UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 83755 / July 31, 2018

Admin. Proc. File Nos. 3-18314; 3-18316

In the Matter of the Application of

SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION

For Review of Action Taken by the Consolidated Tape Association in its role as a registered Securities Information Processor

In the Matter of the Application of

BLOOMBERG L.P.

For Review of Action Taken by the Consolidated Tape Association in its role as a registered Securities Information Processor

ORDER GRANTING MOTION FOR STAY, CONSOLIDATING PROCEEDINGS, AND SCHEDULING BRIEFS

On October 19, 2017, the Consolidated Tape Association Plan participants ("CTA") filed with the Commission amendments that they "designate[d]" pursuant to Rule 608(b)(3)(i) of Regulation NMS as "changing [ ] fee[s]" relating to consolidated market data under the CTA/CQ National Market System plans ("2017 Amendments").[1] Bloomberg L.P. ("Bloomberg") filed an

[1] *Notice of Filing and Immediate Effectiveness of the Twenty-Second Charges Amendment to the Second Restatement of the CTA Plan and the Thirteenth Charges Amendment to the Restated CQ Plan*, Exchange Act Release No. 82071 (Nov. 14, 2017), 82 Fed. Reg. 55,130, 55,134 (Nov. 20, 2017) ("2017 Amendments Filing"), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-11-20/pdf/2017-25027.pdf. For all CTA and CQ amendment filings discussed in this order, we rely on the versions published in the Federal Register. While the CTA Plan participants filed the 2017 Amendments, the Consolidated Tape

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application on December 14, 2017, for an order setting aside the 2017 Amendments as an improper limitation of access to services.[2] It now moves for a stay pending resolution of the underlying application. For the reasons below, we grant Bloomberg's motion.

All our views below are preliminary, based on our review of the record and briefing filed in connection with this motion. These views may change after fuller briefing on the merits and more in-depth review of the record. But, at this stage, Bloomberg has demonstrated that each of the four factors we traditionally consider in assessing a stay application supports granting a stay. First, Bloomberg has made a satisfactory showing that it is likely to prevail on the merits of its improper limitation of access claim, because CTA has made no attempt to justify the fairness and reasonableness of the 2017 Amendments' fee changes as it will be required to do in its brief on the merits. CTA made no attempt because it maintains that CTA's designated fee changes were merely a clarification of existing fees, a position we find unpersuasive on this record. Second, Bloomberg has shown a likelihood that it will be irreparably harmed absent the requested stay because it is likely to permanently lose customers. Third, CTA makes no persuasive showing that it or others will suffer harm from a stay, let alone substantial harm that outweighs the harm that Bloomberg has shown it will likely suffer in the absence of a stay. And fourth, it appears that CTA's amendments could harm the public interest.

We also, as explained below, find it appropriate to consolidate this application with one filed by the Securities Industry and Financial Markets Association ("SIFMA") that seeks to challenge the same 2017 Amendments and to set forth a briefing schedule.[3]

I. Background

A. National Market System and Core Data

In 1975, Congress amended the Securities Exchange Act of 1934, authorizing the Commission to create a National Market System that would govern the dissemination of market information.[4] The system is intended to provide investors centralized and reliable access to

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Association, acting through NYSE in its capacity as Network Administrator of the Consolidated Tape Association and Consolidated Quotation Plan, opposed Bloomberg's stay motion. For convenience, we use the term "CTA" to refer to both.

2 *Application for an Order Setting Aside Amendments of the Consolidated Tape Association Limiting Access to its Services*, Admin. Proc. File No. 3-18316 (filed Dec. 14, 2017), *available at* https://www.sec.gov/litigation/apdocuments/3-18316-event-1.pdf.

3 SIFMA filed its challenge to the 2017 Amendments on December 14, 2017, but has not sought a stay. *See infra* note 82 and accompanying text.

4 *See* Pub. L. No. 94-29, 89 Stat. 97 (1975) (codified as amended in scattered sections of 15 U.S.C.); 15 U.S.C. § 78k-1 (addressing national market system).

market data information, rather than having to rely on individual exchanges and processors.[5] Congress found that centralized processing would "foster efficiency, enhance competition, increase the information available to brokers, dealers, and investors, facilitate the offsetting of investors' orders, and contribute to best execution of such orders."[6]

To effectuate these goals, the Commission has adopted a rule mandating the dissemination of consolidated information on quotations for and transactions in NMS stocks.[7] In particular, Rule 603(b) of Regulation NMS requires exchanges to "act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks" and states that "[s]uch plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor."[8]

The three joint-industry plans of this type—the CTA Plan, the CQ Plan, and the UTP Plan—generally define consolidated market information (or "core data") as consisting of (1) the price, size, and exchange of the last sale; (2) each exchange's current highest bid and lowest offer, and the shares available at those prices; and (3) the national best bid and offer (i.e., the highest bid and lowest offer currently available on any exchange). The plans, which are administered by various registered national securities exchanges and FINRA (referred to as "plan participants"), share responsibility for disseminating that NMS core data.[9] "Brokers responsible for routing their customers' orders . . . clearly must have fair and efficient access to the best displayed quotations of all trading centers to achieve best execution of those orders"; core data

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5 See *Regulation of Market Information Fees and Revenues*, Exchange Act Release No. 42208 (Dec. 9, 1999), 64 Fed. Reg. 70,613, 70,614 (Dec. 17, 1999) ("1999 Concept Release"), *available at* https://www.gpo.gov/fdsys/pkg/FR-1999-12-17/pdf/99-32471.pdf.

6 15 U.S.C. § 78k-1(a)(1)(D).

7 *See* Rule 603(b) of Regulation NMS, 17 C.F.R. § 242.603(b).

8 *See id.*; *see also* Rule 600(b)(13)-(14), (42) of Regulation NMS, 17 C.F.R. §§ 242.600(b)(13)-(14), (42) (defining "consolidated display," "consolidated last sale information," and "national best bid and national best offer").

