MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

May 29, 2020

Via Electronic Submission: rule-comments@sec.gov

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: Market Data Infrastructure Proposed Rule (Release No. 34-88216; File No. S7-03-20)

Dear Ms. Countryman:

Managed Funds Association[1] ("**MFA**") commends the Commission for its initiative in reviewing and reforming the regulatory framework for consolidated market data through the Market Data Infrastructure proposal ("**Proposal**").[2] Over the last several years, we have become increasingly concerned that the current regulatory framework for proprietary exchange market data and consolidated market data fails to protect investors from unreasonable fees,[3] unreasonably discriminatory pricing,[4] and fees that may be imposing an unnecessary and inappropriate burden on competition.[5] These failures lead to inefficiencies in the raising of capital by discouraging market participants from providing liquidity and imposing an unreasonable "tax" on market

[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 over time. 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] Securities Exchange Act Release No. 88216, 85 FR 16726 (Mar. 24, 2020). The Proposal would, among other things: (i) expand the content of consolidated market data to include five levels of depth-of-book quotations away from a protected quotation and odd-lot quotations that when aggregated equal a round lot; (ii) modify round lots from a uniform quantity of 100 shares to lower round lot quantities depending on the average closing price of the security during the previous month's trading; (iii) amend the manner in which consolidated market data is distributed by adopting a decentralized competing consolidator model rather than the exclusive securities information processors ("SIPs") used today; and (iv) permit broker-dealers, but not other market participants, that use consolidated market data solely for internal use only to act as "self-aggregators."

[3] 15 U.S.C. 78f(b)(4).

[4] 15 U.S.C. 78k-1(c)(1)(D).

[5] 15 U.S.C. 78f(b)(8). *See* Richard A. Baker, President and CEO, MFA, Petition for Rulemaking Regarding Market Data Fees and Request for Guidance on Market Data Licensing Practices; Investor Access to Market Data (Aug. 22, 2018), https://www.managedfunds.org/wp-content/uploads/2018/08/MFA-AIMA-Mkt-Data-Petition.final_.8.22.18.pdf ("**MFA Petition for Rulemaking**").

transactions. In addition to the steps the Commission is taking with respect to consolidated market data, we encourage it to continue its review of proprietary exchange market data licensing practices and fees.

MFA supports the Proposal and believes that adopting a competing consolidator model and enhancing the content of consolidated market data will substantially further the central goals of the national market system of assuring the "availability [of consolidated market data] to brokers, dealers, and investors" as well as the "fairness and usefulness of the form and content" of consolidated market data to provide "prompt, accurate, [and] reliable" access on "fair and reasonable terms."[6]

Congress made clear in 1975 that the "heart of the national market system" lies in the systems that "provide automated dissemination of last sale and quotation information with respect to securities, will form the heart of the national market system"[7] and allow market participants "to ascertain at a glance the market that offers the best price."[8] Today, the current exclusive SIP model and content of core data does not serve the needs of investors, many of whom must subscribe to the exchanges' proprietary market data feeds at considerable additional cost to trade effectively, while others are forced to rely on inferior information and outdated technology. The Proposal should help to substantially improve the "heart" of the national market system by narrowing the significant gap in usefulness between exchange proprietary data feeds and consolidated market data.

The Proposal is the latest in a series of reforms to equity market structure that we believe are necessary to advance the goals of the national market system noted above. In this regard, we strongly support the recently adopted order consolidating the three NMS plan governing the collection and dissemination of consolidated market data into a single NMS plan[9] as well as the Commission's 2019 proposal to eliminate effective-upon filing fee amendments to NMS plans, which we believe should be adopted without delay.[10]

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[6] 15 U.S.C. 78k-1(a)(1)(C) and (c)(1).

[7] House Report No. 94-229, S.249 at 93 (May 19, 1975).

[8] House Report No. 94-123, H.R. 4111 at 91 (Apr. 7, 1975).

