



MANAGED FUNDS
ASSOCIATION



August 22, 2018

Via Electronic Delivery

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

Re: Petition for Rulemaking Regarding Market Data Fees and Request for Guidance on Market Data Licensing Practices; Investor Access to Market Data

Dear Mr. Fields:

Managed Funds Association¹ (“MFA”) and the Alternative Investment Management Association² (“AIMA”) (together, the “Associations”) respectfully petition the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) to initiate rulemaking proceedings with respect to self-regulatory organization (“SRO”) rule filings concerning market data. In this submission, the Associations also respectfully request that the Commission initiate certain regulatory actions, issue guidance, and conduct a study with respect to market data licensing practices and fees of exchanges and securities information processors (“SIPs”).

¹ Managed Funds Association (“MFA”) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

² The Alternative Investment Management Association (“AIMA”) is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA’s fund manager members collectively manage more than \$2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (“ACC”) to help firms focused in the private credit and direct lending space. The ACC currently represents over 100 members that manage \$350 billion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (“CAIA”) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors).

The Associations and our members are concerned that the way in which the current regulatory framework for proprietary exchange market data³ and consolidated market data is implemented fails to protect investors from unreasonable fees,⁴ unreasonably discriminatory pricing,⁵ and in some cases, fees that may be imposing an unnecessary and inappropriate burden on competition.⁶ The Associations support the SEC Division of Trading and Markets' initiative to host a staff roundtable on access to markets and market data. Notwithstanding the staff roundtable, we respectfully urge the Commission to begin rulemaking and other actions to reform the approval process for determining proprietary and consolidated market data fees.

In our submission, we respectfully request that the Commission:

- Request financial information from exchanges on market data operating costs and revenue to ensure that fees are reasonable and not unreasonably discriminatory.
- Require that exchanges file more detailed rule filings with respect to market data fee schedules in terms of definitional specificity.
- Conduct more rigorous reviews of rule filings to determine whether rule filings concerning market data fees, licensing terms and auditing practices meet the Sections 6 and 11A requirements of the Exchange Act, including the equitable, fair and reasonableness standards.
- Promulgate rulemaking requiring an exchange to submit to the Commission adequate financial information regarding market data operating costs and revenue in rule filings to justify fee schedule changes.
- Conduct a cost-based review of SIP plan fees, and request that SIP plan participants file SIP Plan operating costs and revenue with joint-industry rule filings (and for the Commission to make such information public).
- Promulgate rulemaking to amend Regulation NMS to allow for public notice and comment prior to the Commission's approval or disapproval of SIP plan fee changes.
- Work with exchanges and the public to issue guidance on general standards with respect to market data licensing practices and terminology.

³ By "proprietary market data", we are referring to what the Commission has coined as "non-core" data—data other than the best-priced quotations and last sale information of all markets in U.S.-listed equities. *See* SEC Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, 73 Fed. Reg. 74,770 (Dec. 9, 2008), (hereinafter "**SEC NYSE Arca Order**") available at: <https://www.gpo.gov/fdsys/pkg/FR-2008-12-09/pdf/E8-28908.pdf>.

⁴ *See* 15 U.S.C. 78f(b)(4).

⁵ *See* 15 U.S.C. 78k-1(c)(1)(D).

⁶ 15 U.S.C. 78f(b)(8).

- Work with European regulators and through IOSCO to develop guidance with respect to market data licensing practices and terminology used by exchanges for basic market data products.
- Conduct a study on ways to reform the U.S. equity market data regulatory framework with respect to proprietary market data and the consolidated data processor model and its governance.

I. Background

The members of the Associations are investment managers who invest on behalf of pension plans, university endowments, charitable organizations, family offices, qualified individuals, and other institutional investors, among others. Our members engage in a diverse and broad-range of investment strategies, and receive market data from SIP⁷ data feeds, directly from exchanges as exclusive processors,⁸ from broker-dealers and/or from third party data vendors. Our members have grown increasingly concerned with practices by many national securities exchanges that are self-regulatory organizations⁹ (“**exchanges**”) relating to market data fee schedules, licensing and related fees, and the regulatory framework in place concerning their distribution of market data;¹⁰ and are concerned that these current practices diminish the continued “availability of information with respect to quotations for and transactions in securities” to investors, which is one of the key Congressional objectives of the National Market System.¹¹

Over the last two decades, regulatory and technological developments have greatly reshaped the equities markets by reducing anticompetitive barriers and promoting fair access to markets and market information. These developments have led to greater market liquidity and depth, tighter bid-ask spreads and lower transaction costs—all of which ultimately serve to lower the cost of capital and enhance economic growth.

