Managing Director, and William C. Thum, Managing Director, SIFMA, to Vanessa Countryman, Secretary, SEC, regarding CTA/CQ/UTP Plan Fee Amendments (SR-CTA/CQ-2021-03; File No. S7-24-89) (December 17, 2021), at 4-5, available at <https://www.sec.gov/comments/s7-24-89/s72489-20109971-264297.pdf>; and Letter from John Ramsay, Chief Market Policy Officer, IEX, to Vanessa Countryman, Secretary, SEC, regarding same (December 17, 2021), at 2-3, available at <https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-20109918-264253.pdf>.

⁸ MDI Rule, supra note 3, 86 FR at 18684 (emphasis added).

underlying consolidated market data using a reasonably related to cost standard.”⁹ As support, the Commission cites its 1999 Market Information Concept Release,¹⁰ wherein it stated that “the fees charged by a monopolistic provider (such as the exclusive processors of market information) 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.”¹¹

But the 1999 Market Information Concept Release was the subject of much criticism at the time. NYSE, like other commenters, made an extensive submission¹² in opposition to the Concept Release, explaining in detail why cost-based pricing for market data would not be possible and was not required by the Exchange Act. Among other things, NYSE pointed out at the time that nothing in the text of the Exchange Act or the Commission’s rules required market data fees to be supported by cost data;¹³ that the legislative history of the 1975 amendments to the Exchange Act, and particularly Section 11A, reflects that Congress’s principal concern was promoting competition between exchanges, not regulating market data pricing;¹⁴ and that economic studies demonstrated that separating out the costs of producing market data from the other costs of operating an SRO is an impossible task that would enmesh the Commission in a continuous ratemaking process that would produce arbitrary results.¹⁵

In the end, the Commission never followed up on the 1999 Market Information Concept Release with any regulations or formal policies requiring cost-based pricing for consolidated market

⁹ Id., 86 FR at 18684 n.1158 & 18685; see also id. at 18773 (“One method for demonstrating compliance with such requirements is that fees are reasonably related to costs; this has been the principal method discussed by the Commission for analyzing the fairness and reasonableness of such fees for core data since the [1999] Market Information Concept Release.”).

¹⁰ See Securities Exchange Act Release No. 42208 (December 9, 1999), 64 FR 70613 (December 17, 1999) (File No. S7-28-99) (the “1999 Market Information Concept Release”).

¹¹ Id., 64 FR at 70627.

¹² See Letter from James E. Buck, Senior Vice President of NYSE, to Jonathan G. Katz, Secretary, SEC, regarding Concept Release on Regulation of Market Information Fees and Revenues (File No. S7-28-99) (April 10, 2000) (the “NYSE 2000 Comment Letter”), available at <https://www.sec.gov/rules/concept/s72899/buck1.htm>. NYSE incorporates the entire submission here, including Appendices A-E.

¹³ See id.

¹⁴ See id., Appendix B.

¹⁵ See id., Appendix C.

data.¹⁶ And in practice, the Commission's standard for evaluating consolidated market data fees has *not* required a showing of the relationship between the fees and the cost of producing the data. For example, in 2013, when the CTA/CQ Plan proposed revisions that both imposed non-display and redistribution fees for core market data and reduced individual professional device fees, the Plan justified the proposal as reasonable not with reference to costs, but because it would be overall revenue-neutral to the Plan.¹⁷ Even though SIFMA criticized the proposal for not addressing the costs of creating core data,¹⁸ the Commission did not abrogate the filing and the fee changes went into effect. As such, requiring cost data now would be a significant change from settled Commission practice.

In any event, it is not clear how the Equity Data Plans even could support the Fee Proposals with information about the costs of producing the market data at issue. As the Participants pointed out in their letter submitting the Fee Proposals, the Operating Committee of the Equity Data Plans plays no role in the creation or dissemination of core data under amended Rule 603(b), and thus has no information about how each exchange would generate core data or the costs that each exchange would incur in doing so. Moreover, just as it was at the time of NYSE's 2000 Comment Letter, it remains impossible to separate out the costs of producing market data from the other costs of operating an exchange.¹⁹

¹⁶ Economist Charles M. Jones has opined that the price of consolidated market data should not be based on costs. See Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR-NYSENAT-2020-05), Exhibit 3A (Charles M. Jones, "Understanding the Market for U.S. Equity Market Data," August 31, 2018) ("A particularly weak argument is that the consolidated feed should be priced based solely on the costs of the SIPs. . . . In regulating the pricing of the consolidated feeds, the SEC appropriately and holistically should consider the overall value of the market data being created.).

¹⁷ See Securities Exchange Act Release No. 70010 (July 19, 2013), 78 FR 44984 (July 25, 2013) (SR-CTA/CQ-2013-04). Specifically, the Participants asserted that the proposed fee change would "realign the Plans' charges more closely with the services the Plans provide . . . without materially changing the revenues the current fee schedules generate" (*id.* at 44984), and would "rebalance the fee schedule but are approximately revenue neutral to the overall market data revenues generated under the Plans" (*id.* at 44985). The Participants estimated that "the revenues resulting from the revised access fees would increase total Network A and Network B revenues by six percent, but this increase would be largely offset by an estimated five percent decrease in total revenues resulting from the revised professional subscriber device fees and an estimated two percent decrease resulting from the revised quote usage fees." *Id.* at 44987.