9 *See Regulation NMS*, Exchange Act Release No. 51808 (June 5, 2005), 70 Fed. Reg. 37,496, 37,503 n.40 (June 29, 2005) ("Regulation NMS Release"), *available at* https://www.gpo.gov/fdsys/pkg/FR-2005-06-29/pdf/05-11802.pdf; Rule 603(b) of Regulation NMS, 17 C.F.R. § 242.603(b). These three entities meet the Exchange Act's definitions for "securities information processor[s]" and "exclusive processor[s]." *See* 15 U.S.C. § 78c(a)(22). Because these three plans are the only processors to whom exchanges and associations are required to report their stock data under Rule 602(a)(1) of Regulation NMS, they effectively have a monopoly over core data. *Cf.* 1999 Concept Release, 64 Fed. Reg. at 70,627 (characterizing "exclusive processors of [core data] market information" as "monopolistic provider[s] of a service").

provides that information.[10] After operating expenses are subtracted, the revenues from these sales and other fees are generally shared among the plan participants.[11]

The Commission has stated that through its rules and regulations it seeks to ensure that core data is widely available for reasonable fees.[12] The Commission has also stated, among other things, that investors "must have [core data] to participate in the U.S. equity markets," and "preserv[ing] the integrity and affordability of the consolidated data stream" is "one of the Commission's most important responsibilities."[13] The Commission reviews core data fees (and changes thereto) to ensure that, consistent with Exchange Act Section 11A, they are, among other things, "fair and reasonable" and "not unreasonably discriminatory."[14] Because the three joint-industry plans responsible for disseminating required NMS core data are monopolistic providers of such data, there is no market competition that can be relied upon to set prices.[15] As

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[10] *See* Regulation NMS Release, 70 Fed. Reg. at 37,539; *see also* Rule 603(c)(1) of Regulation NMS, 17 C.F.R. § 242.603(c)(1) (requiring broker-dealers who provide, "in a context in which a trading or order-routing decision can be implemented, a display of any information with respect to quotations for or transactions in an NMS stock" to also provide the consolidated display in an equivalent manner); 1999 Concept Release, 64 Fed. Reg. at 70,614 ("This consolidated, real-time stream of market information . . . is the principal tool . . . for facilitating the best execution of customers' orders by their broker-dealers.").

[11] *See, e.g., Second Restatement of CTA Plan*, Composite as of January 2, 2018, Section XII.

[12] *See, e.g.*, Regulation NMS Release, 70 Fed. Reg. at 37,560 ("In the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of consolidated market data.").

[13] *Id*. at 37,503, 37,560; *see also* 1999 Concept Release, 64 Fed. Reg. at 70,614 ("This consolidated, real-time stream of market information has been an essential element in the success of the U.S. securities markets.").

[14] *See* 15 U.S.C. § 78k-1(c); *see also* Rules 603(a)(1)-(2), 608 of Regulation NMS, 17 C.F.R. §§ 242.603(a)(1)-(2), 608 (offering additional standards of review for market data).

[15] *See, e.g., Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data*, Exchange Act Release No. 59039 (Dec. 2, 2008), 73 Fed. Reg. 74,779, 74,786-88 & nn.244-45 (Dec. 9, 2008) ("2008 ArcaBook Approval Order"), *available at* https://www.gpo.gov/fdsys/pkg/FR-2008-12-09/pdf/E8-28908.pdf ("[C]entral processors of core data for the Networks . . . in fact have monopoly pricing power for such mandated data," and "[a]lthough the existence of a monopolistic processing facility would not necessarily raise antitrust problems, serious antitrust questions would be posed if access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in the trade or its charges were not reasonable."); *see also* 1999 Concept Release, 64 Fed. Reg. at 70,627 ("[F]ees 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 if fees are too low."); *NetCoalition v. SEC*, 615 F.3d 525, 536 (D.C. Cir. 2010) (*NetCoalition I*) (noting that the

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a result, the Commission has stated that core data fees "need to be tied to some type of cost-based standard" in order to assess their fairness and reasonableness.[16]

B. Display and Non-Display Fee System

In 2013 and 2014, CTA, which administers both the CTA and CQ plans, filed a series of amendments to modify the core market data fee schedules, noting that the most recent fee structure change had been in 1986.[17] In an accompanying filing, CTA stated that over the intervening 27 years, "significant change has characterized the industry, stemming in large measure from technological advances, the advent of trading algorithms and automated trading, new investment patterns, new securities products, unprecedented levels of trading, decimalization, internationalization and developments in portfolio analysis and securities research."[18] The 2014 filing states that the changes to the fee schedules were designed to "realign the Plans' charges more closely with the ways in which data recipients consume market data today."[19] Those amendments became immediately effective when filed, and remain in force; the final round of amendments, filed in 2014 ("2014 Amendments"), are subject to a pending challenge by SIFMA filed under Exchange Act Section 19.[20]

Of particular relevance to Bloomberg's motion is the distinction between display and non-display use of data. Although the terms appeared in the 2013 amendments, it was not until the 2014 Amendments that CTA formally defined "non-display use" for purposes of its fee schedules. In the 2014 Amendments Filing, CTA described "display use" as including

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above-quoted statement from the 1999 Concept Release, "(and the Concept Release in general) addressed market data fees charged by a central exclusive processor of consolidated core data" (internal citations omitted)).

16 *See* 1999 Concept Release, 64 Fed. Reg. at 70,627; *see also NetCoalition I*, 615 F.3d at 529 n.2 ("The SEC has determined that because of the mandatory nature of this regime, core data fees should bear some relationship to cost.").

17 *See 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*, Exchange Act Release No. 70010 (July 19, 2013), 78 Fed. Reg. 44,984, 44,984 (July 25, 2013) ("2013 Amendments Filing"), *available at* https://www.gpo.gov/fdsys/pkg/FR-2013-07-25/pdf/2013-17860.pdf (listing relevant 2013 plan amendments); *Notice of Filing and Immediate Effectiveness of the Twenty-First Charges Amendment to the Second Restatement of the CTA Plan and Twelfth Charges Amendment to the Restated CQ Plan*, Exchange Act Release No. 73278 (Oct. 1, 2014), 79 Fed. Reg. 60,536 (Oct. 7, 2014) ("2014 Amendments Filing"), *available at* https://www.gpo.gov/fdsys/pkg/FR-2014-10-07/pdf/2014-23837.pdf (last revision of fee schedule before 2017).

18 2013 Amendments Filing, 78 Fed. Reg. at 44,985.

19 2014 Amendments Filing, 79 Fed. Reg. at 60,536.

20 Admin. Proc. File No. 3-16220.

conventional uses where a human being viewed data on a terminal, whereas "non-display use" was described as use by computers without any human involvement. CTA explained that because of the rise of automated and algorithmic trading, "data feeds have increased in value and non-display devices consume large amounts of data."[21] The filing noted that using market data as part of trading algorithms and other electronic processes performed "far more quickly than any human being looking at a terminal . . . provides great value to firms and allows them to generate considerable profit[, y]et that usage contributes little to market data revenues [under previous fee schedules]."[22] The filing noted that, by contrast, the industry's reliance on display uses of data had been declining.[23] CTA asserted that establishing "fees for non-display uses of data, along with a reduction in [display] fees . . . would provide an equitable allocation of fees to the industry, would facilitate the administration of non-display uses of market data and would equitably reflect the value of non-display and display data usage."[24]

To facilitate this new fee system, the 2014 Amendments introduced a definition of "Non-Display Use," characterized in the accompanying filing as

> accessing, processing or consuming real-time . . . quotation information or last sale price information, whether delivered via direct and/or redistributor data feeds, for a purpose other than in support of a data recipient's display or further internal or external redistribution. It does not include the use of such data to create and use derived data.[25]

For professional subscribers, two principal types of monthly fees apply to non-display data consumption under the 2014 Amendments.[26] First, a Non-Display Use fee is charged to data feed recipients for each category of non-display use of market data. Because the 2014 Amendments recognize three categories of non-display use, depending on whether "a data recipient makes non-display uses of real time market data on its own behalf," "on behalf of its

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21 2014 Amendments Filing, 79 Fed. Reg. at 60,538.