⁷ 15 U.S.C. 78c(a)(22)(A).

⁸ 15 U.S.C. 78c(a)(22)(B).

⁹ We note that not all self-regulatory organizations have engaged in behavior with respect to market data licensing fees that potentially violates the Securities Exchange Act of 1934 (“**Exchange Act**”). *See, e.g.*, Startup Exchange IEX Challenges Rivals with Free Web Data Feed, Wall Street Journal, Feb. 22, 2017, available at: <https://www.wsj.com/articles/startup-exchange-iex-challenges-rivals-with-free-web-data-feed-1487768460>.

¹⁰ *See, e.g.*, letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA, to the Honorable Mary Jo White, Chair, SEC, on September 28, 2015, regarding MFA Equity Market Structure Policy Recommendations (recommending that the SEC and the SEC Equity Market Structure Advisory Committee conduct a more in-depth examination of SIPs and market data, including the governance of the SIPs), available at: <https://www.managedfunds.org/wp-content/uploads/2015/09/Equity-Market-Structure-Recommendations-with-Cover-Letter.pdf>. *See also* letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, MFA to Brent J. Fields, Secretary, SEC, on December 21, 2017, regarding File No. SR-CTA/CQ-2017-04 (raising concerns with the proposed fee increases in the Consolidated Tape Association Plan and the Consolidated Quotation Plan), available at: https://www.managedfunds.org/wp-content/uploads/2018/01/MFA-Comments-to-CTA-Plan.final_12.21.17.pdf.

¹¹ *See* 15 U.S.C. 78k-1.

Threatening these gains, however, has been the ever-increasing cost of market data. Despite world-wide trends in declining costs of computing and data storage,¹² many exchanges have continued to increase securities market data fees year-after-year, by some estimates 20% or more a year for the last five years.¹³ Not all exchanges have engaged in charging high multi-tier fees for proprietary market data. For example, IEX continues to provide its proprietary market data to market participants free of charge.¹⁴ This petition, however, is focused on practices by certain exchanges, which we believe are inconsistent with the fair, reasonable and equitable standards prescribed by law.

From our members' experiences, especially over the last several years, certain exchanges have continuously increased proprietary and consolidated market data fees by changing the terms of licensing agreements, creating new categories of fees and redefining and recategorizing fees. In the quest for greater market data revenue, exchanges have unbundled products and charged higher fees for the "new" products.¹⁵ Currently, fees related to market data licensing may include: access fees, site fees, distribution fees, display fees, delayed data fees, non-display fees and fees for creating and storing derived data/work. Further adding to the complexity, there is no standardization in terms or procedures among exchanges, which make it harder for investors to compare the cost of different exchange proprietary market data products. Finally, exchanges have in some cases aggressively pursued audits of market data licensees, reviewing usage over several years. Anecdotally, we found that it is not uncommon for licensees to have incorrect understandings of the license agreements due to the divergence in licensing practices and vagueness in terms, and to be asked to pay fees retroactively along with monthly interest fees (at sometimes non-market rates) on retroactive payments. Based on a small sample of members, firms spend an average of 30 business days of employee time per audit in relation to addressing and responding to a market data licensing audit.

We are strongly concerned that the way in which the current regulatory framework is being implemented falls short of the goals of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**") and is not adequately protecting investors from anticompetitive, unfair and unreasonably discriminatory market data licensing practices. As the corporate structure of most exchanges has changed from member-owned utilities to for-profit publicly traded entities, we believe the Commission needs to update and review the implementation of the existing framework by which market data fees are determined. In general, we support the existing industry petitions

¹² See, e.g., Trends in the cost of computing, AI Impacts, March 10, 2015, (stating that "computing power available per dollar has probably increased by a factor of ten roughly every four years over the last quarter of a century") available at: <https://aiimpacts.org/trends-in-the-cost-of-computing/>.

¹³ See There's a new 'hot-button' issue on Wall Street, and battle lines are being drawn, Business Insider, November 3, 2016, available at: <http://www.businessinsider.com/stock-exchanges-market-data-cost-becoming-big-issue-2016-10>.

¹⁴ See *supra* n. 9.

