April 18, 2017

Submitted via email: rule-comments@sec.gov

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

Re: **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 (Release No. 34-80300; File No. SR-CTA/CQ-2017-02)**

Dear Mr. Fields,

SIFMA[1] appreciates the opportunity to submit comments in response to the above-referenced Notice of Filing and Immediate Effectiveness of the amendments ("Amendments") to the CTA Plan and the CQ Plan (collectively, the "Plan"), which was published in the Federal Register on March 28, 2017 (the "Notice"). As described in greater detail in the Notice, the CTA has amended the Plan's fee schedule and non-display use policy to expand the applicability of the non-display fee and the access fee. SIFMA respectfully requests that the Commission abrogate the Amendments pursuant to Regulation NMS Rule 608(b)(3). The Amendments, as published and as currently interpreted by the CTA Plan administrator, the New York Stock Exchange ("NYSE"), constitute a massive fee increase to market participants, particularly small and mid-size firms. The CTA implemented these Amendments in a manner that provided little to no transparency, with a resulting set of incoherent definitions and fees, the applicability of which are entirely dependent upon and subject to the NYSE's non-public interpretations. In this letter, we provide our views on the Amendments as well as our views on the current shortcomings of the governance and procedures to amend NMS plans.

Introduction

SIFMA has long been concerned about both the lack of accountability and transparency

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

regarding the maintenance of the CTA and UTP Plans and the extraordinary fees charged for market data. These concerns are inextricably linked. The lack of transparency as to process makes possible the usurious fees. The misleading public documents surrounding recent CTA fee "clarifications," coupled with crystal clear but irrational private clarifications, epitomizes how markets and investors are ill-served by the failing of our market data regime as presently administered.

From "No Fee" Increase, to "Fee Clarification" to "Massive Fee Increase"

On December 1, 2016, the CTA posted a notification to its website, which noted that the Participants of the CTA "have filed a no-fee change amendment to the Pricing Schedules and the Non-Display Policy."[2] The stated purpose of this filing was to clarify that the "CTA Device Fee is for display data use only," in other words, data that is visibly available to the data recipient.

On March 23, 2017, the Commission published the Notice of Filing and Immediate Effectiveness of the Plan Amendments to the Commission's website. According to this Notice, the CTA had filed a "clarification" regarding "certain fees relating to display and non-display use and when access fees are applicable."[3] The Notice stated that the fee schedules would be amended 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." Additionally, the Access fee would now apply to non-display use, and also where "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 instruction from the redistribution vendor…"

While the scope and target of these fees were unclear in the public filings, NYSE separately provided non-public correspondence which provided enormous clarity.[4]

While we do not know whether multiple vendors received multiple and potentially conflicting letters, we do know that in a letter to at least one vendor dated March 27, 2017, a New York Stock Exchange Director explained to Bloomberg LP's Exchange Business Manager that customer use of Bloomberg's Server API product ("SAPI") would now be considered Non-Display Use.[5] Consequently, SAPI users would be subject to the Non-Display fee and the Access fee. By way of background, SAPI is perhaps the quintessential display product. It had been treated as a display product since the inception of the Display/Non-Display distinction. Based on NYSE's letter that SAPI is now a Non-Display product, we cannot imagine a product that would

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[2] https://www.ctaplan.com/announcements#110000057154

[3] Although the CTA described the Amendments as merely a "clarification," SIFMA notes that the CTA has designated the Amendments as "establishing or changing fees," and thus effective upon filing pursuant to Rule 608(b)(3)(i).

[4] The March 23, 2017 filing noted that "Some vendors will require changes to their licensing and reporting." As these letters to vendors are not part of any public record, we do not know whether all vendors have received comparable or consistent information regarding this fee clarification.

[5] NYSE inaccurately informed Bloomberg that SAPI does not make data visibly available to the data recipient, despite Bloomberg's documented procedures demonstrating that SAPI is only made visibly available to data recipients. NYSE noted that it considered SAPI to be an "extranet service" that provides access to a data feed. "Extranet service" is not a term that is defined in the CTA Plan, and we have no basis to evaluate what NYSE means by this, and how this impacted its determination of Non-Display Use.

qualify as Display Use.

Let's unpack the progression of this rule change, particularly in light of the context of how we have come to have a "display" versus "non-display" distinction. Historically, professionals paid a single fee for data and used it for both "display" purposes (meaning viewed by the human eye and able to be manipulated via Excel, etc.) and "non-display" purposes (fed into an algorithm and not viewed by the human eye).