[9] Securities Exchange Act Release No. 88827, 85 FR 28702 (May 13, 2020). The adopted order would also allocate one-third voting representation to non-self-regulatory organization ("SRO") members and require that the consolidated NMS plan be operated by an independent administrator (*i.e.*, an entity that does not sell proprietary market data). *Id.* *See also* Letter from Jennifer Han, Associate General Counsel, MFA, and Adam Jacobs-Dean, Managing Director and Global Head of Markets Regulation, AIMA, to Vanessa Countryman, Secretary, Commission, re: Notice of Proposed Order Directing the Exchanges and FINRA to Submit a New National Market System Plan Regarding Consolidated Equity Market Data (File Number 4-757) (Feb. 28, 2020), https://www.managedfunds.org/wp-content/uploads/2020/05/MFA-AIMA-ltr-to-SEC-on-New-Consolidated-Data-Plan.final_.2.28.2020.pdf. The Commission also recently approved orders codifying amendments to the SIP NMS plans confidentiality policy and conflict of interest policy. *See e.g.*, Securities Exchange Act Release No. 88825, 85 FR 28090 (May 13, 2020); Securities Exchange Act Release No. 88824, 85 FR 28119 (May 13, 2020).

[10] Securities Exchange Act Release No. 87193, 84 FR 54794 (Oct. 11, 2019). *See also* Letter from Mark D. Epley Executive Vice President & Managing Director, General Counsel, MFA, and Jennifer Han, Associate General Counsel, MFA to Vanessa Countryman, Secretary, Commission, re: Rescission of Effective-Upon-Filing Procedure

However, we believe certain aspects of the Proposal could be improved. Specifically, as discussed in Part I, we believe that market participants that use consolidated market data solely for internal purposes should be permitted to operate as self-aggregators or that the category should be eliminated entirely. In addition, as discussed in Part II, we believe that self-aggregators should be permitted to share consolidated market data with affiliates to promote consistency with today's market structure and eliminate duplicative fees. On the subject of fees, and as discussed in Part III, we believe the Commission should require that fees for the non-display use of consolidated market data be tied to a reasonable cost-based standard. In Part IV, we recommend that competing consolidators be required to provide regulatory data, as defined in the Proposal, at a minimal cost through a separate feed or that exchanges provide regulatory data through their proprietary feeds. Finally, as discussed in Part V, we believe that the proposed modifications to round lots should be simplified by using three round lot tiers and that the Order Protection Rule should apply to all round lot quantities.[11]

I. Other Market Participants Should Be Permitted to Be Self-Aggregators

Under the Proposal, only broker-dealers would be permitted to act as self-aggregators. We believe that other market participants that use consolidated market data solely for internal use should be permitted to operate as self-aggregators to improve investor access to consolidated market data and limit fees for such data.[12] To this end, it is not clear that it is necessary to define the term "self-aggregator." Eliminating this category would create a framework under which market participants could accept and consume consolidated market data, but where they redistribute consolidated market data, they would be required to file with the Commission as competing consolidators.[13]

In establishing the category of self-aggregators, the Commission notes that today "some broker-dealers effectively act as self-aggregators" by purchasing proprietary data feeds from the exchanges "to address latency and content issues that are present with the exclusive SIPs."[14] The Commission further states that it is "concerned that eliminating the ability of broker-dealers to self-aggregate proposed consolidated market data for their own use would be unnecessarily disruptive to the current market data infrastructure landscape."[15] We believe, however, that barring other market participants, such as registered investment advisers ("**RIAs**") and any other

for NMS Plan Fee Amendments; File No. S7-15-19 (Dec. 6, 2019), https://www.managedfunds.org/wp-content/uploads/2020/04/MFA-response-to-NMS-Plan-Fee-Proposal.final_.12.6.19.pdf.

[11] 17 CFR 242.611.