¹⁵ Our members have likened the practice to ordering a hamburger which used to cost \$20, but now costs \$7 for the bun, \$15 for the beef patty, \$3 per fixing and \$1 per condiment, for an overall total cost of \$33 (with lettuce, tomatoes, pickles, ketchup and mustard).

submitted to the Commission for rulemaking concerning market data fees and provide our recommendations below.¹⁶

As such, we respectfully urge the Commission to take immediate action to begin addressing market data licensing practices.

II. Concerns and Recommendations

A. Conducting a Cost Assessment of Market Data Fees; Reviewing Market Data Licensing and Audit Practices; and Requiring Exchanges to Provide Cost Disclosures with respect to Market Data Fee Schedule Filings

The Associations are concerned that exchanges as exclusive processors are charging unreasonable fees for market data products, and as a consequence, restricting trade and harming competition. Specifically, Section 6 of the Exchange Act requires the Commission to determine that the rules of an “exchange provide for the equitable allocation of reasonable dues, fees, and other charges” and “do not impose any burden on competition not necessary or appropriate” in furtherance of the Exchange Act.¹⁷

As supported by case law, the Commission has recognized that fees charged by an exclusive processor of market information need to be tied to some type of cost-based standard in order to preclude excessive profits or underfunding.¹⁸ In addition, Section 11A of the Exchange Act requires SROs to distribute market data on terms that are “fair and reasonable” and “not unreasonably discriminatory”. We respectfully urge the Commission to conduct a cost assessment of exchange proprietary market data costs; and to require that exchanges provide greater transparency in SRO rule filings with respect to proprietary market data fees.

The Securities Acts Amendments of 1975 (the “**1975 Amendments**”) provide the Commission with pervasive rulemaking authority to protect market participants, including

¹⁶ See letter from Bloomberg LP, Citadel Securities, Citigroup Global Markets Inc., Clearpool Group, Inc., E*TRADE Financial Corporation, Fidelity Investments, Hudson River Trading LLC, Investors Exchange LLC, IMC, Interactive Brokers Group, ITG, Inc., MFS Investment Management, Morgan Stanley & Co. LLC, RBC Capital Markets, The Charles Schwab Corporation, Scottrade, Inc., Sun Trading LLC, Susquehanna International Group, LLP, TD Ameritrade, Inc., Tower Research Capital, T. Rowe Price Associates, Inc., UBS Securities LLC, The Vanguard Group, Inc., and Virtu Financial, Inc., to Brent J. Fields, Secretary, SEC, on December 6, 2017, regarding Petition for Rulemaking Concerning Market Data Fees, (hereinafter “**December 6, 2017 Petition**”) available at: <https://www.sec.gov/rules/petitions/2017/petn4-716.pdf>. See also, letter from Tyler Gellasch, Executive Director, Healthy Markets, to the honorable Jay Clayton, Chairman, SEC, on January 17, 2018, regarding Petition to Address Conflicts of Interest, Complexity, and Costs Related to Market Data, available at: <https://www.sec.gov/rules/petitions/2018/petn4-717.pdf>.

¹⁷ 15 U.S.C. 78f.

¹⁸ See SEC Concept Release: Regulation of Market Information Fees and Revenues, Release No. 34-42208, December 9, 1999, (hereinafter “**SEC Concept Release**”) available at: <https://www.sec.gov/rules/concept/34-42208.htm>.

investors, from the potential adverse impacts of monopoly pricing.¹⁹ Section 6 requires the Commission to make certain determinations with respect to exchange rulemaking.²⁰ We are concerned, however, that the Commission has not exercised sufficient authority to protect investors from monopoly pricing, nor has it performed an adequate level of review of exchange rule filings concerning proprietary market data fees. As held by the DC Circuit Court of Appeals, the Commission must make findings and determinations and not merely accept those made by SROs.²¹ Accordingly, as a first step, we believe it is imperative for the Commission to conduct a cost assessment of proprietary market data fees in order to assess whether current proprietary market data fees are fair and reasonable.