¹⁸ See Letter from Melissa MacGregor, Managing Director & Associate General Counsel, SIFMA, to Elizabeth M. Murphy, Secretary, SEC (SR-CT/ACQ-2013-04) (August 8, 2013), available at <https://www.sec.gov/comments/sr-ctacq-2013-04/ctacq201304-1.pdf>.

¹⁹ See Letter from Elizabeth K. King, General Counsel and Corporate Secretary, NYSE, to Vanessa Countryman, Secretary, SEC, regarding Proposal to Establish Fees for the

In sum, the Exchange Act does not require market data fees to be supported by a showing of costs, and historically, the Equity Data Plans have not justified their fee proposals for consolidated market data on the basis of cost data.

The Proposed Fees Should Be Approved Because They Are Fair and Reasonable and Not Unreasonably Discriminatory

Putting aside costs, NYSE believes that the Proposed Fees meet the Exchange Act's requirement of being fair and reasonable and not unreasonably discriminatory²⁰ because they are reasonably related to the value that subscribers gain from the data, and achieve the Commission's objective in Regulation NMS that prices for consolidated market data be set by market forces.

In the 2005 Regulation NMS Adopting Release, the Commission noted that "a drawback" of the single consolidator system is that "it affords little opportunity for market forces to determine the overall level of fees" for consolidated market data.²¹ By contrast, and as described in more detail below, the depth-of-book data that will be required to be included in the new core data has a history of being priced based on market forces. Accordingly, the Fee Proposals meet the Commission's objective for market forces to determine the overall level of fees by basing the proposed fees for consolidated depth-of-book data upon the pricing relationship between the SROs' proprietary depth-of-book data to proprietary top-of-book data. By applying that established ratio to the current prices for consolidated top-of-book data, the Fee Proposals reflect the market forces that drive the pricing of depth-of-book information in relation to top-of-book information and the value that the data has to market participants.

Depth-of-book data and auction information have been available to market participants directly from the exchanges for years, at rates that have been filed with the Commission and that are constrained by direct and platform competition among exchanges.

Regarding direct competition, the pricing for exchange proprietary data feeds is constrained by the highly competitive markets for exchange trading and exchange market data. The competitive market for exchange trading is undeniable; as the D.C. Circuit recognized in NetCoalition v. SEC, "[n]o one disputes that competition for order flow is fierce."²² And

NYSE National Integrated Feed at 11-14 (SR-NYSENAT-2020-05) (August 14, 2020) (the "NYSE National Integrated Feed Letter"), available at <https://www.sec.gov/comments/sr-nysenat-2020-05/srnysenat202005-7644319-222351.pdf>. NYSE incorporates the entire submission here, including Attachments A-E.

²⁰ See 15 U.S.C. 78k-1(c)(1)(C) and (D); 17 CFR 242.603(a)(1) and (2).

²¹ Securities Exchange Act Release No. 51808, 70 FR 37496, 37504 (June 26, 2005) (File No. S7-10-04); see also id. at 37558.

²² See NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (internal quotations omitted).

competition for market data is similarly intense, as was made clear by the Antitrust Division of the U.S. Department of Justice's 2011 determination that the market for real-time proprietary market data is a distinct "relevant market" for antitrust purposes, wherein exchanges compete with each other for the provision of proprietary market data products.²³ The Antitrust Division reached this conclusion at a time when it noted there were only four "major competitors" supplying proprietary market data products, a determination that has become stronger in the intervening years with the entry of numerous new exchanges.²⁴

Moreover, exchanges compete against one another as platforms, with the costs of order execution and proprietary market data products both contributing to the total cost of trading on one exchange platform versus another exchange platform. As platforms, no exchange can raise its prices to supracompetitive levels on one side of the platform (i.e., market data) without losing sales on the other side of the platform (i.e., trading volume). This has been demonstrated by numerous economists in recent years,²⁵ including by Professor Marc Rysman, whose 2019 study was submitted in support of the proposal by NYSE National, Inc. to establish market data fees for its proprietary Integrated Feed market data product.²⁶ Among other things, Professor Rysman concluded that "[t]he platform nature of stock exchanges means that data fees cannot be analyzed in isolation, without accounting for the competitive dynamics in trading services"; "[c]ompetition is properly understood as being between platforms (i.e., stock exchanges) that balance the needs of consumers of data and traders;" and "[c]ompetition for order flow can discipline the pricing of market data, and vice versa."²⁷

²³ See NYSE National Integrated Feed Letter, supra note 19, at 4-6. Among other things, the Antitrust Division's complaint alleged that "[e]ach exchange (or other trading platform) owns non-core data and can distribute it voluntarily for a profit in competition with data from other exchanges." See id. at 6.