[12] *See* proposed Rule 600(b)(82) (defining self-aggregator as "a broker or dealer that receives information with respect to quotations for and transactions in NMS stocks, including all data necessary to generate consolidated market data, and generates consolidated market data solely for internal use. A self-aggregator may not make consolidated market data, or any subset of consolidated market data, available to any other person.").

[13] In other words, nothing would seem to be lost by eliminating the defined category of "self-aggregator."

[14] Proposal at 16789-90.

[15] Proposal at 16790.

non-broker-dealer direct consumer of market data, to act as self-aggregators would be equally disruptive to the current market data infrastructure.

Today, many non-broker-dealer market participants subscribe directly to proprietary data feeds from exchanges to facilitate their trading activity and reduce latency. These market participants typically also subscribe directly to the SIP data feeds to receive regulatory data (*e.g.*, trading halt notifications and other market-wide information) and/or top of book data for certain exchanges (*e.g.*, those with low volume).[16] Under the Proposal, however, unless these non-broker-dealer market participants are permitted to operate as self-aggregators, they would only be permitted to receive consolidated market data through a competing consolidator. Given that non-broker-dealers are able to directly subscribe to exchange proprietary data feeds and to the SIPs today, it is unclear why they should be obligated to receive consolidated market data exclusively through a competing consolidator intermediary under the Proposal. Indeed, the Proposal would create a tiered market, where broker-dealers have systematically better and more timely access to market data than RIAs, which would be detrimental to investors.

Under the Proposal, self-aggregators would have both a speed and potential cost advantage over those who receive consolidated market data from competing consolidators. Regarding speed, the Commission acknowledges that self-aggregators would have a lower latency over an investor receiving consolidated market data from a competing consolidators because of the reduced time associated with aggregating and disseminating market data.[17] Self-aggregators would also be able to receive consolidated market data at the price established by the NMS plan, which costs must be "fair and reasonable" and reasonably related to the cost of producing that data.[18] Market participants receiving consolidated market data from competing consolidators, however, may have to pay a premium over this amount to compensate the competing consolidator for its services.[19]

The Proposal therefore either requires non-broker-dealers to continue to subscribe to proprietary data feeds or to add latency and potential additional costs to their trading based on consolidated market data. This will discourage the use of consolidated market data and undermine the goal of Section 11A of assuring the "availability to brokers, dealers, and ***investors*** of information with respect to quotations for and transactions in securities." (emphasis added).[20] The category and definition of self-aggregators under the Proposal should therefore either be eliminated in its entirety or modified to explicitly allow non-broker-dealers, including, at a minimum, RIAs.[21] Today, direct subscribers to proprietary data and SIP data feeds, regardless of

[16] *See e.g.*, MFA Petition for Rulemaking *supra* n.5 ("Our members engage in a diverse and broad-range of investment strategies, and receive market data from SIP data feeds, directly from exchanges as exclusive processors,8 from broker-dealers and/or from third party data vendors.").

[17] Proposal at 16791 ("Self-aggregators may have a minor latency advantage over market participants that decide to utilize a competing consolidator for their consolidated market data . . .").

[18] *See e.g.*, Proposal at 16770.

[19] It is also conceivable that the costs charged by a competing consolidator might be cheaper than the fees established by the NMS plan. If so, self-aggregators would still have a latency advantage over competing consolidator subscribers.

[20] 15 U.S.C. 78k-1(a)(1)(C).

[21] To the extent the Commission is concerned about non-registered entities acting as self-aggregators, the Proposal should, at a minimum, allow RIAs to act as self-aggregators. However, we do not believe it is necessary for an entity

registration status, are already subject to audits by the market data providers related to their use of such data, so concerns related to ensuring that they are not redistributing consolidated market data to other persons can be addressed through these same mechanisms.

