November 8, 2021

Submitted electronically

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: CTA/CQ/UTP Plan Fee Amendments, Securities Exchange Act Release Nos. 34-93625 (SR-CTA/CQ-2021-03); 34-93618 (S7-24-89)

Dear Ms. Countryman:

MEMX LLC ("MEMX")[1] appreciates the opportunity to provide comments to the Securities and Exchange Commission ("Commission") in connection with the above-referenced national market system ("NMS") Plan amendments ("Amendments"). The Amendments were filed by the Consolidated Tape Association ("CTA"), Consolidated Quotation ("CQ"), and Nasdaq UTP ("UTP") Plans to establish fees for consolidated market data offered pursuant to the market data infrastructure rule ("infrastructure rule").[2] Although MEMX is a participant on the CTA/CQ/UTP Plan operating committees that submitted these filings, we do not support the Amendments, which would undermine the important public policy goals of the infrastructure rule

1 MEMX was founded by leading market participants with the common goal of improving equity markets for investors and challenging the status quo in the exchange space for U.S. equities. Specifically, MEMX's mission is to increase competition, reduce the fixed costs of trading, and simplify the execution of equity trading in the United States.

2 See Securities Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596 (April 9, 2021).

by: (1) generally failing to provide for fair and reasonable fees for consolidated market data; (2) impeding access to market information that the Commission determined should be widely available to investors; and (3) reducing incentives for competing consolidators to enter the market. We therefore urge the Commission to disapprove the Amendments and take steps to mitigate the conflicts of interest that may unfortunately have contributed to this deeply flawed proposal.

I. MEMX SUPPORTS LIMITED PORTIONS OF THE AMENDMENTS, INCLUDING FREE ODD LOT QUOTATION INFORMATION AND LOW NON-PROFESSIONAL USER FEES FOR DEPTH-OF-BOOK QUOTATION INFORMATION

The Commission adopted the infrastructure rule pursuant to Section 11A of the Exchange Act to "assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication"[3] of NMS information and "the fairness and usefulness of the form and content of such information."[4] Consistent with this goal, MEMX advocated for fees that would expand access to consolidated market data during the fee-setting process that culminated in the filing of the Amendments. This includes both free access to odd lot quotation information as well as cheaper access to depth-of-book quotation information for Non-Professional (*i.e.*, retail) users.

One of the major driving forces behind the adoption of the infrastructure rule was a desire to reduce current informational asymmetries between retail investors and other professional market participants. Access to odd lot quotation information is particularly valuable for retail investors, whose orders are often smaller in size and are typically executed within the round lot national best bid or offer ("NBBO"). With retail investors participating in the U.S. equity market in increasing numbers, getting this information to them on fair and reasonable terms has never been more

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[3] See supra note 2 at 18600.

[4] Id.

important. We are therefore glad that the operating committees went along with our proposal to provide this information without charge. Similarly, while only a subset of retail investors have access to depth-of-book quotation information today, it is important to permit those that need or want to access this information to be able to do so for a relatively modest fee. This is particularly the case in today's market environment where retail investors have and continue to become increasingly more sophisticated. While we proposed that the CTA/CQ/UTP Plans adopt a lower fee than the fee proposed in the Amendments, we believe that the proposed Non-Professional user fees are also a step in the right direction. Nevertheless, as discussed in this comment letter, we continue to have unaddressed concerns with significant portions of the Amendments that are inconsistent with the goal of expanding access to consolidated market data and ultimately with the Exchange Act requirement that such fees be fair, reasonable, and not unfairly discriminatory.

II. THE PROPOSED FEES, WHICH ARE GENERALLY HIGHER THAN FEES CHARGED FOR COMPARABLE PROPRIETARY DATA PRODUCTS, ARE NOT "FAIR AND REASONABLE" AS REQUIRED BY THE EXCHANGE ACT

As discussed, the infrastructure rule was adopted to facilitate investor access to critical market information. The infrastructure rule seeks to achieve this goal through: (1) the addition of several new data elements to consolidated market data, such as information on odd lot and depth-of-book quotations as well as auction information; (2) the replacement of the exclusive securities information processors ("SIPs") with competing consolidators and self-aggregators; and (3) the reduction of round lot sizes in high-priced securities that currently trade with artificially wide spreads.[5] While the infrastructure rule's round lot changes would not be implicated by the

[5] In a June 2021 white paper, MEMX recommended that the listing exchanges make the infrastructure rule's round lot changes before the transition to competing consolidators, which would significantly reduce investor transaction costs. See Why we should change

Amendments, the proposed fees – which as we discuss later are generally higher than the fees charged for comparable proprietary market data today – would largely serve to limit access to NMS information that the Commission chose to include within the new definition of consolidated market data and may hamper the viability of the decentralized consolidation model.