22 *Id*.

23 *Id*. at 60,536-37.

24 *Id*. at 60,538.

25 *Id*.

26 Under the CTA Plan, the charges for nonprofessional subscribers, which are defined as "natural person[s] who receive[] market data solely for [their] personal, non-business use," are $1 per month for each of Network A and Network B, although other applicable charges still apply to the vendor providing services to nonprofessional subscribers. *See* CTA, *Nonprofessional Subscriber Policy*, *available at* https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Policy%20-%20Non-Professional%20Subscribers%20-%20CTA.pdf; *Second Restatement of CTA Plan*, Composite as of September 1, 2015, Ex. E, "SCHEDULE OF MARKET DATA CHARGES," at 3 nn.2-3 ("2015 Fee Schedule"); *Second Restatement of CTA Plan*, Composite as of January 2, 2018, Ex. E, "SCHEDULE OF MARKET DATA CHARGES," at 3 nn.2-3 ("2018 Fee Schedule").

clients," or "for the purpose of internally matching buy and sell orders within an organization," a firm using data for all three categories of use might "thereby subject itself to the non-display fees for each category."[27] Second, an access fee is charged "to those who obtain . . . data feeds."[28]

C. Bloomberg SAPI

In its motion, Bloomberg outlines three basic services it offers to its customers for core data. The first is its Bloomberg Terminal display service, which Bloomberg describes as "display[ing] real-time market data, news, and analytics on the desktops, laptops, or smartphone devices of authorized Bloomberg subscribers." The parties have not disputed that Bloomberg Terminal is a display service not subject to the Non-Display Use and access fees.

The second is Bloomberg Market Data Feed ("B-PIPE"), which can be used for "automated, algorithmic, or other 'black box' applications." The parties have not disputed that Bloomberg B-PIPE is a non-display service subject to the Non-Display Use and access fees.

The third is Bloomberg's Server Applications Program Interface service ("Bloomberg SAPI"), which functions with Bloomberg Terminal and supplies the same data as Bloomberg Terminal. Bloomberg states in its brief that it launched Bloomberg SAPI in 2004, well before the introduction of the display/non-display fee divisions implemented in the 2013-14 Amendments. Whereas Bloomberg Terminal supplies data directly to display devices, Bloomberg SAPI does so via a customer server. According to Bloomberg, this enables users to "view data on third-party and customer proprietary applications not available in the Terminal, allowing them to choose the best ways to use data to inform their investment decisions." Bloomberg points to several advantages that SAPI affords to customers because of the centralization of the data, including: (a) ensuring consistency of real-time data between different applications; (b) eliminating redundant downloading of data to different devices; (c) allowing for more effective central maintenance and control; and (d) providing customers the option to view SAPI data through their own preferred applications, rather than only those offered by Bloomberg. Bloomberg emphasizes that such benefits "all facilitate the viewing of real-time data on a screen by humans." Bloomberg asserts that Thomson Reuters's Eikon Server API ("Eikon SAPI") offered similar services to Bloomberg SAPI.

Bloomberg contends multiple provisions in its contracts with customers impose restrictions "to ensure SAPI is used only for display purposes." The contracts, for example, prohibit "any non-user-based, non-display application, including but not limited to any automated algorithmic trading application" and limit data consumption, certification requirements, and audit procedures. Bloomberg also imposes technological controls, such as log-in requirements and monitoring of data usage. Bloomberg explains that these provisions are designed in part "to ensure SAPI subscribers do not use data in ways that require a [ ] subscription" to Bloomberg's non-display service B-PIPE, because B-PIPE subscriptions are

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[27] 2014 Amendments Filing, 79 Fed. Reg. at 60,538.

[28] *Id*. at 60,539. The access fee predates the 2013 amendments, though its amount and applicability have changed.

"considerably more expensive." Thus, Bloomberg SAPI, according to Bloomberg, enhances the display use experience, but with restrictions on non-display use to avoid incurring non-display fees and to prevent competition with Bloomberg's own non-display service B-PIPE.

D. The 2017 Amendments

CTA filed the 2017 Amendments that are the subject of this proceeding on October 19, 2017, seeking "to amend the Plans' fee schedule as well as the Non-Display Use Policy to clarify the applicability of the non-display fee . . . and the access fee."[29] CTA designated the 2017 Amendments "as establishing or changing a fee or other charge collected on [its] behalf" pursuant to Rule 608(b)(3)(i) of Regulation NMS.[30] As a result, the 2017 Amendments were immediately effective when filed, and the Commission did not abrogate the amendments within the 60-day period prescribed by the rule.[31]

The 2017 Amendments changed the definitions of "Non-Display Use" and "access fee." The 2017 Amendments Filing stated that the changes were necessary because "[t]he Participants believe that some vendors are mischaracterizing their customers' usage and creating artificial loopholes to avoid the Non-Display Use and access fees pursuant to [the 2014 Amendments] in an attempt to obtain an advantage over other vendors."[32] The filing identified Bloomberg SAPI as its only example of a vendor allegedly mischaracterizing its customers' usage. The filing cited extensively to a comment letter Bloomberg submitted before the review period had elapsed in response to an earlier version of the amendments that CTA withdrew in March 2017.[33] The 2017 Amendments Filing pointed to Bloomberg's descriptions of SAPI's capabilities and restrictions in that comment letter as support for the filing's statements that Bloomberg "has not been accurately reporting its Bloomberg SAPI product," and that "Bloomberg SAPI is not at its core a display product."[34] The filing stated that this characterization "is clearly contrary to the language and purpose of the 2014 Fee Amendments," but the 2017 Amendments will

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29 2017 Amendments Filing, 82 Fed. Reg. at 55,130.

30 *Id*. at 55,131; 17 C.F.R. § 242.608(b)(3)(i).

31 Rule 608(b)(3)(iii) of Regulation NMS, 17 C.F.R. § 242.608(b)(3)(iii).

32 2017 Amendments Filing, 82 Fed. Reg. at 55,130.