If non-broker-dealers are not permitted to act as self-aggregators, then we believe that there should be some mechanism for the Commission to review or abrogate fees charged by competing consolidators to ensure that consolidated market data is available on terms that are fair and reasonable (*i.e.*, reasonably related to costs), consistent with Rule 603(a) of Regulation NMS and Section 11A of the Exchange Act.[22] Conceivably, a monopoly provider could emerge with a fast and efficient network for the provision of consolidated market data that could charge whatever price it wanted. While there might be alternatives available from other competing consolidators, these offerings may not in fact be competitive given the importance of speed in today's markets or the expenses and difficulty that firms may face when switching data vendors.

II. Self-Aggregators Should Be Permitted to Share Consolidated Market Data with Affiliates

Self-aggregators should be permitted to share consolidated market data internally with affiliates in order to improve investor access to consolidated market data and avoid duplicative costs for closely affiliated entities. The Commission states in the Proposal that "self-aggregators would not be permitted to re-distribute or re-disseminate proposed consolidated market data to any person, including to any affiliates or subsidiaries" and that any redistribution to an affiliate would require registration as a competing consolidator.[23] The result of this guidance would unduly limit the use of consolidated market data and raise costs for firms affiliated with a self-aggregator.

Many market participants operate both a broker-dealer and an affiliated RIA.[24] Today, these firms will often operate as a single integrated business and share proprietary and/or consolidated market data with their affiliate(s), subject to applicable redistribution or other fees applicable to such internal sharing. Under the Proposal, a broker-dealer acting as a self-aggregator would no longer be permitted to share consolidated market data with its affiliate without the costly registration requirements applicable to a competing consolidator and attendant compliance with Regulation SCI. These firms have no interest in starting new market data businesses and only wish to operate efficiently. Yet, the Proposal would require, for example, an investment adviser

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or person to be registered with the Commission to be able to act as a self-aggregator given that market data providers (*e.g.*, the exchanges or administrator of the new consolidated NMS plan) would be able to audit their use of market data as well as the Commissions broad enforcement authority to police against unregistered entities (*e.g.*, an unregistered competing consolidator). Limiting self-aggregators to only Commission-registered entities would directly conflict with the statutory mandate in Section 11A of ensuring the availability of consolidated market data "to investors," a category that encompasses all market participants including those not registered with the Commission. *Id.*

[22] 17 CFR 242.603(a); 15 U.S.C. 78k-1(c)(1)(C).

[23] Proposal at 16790.

[24] Other firms may operate multiple RIAs with no affiliated broker-dealer, a RIA with a non-registered entity (*e.g.*, a family office), but still directly consume proprietary and/or consolidated market data that is used by those affiliates, subject to any applicable internal re-distribution fees applicable to such market data.

affiliated with a self-aggregator to separately pay for its own consolidated market data feed, which, as noted above, it could only receive from a competing consolidator because it would not be permitted to act directly as a self-aggregator. Thus, a firm that today shares market data with its affiliates would, under the Proposal, have two separate consolidated market data feeds with different latencies (*e.g.*, a self-aggregating broker-dealer and a RIA subscribing to a competing consolidator) at double the cost, and shouldering the burden of maintaining separate market data infrastructures for a broker-dealer self-aggregator, and its non-broker-dealer affiliates.

The Proposal does not provide a basis for this increased cost on firms and it is unclear why reasonable internal re-distribution fees could not be used to lower these expenses. Affiliate usage and related fees for internal redistribution are already contemplated in a variety of ways under existing proprietary market data and consolidated market data fee schedules.[25] Requiring duplicative fees for affiliates of a self-aggregator, however, conflicts directly with the statutory goal of ensuring access to consolidated market data on "fair and reasonable terms."[26]

As discussed above in Part I, we believe that self-aggregators should not be restricted to broker-dealers. Thus, we believe that any market participant should be permitted to operate as a self-aggregator *and* be able to share consolidated market data with its affiliates. To the extent the Commission does not eliminate the category of self-aggregator or expand it to include non-broker-dealers, the Commission should nonetheless permit redistribution to affiliates under the currently proposed definition of a self-aggregator.

