



Invested in America

August 8, 2013

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

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

Re: Consolidated Tape Association; Notice of Filing and Immediate Effectiveness of the Nineteenth Charges Amendment to the Second Restatement of the CTA Plan and Eleventh Charges Amendment to the Restated CQ Plan, 78 Fed. Reg. 44984 (July 25, 2013)

Dear Ms. Murphy:

SIFMA¹ appreciates the opportunity to comment on the above-captioned notice (the “Notice”), under which the CTA Plan (the “Plan”) is implementing a rule change to amend the Second Restatement of the Plan in response to requests from the industry to simplify the existing market data fee schedules and reduce associated administrative burdens (“Fee Change Proposal”).² SIFMA greatly appreciates the industry dialogue that led to these proposed changes and fully supports the Plan’s efforts to simplify pricing and reduce the administrative burdens on members. We hope that other National Market System Plans will engage in similar constructive discussions with the industry.³

We do, however, continue to believe that the Plan’s overall fees and the process by which fee changes are made – even for the laudatory reasons here – are inconsistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*.⁴

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 develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² 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 Submitted by the BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.; 78 Fed. Reg. 22588 (April 16, 2013).

³ *Compare* Comment Letter from SIFMA re: Nasdaq UTP Plan Amendment for Level 1 Professional Fee Increase (March 28, 2013).

⁴ 615 F.3d 525 (D.C. Cir. 2010).

Although the CTA did share the impact these changes with the Advisory Committee, as further described below, the Fee Change Proposal lacks publicly available documentation to support its contentions that the fees are “fair and reasonable” as required in *NetCoalition I*. SIFMA also recognizes due to the technical limitations of an aggregated feed, the CTA feeds are inherently slower than their individual exchange counterparts, making them more inclusive but less desirable, and firms are still required to purchase these feeds under SEC rules.

1. There is no publicly available cost information to support any individual or overall fees as “fair and reasonable” within the meaning of the Exchange Act as required by *NetCoalition I*. Instead, the CTA uses a “value” or comparison approach to justify the fees.

Under the Exchange Act, fees imposed by an exclusive processor of data must be “fair and reasonable.”⁵ The fees here concern “core” data—last sale and best bid and offer data. The Commission has previously recognized that the determination of whether core data fees are “fair and reasonable” should take into account the cost of collecting and producing the data. For example, in the 1999 SEC “Market Information Concept Release” (the “Concept Release”) the Commission noted that:

[T]he fees charged by a monopolistic provider of a service (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 fees are too low.⁶

The Concept Release, therefore, found that “the total amount of market information revenues should remain reasonably related to the cost of market information.”⁷

This view was confirmed in *NetCoalition*, where the D.C. Circuit distinguished between “core” data and “non-core” data, such as depth-of-market data.⁸ Referring to the legislative history of the Securities Acts Amendments of 1975, the Court found that the Commission has special oversight duties with respect to core data that require it to conduct a cost analysis typical of public utility ratemaking in determining whether data fees are “fair and reasonable” within the meaning of the Act:

The petitioners rely on portions of the legislative history suggesting the Commission was supposed to “assume a special oversight and regulatory role” over exclusive processors by treating them as public utilities, a role inconsistent with allowing market forces to determine market data prices. S.Rep. No. 94-75, at 12 (1975), as reprinted in 1975 U.S.C.C.A.N. 179, 190 (Senate Report); *see id.* at 11, 1975 U.S.C.C.A.N. at 189 (“Any exclusive processor is, in effect, a public utility, and thus it must

⁵ 15 U.S.C. § 78k-1(c)(1)(C).

⁶ Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613, 70,627 (Dec. 17, 1999).

⁷ *Id.*

⁸ 615 F.3d at 534-35.

function in a manner which is absolutely neutral...”); Conference Report at 93, 1975 U.S.C.C.A.N. at 324 535*535 (“[W]here a self-regulatory organization or organizations utilize an exclusive processor, that processor takes on certain of the characteristics of a public utility and should be regulated accordingly.”). These statements, however, refer to an “exclusive central processor for the composite [i.e., consolidated core data] tape or any other element of the national market system,” not to an exchange acting as the processor of its proprietary non-core data. Senate Report at 11, 1975 U.S.C.C.A.N. at 189 (emphases added); *see also* Conference Report at 93, 1975 U.S.C.C.A.N. at 324. In fact, the legislative history indicates that the Congress intended . . . that the SEC wield its regulatory power “in those situations where competition may not be sufficient,” such as in the creation of a “consolidated transactional reporting system.” Conference Report at 92, 1975 U.S.C.C.A.N. at 323; *see* Senate Report at 12, 1975 U.S.C.C.A.N. at 190 (“[I]n situations in which natural competitive forces cannot, for whatever reason, be relied upon, the SEC must assume a special oversight and regulatory role.”).⁹

The Plan’s responsibility with respect to the fee increase is clear. It should provide cost –based standards to justify the fee, so that the Commission can carry out its “special oversight and regulatory role.”

In leveling the playing field, some of the Plan’s fee changes will result in an expense reduction for some firms, some of the fee changes will result in a fee increase for other firms. Accordingly, the Plan is expected to provide cost implications to show that its overall fees are fair and reasonable within the meaning of Section 11A of the Exchange Act and the D.C. Circuit’s decision in *NetCoalition*. SIFMA understands that the Plan provided extensive details to the Advisory Committee that illustrated the impact of the changes, and yet those details were not included in this Fee Change Proposal.

Instead, the Notice cites a number of factors justifying the fees, including: new data elements that were added to the data feeds, improvements in latency, comparison to other National Market System Plans’ core market data fees and vendor fees, and “declining unit purchase costs.” The Notice also states that since 1987 “the direct costs of the securities information processor and the network administrators have increased by 89 percent.” To comply with *NetCoalition*, the Plan was required to disclose publicly what those costs are, and then show that its annual market data revenues are reasonably related to those costs.

We respectfully request that the Commission and the Plan make that cost information publicly available to demonstrate that the core data fees are fair and reasonable.

⁹ *Id.*

2. CTA feed continues to lag behind current technology and market structure developments, yet firms are still required to buy it.

The CTA feed only contains the best bid and offer in the market for a given security. SIFMA member firms are required to buy the CTA quotations under NMS Rule 603(c). Yet this consolidated quote often is only for a few hundred shares, and the market has moved by the time an investor has made his or her trading decision. As a result, SIFMA members, for both their own representatives and their clients, must purchase “depth of book” data directly from the individual exchanges or suffer an informational disadvantage. The same infrastructure creates the depth-of-quote data. SIFMA members, however, are essentially charged twice for the core data as it is in the proprietary feeds and can be extracted to create a Best Inside Market to be able to furnish their representatives or clients with the better data thus incurring an additional expense. Given that the technology exists to create a faster, deeper consolidated quote, SIFMA requests that the Commission and CTA investigate fundamental changes to include market depth with “core data” in the interest of fairness and enhanced protection of all investors.

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SIFMA appreciates the CTA’s efforts to reduce burdens and costs for the industry participants and we hope to encourage this open dialogue between the industry and the CTA in the future. Please contact me at [REDACTED] if you have any questions or comments.

Respectfully submitted,

/Melissa MacGregor/

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SIFMA