33 *Notice of Filing and Immediate Effectiveness of the Twenty-Second Charges Amendment to the Second Restatement of the CTA Plan and the Thirteenth Charges Amendment to the Restated CQ Plan*, Exchange Act Release No. 80300 (Mar. 23, 2017), 82 Fed. Reg. 15,404 (Mar. 28, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-03-28/pdf/2017-06083.pdf; *Notice of Withdrawal of the Twenty-Second Charges Amendment to the Second Restatement of the CTA Plan and the Thirteenth Charges Amendment to the Restated CQ Plan*, Exchange Act Release No. 80819 (May 31, 2017), 82 Fed. Reg. 26,171, 26,171 (June 6, 2017), *available at* https://www.gpo.gov/fdsys/pkg/FR-2017-06-06/pdf/2017-11580.pdf; Letter from Greg Babyak, Head, Global Regulatory and Policy Group, Bloomberg LP (Apr. 18, 2017), *available at* https://www.sec.gov/comments/sr-ctacq-2017-02/ctacq201702-1710668-150186.pdf.

34 2017 Amendments Filing, 82 Fed. Reg. at 55,133, 55,136.

"definitively remove any ambiguity."[35] However, "to meet any concerns that the existing policy was insufficiently clear," the filing stated that the amendments would be applied only prospectively.[36]

The 2017 Amendments Filing accordingly explained that the definition of Non-Display Use was being changed "to explicitly state that any use of data that does not make data visibly available to a data recipient on a device is a Non-Display Use."[37] CTA added, however, that once data "has been visibly displayed via a graphical user interface, it can be exported via a data delivery exchange to a format such as Excel for further display use" without being subject to the Non-Display Use or access fees.[38]

The differences between the definitions after the 2014 Amendments and the 2017 Amendments are summarized in the following table (with changes in bold):

	Post-2014 Amendments[39]	**Post-2017 Amendments**[40]
Non-Display Use	Non-Display Use refers to accessing, processing or consuming data, whether delivered via direct and/or redistributor data feeds, for a purpose other than in support of the datafeed recipient's display or further internal or external redistribution. It does not apply to the creation and use of derived data.	Non-Display Use refers to accessing, processing or consuming data, regardless of the method of transmission of the data, for a purpose other than in support of the datafeed recipient's display or further internal or external redistribution; **any use of the data that does not make the data visibly available to the data recipient on a device is a Non-Display Use**. It does not apply to the creation and use of derived data. **CTA reserves the right to make the sole determination as to whether a datafeed recipient's use constitutes Non-Display Use and the category of such Non-Display Use**.
Access Fee	Access to data feeds through an extranet service subjects the data feed recipient to direct access charges.	**The access fee applies if: (i) the data recipient uses the data for non-display; or (ii) the data recipient receives the data in such a manner that the data can be manipulated and disseminated to one or more devices, display or otherwise, regardless of encryption or instructions from the redistribution vendor regarding who has authorized access to the data.**

35 *Id*. at 55,132.

36 *Id*. at 55,130 n.5.

37 *Id*. at 55,133.

38 *Id*. at 55,132. The fee changes were the same for the CTA and CQ plans.

39 2015 Fee Schedule at 4 n.8, 5 n.10.

40 2018 Fee Schedule at 4 n.8, 5-6 n.10.

Bloomberg filed an application for an order setting aside the 2017 Amendments pursuant to Section 11A of the Exchange Act.[41] Bloomberg's application stated that the Amendments "limit the access of [Bloomberg] and its customers to market data made available by CTA and are inconsistent with the [Exchange] Act." Bloomberg moved to stay the 2017 Amendments on February 6, 2018.[42]

II. Analysis

Exchange Act Section 11A(b)(5)(A) provides the Commission discretion to stay a securities information processor's ("SIP's") limitation of access to services offered, either "summarily or after notice and opportunity for hearing on the question of a stay."[43] A stay is an "extraordinary remedy," and the moving party has the burden of establishing that it is warranted.[44] In deciding whether to grant a stay, the Commission traditionally applies the following four-factor test: it considers (i) the likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) the likelihood that the moving party will suffer irreparable harm without a stay; (iii) the likelihood that another party will suffer substantial harm

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41 Bloomberg asks that we consider its application in the alternative pursuant to Rule 608(d) of Regulation NMS or Exchange Act Section 19. Because we grant this motion under Section 11A, we do not address these potential alternative bases.

42 Bloomberg submitted a Notice of Supplemental Authority attaching two Commission orders abrogating two recent NMS plan amendments. *See Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Pl*an, Exchange Act Release No. 83148 (May 1, 2018), 83 Fed. Reg. 20,126 (May 7, 2018), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-05-07/pdf/2018-09579.pdf; *Order of Summary Abrogation 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*, Exchange Act Release No. 83149 (May 1, 2018), 83 Fed. Reg. 20,129 (May 7, 2018), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-05-07/pdf/2018-09580.pdf. CTA responded that the orders were "not relevant to the Commission's resolution of the [m]otion." Pursuant to Commission Rule of Practice 323, 17 C.F.R. § 201.323, we take official notice of these orders, but do not rely upon them in arriving at our conclusions.

43 *See* 15 U.S.C. § 78k-1(b)(5)(A); *see also Bunker Ramo Corp.*, Exchange Act Release No. 14606, 1978 WL 197047, at *3 (Mar. 24, 1978) ("The express language of section 11A(b)(5)(A) confers broad discretion upon the Commission to issue a stay . . . .").

44 *See Nken v. Holder*, 556 U.S. 418, 432-34 (2009); *Mark E. Laccetti*, Exchange Act Release No. 79138, 2016 WL 6137057, at *2 & n.10 (Oct. 21, 2016); *Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *2 (Apr. 4, 2014).

as a result of a stay; and (iv) a stay's impact on the public interest.[45] The appropriateness of a stay turns on a weighing of the strengths of these four factors; not all four factors must favor a stay for a stay to be granted.[46] The first two factors are the most critical, but a stay decision rests on the balancing of all four factors.[47] We emphasize that our conclusions here are not final. We have based them only on a review of the record and arguments currently before us. Any "[f]inal resolution must await the Commission's determination of the merits of [an applicant's] appeal."[48]

A. Likelihood of Success on Merits

Bloomberg challenges the 2017 Amendments under Exchange Act Section 11A(b)(5) as an improper limitation of access.[49] Section 11A(b)(5) directs the Commission, in evaluating a challenge of this type, to determine whether: (i) the claimed limitation is consistent with the Exchange Act and related rules and regulations; (ii) the petitioner "has not been discriminated against unfairly"; and (iii) the limitation does not impose a burden on competition "not necessary or appropriate in furtherance of the purposes of [the Exchange Act.]"[50] If the limitation fails to

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45 *See Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *2 (July 18, 2016); *Toland*, 2014 WL 1338145, at *2; *see also Nken*, 556 U.S. at 434 (outlining similar four-factor test); *Bunker Ramo*, 1978 WL 197047, at *4 (applying four-factor test in Section 11A proceeding).

46 *See Michael Earl McCune*, Exchange Act Release No. 77921, 2016 WL 2997935, at *1 (May 25, 2016) (citing *Elec. Transaction Clearing, Inc.*, Exchange Act Release No. 73698, 2014 WL 6680112, at *1 (Nov. 26, 2014)); *Am. Petroleum Inst.*, Exchange Act Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012).