1. Proprietary Market Data Fees are not Constrained by Competition.

The Associations' members purchase proprietary market data (*e.g.*, depth-of-book and imbalance data) from exchanges for a variety of reasons, including strategy implementation, risk-analysis, best-execution, less latency than other sources and to fulfill fiduciary obligations. As the U.S. equity market structure has evolved with decimalization and electronic trading,²² more and more market participants have found that consolidated market data (*i.e.*, SIP data feeds) do not provide enough information for firms to rely on alone if they want to remain competitive. While investment advisers and the broker-dealers they employ have many choices as to where they execute their trades, investment advisers of certain strategies submit that they have a fiduciary obligation to have a comprehensive view of market liquidity in order to execute their investment strategy, which means that they need to buy proprietary exchange market data feeds that account for a sizable portion of market liquidity. The only source for exchange-specific data, such as depth-of-book data, whether directly or indirectly, is from the exchange on which the limit orders rest. As such, our members have found that proprietary market data from the primary exchange groups is critically important to them and that there are no comparable alternative sources for such market data. For many market participants, it is simply not a practical option to avoid purchasing

¹⁹ Congress, in adopting Section 11A in the 1975 Amendments, provided the Commission with broad authority to facilitate the establishment of a national market system, recognizing that “communication systems, particularly those designed to provide automated dissemination of last sale and quotation information with respect to securities, will form the heart of the national market system.” H.R. Rep. No. 94-229, 94th Cong., 1st Sess. 93 (1975). With respect to an exclusive processor, Congress noted that it would be “in effect, a public utility, and thus it must function in a manner which is absolutely neutral with respect to all market centers, all market makers, and all private firms” and that the Commission would be responsible “to assure the processor’s neutrality and the reasonableness of its charges in practice as well as in concept.” S. Rep. No. 94-75, 94th Cong., 1st Sess. 7 and 12 (1975) (hereinafter “**Senate Report**”). The Commission has also acknowledged that the requirements of Sections 6 and 11A apply to fees charged for consolidated and proprietary market data alike. See SEC NYSE Arca Order *supra* n. 3 at 74,779. See also *NetCoalition v. SEC*, 715 F.3d 342 (2013) (hereinafter “*NetCoalition I*”).

²⁰ 15 U.S.C. 78f.

²¹ See *Susquehanna International Group, LLP v. SEC*, 866 F.3d 442 (2017).

²² As securities prices moved from increments of sixteenths (*i.e.*, 1/16 of a dollar) to one-cent, the level of depth accumulated at the NBBO price significantly decreased. As such, after decimalization, SIP data feeds provided much less depth of book information. See *NetCoalition I supra* n. 19.

direct proprietary market data from a major exchange because the fees are too high.²³ Because most trading is now spread across at least eight exchanges, avoiding the purchase of a direct feed from a major exchange is akin to reading every other page of a textbook or using only a portion of the ingredients to a recipe.

We urge the Commission to reassess the assumptions that it made in the SEC NYSE Arca Order with respect to an exchange's competitive pressure to attract order flow translating into competitive pressure for setting market data fees, as well as whether firms can truly meet their best execution obligations relying solely on SIP data feeds.²⁴ We disagree with the assumptions the Commission made in the SEC NYSE Arca Order from 2008, and submit that market data fees are not subject to a competitive market. Thus, we believe the Commission must conduct a cost assessment of proprietary market data fees in order to assess whether fees are reasonable and fair.²⁵

2. The SEC Should Conduct a Cost Assessment of Fees.

In the *NetCoalition* cases, the DC Circuit Court of Appeals made clear that the Exchange Act requires the Commission to make a determination with respect to whether an exchange's proposed market data fees are fair and reasonable.²⁶ The Commission's recent decision *In the Matter of the Application of Bloomberg L.P.*, similarly, stated that "fairness and reasonableness must be explained and supported in such a manner that the Commission has sufficient information before it to satisfy its statutorily mandated review function".²⁷

Our members are concerned that exchange market data licensing practices, including the various access, site, distribution, display, delayed data and non-display fee categories, among others, are not demonstrably tied to any cost-based standard, and thus, do not meet the "fair," "reasonable" or "equitable" standards prescribed by law. While we appreciate the investment and

²³ We strongly disagree with the Commission's argument in *NetCoalition I* that order flow competition constrains proprietary market data pricing. See *NetCoalition I supra* n. 19.

²⁴ SEC NYSE Arca Order *supra* n. 3 at 74,783 (assuming that the "compelling need to attract order flow imposes significant pressure on NYSE Arca to act reasonably in setting its fees for depth-of-book order data"). The Commission stated that it did not "view obtaining depth-of-book data as a necessary prerequisite to broker-dealers' satisfying the duty of best execution" and that if the costs of such data were too high that broker-dealers would not buy it, which in turn would put pressure on the exchange selling the data to lower the price that it charges. See *id.* at 74,788.