In 2014, arguing that black box computers were depriving the exchanges of revenue, the exchanges imposed a new fee for non-display use of data. Upon being granted approval to charge separately for Non-Display Use, the term was defined as "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."[6] Consequently, at the time the definition of Non-Display Use was adopted by the CTA, it was clear that Non-Display Use would not apply when the data was visibly available, including, without limitation, the creation and use of derived data.

In at least one letter to a vendor, NYSE has completely ignored the visual display aspect of the definition of Non-Display Use.[7] In its March 27, 2017 letter to Bloomberg, NYSE offers an interpretation that seems to obliterate the difference between "display" and "non-display" by deeming SAPI as a Non-Display Use. Now, "display uses" will apparently henceforth be defined as "non-display," regardless of whether the data is visibly available. While vendors have carefully structured a system to ensure use of display data by only entitled users, NYSE has declared that the efficacy of vendors' encryption is totally irrelevant. We presume this is because the display uses have been defined out of existence.

In addition, and because the data recipient's use is considered to be Non-Display Use, recipients of the data will also be charged the Access Fee. Consequently, the "no-fee increase," as the Amendments were originally touted, have become massive fee increases imposed on end users of *top of book* data.

<u>The Non-Display Use Fee and the Access Fee</u>

The Non-Display Use fees and Access fees are significant, and they will have a disproportionately large impact on small and mid-size firms. For example, a firm that previously received Network A data from the CTA, and made the data available to 10 professional devices for display use only, would have paid approximately $270 per month. Upon the NYSE interpretation noted above, the professional devices would now be considered a non-display use,

[6] https://www.nyse.com/publicdocs/ctaplan/notifications/trader-update/22nd%20Charges%20Amendment%20to%20the%20Second%20Restatement%20and%2013th%20Charges%20Amendment.pdf

[7] Presumably other similarly situated vendors received similar letters; however, because none of these communications have been included in a public filing or otherwise made publicly available, SIFMA has no way of knowing. If the substance of the Amendments are being interpreted broadly, these fee increases constitute a denial of access under Section 11A of the Securities and Exchange Act of 1934. If these fees are being applied to only one firm or a limited group, then these fees are not only a denial of access, but also violate the prohibition on imposing fees in a non-discriminatory fashion.

and the firm would thus need to pay the Network A access fee of $2,000 per month and the Non-Display Use fee of $4,000 per month merely to obtain the same last sale price and quotation information. For this hypothetical firm, the fee will have increased $6,000 per month, or over 2,000%, for the same top of book data. [8] If the firm also receives last sale price and quotation information for Network B securities, the firm will have to pay an additional $1,000 in Access fees and $2,000 in Non-Display Use fees on top of the professional device fees. Overall, fees for both Network A and Network B securities could increase by as much as $9,000 per month.[9] Every firm that is subject to a similar NYSE interpretation of the Amendments will experience a similar price increase, depending on the number of professional users for each firm. As this likely impacts *thousands* of firms, we can be sure that an extraordinary number of investors will be facing a significant impediment to their ability to access core data.[10]

Top of Book Data, Capital Formation, and a CTA Process That Thwarts the Public Interest

As the Commission is aware, SIFMA on behalf of its members and ultimately investors has been engaged in the so-called "NetCoalition/SIFMA" litigation for more than a decade. In the course of this litigation, the U.S. Court of Appeals for the District of Columbia has found -- based on the extensive record relating to the contested fees before the Court -- that those fees are not subject to competitive forces and are in violation of the Act. SIFMA has pursued this litigation, which is now on remand before the Commission, because of the critical import of depth-of-book data.

It is worth stressing that the fee "clarification" before us, of course, has nothing directly to do with depth of book data. The "clarification" is for top of book data. That is data which is conceded by all market participants -- including the SEC -- to be monopoly data which is absolutely essential for trading and best execution compliance.

Not only must top of book data be readily available, but the SEC has also long held that top of book data fees must bear a reasonable relationship to cost. The Court of Appeals, in both NetCoalition/SIFMA I, and NetCoalition/SIFMA II, has adopted this view. Specifically, "The SEC has determined that because of the mandatory nature of this regime, core data fees should bear some relationship to cost." *NetCoalition v. SEC*, 615 F.3d 525, Note 2 (D.C.Cir.2010)(*NetCoalition/SIFMA I*). The SEC has determined that fees charged for core data "need to be tied to some sort 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*, 715 F.3d 342, 346 (D.C. Cir. 2013)(*NetCoalition/SIFMA II*).