47 *See Harding Advisory LLC*, Securities Act Release No. 10330, 2017 WL 1163327, at *1 (Mar. 29, 2017); *see also Nken*, 556 U.S. at 434 ("The first two factors of the traditional standard are the most critical."); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008) (warning that "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course[,]" and emphasizing that "the balance of equities and consideration of the public interest[ ] are pertinent" to the assessment).

48 *See Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013).

49 We have previously treated fees charged by securities information processors as reviewable prohibitions or limitations on access under Exchange Act Section 11A. *See* Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings, *Sec. Indus. & Fin. Mkts. Assoc.*, Exchange Act Release No. 72182, 2014 WL 1998525, at *8 & n.74 (May 16, 2014) (collecting authority).

50 15 U.S.C. § 78k-1(b)(5)(B) (applying to "any proceeding to review the prohibition or limitation of any person in respect of access to services offered by a registered [SIP]"). Rule 603(a) of Regulation NMS expands on the first two prongs of Section 11A(b)(5) to explain that exclusive processors who distribute NMS stock information must "do so on terms that are fair and reasonable" and "not unreasonably discriminatory." 17 C.F.R. § 242.603(a)(1), (2); *see also*

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satisfy any one of those elements, "the Commission, by order, shall set aside the . . . limitation and require the registered [SIP] to permit such person access to services offered by the registered [SIP]."[51]

As explained below, Bloomberg has shown a likelihood of success on the merits, because the 2017 Amendments make no attempt to justify CTA's fee changes as fair and reasonable, and as such they have not been shown to be consistent with the Exchange Act. Because we find that Bloomberg has shown a likelihood of success on the first prong of the Section 11A analysis, we do not consider the other two.

1. Fairness and Reasonableness

Exchange Act Section 11A(c) and Rule 603(a) of Regulation NMS require, generally, that distribution of core data must be on terms that are "fair and reasonable."[52] The 2017 Amendments offer no support under any standard to demonstrate fairness and reasonableness, including the cost-related analysis that the Commission has discussed in the past.[53] CTA argues such support is unnecessary because the 2017 Amendments do not change any fees or in fact make any substantive change to the plans at all. At this stage, we reject that characterization of the 2017 Amendments. Because Bloomberg has made a showing that CTA has not addressed the fairness and reasonableness of the fees, which has not been rebutted by CTA, Bloomberg has demonstrated a likelihood of success on the issue of whether the 2017 Amendments are inconsistent with the Exchange Act.

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15 U.S.C. § 78k-1(c)(1)(C)-(D) (directing the Commission to promulgate rulemaking to assure "fair and reasonable terms" for stock information).

51 15 U.S.C. § 78k-1(b)(5)(B).

52 *See* 17 C.F.R. § 242.603(a)(1); 15 U.S.C. § 78k-1(c)(1)(C); *see also Nat'l Mkt. Sys. Sec.*, Exchange Act Release No. 20874, 1984 WL 472209, at *6 (Apr. 17, 1984) (*Instinet II*) ("[T]he legislative history of the 1975 Amendment indicates that Congress expected the Commission to review both the reasonableness and fairness of an exclusive processor's fees under Section 11A(b) of the Act."), *aff'd, Nat'l Ass'n Sec. Dealers, Inc. v. SEC*, 801 F.2d 1415 (D.C. Cir. 1986); *Institutional Networks Corp.*, Exchange Act Release No. 20088, 1983 WL 404184, at *5 (Aug. 16, 1983) (*Instinet I*) ("[T]he Commission believes that nationwide disclosure of market information, including transaction and quotation information in a useful form and on fair and reasonable terms, has been an essential aspect of the Commission's efforts to facilitate a national market system." (citing Exchange Act Section 11A)).

53 See footnotes 63-65, *infra*, and accompanying text.

a. 2017 Amendments as Fee Changes

In its opposition brief, CTA asserts that the 2017 Amendments do not need to be justified as fair and reasonable fee changes, because, CTA claims, no fees are changed.[54] Rather, CTA argues, the amendments merely "clarify the way vendors report to CTA so that CTA can administer fees set in 2014 in a fair and reasonable manner that does not impose a burden on competition."

We disagree, and find instead that the 2017 Amendments do change fees, as illustrated by the 2017 Amendments Filing's own language.[55] CTA labeled the 2017 Amendments, pursuant to Rule 608(b)(3)(i) of Regulation NMS, "as establishing or changing a fee or other charge,"[56] and we assume CTA properly stated the appropriate designation upon filing. And in fact, the practical effect of the filing is that the fees imposed on Bloomberg are changed. The 2017 Amendments' definitions of access and Non-Display Use fees appear to affect Bloomberg SAPI customers in ways that the fees from the 2014 Amendments did not, resulting in changing Bloomberg SAPI customer fees from less than $150 per month to over $3,000 a month, and in some cases, over $9,000.[57] In particular, the 2017 Amendments expand the coverage of the

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[54] CTA repeatedly asserts in its brief that "the [2017] Amendment[s] change[] no fees" and "do[] not adjust . . . fees." Rule 608(b)(3) of Regulation NMS provides a process by which a SIP filing a fee change amendment can bypass the more fulsome review procedures of Rule 608(b)(2) and render a plan amendment immediately effective. *See* 17 C.F.R. § 242.608(b)(2)-(3). Should CTA pursue in its brief on the merits its position that the 2017 Amendments are not fee changes, it should address any possible legal consequences of its contrary designation in the 2017 Amendments Filing, such as whether the amendments ever went into effect. *See* 17 C.F.R. § 608(d)(3) (allowing Commission to review appeals connected to the operation of national market system plans to determine whether "the action or failure to act is in accordance with the applicable provisions of such plan"); Rule 608(b)(1) of Regulation NMS, 17 C.F.R. § 608(b)(1) ("No national market system plan, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with paragraph (b)(3) of this section."); *see also Bloomberg L.P.*, Exchange Act Release No. 49076, 2004 WL 67566, at *3-5 (Jan. 14, 2004) (setting aside action by NYSE because it constituted an exchange rule but was never properly filed under Exchange Act Section 19(b)).

[55] Implicit in CTA's characterization of the 2017 Amendments as a clarification of existing fees implemented in the 2014 Amendments is the position that the 2014 changes were themselves fair and reasonable. Because we find that the 2017 Amendments effectuate fee changes from the 2014 Amendments, which are the subject of a separate lawsuit, we need not address whether the 2014 fee changes were fair and reasonable. *See* Admin. Proc. File No. 3-16220.

[56] 2017 Amendments Filing, 82 Fed. Reg. at 55,131.