²⁵ See *NetCoalition I supra* n. 19 (finding that the SEC failed to show that NYSE Arca is subject to significant competitive forces in pricing ArcaBook). See *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("Where evidence indicates that a firm has in fact profitably [raised prices substantially above the competitive level], the existence of monopoly power is clear."). See also *NetCoalition v. S.E.C.*, 715 F.3d 342 (2013) (hereinafter "*NetCoalition II*") (upholding the DC Circuit Court of Appeals determination in *NetCoalition I* that there must be evidence that competition will in fact constrain pricing for market data in order for fees to be considered fair and reasonable).

²⁶ See *id.*

²⁷ *In the Matter of the Application of Bloomberg L.P.*, SEC Rel. No. 83755, July 31, 2018, (Order Granting Motion for Stay) (hereinafter "**Bloomberg Order**") available at: <https://www.sec.gov/litigation/opinions/2018/34-83755.pdf>. See also *Susquehanna International Group, LLP supra* n. 21 at 14-15.

technology upgrades that exchanges make with respect to market data processing systems, we are not convinced that the steep increases in market data fees year after year are cost-related hikes.

To our members, it seems like exchanges continue to create new proprietary fee categories and connectivity offerings to increase the overall costs to consumers even though the products remain more or less the same. Given the statutory mandate, as well as industry controversy created by the level of proprietary market data fees, we believe the Commission should conduct a cost assessment of current proprietary market data fees. Even if exchanges are justified in their market data fee schedules, we believe it is in the public interest for the Commission to bring greater transparency and accountability to this process.

3. A Cost Assessment of Fees Would Shed Light on Whether Proprietary Market Data Fees Impose Unnecessary or Inappropriate Burdens on Competition and Whether Such Fees are Unreasonably Discriminatory.

Our members are also very concerned that the high cost of proprietary market data is beginning to constrain competition. We understand that market data fee increases are starting to have a material impact on some firms by causing those firms to modify their strategies in order to decrease costs from proprietary market data fees. This is particularly true for small to mid-size firms as market data fees represent a larger share of these firms' operating costs, and challenge them to compete with larger firms. To the extent that supracompetitive proprietary market data fees are constraining competition, we submit that this violates Section 6 of the Exchange Act which provides that "[t]he rules of the exchange do not impose any burden on competition not necessary or appropriate".²⁸ Supracompetitive pricing that is not tied to some type of cost-based standard would also constitute a limitation of access to market data services and be subject to the Commission's review.²⁹

In the context of the fairness and reasonableness of specific fees, the Commission has stated with respect to consolidated data that "individual fees must be evaluated in terms of the national market system objective to assure the wide availability of market information" and that "fees should not be set at levels that effectively restrict the availability of real-time information."³⁰ As Sections 6 and 11A of the Exchange Act both apply to proprietary market data from exclusive processors, we believe that proprietary market data fees should also be evaluated to assure the widest possible availability of market information.³¹ Such approach would limit the likelihood of a fee imposing an unnecessary or inappropriate burden on competition, increasing the cost of capital and negatively impacting the economy.

²⁸ 15 U.S.C. 78f(b)(8).

²⁹ See 15 U.S.C. 78k-1(b)(5). The Commission has stated that "information revenues should remain reasonably related to the cost of market information." SEC Concept Release, *supra* n. 18.

³⁰ SEC Concept Release, *supra* n. 18.

³¹ See SEC NYSE Arca Order *supra* n. 3 at 74,779.

Lastly, we are concerned that the “non-display” versus “display” market data licensing categorizations³² are unreasonably discriminatory and contrary to the scheme mandated by Section 11A of the Exchange Act.³³ In determining whether a fee or rate is “unreasonably discriminatory,” courts have looked to operating revenues, the cost of service and the rate base allocable to each class.³⁴ We do not believe exchanges can justify the licensing fee differences charged for non-display and display fees. The categorizations suggest that the “fee applies based on functionality or potential use, not actual use.”³⁵ We think these categorizations, distinguishing data usage between computers and humans, are too general and do not accurately assess the level of data a market participant uses. Moreover, given how technology has evolved, allowing all types of investors to use software applications to assist with and/or perform their day-to-day operations, we do not believe the non-display/display category fairly or accurately measures data usage. Instead, we think it inappropriately forces investors to pay much higher rates for market data and violates the requirement for an exchange to provide market data on terms which are not unreasonably discriminatory.³⁶

4. Exchanges Need to Provide Greater Detail and Transparency on How They Assess Market Data Usage by Market Participants in Their SRO Rule Filings.