As background, the new data elements to be included on the SIPs under the amended definition of consolidated market data – *i.e.*, odd lot quotation information, aggregated depth-of-book quotation information, and auction information – have been available to subscribers of exchange proprietary feeds for quite some time.[6] The Commission determined in the infrastructure rule, however, that the current system for the distribution of such data via proprietary data feeds was inadequate to the task of getting important market information to market participants. As a result, the Commission decided to expand the data content made available on the public SIPs. To facilitate this reform, the Commission further required that the effective NMS Plans file proposed fees to govern the dissemination of this new data content and make other changes needed to facilitate the implementation of the infrastructure rule, including the transition from the current distribution model to a new and competitive decentralized consolidation model. In so doing, the Commission hoped to expand access to this critical market information at fair and reasonable prices. This is an important goal that goes to the core of the Commission's tripartite mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

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round lots now, Adrian Griffiths, Head of Market Structure, MEMX, *available at* https://memx.com/wp-content/uploads/MEMX_Round-Lots_white-paper.pdf.

6 Proprietary data feeds also include other data content that would not be available on the SIPs, including order-by-order depth-of-book information, which is widely considered to be the most valuable source of information since it includes information on every order processed by exchange systems as opposed to aggregated market information.

Market data is the lifeblood of the securities markets. Congress recognized this fact when it authorized the Commission to facilitate the creation of a national market system for securities in the 1975 amendments to the Exchange Act. In the years since, trading has become increasingly more automated, and investors have become more sophisticated in terms of the data that they use to make investing decisions as well as the data that they expect brokers to use to facilitate best execution of their orders. The securities markets have also become more accessible to different kinds of investors, including retail investors that are now participating in U.S. equity and other markets in increasing numbers. These new investors also need access to high-quality and timely market information to facilitate their trading. However, there are still impediments that limit the accessibility of this critical data, much of which is available only on proprietary data feeds today.

Adding additional data to the public SIPs, as an alternative to costly proprietary feeds sold by individual exchanges, could enhance investor access to important market information and facilitate best execution.[7] However, it can only have this effect if the price is right. Today, cost imposes a limitation on access to information contained in proprietary data feeds. The solution to this problem therefore cannot be *more costly* data provided by the SIPs. Yet, as detailed below, that is generally what the Amendments would offer to firms subscribing to the public SIP feeds.

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7 As the Commission has said, "[w]idespread availability of timely market information promotes fair and efficient markets and facilitates the ability of brokers and dealers to provide best execution to their customers." See supra note 2 at 18599.

Methodology

MEMX compared the proposed fees to fees currently charged for proprietary data feeds offered by U.S. equities exchanges that charge for access to this data.[8] These exchanges combine their data products in different ways, such as including auction information in certain depth-of-book products, for example. So, although we advocated for a fee structure that includes separate fees for different data elements so firms only pay for the data that they have chosen to consume, we focused our comparison on the cost to a firm that is interested in all of the data elements included in the new definition of consolidated market data. We then compared both user and access fees for consolidated market data under the Amendments to the price that a firm would pay to obtain that data from proprietary data products that offer similar information.

For this comparison we used the following proprietary data feeds: (1) TotalView for The Nasdaq Stock Market ("Nasdaq"), Nasdaq BX, Inc. ("BX"), and Nasdaq PHLX LLC ("PSX");[9] (2) a combination of OpenBook, ArcaBook, Order Imbalances, and Trades for New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("Arca"), NYSE American LLC ("American"), and NYSE National, Inc. ("National");[10] and (3) Summary Depth for Cboe BZX Exchange, Inc.

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8 While all U.S. equities exchanges offer proprietary data feeds, MEMX and certain other exchanges currently provide free access to these feeds.

9 TotalView is an order-by-order depth-of-book product. We used TotalView as it is the same price as Level 2 and also includes auction information for Nasdaq auctions. Nasdaq does not offer a standalone auction feed that is separate from TotalView. All fees for the Nasdaq family of exchanges used for our calculations are *available at* http://www.nasdaqtrader.com/Trader.aspx?id=DPUSData.

10 Where applicable we used aggregated depth-of-book feeds – *i.e.*, NYSE OpenBook, NYSE American OpenBook, NYSE ArcaBook. We also include use of the Trades feeds for those markets since the relevant aggregated depth-of-book feeds do not include last sale. National does not offer an aggregated depth-of-book feed so we used NYSE National Integrated for that market, which is an order-by-order depth-of-book product.

("BZX"), Cboe EDGX Exchange, Inc. ("EDGX"), Cboe BYX Exchange, Inc. ("BYX"), and Cboe EDGA Exchange, Inc. ("EDGA").[11] The feeds used for our comparison generally track the information included in the definition of consolidated market data pursuant to the infrastructure rule. In some cases, however, additional information may be provided by those feeds, particularly when those feeds include order-by-order depth-of-book information as is the case for feeds used for Nasdaq, BX, PSX, and National. So, while our comparison is the closest approximation of what similar information would cost using proprietary data feeds, at any given price a subscriber would likely be better off subscribing to the proprietary data feeds listed instead of purchasing consolidated market data from the SIPs given the additional information included on those feeds.