[57] It is also telling that the 2017 Amendments Filing warns that the amendments are necessary because "absent the clarification, the market vendors that are now accurately reporting may feel compelled to take advantage of this perceived loophole [in the 2014 Amendments]." *Id*. at 55,136. CTA would not need to expend the effort it has to implement and defend the 2017

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access fee, from "data feeds" to any data that "*can be* manipulated and disseminated to one or more devices, display or otherwise, regardless of encryption or instructions from the redistribution vendor regarding who has authorized access to the data."[58] Thus, according to the 2017 Amendments Filing, if Bloomberg SAPI provides the capability for non-display use, even the product's display-use only customers would have to pay the access fee under the 2017 Amendments. The 2017 Amendments Filing also notes that Bloomberg has not interpreted the 2014 Amendments' access and Non-Display Use fees as covering Bloomberg SAPI customers (and, in fact, has not applied those fees to them). But the 2017 Amendments are clearly designed to cover Bloomberg SAPI, and CTA has signaled its intention to begin collecting these fees from Bloomberg and its customers.[59]

b. Methods of Illustrating Fairness and Reasonableness

Because the 2017 Amendments change fees, CTA's failure to identify any basis by which those fee changes could be assessed for fairness and reasonableness is likely to prove fatal to its defense on the merits against Bloomberg's limitation of access claims. In the 2017 Amendments Filing, CTA states only that it "believe[s] that the proposed amendment[s are] fair and reasonable and provide[] for an equitable allocation of dues, fees, and other charges among vendors, data recipients and other persons."[60] Such an unsupported declaration is not adequate to demonstrate fairness and reasonableness.[61] Rather, fairness and reasonableness must be

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Amendments if this "perceived loophole" were not one that needed to be closed with new fee definitions rather than increased enforcement of the existing language.

[58] 2015 Fee Schedule at 4 n.8, 5 n.10; 2018 Fee Schedule at 5-6 n.10 (emphasis added).

[59] *See* 2017 Amendments Filing, 82 Fed. Reg. at 55,132-33, 55,136. Our preliminary conclusion that the 2017 Amendments constitute fee changes for Bloomberg SAPI and its customers also negates CTA's argument that Bloomberg waived its challenge of the Non-Display Use and access fees because they "were established by the 2014 Amendments," and Bloomberg did not contest those earlier amendments. The fact that the 2017 Amendments Filing contemplates collecting fees only prospectively, and CTA's failure to pursue fee collection from Bloomberg SAPI customers until the new fee definitions were in place, is perhaps further indication that CTA is not entirely persuaded of its own argument that the 2017 Amendments do not change the applicability of the 2014 Amendments' fees.

[60] 2017 Amendments Filing, 82 Fed. Reg. at 55,136.

[61] *Cf.* Rule of Practice 700(c)(3), 17 C.F.R. § 201.700(c)(3) (providing that a self-regulatory organization ("SRO") submitting a proposed rule change to the Commission "must explain [in its filing] why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization," and explaining that "[a] mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient" to meet the SRO's burden) (Rule of Practice applicable to SRO rule disapproval proceedings initiated by the Commission).

explained and supported in such a manner that the Commission has sufficient information before it to satisfy its statutorily mandated review function, which CTA has not done.[62]

The principal method we have discussed for assessing the fairness and reasonableness of core data fees has stated that core data fees should bear at least some relationship to costs;[63] past Commission statements have contemplated various approaches for how that relationship might be assessed.[64] This is because distributors of core data have an effective monopoly over such data, and accordingly competitive market forces are not operating to impose sufficient constraints to promote core data fees' fairness and reasonableness.[65] We have also previously indicated a preference for consensus among market participants.[66]

Here, as noted above, the 2017 Amendments Filing does not identify any basis by which CTA's fee changes could be assessed for fairness and reasonableness. The filing is devoid of any mention of costs other than a sentence that, in discussing the 2014 Amendments, notes that those fees "allowed those who make Non-Display Uses of data to make appropriate contributions

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62 *See* Exchange Act Section 11A(b)(5), 15 U.S.C. § 78k-1(b)(5); *see also NetCoalition I*, 615 F.3d at 543 (requiring the Commission to "adequately support[] its determination[s]" when approving or disapproving rule changes).

63 *See, e.g.*, 1999 Concept Release, 64 Fed. Reg. at 70,622-23; *Concept Release Concerning Self-Regulation*, Exchange Act Release No. 50700 (Nov. 18, 2004), 69 Fed. Reg. 71,256, 71,275 (Dec. 8, 2004) ("2004 Concept Release"), *available at* https://www.gpo.gov/fdsys/pkg/FR-2004-12-08/pdf/04-26154.pdf; *see also NetCoalition I*, 615 F.3d at 529 n.2 ("The SEC has determined that because of the mandatory nature of this regime, core data fees should bear some relationship to cost."). This does not preclude the Commission from considering in the future the appropriateness of another guideline to assess the fairness and reasonableness of core data fees in a manner consistent with the Exchange Act.

64 *See, e.g.*, 1999 Concept Release, 64 Fed. Reg. at 70,627; 2004 Concept Release, 69 Fed. Reg. at 71,275.

65 *See, e.g.*, 1999 Concept Release, 64 Fed. Reg. at 70,627 ("[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 if fees are too low."); 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,788 n.255 (noting that "the mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees" and that the "absence of competitive forces impels the use of a regulatory alternative").

66 *See, e.g.*, 1999 Concept Release, 64 Fed. Reg. at 70,629; 2004 Concept Release, 69 Fed. Reg. at 71,273. We have, in the past, looked to consensus among market participants to inform our assessment of the reasonableness of market data fees. *But see Susquehanna Int'l Grp., LLP*, 866 F.3d 442, 447-48 (D.C. Cir. 2017) (expressing skepticism that fairness and reasonableness can be assured solely through reliance on SRO decision-making processes). In any event, here, the two lawsuits challenging the 2017 Amendments—this proceeding and one filed by SIFMA, a major industry trade group—suggests that no consensus was reached.

to the costs of collecting, processing, and redistributing the data."[67] In fact, CTA's opposition brief to Bloomberg's motion concedes that "[t]he [2017] Amendment[s] did not address costs . . ." because of its assertion that no fees have been changed; we have already explained why we reject this argument.

2. Unfair Discrimination and Burden on Competition

Bloomberg has demonstrated a likelihood of succeeding in its argument that the 2017 Amendments fail to satisfy the first element of Section 11A(b)(5), consistency with the Exchange Act and its related rules and regulations . It thus has made a sufficient showing on the first factor of the stay analysis, i.e., a likelihood of success on the merits of its application.[68] We note, however, that Bloomberg also argues that the 2017 Amendments unfairly discriminate against Bloomberg by singling it out for disparate treatment, and that they constitute an inappropriate burden on competition. Although we need not reach these issues for purposes of deciding this motion, CTA will need to address these statutory requirements at the merits stage.