III. The Commission Should Require Fees for Non-Display Use of Consolidated Market Data Be Tied to a Reasonable Cost Basis

We believe the Commission should make clear in any adoption of the Proposal that non-display use fees for consolidated market data must be tied to some reasonable cost basis.[27] Concerns relating to non-display use fees have been a persistent issue for market participants for

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[25] The Commission could also use existing definitions of affiliates to define the scope of what constitutes an affiliate that could share in consolidated market data generated by a self-aggregator. *See e.g.*, 17 CFR 240.12b-2 (which is proposed to be used in connection with proposed Form CC and defining the term as follows: "[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified").

[26] 15 U.S.C. 78k-1(c)(1)(C). To the extent the Commission is concerned that an affiliate receiving consolidated market data from a self-aggregator would not receive the benefits of Regulation SCI because self-aggregators are not subject to Regulation SCI, we note that such affiliates today operate fine without such protections and any systems disruption to the self-aggregator's provision of consolidated market data would only impact its affiliates. Firms should be allowed to assume such risks if they so choose.

[27] *See e.g.*, Schedule of Market Data Charges, CTA Plan, at 4 (Jan. 1, 2015), https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Schedule%20Of%20Market%20Data%20Charges%20-%20January%201,%202015.pdf ("CTA Plan Fee Schedule") ("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 data feed recipient's display or further internal or external redistribution.").

many years and are conspicuously not addressed in the Proposal.[28] We believe any meaningful reform of market data infrastructure should address these concerns.

As background, non-display use fees apply where a data recipient integrates consolidated market data into its systems or software without the need for a user to actually see the data. This integration provides data recipients with flexibility to process and manipulate consolidated market data to suit their needs.[29] Generally, only where a data recipient merely displays consolidated market data without automated integration into its systems can non-display use fees be avoided. Non-display use fees were adopted in 2014 as immediately effective fee filings precisely because the SIP administrators found that SIP "data feeds have become more valuable" and increasingly "critical to [market participants'] business."[30] As one exchange acknowledged in 2013 "a majority of trading is done by leveraging non-display devices consuming massive amounts of data."[31]

MFA believes that non-display use fees should be tied to a reasonable cost basis to better align with how market participants trade today, the requirements of Section 11A of the Exchange Act,[32] and the Commission's stated goal of assuring "reasonable fees that promote the wide public availability of consolidated market data."[33] As a threshold matter, there is no statutory basis for the fees for the non-display use of consolidated market data to increase based on the SIP administrator's perceived value of that data (rather than being tied to a reasonable costs basis). The stated rationale in adopting non-display use fees—that consolidated market data has become increasingly valuable to users—concedes that the basis for these fees is to extract greater rents from the consolidated market data and not as a result of any additional costs related to its production.

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[28] *See e.g.*, MFA Petition for Rulemaking, *supra* note 5, at 9. *See also* Letter to Brent J. Fields, Secretary, Commission, from Richard H. Baker, President and CEO, Global Head of Government Affairs Managed Funds Association and Jiří Król, Deputy CEO, Global Head of Government Affairs, AIMA, at 5, 11 (Dec. 20, 2018), https://www.sec.gov/comments/4-729/4729-4826120-177029.pdf.

[29] Non-display use fees do not apply to derived data. "Derived data is generally understood by the industry to consist of pricing data or other information that is created in whole or in part from consolidated quotation or last sale price information, but which cannot be reverse engineered to recreate such information or be used to create other data that is recognizable as a reasonable substitute for such information. For instance, using consolidated quotation information or last sale price information to value portfolios or create indexes would not be considered Non-Display Use." Exchange Act Release No. 82071, 82 FR 55130, (SR-CTA/CQ-2017-04). While there are not currently fees for the derived data assessed by the exclusive SIPs, we remain concerned about the possibility of future attempts to assess such fees with respect to consolidated market data.

