



December 11, 2017

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

Re: Notice of Filing and Immediate Effectiveness of the Fortieth 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 (Release No. 34-82072; File No. S7-24-89)

Dear Mr. Fields,

SIFMA¹ appreciates the opportunity to submit comments in response to the above-referenced Notice of Filing and Immediate Effectiveness of the proposed amendment to the UTP Plan ("Proposed Amendment"), which was published in the Federal Register on November 20, 2017.² As outlined below, SIFMA respectfully requests that the Commission suspend the Proposed Amendment. If there is no change in policy, SIFMA is uncertain as to why the Proposed Amendment was filed with the Commission at all. If indeed this is a change in policy or fees, hiding the full import of UTP rules and fees is a dangerous practice and not one that SIFMA supports.

The Proposed Amendment notes that derived data will now be fee liable under the "regular fee schedule." While the participants ("Participants") appear to be adding a fee to the text of the UTP Plan ("Plan"), the notice of the Proposed Amendment does not meaningfully explain the imposition of the fee, the size of the fee increase, when this fee will apply to recipients of derived data, how this changes the existing UTP Plan policy, or, if no change to the policy, how this fee was enforced prior to its addition to the Plan. The Proposed Amendments are not clear, and SIFMA is very concerned that the Proposed Amendments mean that UTP is now removing the long-held derived data exemption in an effort to charge monopoly rents on the data. The Participants have not made any attempt to demonstrate that the Proposed Amendments are fair and reasonable, in the public interest, or further the goals provided for under Exchange Act of

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. 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. 82072 (Nov. 14, 2017), 82 FR 55137 (Nov. 20, 2017).

1934, and the rules promulgated thereunder.

In October 2014, the participants ("Participants") of the UTP Plan ("UTP Plan" or the "Plan") amended the Plan to establish Non-Display use fees for three categories of Non-Display use (the "2014 Amendment").³ Despite the imposition of these fees, the Participants made clear that "Non-Display Use does not apply to the creation and use of derived data," and this language was incorporated into the text of the UTP Plan.

On November 14, 2017, the Participants filed the Proposed Amendment with the Commission. The Participants propose to amend the Plan language to state that the Non-Display fees do not apply when data is used to create derived data and the derived data is used for the purposes of "solely displaying" the derived data. It also adds the following language to derived data: "but the data may be fee liable under the regular fee schedule." This creates more ambiguity than it does clarity. First, "derived data" is not a term that is defined under the UTP Plan. Second, the public notice attempts to describe the applicability of this undefined term by reference to two additional undefined terms: "solely displaying" and "regular fee schedule."⁴

Although the Participants note that this Proposed Amendment is merely a conforming amendment that will "maintain the historical approach of the fee liability of derived data," this amendment, and the attendant explanation, raises more questions than it resolves. What provisions of the "regular fee schedule," are applicable, and what is deemed to be the regular fee schedule? In the related explanation of the public notice, what does it mean to be "used for the purpose of solely displaying the derived data?" Why did this oversight persist for three years? Have the other exchanges similarly forgotten to incorporate the intended language? Have the fees been enforced since 2014 pursuant to the text of the UTP Plan or according to the spirit of this explanation? Why do they need to add this new fee language if the intent is not to start charging fees? Why does UTP believe the Proposed Amendment constitutes appropriate notice?

Most importantly, the Proposed Amendment does not explain the impact on existing market participants or which participants will be impacted. It is not clear whether the Participants intend to administer the Plan differently under this new language. It appears on its face that this is indeed a fee increase. The Proposed Amendment is explicitly clear that derived data will be fee liable under the "regular fee schedule." However, the release provides no meaningful insight into what this means, how things will change moving forward, or the size and scope of any impact. In the discussion under the "Method of Determination and Imposition, and Amount of, Fees and Charges," the section of the notice specifically designated for a discussion of the amount of the fees, the Participants merely state that the Proposed Amendment is "fair and reasonable since it corrects an inadvertent omission in order to ensure the continued implementation of the derived data policy that has been in place for at least ten years," and then goes on to say that derived data will be fee liable at the underlying product rates. However, the exact same fee schedule has not been in place for the past ten years. The operative change here, "but the data may be fee liable under the regular fee schedule," implies that derived data may now be subject to additional fees. The Participants are adding a fee to the text of the UTP Plan, but the portion of the notice dedicated to explaining the amount of the fee increase does not

³ See Securities Exchange Act Release No. 73279 (Oct. 1, 2014), 79 FR 60522 (Oct. 7, 2014).

⁴ Id. at 55138. (emphasis added)

meaningfully address the issue. The explanation also begs the question that if this is truly a continued implementation of the derived data policy, how was the policy enforced before this was part of the UTP Plan? And if this is truly not a fee hike, why are the Participants referencing that the Proposed Amendment is "fair and reasonable"?

Finally, the sole example provided by the UTP Plan does not provide any clarity as to what is really changing. The Participants note that in:

"Instances where a data recipient is using the data in Non-Display to create derived data, such as Indications of Interest or Volume-Weighted Average prices, for the purpose of solely displaying such data, then the Non-Display fee schedule does not apply. Such use may be fee liable for the Subscriber fees, and other fees such as Access and/or Redistributor fees, if applicable."

The Participants additionally state this will maintain the historical approach to fee liability. It would be informative if the Participants outlined when the new fees *would* apply rather than indicate one instance when the fees do not, while also noting unhelpfully that other fees will be applied "if applicable." This example is particularly unhelpful since the creation and use of derived data was already expressly excluded from fee liability for non-display use. It would also be helpful to know what the historical approach to fee liability means, why the Participants believe this amendment is now necessary, and whether the Participants have been actually charging the "regular fees" under the historical approach.

This lack of clarity and intentionally vague language in plan rulemaking is not a new problem. In fact, back in 2014, SIFMA submitted a comment letter in connection with the 2014 Amendment. SIFMA noted that the UTP Plan operators referenced "feedback provided by SIFMA" in the notice of the 2014 Amendment. SIFMA at the time wrote:

Such feedback was given during a single 90-minute meeting held in late April 2014, during which the exchange representatives shared some limited details of these proposals with SIFMA members, but such proposals were not discussed at any length or in any detail because such details were not made available at that time. Despite SIFMA's follow-up requests for more details to provide informed comments, the plans failed to give any.⁵

As contemplated by the rules of the Commission, SIFMA supports a transparent rulemaking process that provides fair notice and an opportunity to comment. Certain others have recently engaged in rulemaking efforts that have failed to describe the purpose or impact of their proposed rules.⁶ Such opaque rulemaking processes deprive market participants of material information regarding fee increases and permit no opportunity for public comment, or for the Commission to exercise meaningful oversight. SIFMA believes the Participants should provide a meaningful explanation of the Proposed Amendment rather than a notice that, on its face, appears to be a fee increase couched as a conforming amendment to an existing policy. Given the lack of clarity on what the Proposed Amendment means, SIFMA believes the Proposed

⁵ See Letter from Ira D. Hammerman, Executive Vice President, SIFMA, dated October 28, 2014.

⁶ See Securities Exchange Act Release No. 82071 (Nov. 14, 2017), 82 FR 55130 (Nov. 20, 2017).

Amendment in its present form deserves further scrutiny and suspension by the Commission.

We appreciate the opportunity to provide SIFMA's views to the Commission on these important issues. If you have any questions or would like to discuss this matter further, please do not hesitate to contact us.

Respectfully submitted,

/Melissa MacGregor/

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