Results

As shown in the table below, while the proposed fees would be lower for the limited subset of Non-Professional users that consume depth-of-book quotation information,[12] the proposed fees are otherwise higher than the fees currently charged for proprietary data products that offer similar information. In particular, the proposed fees are: (1) between 24% and 33% more expensive for each Professional user, depending on the applicable Tape A tier;[13] and (2) 1% more expensive in

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Finally, we used Order Imbalances to capture auction information for NYSE and American. Auction information for Arca is included within ArcaBook. Chicago does not currently charge for its market data so there are no fees included for that market. All fees for the NYSE family of exchanges used for our calculations are *available at* https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Pricing.pdf.

11 Summary Depth is an aggregated depth-of-book feed and also includes last sale information. BZX does not charge for its auction information. See BZX, EDGX, BYX, and EDGA Schedule of Fees for pricing information for the Cboe family of exchanges.

12 See infra note 15.

13 Professional user fees, which account for about half of the SIP revenue pool overall, are tiered for Tape A subscribers. Among other potential changes to the existing SIP fee

terms of access fees.[14] With proposed fees that are generally *more expensive* than current proprietary data offerings, the Amendments clearly fail the "fair and reasonable" test required by the Exchange Act. They would also ensure that the infrastructure rule does not live up to its goal of expanding the availability of new data content that the Commission chose to include within consolidated market data. This alone should be fatal to the Amendments.

		Proposed Fees	Proprietary Fees	Difference
Non-Professional User		\$45 (\$15) [15]	\$45	0% (-67%)
Professional User	1-2 internal users	\$419	\$315	33%
	3-999 internal users	\$401	\$315	27%
	1K-9999 internal users	\$397	\$315	26%
	10K+ internal users	\$393	\$315	24%
External Distribution [16]		\$43,005	\$42,500	1%

** A positive number (red) in the difference column indicates that the proposed fees are higher than the fees currently charged for comparable proprietary data products.*

structure, MEMX believes that the operating committees should consider whether the Tape A tiers are fair, reasonable, and not unfairly discriminatory.

14 User and access fees account for the majority of SIP revenues. See SIP quarterly revenue disclosures *available at* https://www.ctaplan.com/metrics, https://utpplan.com/metrics. Although non-display fees account for ~10% of revenues, we do not include numbers for non-display fees because differences in the ways that non-display fees are computed across the various exchanges and the SIPs make an apples-to-apples comparison difficult.

15 Under the Amendments, a Non-Professional user with access to all data content, including top-of-book, trades, odd-lots, depth-of-book, and auction information would incur a fee of \$45. The bracketed number (\$15) represents the fee excluding auction information. While the fees for proprietary data products used in our comparison include auction information, retail investors are less likely to want or need access to auction information and so we separately note the prices without that information included.

16 External distribution column includes applicable direct access and redistribution charges for both SIP and proprietary fees.

** A negative number (green) in the difference column indicates that the proposed fees are lower than the fees currently charged for comparable proprietary data products.*

Although the Commission refrained from mandating that specific fees or fee structures be adopted by the Plans, the Amendments must satisfy the relevant Exchange Act standards – *i.e.*, the proposed fees must be fair and reasonable and not unfairly discriminatory.[17] By any measure, the proposed fees have missed the mark. In fact, by filing fees that are generally more expensive than current proprietary data offerings, the Amendments would have one primary impact, rendering meaningless the very regulation that the proposed fees were supposed to facilitate. And, even where the proposed fees are lower than the fees charged for comparable proprietary data – as is the case for Non-Professional users that want expanded content – the fact that the other fees are higher than proprietary offerings is likely to reduce incentives for competing consolidators to actually offer that data content to their customers. Specifically, as professional market participants are the largest consumers of depth-of-book quotation information, competing consolidators may choose not to expend the time and resources necessary to provide that data to Non-Professional users if there is no demand from those professional market participants at the proposed prices.

If the events of the months following the Commission's adoption of the infrastructure rule in December 2020 are any guide, getting additional market information to retail and other investors at a reasonable price is more important than ever. It is therefore imperative that the Commission disapprove the Amendments so that those investors can reap the benefits of a more robust public SIP that animated the Commission to adopt the infrastructure rule in the first place. The Commission cannot allow a handful of exchange families that would be competitors of an

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17 See Sections 11A(c)(1)(C)-(D) of the Exchange Act and Rule 603(a) of Regulation NMS, 17 CFR 242.603(a).

expanded public SIP to set unreasonable fees that would stifle that nascent competition and undermine the Commission's work to expand investor access to increasingly critical market data. Putting aside significant questions about whether those exchanges' proprietary data products are offered on terms that are fair and reasonable to begin with, we are at a loss as to how those exchanges could have determined in good faith that fair and reasonable fees for consolidated market data should exceed the fees that they have set for their own proprietary market data.