Our members report that exchange SRO rule filings concerning market data fee schedules are overly general in defining key terms, such as “non-display”, and as a result, we are concerned that such rules are vague and ambiguous.³⁷ Members report it can be difficult to obtain more clarity from exchanges on fee descriptions and that it isn’t until an exchange conducts an audit of a firm’s market data usage (generally through third-party audit firms) that a firm will learn whether it is complying with the exchange’s market data license agreement.

³² The general explanation for the non-display and display categorizations is whether a computer or a human uses the data.

³³ 15 U.S.C. 78k-1.

³⁴ See, e.g., *State of North Carolina, ex rel. Utilities Commission v. Carolina Utility Customers Association, Inc.*, 399 S.E.2d 98 (N.C. 1991).

³⁵ See Bloomberg Order *supra* n. 27 (suggesting that fees should be levied based on actual use).

³⁶ 15 U.S.C. 78k-1(c)(1)(D).

³⁷ Cf NYSE Non-Display Use Definition: NYSE Non-Display Use of real-time NYSE Market Information means accessing, processing or consuming NYSE Market Information, delivered via direct and/or Redistributor (defined below) data feeds, for a purpose other than in support of data recipient’s display or further internal or external redistribution, NYSE Non-Display Use Policy, available at: https://www.nyse.com/publicdocs/nyse/data/Policy-NonDisplay_PDP.pdf; Nasdaq Non-Display Definition: Nasdaq non-display usage is a means of accessing Nasdaq data that involves automated access or use by a machine, without access or use of a Display by a natural person or persons, Nasdaq Global Information Services Data Policies, available at: <http://www.nasdaqtrader.com/content/AdministrationSupport/Policy/DATAPOLICY.pdf>; and Cboe Non-Display Usage Definition: any method of accessing an Exchange Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons, Cboe Global Markets U.S. Market Data Policies, available at: http://cdn.batstrading.com/resources/membership/Market_Data_Policies.pdf. See *infra* Section II.C.

Also, members report that exchanges place the burden of proof on market participants to demonstrate and provide evidence of how they use market data. If an exchange or its third-party auditor does not like a firm's entitlement system, then the firm is often assessed higher fees for not being able to prove that it used less market data. Since exchange market data fee schedules are ambiguous, it is very common for market participants to be assessed additional usage fees retroactively with monthly interest rates of one to three percent. We understand that exchanges will charge fees retroactively for inadvertent market data usage, but generally will not credit firms for market data fee payments where market data was not used due to a mistaken understanding of the ambiguous market data licensing agreements.

We are concerned that exchange rules concerning market data fee schedules are ambiguous and applied punitively in some cases on market participants through retroactive fee assessments and interest charges. Exchange rules should be explicit with respect to market data fees and how market participants are expected to demonstrate their market data usage. The current practices are inconsistent with Sections 6 and 11A of the Exchange Act as many exchange rules and the practices discussed above do not provide for the "equitable allocation of reasonable . . . fees", "promote just and equitable principles of trade", "protect investors and the public interest", nor do they protect market participants from "unfair discrimination between customers".³⁸ We believe the Commission should review exchange market data licensing terms and auditing practices for compliance with Sections 6 and 11A of the Exchange Act.

Recommendation

We believe the Commission needs to conduct a more rigorous review of exchange rule filings concerning proprietary market data fees, including a cost assessment. While exchanges file fee changes with the Commission, currently, these filings do not include enough financial information for either the Commission or market participants to understand and analyze the reasonableness of these fees. These SRO fee schedule filings also do not include enough specificity and clarity for market participants or the Commission to understand how fees are assessed, or exchange market data usage audit procedures. We echo a concern raised by former Commissioners Cynthia Glassman and Paul Atkins, which is that "the size of market data revenues and lack of accountability for the use of these revenues by the SROs creates market distortions and inefficient allocation of resources."³⁹ Given our concerns with the fairness and reasonableness of existing market data licensing practices and fees, we urge the Commission to address the reasonableness of the market data licensing practices and rates charged by exchanges.

The Associations recommend that the Commission: (1) request financial information from exchanges on market data operating costs and revenue to ensure that fees are reasonable and not unreasonably discriminatory; (2) require that exchanges file more detailed rule filings with respect to market data fee schedules in terms of definitional specificity; and (3) conduct more rigorous reviews of exchange rule filings to determine whether rule filings concerning market data fees,

³⁸ 15 U.S.C. 78f(b).

