



April 30, 2018

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

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

Re: Release No. 34-82938, File No. S7-24-89

Dear Mr. Fields:

Healthy Markets Association appreciates the opportunity to offer our comments to the above-referenced filing, which was published in the Federal Register on March 29, 2018¹ (“UTP Plan Filing”). As we outlined in our April 11, 2018 comment letter to the analogous CTA/CQ Plan Filing,² the proposed UTP Plan amendment further introduces unnecessary complexity and costs for the provision of public market data. As detailed more fully below, we have a number of questions and concerns with the proposed filing, and we urge the Commission to abrogate it pursuant to Rule 608(b)(3).

This particular filing is a symptom of a deeply conflicted and flawed regulatory regime for market data. We reiterate our requests from our recent rulemaking petition with the

¹ Joint Industry Plan; Notice of Filing and Immediate Effectiveness 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, 83 Fed. Reg. 13542, (Mar. 29, 2018), *available at*



Commission.³ We urge the Commission to take bold action to address this more deeply-rooted structural problem with market data, including how it is collected, paid for, and distributed. Amongst other actions, we urge the Commission to (1) reduce unnecessary complexity in the public data revenue streams, and (2) reduce the impacts of the conflicts of interest inherent in the current NMS Plan governance processes.⁴

About Healthy Markets Association

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.⁵

Our members rely on public market data to effectuate their business and manage their compliance obligations each and every day. The conflicts of interest, complexity, and costs of market data impact our members directly and indirectly.

Specific Issues Associated with the UTP Plan Filing

The UTP Plan Filing amends the plans to change the Broker-Dealer Enterprise

³ Letter from Tyler Gellasch, Healthy Markets Association to Jay Clayton, SEC, Jan. 17, 2018, *available at* <https://www.sec.gov/rules/petitions/2018/petn4-717.pdf> (“Healthy Markets Petition”).

⁴ While this letter is primarily focused on concerns regarding the provision of and payments for “public” market data, Healthy Markets is similarly concerned with provision of and payments for other essential market data, such as that provided by exchanges’ so-called “proprietary” data feeds, as well as other important data that may be aggregated and distributed by exchanges. Unfortunately, both “public” and “private” data are non-competitive markets. U.S. Dep’t of the Treasury, *A Financial System That Creates Economic Opportunities: Capital Markets*, 64, Oct. 2017, (recommending that “the SEC also recognize that markets for SIP and proprietary data feeds are not fully competitive. The SEC has the authority under the Exchange Act to determine whether the fees charged by an exclusive processor for market information are “fair and reasonable,” “not unreasonably discriminatory,” and an “equitable allocation” of reasonable fees among persons who use the data.”), *available at* <https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf>. As we wrote in our Market Data Report, “[t]he regulatory framework that once oversaw non-profit, mutualized trading platforms has proven ill-equipped to circumscribe the abuses arising from the pricing power enjoyed by US equity exchanges.” Healthy Markets Association, *US Equity Market Data – How Conflicts of Interest Overwhelm an outdated Regulatory Model & Market Participants*, Nov. 2017, at 6, *available at* <https://www.healthymarkets.org/new-products/market-data-how-conflicts-overwhelm-an-outdated-regulatory-model>.

⁵To learn more about Healthy Markets or our members, please see our website at <http://healthymarkets.org>.

Maximum Monthly Charge (“Enterprise Cap”) and Per-Quote-Packet Charges. In particular, the UTP Plan Filing would raise the Enterprise Cap from \$648,000 to \$1,260,000.⁶ The UTP Plan Filing also modifies the Per-Quote Packet Charges for a broker-dealer with 500,000 or more Non-professional Subscribers to \$.0025 from \$.0075.⁷ The Plan Participants argued that the changes were needed to restore revenues lost to consolidation of firms that may be subject to the Enterprise Cap.⁸

The Plan Participants, however, fail to provide any discussion, examples or documentation to support its generalized claims about industry consolidation. But, conceptually, they lay out an example. For example, assume Broker A and Broker B were both subject to the Enterprise Cap. If they consolidated, the combined entity would be subject to just the one Enterprise Cap, and the revenues to the Plans would be cut significantly. The UTP Plan Filing argues that the Plan Participants designed the changes to approximately restore the revenues to the Plans by ensuring that the combined entity would pay about the same as the separate entities had prior to the consolidation.⁹

While the filing suggests that it would be “revenue neutral,” we are not confident that such an objective is, by itself, consistent with the Exchange Act. The Exchange Act doesn’t seek to protect the exchanges’ revenues. Rather, it seeks to protect the public interest by, amongst other things, promoting competition, the reasonable allocation of fees, and non-discrimination.¹⁰ Further, there is no detailed impact analysis in the filing. Further still, Plan Participants’ past analyses regarding fees have proven inaccurate. By way of example, they changed fee schedules in 2013 and represented that the changes would increase revenues by approximately \$235,000 per month.¹¹ Then, just one year later, the Plan Participants stated that monthly revenues from Professional Subscriber device fees for June 2014 remain more than \$1,693,486 below the level of Professional

⁶ UTP Plan Filing, at 13542.

⁷ UTP Plan Filing, at 13543.

⁸ UTP Plan Filing, at 13542.

⁹ UTP Plan Filing, at 13543.

¹⁰ See Memorandum from the SEC Division of Trading and Markets to Equity Market Structure Advisory Committee, Oct. 20, 2015, (citing Section 6 of the Securities Exchange Act of 1934), available at <https://www.sec.gov/spotlight/emsac/memo-regulatory-model-for-trading-venues.pdf>.