III. THE PROPOSED FEES ARE PLAGUED BY DOUBLE COUNTING AND OTHER SIGNIFICANT ISSUES THAT SIMILARLY RAISE SERIOUS QUESTIONS ABOUT THE INTEGRITY OF THE PROCESS USED TO DESIGN THE AMENDMENTS

As discussed, the Amendments would undermine the entire premise of the infrastructure rule by ensuring that the new SIP content is more expensive than data already offered on proprietary feeds sold by the U.S. equities exchanges. While that should be sufficient for the Commission to find that those fees do not meet the requirements of the Exchange Act, we are compelled to address certain additional issues with how those numbers were calculated in the first place. Although setting fees for consolidated market data requires some exercise of judgment, these issues are so clear on their face that they call into question the integrity of the process used to set fees under the current NMS Plans, where a minority of exchange groups is able to set pricing that would avoid any true competition between SIP data and proprietary data products that have risen over the years to account for a significant portion of their revenues. MEMX repeatedly raised significant concerns about both the overall level of these fees and the calculations used to produce them during meetings of the market data subcommittee that designed this proposal. Those issues were ignored. The result is a flawed set of Amendments that fail even the most basic of smell tests.

The following simplified example is illustrative of the most salient issues. As discussed in the Amendments, the proposed fees were determined by comparing the pricing of certain top-of-book and depth-of-book feeds offered by the various exchanges that charge for their market data and using that multiplier to determine the fee for aggregated depth-of-book SIP data. So, for the sake of this example, assume that there are two U.S. equities exchanges, and further assume that the following Professional User fees are associated with SIP and proprietary data offerings:[18]

- **Exchange A (Tapes A, B, C):**
  - $10 (Top + Trades)
  - $30 (Order-by-Order Depth, Auction Information)
- **Exchange B (Tapes A, B, C):**
  - $10 (Top + Trades)
  - $20 (Aggregated Depth)
  - $40 (Order-by-Order Depth)
  - Auction information: Free
- **SIP (Tapes A, B, C):**
  - $20 (Top + Trades) [19]

Based on these numbers, the multiplier used to determine aggregated depth-of-book pricing for the SIPs would be 350%, which is the average of 300% (A: $30 /$10) and 400% (B: $40/$10).

[18] The proposed depth fees are generally based on the multiplier determined for Professional User fees, with Non-Professional user fees, access fees and non-display fees also using this multiplier.

[19] For this example, we assume that the SIP charges a fee that is equal to the sum of fees charged by the individual exchanges. However, as we discuss later, current SIP fees also exceed the cost of similar proprietary exchange offerings.

Applying that multiplier to the SIP top-of-book fee of $20 would result in a fee of $70 for aggregated depth-of-book information, which in this simplified example is the same as the fee for proprietary order-by-order depth-of-book products. However, as proposed in the Amendments, that $70 Professional User fee only comes with access to aggregated depth-of-book information. It does not include top-of-book information even though the calculation is based on a depth-of-book product that includes top-of-book information and the value of top-of-book information is therefore already embedded in the cost proposed for depth-of-book information. Instead, when including top-of-book information, the relevant fee would be $90 ($70 + $20), which is more than the cost of the two proprietary feeds. This is straightforward double counting, plain and simple.

Those who have been reading carefully have probably already spotted the second issue. Exchange B in the example actually offers an aggregated depth-of-book product at a discount to the price of its more comprehensive order-by-order depth-of-book feed.[20] Since the infrastructure requires the SIPs to disseminate five levels of aggregated depth-of-book information that pricing would presumably be more relevant to the question of how to price SIP data. However, the calculations used for the Amendments ignore the fact that there is a better price associated with the aggregated depth-of-book feed. What possible justification can there be for using the more

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[20] For example, on BZX a Professional user is currently charged $5 per month for five levels of "Summary Depth" compared to $40 per month for full order-by-order depth-of-book information information. See BZX Schedule of Fees. Other more expensive aggregated depth-of-book products are generally "legacy" products offered by the Nasdaq and NYSE family of exchanges prior to their offering order-by-order depth-of-book feeds. See e.g., infra note 21 (comparing Nasdaq TotalView to Level 2).

expensive order-by-order feed when the infrastructure rule is clearly limited to aggregated depth-of-book quotation information? The Amendments offer no explanation for this irrational choice.[21]