[30] Exchange Act Release No. 69157, 78 FR 17946, 17949 (March 25, 2013) (SR-CTA/CQ-2013-01).

[31] Exchange Act Release No. 69285, 78 FR 21172, 21174 (April 9, 2013) (SR-NYSEMKT-2013-32)

[32] Section 11A is built on the foundation that a national market system must assure the "fairness and usefulness of the form and content" of consolidated market data to provide "prompt, accurate, [and] reliable" access to such data on "fair and reasonable terms." 15 U.S.C. 78k-1(c)(1).

[33] *See e.g.*, Exchange Act Release No. 51808, 70 FR 37495, 37560 (June 29, 2005) ("Regulation NMS Adopting Release") ("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.").

Moreover, the current fees for non-display use are excessive, particularly when added to access fees and other subscriber charges.[34] The CTA Plan currently charges separate non-display use fees for quotation information and transaction information and separately for Network A securities and Network B securities. The monthly non-display use fees for both transaction and quotation data for Network A are $4,000 and for Network B are $2,000.[35] The same non-display use fees for Network C securities under the UTP plan are $3,500 each month for a firm using the market data solely for internal purposes.[36] Consequently, a firm seeking non-display use of consolidated market data from all three SIPs just for its own trading faces a monthly cost of $9,500, not including any other fees. These costs disproportionately impact smaller firms. A firm with a large number of traders has a much lower cost per market data user than a smaller firm, which is subject to the same charges.[37] These costs are also set against the backdrop of a market data infrastructure where most market participants find they need to pay for proprietary exchange data feeds, in addition to the SIP feeds, given the paucity of consolidated market data and the significant latency of SIP data feeds.[38]

In establishing a national market system in 1975, Congress stated its belief that SIPs assume "certain of the characteristics of a public utility and should be regulated accordingly."[39] Yet, as noted, the SIPs have been permitted, through immediately effective fee filings, to charge fees based on the SIP administrators' perceived value of the non-display use of consolidated market data. This is not how a public utility operates. A water utility could not charge more for water simply because consumers found new profitable ways to use the water, just as a utility company could not increase its rates because consumers found more profitable uses of the energy. Instead, market participants today are required to pay an unjustified premium to use data through automated processes consistent with today's trading and regulatory expectations.

In light of the foregoing, we urge the Commission to explicitly require that non-display use fees be subject to some reasonable cost basis. This cost-based standard should also apply to any other fees with respect to consolidated market data that might be charged in the future, including any attempt to assess fees for the derived use of consolidated market data.[40] As noted, we strongly

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[34] These additional fees can include access fees, display fees, subscriber fees, multiple feed charges, late/clearly erroneous reporting charges, consolidated volume data, redistribution fees and others. *See e.g.*, CTA Plan fee Schedule, *supra* note 27 *and* UTP Plan Data Policies (October 2018), http://www.utpplan.com/DOC/Datapolicies.pdf.

[35] *See e.g.*, CTA Plan fee Schedule, *supra* note 27.

[36] *See* UTP Plan Data Policies, *supra* note 34, at 2.

[37] For example, a firm with 100 employees would pay $95 per market data user while an individual trader seeking non-display must still pay $9,500, a 100-fold difference in fees.

[38] Many market participants purchase SIP data as a substitute for paying for the proprietary data feeds of some lower volume exchanges. In this way, they can get a complete view of the market purposes of order routing without having to buy all exchanges' proprietary data feeds. However, in order to make this data useful, it is necessary to integrate the SIP data into their systems, subjecting firms to the non-display use fees.

[39] House Report No. 94-229, S.249 at 93 (May 19, 1975). *See also* Proposal at n.390 (noting that "[t]he Senate Report stated that an exclusive processor of market information is, 'in effect, a public utility'") (citing S. Rep. No. 94–75 at 7 (1975)).