¹¹ *Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment No. 28 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, 78 Fed. Reg. 22588 (Apr. 16, 2013), available at <https://www.gpo.gov/fdsys/pkg/FR-2013-04-16/pdf/2013-08866.pdf>.

usage fees collected in September 2011.¹²

If those with the information pertaining to usage are incapable of providing the impact of a proposed change, one could not expect a market participant with much less information to accurately assess an amendment's overall impact. While the public's views and analysis should be sought, that is not an adequate substitute for more complete and accurate information from the Plan Participants.

The Commission has long had concerns with the absence of a uniform fee structure for subscribers.¹³ Public market data should not create and exacerbate competitive advantages. Nevertheless, there are still not uniform fee structures for subscribers.

Enterprise Caps were created for the explicit purpose of making real-time market data more readily available to investors, less expensive, and more predictable in the new internet era.¹⁴ From the outset, Enterprise Caps were intended to apply to a very small number of firms. And while Enterprise Caps are, by their nature, discriminatory, this injustice was deemed important to help support the inexpensive provision of market data to the new swath of customers flooding into the markets via the internet. The very justification of the UTP Plan Filing runs directly counter to this original rationale for implementing Enterprise Caps. Rather than promoting public policy or a benefit to the markets, the UTP Plan Filing, like the analogous CTA/CQ Plan filing, appears to be exclusively about preserving the profits accruing to Plan Participants.

Interestingly, the UTP Plan Filing states that “[t]he proposed amendments do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Securities Exchange Act of 1934.”¹⁵ The filing offers no data or detailed analysis to establish that assertion, however.

¹² *Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment No. 33 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, 79 Fed. Reg. 60522 (Oct. 7, 2014), available at <https://www.gpo.gov/fdsys/pkg/FR-2014-10-07/pdf/2014-23838.pdf>.

¹³ See, e.g., American Stock Exchange, Inc., et al. Application Pursuant to Securities and Exchange Act of 1934; Order, 45 Fed. Reg. 6521, at 6522 (January 28, 1980) available at <https://cdn.loc.gov/service/ll/fedreg/fr045/fr045019/fr045019.pdf>, (“The Commission continues to be concerned by the absence of a uniform fee structure...”).

¹⁴ Consolidated Tape Association; Notice of Filing of Fourth Charges Amendment to the Second Restatement of the Consolidated Tape Association Plan and the Third Charges Amendment to the Restated Consolidated Quotation Plan, Sec. and Exch. Comm’n; 64 Fed. Reg. 36412 (July 6, 1999) available at <https://www.gpo.gov/fdsys/pkg/FR-1999-07-06/pdf/99-16953.pdf>.

¹⁵ UTP Plan Filing, at 13543.



Lastly, as detailed more fully in our April 11, 2018 letter, regardless of the past amendments or suggestions to the contrary, we believe all Plan filings are legally subject to SEC notice, comment, and review.

The amendments proposed by the UTP Plan Filing are discriminatory, are not appropriately analyzed or justified, and add significant complexity to an already complex and conflicted process. We therefore request that the Commission abrogate the filing. Furthermore, Enterprise Caps should be eliminated as part of the broader process of modernizing the UTP fee schedules to simply allow for the non-discriminatory, consistent access and pricing of public market data.

Recommendations

Public market data are the foundation of our capital market system, but have become deeply conflicted by for-profit interests. As we outlined in our recent petition to the SEC,¹⁶ the privileged regulatory status of exchanges and conflicted oversight of data fees should not be allowed to proliferate at the expense of investors.

Healthy Markets recommends that the Commission take aggressive action to utilize its existing authority to rationalize and improve the regulatory framework for market data and connectivity. If the Plans are to be retained, then the Commission should:

- require justification of data, connectivity, and fee changes for both public and private feeds, and thoroughly review all such changes for fairness, reasonableness and potential discriminatory impacts and undue burdens on market participants;
- expressly acknowledge the governmental function of the SIP data feeds, and so require exchanges to return all revenues in excess of expenses incurred to operate and maintain the SIP data processing;
- revise NMS Plan governance to include voting representation from investment advisers and broker-dealers;
- eliminate “one vote per exchange registration” and replace with “one vote per exchange group”;

¹⁶ Healthy Markets Petition.



HEALTHY MARKETS
TRANSPARENCY & TRUST

- simplify pricing models within the SIP to eliminate the need to count end users, accounts or terminals, and eliminate the distinctions between professionals and non-professionals;
- establish clear parameters for market data audits by exchanges or their representatives;
- increase the transparency of public market data revenue collection and costs so that the public is aware of both on a quarterly basis;
- improve the relative value of the SIP feeds by expanding the information to include order depth of book information;
- minimize the time discrepancies between when market participants may receive information from the private data feeds and the SIP feeds;
- clarify that rule filing requirements apply to all data derived from an exchange's role in the national market system and marketed to anyone, including a data vendor, whether by the exchange or an affiliate and that standards for market data filings apply;
- require all exchanges to provide detailed financial information regarding their public data fees, their revenues and expenses related to public and private data, as well as connectivity or other related products and services;
- increase the transparency and disclosure of enhancements to SIP resiliency;
- mandate monthly public reporting of latency across SIP plans and how that compares to the private market data products offered by the exchanges; and
- if competing SIPs are permitted, establish protections to mitigate conflicts of interest and abuses that may be created by differences between the SIPs.



Conclusion

Healthy Markets recommends that the Commission abrogate the UTP Plan Filing, and further work to improve the regulatory framework for public market data. Should you have any questions or would like to discuss these matters further, please call Chris Nagy, Director, Healthy Markets Association at [REDACTED].

Sincerely,

Tyler Gellasch
Executive Director

Cc: Brett Redfearn, Director of the Division of Trading and Markets
John Roeser, Associate Director, Division of Trading and Markets