³⁹ Regulation NMS Adopting Release, 70 Fed. Reg. 37,496 (June 29, 2005), available at: <https://www.sec.gov/rules/final/34-51808fr.pdf>.

licensing terms and auditing practices meet the Sections 6 and 11A requirements of the Exchange Act, including the equitable, fair and reasonableness standards. We also recommend that the Commission promulgate rulemaking requiring an exchange to submit to the Commission adequate financial information regarding market data operating costs and revenue in exchange rule filings to justify fee schedule changes.

B. Conducting Greater Oversight of the SIP Plan Fees

We echo the above concerns with respect to fees for consolidated market data. We do not believe the Commission can make a determination as to the fairness and reasonableness of fees without understanding the costs related to market data. For example, we find it hard to believe that the 6000% fee increase vendors are projecting to members as a result of consolidated data fee increases are cost-related hikes.⁴⁰ As such, we think the Commission needs to conduct a more rigorous, cost-based review of filings by SIP plan participants to ensure that fee increases are fair and reasonable, consistent with the District of Columbia Circuit Court of Appeals' decision in *NetCoalition I*.⁴¹ In addition, Rule filings by SIP plan participants to increase fees should not be effective upon filing as Section 11A of the Exchange Act does not mandate it. The Commission needs time to make a determination as to the appropriateness of such filing and the public needs time for public notice and comment.

Recommendation

We recommend that the Commission conduct a cost-based review of SIP plan fees, request that SIP plan participants file SIP Plan operating costs and revenue with joint-industry rule filings (and for the Commission to make such information public), and promulgate rulemaking to amend Regulation NMS to allow for public notice and comment prior to the Commission's approval or disapproval of SIP plan fee changes.⁴²

C. Guidance on General Standards for Market Data Licensing Practices

As discussed above, our members report that exchange market data licensing and connectivity practices are becoming more complicated and confusing. Section 11A of the Exchange Act grants the Commission broad authority to promulgate regulations necessary or appropriate in the public interest, for the protection of investors to assure that market participants

⁴⁰ Bloomberg Notice to Customers of Bloomberg Server Applications Program Interface service, May 24, 2018. *See also* letter from Greg Babyak, Bloomberg LP, to Brent J. Fields, on February 7, 2018, regarding Motion to Stay the Effectiveness of CTA's Fee Amendments (SEC Rel. No. 34-82071; File No. SR-CTA/CQ-2017-04), available at: <https://www.sec.gov/comments/sr-ctacq-2017-04/ctacq201704-3010691-161881.pdf>.

⁴¹ *NetCoalition I supra* n. 19. 15 U.S.C. 78f(b) and 78k-1.

⁴² We support the December 6, 2017 Petition recommendation for the Commission to amend SEC Rule 608 by removing section 608(b)(3)(i) from SEC Rule 608. *See* December 6, 2017 Petition, *supra* n. 16 at 8 (explaining that the rule amendment would preclude SIPs' market data fee filings from becoming immediately effective, and would require a public notice and comment period prior to the SEC's approval or disapproval of any fee changes—thus allowing for transparency and stakeholder input).

may obtain on terms which are not unreasonably discriminatory market data distributed by any exchange or SIP.⁴³ In granting such authority, Congress intended for the SEC to “remove burdens on competition consistent with investor protection” and in situations in which natural competitive forces cannot, such as in the instance of an exclusive processor, the “SEC must assume a special oversight and regulatory role.”⁴⁴ We believe exchange and SIP market data licensing practices is an area in which the Commission should become more engaged to provide a “first line of defense against anti-competitive practices” and “to assure a processor’s neutrality and the reasonableness of its charges in practice as well as in concept.”⁴⁵ We urge the Commission to issue regulatory guidance to provide general standards concerning market data licensing practices and terminology for exchanges and NMS plans.

For example, exchanges tend to have similar, broad definitions for “non-display” market data,⁴⁶ however, the exchanges apply different categorizations and interpretations to the “non-display” definition. Even examples of uses for “non-display” provided by exchanges are often broad, such as operational control programs, surveillance programs, and clearing and settlement activities.⁴⁷ Exchanges also itemize fees differently, use different units of counts, and different interpretations and policies on “derived data”, among others. As a result, market participants find it very burdensome to fully comprehend and manage multiple exchange proprietary market data licensing agreements.