Next, what about auction information? In the example, Exchange A offers auction information on its order-by-order depth-of-book feed and Exchange B offers that information free of charge. In the real world, this is how many listing exchanges have priced their auction information. Although in some cases a listing exchange allows firms to purchase auction information separately, Nasdaq includes its auction information in TotalView, NYSE, Arca, and American include auction information in their Integrated feed, and BZX offers its auction information for free. Since these exchanges include auction information in the order-by-order depth-of-book feeds used in the SIP depth-of-book calculation, or offer it without charge, it would ordinarily be safe to assume that the SIP depth-of-book price includes that information. However, that assumption would be incorrect. In fact, similar to the double counting issue discussed above, a firm would have to pay a separate fee for auction information under the Amendments. This fee would be $7,[22] which is equivalent to 10% of the depth-of-book price, even though that auction

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21 Some of the exchanges have also explicitly discussed the significant differences between order-by-order and aggregated depth-of-book information. For example, Nasdaq has touted in its regulatory filings that its TotalView offering, which contains order-by-order depth-of-book information, contains "approximately 20 times more information" than in its aggregated Level 2 product. See Securities Exchange Act Release No. 79863 (January 23, 2017), 82 FR 8632 (January 27, 2017) (SR-NASDAQ-2017-004). In that filing, Nasdaq also explained that it intends to eventually retire the "legacy" Level 2 product. These exchanges cannot be heard now to claim ignorance of the important differences between aggregated and order-by-order depth-of-book products when setting SIP fees.

22 When including the prices for all of the data elements included within consolidated market data, the total price for SIP data in this example would be $97, even though the same information is available for $70 on the proprietary feeds used for these calculations.

information is present on the feeds used to calculate the depth-of-book price and the exchanges that offer separate feeds for auction information generally do not charge Professional user fees.[23]

Finally, in our simplified example there are only two exchanges instead of the sixteen U.S. equities exchanges that currently compete for order flow. However, the Amendments do not actually perform this calculation across all exchanges that sell proprietary market data. Instead, only pricing information from the following exchanges are used in the calculation: (1) Nasdaq; (2) NYSE; and (3) IEX, which recently proposed fees that have yet to go into effect and which don't include Professional user fees that formed the basis of the calculation for the other exchanges considered.[24] The Cboe family of exchanges are excluded as "outliers," which is a direct result of using pricing for order-by-order depth-of-book feeds instead of aggregated depth-of-book feeds that Cboe offers at a significant discount to the more content rich order-by-order feeds.[25] Pricing from BX and PSX is similarly excluded. And of the NYSE family of exchanges only NYSE itself is considered, except that for some unexplained reason NYSE BQT is used in the denominator for the NYSE ratio with only NYSE Integrated in the numerator. This despite the fact that NYSE BQT actually contains market data from NYSE, Arca, American, National, and Chicago, whereas the NYSE Integrated product includes only information from NYSE classic. Although the proposed

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23 For example, NYSE, Arca, and American each offer an order imbalances feed. While the associated fees for those feeds include access and non-display fees, all of those exchanges allow Professional and Non-Professional users to access their auction information without paying a separate fee. See NYSE Proprietary Market Data Pricing *available at* https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Pricing.pdf.

24 See SR-IEX-2021-14 (pending publication).

25 Confusingly, the IEX DEEP product similarly provides aggregated depth-of-book quotation information, so we are not sure what principle was used to determine when to consider aggregated vs. order-by-order depth-of-book products except to pick the most expensive product offered by each exchange considered for the calculation.

fees would be no less flawed if they included these other markets, these arbitrary decisions seriously call into question whether the "calculations" used to determine the fees are anything more than an after-the-fact attempt to justify the plainly unjustifiable. However, as dressed up as these calculations may appear to be, the reality is they are not much more than lipstick on a pig.

As member-owned exchange, an SRO registered with the Commission, and a participant on the operating committees of the Plans responsible for governing the national market system for U.S. equities, MEMX takes our responsibility to act in in the interest of investors and the broader market seriously. The Amendments unfortunately do not reflect the sort of reasoned decision-making that we should expect from the stewards of the national market system. Rather than reflect good-faith deliberation on matters important to the continued health of the U.S. equity markets, the Amendments consistently reflect questionable decision-making by a handful of exchange families that have put their own wants ahead of the needs of the investors and markets they serve.

IV. THE PROPOSED FEES WOULD UNDERMINE THE DECENTRALIZED CONSOLIDATION MODEL BY FAILING TO ACCOUNT FOR PROCESSOR COSTS SHIFTED FROM THE SROs TO MARKET PARTICIPANTS & REDUCING INCENTIVES FOR FIRMS TO REGISTER AS COMPETING CONSOLIDATORS

When it adopted the infrastructure rule and required the Plans to set associated fees, the Commission explained that "[t]he proposed new fees will need to reflect the following: (i) that consolidated market data includes additional new content (i.e., depth of book data, auction information, and additional information on orders of sizes smaller than 100 shares); (ii) that the effective national market system plan(s) is no longer operating the exclusive SIPs and is no longer performing collection, consolidation, and dissemination functions; and (iii) that the SROs are no longer responsible for the connectivity and transmission services required for providing data to the exclusive SIPs from the SROs' data centers."[26] The Amendments only address the first of these considerations, *i.e.*, the inclusion of additional data elements within consolidated market data.