²⁴ See id. at 6-9.

²⁵ See id. Attachment B (Hendershott and Nevo, Statement Regarding the SEC's Proposed Order Concerning the Pricing of Depth-of-Book Market Data, In re SIFMA, Admin. Proc. File No. 3-15350 ¶¶ 37-70; and Attachment C, Expert Report of Janusz A. Ordover, In re SIFMA, Admin. Proc. File No. 3-15350, ¶¶ 6-19, 33-41, 58-59. The versions appearing as Attachment B and Attachment C are the redacted "public" versions of those documents, unredacted versions of which were submitted to the Commission under seal and remain under seal in File No. 3-15350.

²⁶ See Securities Exchange Act Release No. 88211 (February 14, 2020), 85 FR 9847 (February 20, 2020) (SR-NYSE-NAT-2020-05), Exhibit 3B (Marc Rysman, "Stock Exchanges as Platforms for Data and Trading," December 2, 2019 (the "Rysman Report")). NYSE incorporates the entire proposal here.

²⁷ See Rysman Report, supra note 26, ¶ 98. See also Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285-86 (2018) ("Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects

Given this inter-exchange competition, the exchanges' filed prices for depth-of-book data and auction information are constrained by market forces. The ratio between such filed proprietary depth-of-book fees and proprietary top-of-book data therefore provides the Commission with a benchmark for evaluating the Proposed Fees. The Proposed Fees are fair, reasonable, and not unfairly discriminatory because they are based on this ratio, which is reflective of market forces.

Several commenters have critiqued various aspects of the Fee Proposals, contending that the comparisons and calculations should have been done in slightly different ways. NYSE addresses some of those criticisms below:

- Some commenters assert that the Fee Proposals should be disapproved because the Participants "failed" to follow the Commission's "instruction" that competing consolidators not be charged redistribution fees. However, after much study and discussion, the Participants concluded that it would be unfair, unreasonable, and unfairly discriminatory *not* to charge redistribution fees to competing consolidators. Although the Commission believed it would be unfair to charge redistribution fees to competing consolidators when self-aggregators would not be subject to them,²⁸ the Participants concluded that a more appropriate comparison is between competing consolidators and downstream vendors, both of which would be competing to sell consolidated market data directly to the same market data subscribers. Because vendors would still be subject to redistribution fees when redistributing data to market data subscribers, it would be unfair to such vendors and would impose a burden on competition for competing consolidators not to be charged a redistribution fee for exactly the same activity.
- Some commenters argue that the Fee Proposals should be disapproved because the Participants failed to "back out" fees for the current UTP and CTA/CQ Processors from the proposed fee structure. However, the MDI Rule requires the current Processors to continue operating for at least several more years, until the Operating Committee recommends to the Commission that they be retired. Accordingly, there are no savings to back out of any proposed fee structure at this time, and the issue can be addressed if and when the current Processors cease operations.
- One commenter argues that the Fee Proposals should be disapproved because, for some firms, the professional fees proposed would allegedly be higher than if the firms purchased certain cherry-picked proprietary data products directly from certain exchanges.²⁹ But this comparison is between apples and oranges, and does not

differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services.").

²⁸ MDI Rule, supra note 3, 86 FR at 18685.

²⁹ See Letter from Adrian Griffiths, Head of Market Structure, MEMX LLC, to Vanessa Countryman, Secretary, SEC, regarding CTA/CQ/UTP Plan Fee Amendments (SR-

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account for the fact that purchasers of the new data would be receiving a *consolidated* data product that aggregates all exchanges' data together to determine an NBBO and the five best levels of depth from among all the exchanges. It also disregards the fact that the Fee Proposal includes much lower fees for non-professionals, such as retail traders. It is fair, reasonable, and not unreasonably discriminatory for Wall Street to pay higher fees than Main Street.

The Fee Proposals as a whole present fair, reasonable, and not unreasonably discriminatory proposals that meet the standards of the Exchange Act. Should the Commission disagree, however, NYSE believes that it would be inconsistent with both the Exchange Act and Rule 608 for the Commission to *sua sponte* change any or all of the proposed fees, as any such change would be material to the Fee Proposal overall. As such, if the Commission intends to revise the Fee Proposal in any material way, it must do so through rulemaking under Rule 608(b)(2) by providing public notice of the specific changes it proposes and giving the Participants and the general public an opportunity to comment.³⁰

Respectfully submitted,



Hope M. Jarkowski

cc: Honorable Gary Gensler, Chair
Honorable Allison Herren Lee, Commissioner
Honorable Hester M. Peirce, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
Haoxiang Zhu, Director of the Division of Trading and Markets

CTA/CQ-2021-03; File No. S7-24-89) (November 8, 2021), at 3-10, available at <https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-9403088-262830.pdf>,

³⁰ See Procedures and Requirements for National Market System Plans, Release No. 16410 n.45 (December 7, 1979) (regarding proposed SRO amendments to NMS Plans, the Commission “intends to publish notice of any material changes for public comment prior to Commission approval”).