B. Irreparable Harm

Bloomberg has shown a likelihood that it will suffer irreparable harm in the absence of a stay because it is likely to permanently lose customers.[69] Bloomberg argues that enforcing the new fees against Bloomberg SAPI will "cause many customers to terminate their subscriptions and purchase alternative data services." In support of anticipated customer loss, Bloomberg points to Thomson Reuters's decision to withdraw its own similar service, Eikon SAPI, from sale once it became aware of CTA's intention to promulgate the 2017 Amendments. Bloomberg argues that this shows such services are untenable if the fees in the 2017 Amendments are imposed on them. Although Bloomberg's argument is essentially one of economic injury, which ordinarily is not sufficient to constitute irreparable harm,[70] Bloomberg also argues that

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67 2017 Amendments Filing, 82 Fed. Reg. at 55,134. Nor does CTA's 2017 Amendments Filing contend that the fee changes are fair and reasonable because they are revenue neutral, stating instead that they are "not motivated by a plan to increase fees or revenues" and that CTA is "unable to forecast what revenue increase, if any, may result from the proposed amendment[s]," but "generally do[es] not believe that this proposed amendment[s] would result in a material increase in revenue." *Id*. at 55,136.

68 *See* 15 U.S.C. § 78k-1(b)(5)(B).

69 Bloomberg also argues that it will be irreparably harmed by the mere disclosure of its SAPI customer list to CTA. We need not reach this contractual issue because we find that Bloomberg has shown a likelihood that it will suffer irreparable harm in the absence of a stay for the reasons explained in the text below.

70 *See, e.g., Va. Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."); *Dawson James Sec.*, Exchange Act Release No. 76440, 2015 WL 7074282, at *3 (Nov. 13, 2015) (same) (quoting *William Timpinaro*, Exchange Act Release No. 29927, 1991 WL 288326, at *3 (Nov. 12, 1991)); *Toland*, 2014 WL 1338145, at

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"substantial switching costs," such as multi-year data contract commitments and technological and training expenses, are among the factors that would likely make such a loss of customers permanent once they turned to other services for their data needs. These unusual circumstances, in which a distinctive technological product is at risk of becoming unsustainable because of new SIP fees specifically targeting the product, are comparable to situations where courts of appeals have found that certain types of economic harm may constitute irreparable injury for purposes of a stay.[71] At this stage, we find Bloomberg's arguments are a proper basis upon which to find a likelihood of irreparable harm.

CTA counters that, because it "has not concluded whether SAPI allows for non-display use," it is too early to tell how the 2017 Amendments might affect Bloomberg SAPI and its customers, and so the threat of customer loss is too speculative at this point. But this statement appears to contradict the 2017 Amendments Filing, which states that "[t]he functionality made available by the Bloomberg SAPI is not at its core a display product," and claims that "Bloomberg concedes . . . that the Bloomberg SAPI allows customers to run server-based applications on market data," with "any such use constitut[ing] Non-Display Use . . . [that] should be subject to the Non-Display Use and access fees."[72]

CTA also argues in its brief that "the only Bloomberg customers who could be affected in any way by the Amendment[s] are those who use SAPI for non-display purposes." But Bloomberg argues convincingly that Bloomberg SAPI does offer advantages over Bloomberg

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*2 ("[A]s the Commission repeatedly has noted, 'the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay.'" (quoting *Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004))).

[71] *See, e.g., Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 20 (1st Cir. 1996) ("[S]everal courts have recognized that the loss of a prestigious brand or product line may create a threat of irreparable injury if it is likely that customers (or prospective customers) will turn to competitors who do not labor under the same handicap." (citations removed)); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co*., 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied." (citation removed)), *abrogated on other grounds, Winter*, 555 U.S. 7; *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.,* 559 F.2d 841, 843 & n.2 (D.C. Cir. 1977) (finding that "an essentially economic injury" can still rise to an irreparable harm showing, particularly where there is "little indication" of harm to others in granting stay); *Instinet I*, 1983 WL 404184, at *7 (finding irreparable harm where the absence of a stay would deny movant the opportunity to launch its new product, since "thereby it may lose (1) potential customers (2) revenues and (3) competitive advantages"); *see also Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) (holding that company's need to raise fees to recoup projected losses because of challenged statute constituted irreparable harm because "even if higher rates and fees do not drive customers away, loss of established goodwill may irreparably harm a company").

[72] 2017 Amendments Filing, 82 Fed. Reg. at 55,132.

Terminal for display-use only customers because of its centralization of data receipt. Such customers would also be affected by the 2017 Amendments, because both the filing and the fee schedule itself state that the access fee applies if "the data recipient receives the data in such a manner that the data *can be* manipulated and disseminated . . . ."[73] This suggests that the access fee applies based on functionality or potential use, not actual use. Customers will thus be faced with the choice of paying more fees for Bloomberg SAPI, or losing its advantages by switching to Bloomberg Terminal or another display service. These impacts also appear imminent, as CTA's request for the Bloomberg SAPI customer list shortly before Bloomberg filed its motion suggests that it intends to begin enforcing the 2017 Amendments soon.[74]

C. Balance of Harms and Public Interest

Both the balance of potential harm to Bloomberg against potential harm to others, and the public interest, weigh in favor of granting the stay. CTA argues that others would be substantially harmed if a stay were granted because it would deprive the SIPs "of fees their filings allow them to charge," and Bloomberg would continue "to avoid competing on a level playing field with other market data vendors," the prevention of which, according to CTA, was the original reason for implementing the 2017 Amendments.[75] CTA also argues that other vendors will be harmed. But these arguments are premised on CTA's merits arguments that the 2017 Amendments' fees are fair and reasonable and properly apply to Bloomberg SAPI, which we have already addressed.[76] CTA has thus failed to identify, nor can we discern, anyone who would be substantially harmed by issuance of a stay.

We also believe that the public interest weighs in favor of a stay. As CTA points out, the typical purpose of equitable relief like a stay is to preserve the status quo.[77] Here, CTA had not yet enforced the amendments against Bloomberg or anyone else when Bloomberg filed its stay motion, so a stay would preserve the status quo based on the current record.[78] Furthermore,

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73 *Id*. at 55,133 (emphasis added); 2018 Fee Schedule at 5-6 n.10 (emphasis added).

74 *See Grand River Enter. Six Nations, Ltd. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007) (requiring irreparable injury to be "actual and imminent"); *see also Akindemowo*, 2016 WL 3877888, at *2 (stating injury must be shown to be "both certain and great and actual and not theoretical" (internal quotation marks and citation removed)).

75 *See, e.g.*, 2017 Amendments Filing, 82 Fed. Reg. at 55,135.

76 *Cf. Options Clearing Corp.*, Exchange Act Release No. 81628, 2017 WL 4097866, at *2 (Sept. 14, 2017) (rejecting argument for stay premised on "prevent[ing] distortion of the competitive landscape from continuing to harm competition" because the argument "presumes [movants] are correct on the merits" and so "is too speculative at this stage to be the basis for relief").