Under the infrastructure rule, the exclusive SIPs are to be replaced with competing consolidators that will collect data from each of the exchanges and create consolidated market data for dissemination to the public, and self-aggregators that will consolidate the data they collect for internal use. Market participants will therefore bear the cost of collecting, consolidating, and disseminating SIP data, either through fees charged by competing consolidators for their services, or expenses incurred directly by firms that become self-aggregators. This is in contrast to the current model, where the SROs are responsible for the costs associated with creating and distributing consolidated market data. Although there will be a period of parallel operation where the current exclusive SIPs and competing consolidators are both disseminating market information to the public, fair and reasonable SIP fees should include some discount to the fees charged for existing content to account for this transfer of cost. However, despite explicit instruction from the Commission, the Amendments fail to account for the transfer of costs from the SROs to market participants. By failing to account for this transfer of cost to the industry, the Amendments effectively increase, without justification, the cost of consolidated market data.

The Commission decided that the fee setting process would be the first key milestone towards implementation of the infrastructure rule because the fees set for consolidated market data are an important factor for potential competing consolidators to consider when deciding whether or not to enter this business. By allowing the SROs to continue to profit from collection, consolidation, and dissemination services that they no longer provide, the Amendments would

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[26] See supra note 2 at 18682.

reduce the potential revenue pool to be shared by the competing consolidators providing those services. This would impact a potential competing consolidator's ability to profit from providing these services and may therefore impact a firm's decision to register as a competing consolidator.

There is also unlikely for there to be *any* demand for the new data elements included in consolidated market data at prices that exceed the fees charged for proprietary data feeds today. The Amendments would therefore also serve to limit the potential customer base for competing consolidators. Under the decentralized consolidation model, a number of competing consolidators are to compete to provide consolidation and dissemination services to market participants. The overall size of the market that they are competing for is therefore an important input into the decision of whether or not to become a competing consolidator. Competing consolidators may choose to enter the business if the market for consolidated market data is expanded to include the new data content described in the infrastructure rule, such as depth-of-book information. However, if that information is not available at a reasonable price, the potential customer base that competing consolidators are competing for will be correspondingly smaller, and potential competing consolidators may choose not to register as a result. The Amendments would therefore inappropriately impede the viability of competing consolidators under the infrastructure rule.

V. THE AMENDMENTS FAIL TO ANALYZE WHETHER CURRENT SIP FEES ARE FAIR AND REASONABLE IN LIGHT OF THE NEW DECENTRALIZED CONSOLIDATION MODEL FOR CONSOLIDATED MARKET DATA

The Amendments use the fees currently charged for SIP data as a baseline for determining fees for the new data content added by the infrastructure rule. Accounting for the transfer of cost from the SROs to market participants under the decentralized consolidation model is therefore *doubly* important since it would impact both the fees for current content and the fees to be applied for the new data elements included within consolidated market data. However, the Amendments do not account for this transfer of cost in analyzing whether the fees for the current SIP data, or new data content, are fair and reasonable under the Exchange Act. This is a significant failing.

It is also important to consider more wholistically whether the current fees charged for SIP data are fair and reasonable in light of data available on proprietary data feeds today. The SIPs are the backbone of the national market system envisioned by Congress, and the SIP feeds play an important role in getting critical market information to public investors. However, any discussion of SIP fees would be incomplete without discussing the numerous ways in which market participants are currently incentivized to *avoid* providing SIP data to their customers at all.

Although Rule 603(c) of Regulation NMS ("Vendor Display Rule") requires that a consolidated display be provided in any context in which a trading or order-routing decision can be implemented, retail brokers often provide proprietary market data to their customers in other contexts due to the high price of SIP feeds relative to those products. Indeed, certain exchanges offer proprietary data products like Nasdaq Basic and Cboe One that cater to firms that would otherwise use SIP data, taking advantage of the relatively expensive SIP feeds to price their own market data at a discount, sometimes offering both lower user fees and lower enterprise caps for access to that data. Further, the CTA/CQ/UTP Plans actually charge fees for Professional and Non-Professional Users that are often higher than the fees charged by all of the exchanges *combined*.

		Current SIP Fees	Nasdaq Basic Fees	Cboe One Summary Fees
Non-Professional User		$3	$1	$0.25
Professional User	1-2 internal users	$92	$26	$10
	3-999 internal users	$74	$26	$10
	1K-9999 internal users	$70	$26	$10
	10K+ internal users	$66	$26	$10
External Distribution [27]		$10,500	$2,000	$5,000

		Current SIP Fees	Proprietary Fees (Top +Trades) [28]	Difference
Non-Professional User		$3	$2.25	33%
Professional User	1-2 internal users	$92	$54	70%
	3-999 internal users	$74	$54	37%
	1K-9999 internal users	$70	$54	30%
	10K+ internal users	$66	$54	22%
External Distribution [29]		$10,500	$15,500	-32%

** A positive number (red) in the difference column indicates that the current SIP fees are higher than the fees currently charged for comparable proprietary data products.*

** A negative number (green) in the difference column indicates that the current SIP fees are lower than the fees currently charged for comparable proprietary data products.*

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27 See supra note 16.