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[8] Since standard practice is for professional device fees to be paid at the entity level, we have calculated the percentage increase in fees conservatively by choosing the aggregate device fees payable by the entity as the basis.

[9] These fee estimates conservatively assume that only one category of Non-Display Use applies to the recipient. The CTA recognizes three categories of Non-Display Use for both Network A and Network B securities. One, two or three categories of Non-Display Use may apply to a single firm. Consequently, Non-Display Use fees could be a multiple of the estimates provided.

[10] SIFMA is not in a position to know the intentions of the NMS plan sponsors for Network C securities or the exchanges that provide depth of book data, but it is reasonable to assume that others may undertake similar rulemakings if this is permitted to stand.

Needless to say, there has been zero demonstration of a cost-based justification for any fee increase, let alone a 2,000% fee increase.

The basic foundational precepts of the SEC are to: (i) protect investors; (ii) maintain fair, orderly and efficient markets, and (iii) promote capital formation. A 2,000% fee increase directly undermines all three. Likewise, it would seem the five factors that Congress specified to guide the SEC in establishing the National Market System -- (i) efficiency; (ii) fair competition; (iii) availability of market data; (iv) practicability of order execution in the best market; (v) the opportunity for an investor's order to be executed directly -- are all violated by this proposed fee increase.

As the Trump Administration begins to focus on instances of potentially excessive regulation, it is worth noting that SROs impose about 1,500 fees or regulatory changes annually. Some of these proposals are of little impact, but many -- including this fee "clarification" -- combine the toxic elements of being enormously burdensome and immediately effective without opportunity for even cursory public review. The destructive cost and burden of ill-advised SRO regulation can't be overstated.

The SROs have a long history of conducting the most meaningful NMS plan business in executive sessions or "executive subcommittee meetings," both of which exclude Advisory Committee members. As noted above, the impact and purpose of these changes was not clear until very recently. To the extent that information has been made publicly available, it has been misleading or incomplete.

SIFMA has previously highlighted that the exchanges act as both for-profit, publicly-traded companies with obligations to their shareholders, while simultaneously acting as regulators to the companies that they either list or member firms (broker-dealers) with whom they compete. Many conflicts of interest are present. The foremost conflict at issue here is the for-profit nature of the exchanges clashing with their statutory responsibility to provide core data for consolidation into a single stream of data for each NMS stock at a price that is tied to a cost-based standard. This conflict is real, as evidenced by the exchanges' decisions via the Amendments. This new expense for core data is an impediment to the listing of securities, and will likewise have a disproportionate effect on the small and mid-sized member firms who must purchase the data -- all to the detriment of capital formation -- one of the core prongs of the Commission's mission.

SIFMA has long advocated in favor of reform of the Plan process. For example, we were pleased when, last June, the Equity Market Structure Advisory Committee (EMSAC) made useful recommendations to provide a more meaningful role for NMS Plan Advisory Committees. Clearly the fee "clarification" at issue here is stark evidence of the import of scrubbing this process.

The administration of the NMS Plans should be conducted in an open process independent from the exchanges. The NMS agendas, meetings, and minutes should be open to the public. These changes would make the governance of NMS Plans consistent with the statutory "fair representation" requirements governing the SROs themselves, and assure transparency in governance to further the public interest and the protection of all investors.

There is nothing in the Exchange Act, or the applicable rules thereunder, that would prohibit industry members from fully participating in the governance of NMS Plans or from making the proceedings more transparent. Unless and until industry is provided substantial participation -- with a real voice and number of votes to override self-serving exchange policies -- the governance of NMS Plans will continue to include onerous fee increases, such as those included in the Amendments.

Conclusion

There has been no attempt to meet the legal requirements as to process and substance for a fee increase -- particularly a 2000% fee increase for monopoly core data. A fee increase of this size and nature would have serious consequences for capital formation, investor protection, and the efficient operation of the markets.

For these reasons, we believe the Commission should abrogate the Amendment and disallow this fee increase. We appreciate the opportunity to provide SIFMA's views to the Commission on these important issues. If you have any questions or would like to discuss this matter further, please do not hesitate to contact me at mmacgregor@sifma.org or 202-962-7300.

Respectfully submitted,

/Melissa MacGregor/

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