77 *See, e.g., Wash. Metro. Area Transit Comm'n,* 559 F.2d at 844 (equating the granting of "interim injunctive relief" to "[a]n order maintaining the status quo" and describing such release as "preventative, or protective").

78 CTA cannot fault Bloomberg for waiting to file its motion to stay the 2017 Amendments until CTA sought to enforce them, since that was the point at which the threat of irreparable

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Bloomberg points out, and CTA concedes, that Thomson Reuters withdrew Eikon SAPI, its competing product, from the market after it became aware of CTA's "intent to clarify" its fees in the 2017 Amendments. Generally, providing customers with multiple product options fosters innovation and competition and is in the public interest.[79] The possible harm to the public caused by the potential loss of an innovative technological product further weighs in favor of granting a stay.[80]

* * *

Our determination on the first two stay factors alone—that Bloomberg has made a strong showing of a likelihood of success on the merits and irreparable harm—weighs heavily in favor of granting a stay.[81] That the balance of harms and public interest factors also favor a stay reinforces our decision to grant Bloomberg's motion.

III. Consolidation and Briefing

In addition to Bloomberg's challenge at issue in this stay motion, SIFMA also filed a challenge to the 2017 Amendments.[82] Because these two challenges address the same amendments, the Commission has determined that it is appropriate to consolidate them and commence briefing.

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harm became concrete. *Cf. Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995) (linking accusations of delay in moving for preliminary injunctive relief to irreparable harm assessment).

[79] *See, e.g.*, 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,771 ("[T]he Commission recognizes that exchanges have responded [to the particular needs of retail investors using advertiser-supported internet websites] by developing new innovative data products specifically designed to meet the reference data needs and economic circumstances of these Internet users."); 2004 Concept Release, 69 Fed. Reg. at 71,258-59 (noting that "heightened competition" between exchanges "has benefited trading markets by spurring innovation in trading systems and responsiveness to customers"); *Instinet II*, 1984 WL 472209, at *17 & n.99 (speaking positively of vendors being "encouraged to develop improved formats for presenting [core data] information" and noting "Congress and the courts have viewed competition as a major goal of the NMS mandated by Section 11A").

[80] *See, e.g., In Re Bloomberg, L.P.*, Exchange Act Release No. 47891, 2003 WL 21184560, at *2 (May 20, 2003) ("[The Commission is] troubled by the potential anti-competitive impact of the NYSE's actions. Under the circumstances, a brief, interim stay . . . would serve the public interest."); *Instinet I*, 1983 WL 404184, at *6 (concluding that because of the benefit of "competition provided by Instinet's emergence in [the] market," it would be "in the public interest for Instinet to be granted interim relief so that the public will have access to Instinet's new service at the earliest possible date").

[81] *See Nken*, 556 U.S. at 434.

[82] Admin. Proc. File No. 3-18314.

Commission Rule of Practice 201(a) provides that we may order consolidation of proceedings "involving a common question of law or fact."[83] These challenges involve the same plan amendments. Proceeding with them at the same time will provide an opportunity to address the common substantive legal and factual issues they raise. This will serve the interests of all parties, promote efficiency, and conserve resources.[84] We perceive no prejudice to the rights of any party in allowing consolidation to occur, as such consolidation will "not affect the right of any party to raise issues that could have been raised if consolidation had not occurred."[85]

CTA has stated that the challenges in both proceedings should be held in abeyance pending resolution of another action, Administrative Proceeding File No. 3-15350,[86] which is currently on appeal before the Commission and challenges changes to individual self-regulatory organizations' ("SRO") rules related to non-core data fees. We have not ruled on these abeyance requests.[87]

Although CTA does not expressly designate its abeyance requests as motions, we believe it is appropriate to deny them to the extent they are meant as such, and we set forth a briefing schedule. We have assessed the fairness and reasonableness of NMS plan amendments and SRO rule changes, and any accompanying prohibitions or limitations on access, differently depending on whether core or non-core data is involved.[88] Moreover, we review applications for plan amendments under different sections of the Exchange Act and through different proceedings than we do for rule changes.[89] Given the nature of the challenges to the 2017 Amendments at issue, we believe it is appropriate to proceed with full briefing on the merits of Bloomberg's and SIFMA's applications at this time.

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83 17 C.F.R. § 201.201(a).

84 *See* Rule of Practice 103(a), 17 C.F.R. § 201.103(a) (requiring that Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every proceeding").

85 *See* 17 C.F.R. § 201.201(a).

86 In the 3-18314 proceeding related to SIFMA's challenge, SIFMA did not respond to the abeyance request. In the 3-18316 proceeding, Bloomberg stated that CTA's request "ignores the differences between core and non-core data . . . and offers no argument for abeyance."

87 Pursuant to Rule of Practice 420(e), CTA filed records in these proceedings on December 26, 2017.

88 *See, e.g.*, 2008 ArcaBook Approval Order, 73 Fed. Reg. at 74,779, 74,787-88 & n.255 (noting that while market forces can constrain non-core data fees, and so be used to assess their fairness and reasonableness, the "absence of competitive forces impels the use of a regulatory alternative" for core data fees).

89 *Compare* 15 U.S.C. § 78s(f) (SRO actions) *with* 15 U.S.C. § 78k-1(b)(5) (NMS plan actions).

Accordingly, IT IS ORDERED that Bloomberg's motion for a stay is granted; and it is further

ORDERED that Administrative Proceeding File Number 3-18314 be consolidated with 3-18316; and it is further

ORDERED that CTA's requests for abeyance be denied; and it is further

ORDERED that SIFMA and Bloomberg shall file briefs in support of their applications, not to exceed 14,000 words, by August 30, 2018. CTA shall file its opposition brief, not to exceed 14,000 words, by October 1, 2018. Any reply briefs shall not exceed 7,000 words and shall be filed by October 15, 2018. Requests for extensions of time to file briefs will be disfavored.[90] Pursuant to Rule 180(c) of the Rules of Practice,[91] failure to file a brief in support of the application may result in dismissal of this review proceeding.

To the extent possible, a decision on the merits by the Commission with respect to this consolidated matter will be issued within four months of the completion of briefing. If the Commission determines that the complexity of the issues presented in the briefs warrants additional time, the decision of the Commission in this matter may be issued within six months of the completion of briefing. If the Commission determines that a decision by the Commission cannot be issued within the six-month period, the Commission may extend that period by orders as it deems appropriate in its discretion. The Commission deadlines in this order confer no rights or entitlements on parties or other persons.

By the Commission.

Brent J. Fields
Secretary

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90 Attention is called to Rules of Practice 150-152, 17 C.F.R. § 201.150-152, with respect to form and service, and Rule of Practice 450(b), 17 C.F.R. § 201.450(b), with respect to content limitations.

91 17 C.F.R. § 201.180(c).