28 This column shows the aggregate pricing for proprietary data products containing top-of-book quotation and trade information using the following products: (1) Basic for Nasdaq, BX, and PSX; (2) a combination of BBO and Trades for NYSE, Arca, and American; and (3) Top for BZX, EDGX, BYX, and EDGA. The top-of-book products offered by the Nasdaq (Basic) and Cboe (Top) family of exchanges also include last sale information. BBO and Trades feeds are offered free of charge for National and Chicago.

29 See supra note 16.

As shown, although access fees are lower for SIP data, the SIPs currently charge a premium for Professional and Non-Professional user fees that account for the bulk of SIP revenue. This creates obvious disincentives for firms to take SIP data that would be exacerbated by the Amendments. Rather than continue to charge fees that are not competitive, MEMX believes that SIP fees should be designed to facilitate getting high-quality and timely data to investors.

The operating committees for the CTA/CQ/UTP Plans should therefore analyze whether it is fair and reasonable to continue to charge Professional and Non-Professional User fees that exceed the fees charged for similar proprietary market data. This is particularly the case where, as is the case for proprietary data feeds, the fees are supposed to reflect only the value of the data itself and not the collection, consolidation, and dissemination of that data. Indeed, since brokers often provide a single proprietary data product such as Nasdaq Basic or Cboe One when they are permitted to do so under the Vendor Display Rule, that analysis should also consider whether appropriate SIP pricing should be more competitive with those individual products as well.

Finally, any analysis of current SIP fees should include a discussion of what structural changes could be made to SIP fees to eliminate or reduce the incentives that firms have today to avoid providing SIP data to their customers. MEMX presented to the SIP market data subcommittee a proposal to introduce tiered enterprise licenses for retail brokers based on the total number of subscribers accessing SIP data. A tiered enterprise cap would fundamentally change current incentives by allowing firms to provide high-quality streaming SIP data to all of their customers at a single, fair, price without any need for brokers to substitute other products to avoid SIP fees. We believe that this would drive greater usage of SIP data and could also reduce the administrative burden associated with the classification and counting of Professional and Non-Professional users. While we acknowledge that this proposal requires a thoughtful study of usage data currently held by the Plan administrators so that tiers and qualification criteria can be set at appropriate levels, we believe that the operating committees should carefully consider ways to improve the structure of the current fees to address these longstanding industry concerns.

VI. THE AMENDMENTS WOULD CHARGE REDISTRIBUTION FEES TO COMPETING CONSOLIDATORS TAKING THE PLACE OF EXCLUSIVE PROCESSORS IN DEFIANCE OF EXPLICIT INSTRUCTIONS FROM THE COMMISSION

Today, vendors that redistribute SIP data are charged a redistribution fee. This redistribution fee is paid by vendors that choose to redistribute SIP data, but not the exclusive processors that are responsible for creating consolidated market data for dissemination to the public. Under the decentralized consolidation model adopted pursuant to the infrastructure rule, competing consolidators would take the place of the current exclusive processors in that they would similarly be responsible for creating consolidated market data for dissemination to the public. The Commission therefore explained when it adopted the infrastructure rule that "the fees for data content underlying consolidated market data should not include redistribution fees for competing consolidators." [30] The Amendments disregard this clear direction from the Commission, placing an inappropriate burden on competing consolidators that take the place of exclusive SIPs.

VII. THE AMENDMENTS PROVIDE NO REAL SUBSTANTIVE JUSTIFICATION FOR THE PROPOSED FEES BEYOND COMPARING THE FEES ACTUALLY PROPOSED TO "ALTERNATIVES" CREATED BY THE PLAN PARTICPANTS THEMSELVES

The burden to demonstrate that the Amendments are consistent with the Exchange Act and rules and regulations thereunder is on the SRO participants to the CTA/CQ/UTP Plan.[31] However,

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[30] See supra note 2 at 18685.

[31] See Rule 700(b)(3).

the Amendments provide little justification for the proposed fees. For example, rather than providing any substantive analysis of the impact of the proposed fees on competition, as required under the Exchange Act and Commission rules, the Amendments simply state that "[t]he Participants believe that the proposed amendments comply with the requirements of the [infrastructure rule], which have been approved by the Commission." This is a *non-sequitur*. The infrastructure rule requires that the CTA/CQ/UTP Plans file fees for consolidated market data, and the Commission has made clear that it is required to evaluate whether the proposed fees are consistent with the Exchange Act. Stating that the filing of *some* fees was required is not an analysis of the impact on competition of the fees *actually proposed*. And, as we've already discussed, we believe the fees proposed in the Amendments would inhibit competition from competing consolidators and thereby undermine the important goals of infrastructure rule.