The inconsistent licensing practices and terminology used by exchanges create unnecessary burden across the industry and contribute to inadvertent noncompliance with licensing agreements. The status quo harms investors and creates inefficient allocations of resources within firms by forcing market participants to divert resources to the administration of market data licensing agreements and audits. Greater uniformity in market data licensing terminology and the application of agreement definitions would increase transparency, decrease costs related to the administration and implementation of agreements, as well as make it easier for Commission Staff to assess costs and fees.

Finally, we note that the discrepancies and confusion in market data licensing practices is not unique to the U.S. markets as many exchange groups are global. We encourage the Commission as a global leader in securities regulation to work with European regulators and through the International Organisation of Securities Commissions (“IOSCO”) to develop

⁴³ 15 U.S.C. 78k-1(c)(1)(D).

⁴⁴ Senate Report *supra* n. 19 at 12.

⁴⁵ *See id.*

⁴⁶ *See* n. 37.

⁴⁷ *See, e.g.,* NYSE Non-Display Use Policy, March 2017, available at: https://www.nyse.com/publicdocs/nyse/data/Policy-NonDisplay_PDP.pdf; and Nasdaq Provides Clarification for U.S. Non-Display Policy, December 14, 2015, available at: <http://www.nasdaqtrader.com/TraderNews.aspx?id=dn2015-09>. Separately, we question the policy decision to charge fees for non-display usage relating to categories, such as surveillance and risk management, as we do not think it is smart public policy to deter market participants from conducting greater surveillance or risk management.

guidance with respect to market data licensing practices and terminology used by exchanges for basic market data products.

Recommendation

We believe Commission guidance on exchange standards in market data licensing practices and terminology is necessary and in the public interest and will reduce complexity, burden and the inefficient allocation of resources by market participants and exchanges. Accordingly, we recommend that the Commission work with exchanges and the public to issue guidance on general standards with respect to market data licensing practices and terminology. We also recommend that the Commission recommend and work with European regulators and through IOSCO to develop guidance with respect to market data licensing practices and terminology used by exchanges for basic market data products.

D. SEC Study on Market Data Reforms

The Associations believe that the Commission should review the current regulatory framework for market data, including both consolidated SIP feeds and proprietary market data. The technology and markets have evolved tremendously since the Commission's last concept release on market data in 1999. Also, since then exchanges have shifted away from the public utility model to publicly-traded corporations. We believe it is timely for the Commission to evaluate whether the current regulatory framework concerning market data continues to serve "the public interest, the protection of investors, and the maintenance of fair and orderly markets."⁴⁸ The Commission should also evaluate standards for a cost-based framework that would promote "fair and reasonable" and "not unreasonably discriminatory" fees.⁴⁹

Regarding SIP data feeds, we believe the Commission should review whether the current model for the dissemination of consolidated market data is optimal, including the governance structure. We have been concerned with the governance structure of the joint industry plans to distribute consolidated market data (the "**SIP governance model**") and believe that the SIP governance model under Regulation NMS does not effectively mitigate conflicts of interest.⁵⁰ The governance structure for SIPs under Regulation NMS establishes non-voting advisory committees and provides members with the right to submit their views to the operating committees of the SIPs. However, as non-voting members, the advisory committees have very little authority to influence issues of major impact to retail and institutional investors, broker-dealers and other market participants, such as SIP fee increases and technology upgrades. As a result, the advisory committees to the SIPs are not able to mitigate the conflicts of interest that exist between exchanges charged with overseeing the SIP data feeds, and that in turn sell proprietary market data products and connectivity offerings of their own that potentially compete with the SIP data feeds.

⁴⁸ See 15 U.S.C. 78k-1.

⁴⁹ 15 U.S.C. 78f.

⁵⁰ See Regulation NMS Adopting Release *supra* n. 39 at 37,561.

Recommendation

Accordingly, we recommend that the Commission conduct a study on ways to reform the U.S. equity market data regulatory framework with respect to proprietary market data and the consolidated data processor model and its governance.

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The Associations greatly appreciate the Commission's consideration of the issues raised in this letter. If you or the Commission staff have any questions or comments, please do not hesitate to contact Jennifer Han, Associate General Counsel, MFA, at (202) 730-2600, and Adam Jacobs-Dean, Managing Director, Global Head of Markets Regulation, AIMA, or Jiří Król, Deputy CEO, AIMA at +44 20 7822 8380.

Respectfully submitted,

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