Similarly, the Amendments avoid any real discussion of whether the proposed fees are fair, reasonable, and not unfairly discriminatory. Rather, the Amendments suggest that the proposed fees are appropriate because they are lower than some other alternatives considered by the operating committees. However, that does not meet the Exchange Act requirements for substantive justification. Even more tellingly, MEMX submitted its own proposal to the operating committees that would have resulted in much more reasonable fees designed to facilitate access to market information that we believe should be widely available at a modest price. Suggesting that the proposed fees are appropriate because they are better than some other group of alternatives that were "considered," while simultaneously ignoring any better alternatives is no justification at all.

VIII. THE COMMISSION SHOULD REQUIRE THAT THE FEES NECESSITATED BY THE INFRASTRUCTURE RULE BE SET BY THE CT PLAN, OR TAKE OTHER STEPS TO MITIGATE THE CONFLICTS PRESENT IN THE EXISTING NMS PLANS

In addition to addressing the data content to be included on the SIPs and the method for distributing that data to the millions of market participants and investors that rely on it, the Commission has taken other important actions to improve the distribution of consolidated market data to the public. Chief among those actions was the May 6, 2020 order requiring various SROs to submit a new single NMS Plan to replace the CTA/CQ/UTP Plans that currently govern the dissemination of this information ("Governance Order").[32] The SROs met that obligation by filing a proposed Plan on August 11, 2020, and the so-called "CT Plan" was approved by the Commission, with important modifications, on August 6, 2021.[33] While the CT Plan is currently stayed pending the resolution of challenges filed in the Court of Appeals for the D.C. Circuit by the Nasdaq, NYSE, and Cboe family of exchanges,[34] we encourage the Commission to consider whether the CT Plan is a more appropriate body for setting fees for consolidated market data.

As discussed, the Amendments are fundamentally flawed and inconsistent with the Exchange Act. They must therefore be disapproved. However, determining the process to be used to establish appropriate fees following any disapproval is equally important. While the Commission could choose to give the CTA/CQ/UTP Plans a second bite at the apple, this is

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32 See Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020).

33 See Securities Exchange Act Release No. 92586 (August 6, 2021), 86 FR 44142 (August 11, 2021).

34 MEMX filed an *amicus* brief in support of the Commission in an initial appeal of the Governance Order. That case was dismissed by the D.C. Circuit on the grounds that the Governance Order was not a "final order" subject to its review. The exchanges listed above then filed the current appeal after the Commission approved the CT Plan.

unlikely to produce a less flawed result given the current voting structure of those NMS Plans, which vests the three large exchange groups with sufficient voting authority to set pricing without needing a *single* vote from any of the independent U.S. equities exchanges or the Financial Industry Regulatory Authority ("FINRA"). Putting the responsibility for setting fees in the hands of the CT Plan created under the Governance Order instead would allow SIP fees to be set by an operating committee that better reflects the constituencies impacted by this filing, including representatives of non-SROs that would be permitted to vote on these matters for the first time, while also addressing the current concentration of SRO votes in the large exchange groups.

While we acknowledge that the Commission will have to wait to pass this responsibility on to the CT Plan in light of the stay granted by the Court of Appeals for the D.C. Circuit, we understand that the court has also agreed to expedite the case. The case may therefore be resolved prior to Commission action on the Amendments being required pursuant to the recently-amended Rule 608 of Regulation NMS, which requires that the Commission approve or disapprove NMS Plan amendments within 300 days of their publication in the *Federal Register*.[35] MEMX supports the Commission's efforts to improve the governance structure of the Plans, and the Amendments illustrate just how important good governance is to the national market system.

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How do we improve access to market data that investors need? The answer to this question has never been more important than it is today. Among other recent trends, 2021 has been a year

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[35] Although there are no time limits applicable to the D.C. Circuit's resolution of the related appeal, we expect that the court may ultimately rule in advance of the Commission's deadline. If the court does not rule in favor of the Commission, we ask the Commission to consider what governance changes may be made consistent with any such ruling.

of record volumes amid strong and continued retail participation in the market. Yet, the public SIP feeds used by retail and other investors provide materially less information than the more expensive proprietary data feeds. This informational asymmetry can be remedied by including more data on the SIPs, *only if* that data is available at a competitive price that facilitates, rather than hinders, widespread access to this information. The Amendments will have the opposite effect and would further serve as a deterrent to competing consolidators entering the business. If the infrastructure rule is to be anything more than a purely academic exercise, the fees set for access to consolidated market data must be fair and reasonable. The proposed fees clearly fail this important statutory test and should therefore be disapproved by the Commission.

Sincerely,

/s/ Adrian Griffiths

Adrian Griffiths
Head of Market Structure