[40] Although the SIPs do not currently assess fees for the use of derived market data and we believe the SIPs do not have any intellectual property rights in derived data, it is conceivable that they might seek to adopt such fees down

support the Commission's proposal to eliminate effective upon filing fee changes with respect to NMS plans, but believe the Commission should address non-display use fees directly in any adoption of the Proposal. The SIP administrators have made no meaningful effort to tie non-display use fees to a reasonable cost-based standard notwithstanding statutory requirements and the public utility nature of consolidated market data. The result has been increased costs to market participants to the benefit of exchanges, which we believe is contrary to protection of investors and the public interest.

IV. Competing Consolidators Should Be Required to Provide a Regulatory Data-Only Feed at Minimal Cost and/or Exchanges Should Be Allowed to Provide Regulatory Data via Their Proprietary Feeds

The Commission should require competing consolidators to provide a regulatory data-only feed at a fair and reasonable price relative to the cost of that subset of consolidated market data.[41] Alternatively, we believe the Commission should explicitly permit exchanges to provide regulatory data through their proprietary market data feeds.[42] Regulatory data is not currently available through the exchange's proprietary data feeds, and some market participants subscribe to SIP data today simply in order to obtain regulatory data information. Of all the components of consolidated market data under the Proposal, regulatory data is most clearly a public good, providing essential market wide notices, and should therefore be readily accessible to market participants.

While competitive forces may compel competing consolidators to provide a regulatory data-only feed to subscribers, there is no guarantee that this, in fact, would be an offering they provide and the price of the offering may be excessive despite its basic nature. Accordingly, we respectfully request that the Commission provide that competing consolidators must make available a regulatory-data only feed at a price that recognizes the critical need for this information as a public good and the lack of availability of this information through other means (*i.e.*, through proprietary data feeds). The Commission should likewise consider in the combination with such requirement or as an alternative allowing exchanges to provide regulatory market data through their proprietary feeds.

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the road, just as many exchanges have adopted fees for the use of derived data. Derived data, by definition, is a use that cannot be readily reverse engineered to recreate the original market data from which it came. We strongly oppose fees for such use for both proprietary exchange market data products and consolidated market. There is no additional costs associated with the derived use of market data, so such costs should be zero.

[41] Regulatory data would broadly consist of information related short sale circuit breaker, price brands related single stock and market wide circuit breakers, trading halt notifications, round lot sizes, opening and closing prices, and certain other notifications (*e.g.*, trade through exempt indicators). *See* proposed Rule 600(b)(77).

[42] Although there does not appear to be an explicit restriction on exchanges making regulatory data available through their proprietary market data feeds, we understand that the exchanges have either not sought to or been permitted to provide regulatory data through their proprietary market data feeds. To the extent this limitation arises out of concerns of certain market participants (*i.e.*, proprietary market data subscribers) receiving regulatory data sooner than others, we note that self-aggregators under the Proposal would receive regulatory data faster than those using a competing consolidator. Thus, there is no practical reason why exchanges should not be permitted to provide regulatory data via their proprietary market data feeds.

V. The Proposed Five Round Lot Tiers Should Be Simplified to Three Tiers and All Round Lots Quotations Should Be Protected under Rule 611

We believe the proposed round lot tiers should be simplified to three tiers and that Rule 611 (the "Order Protection Rule") should extend to all round lot quotations. Specifically, we believe the Commission should adopt round lot tiers as follows: (i) a 100 share round for stocks priced up to $500.00; (ii) a 10 share round lot for stocks priced between $500.01 and $1,000.00; and (iii) a 1 share round lot for stocks prices above $1,000.01.[43] We believe the Order Protection Rule should extend to all quotations in these round lot sizes to simplify routing decisions, facilitate best execution, and avoid trade throughs.

Extending the Order Protection Rule to All Round Lots

Today, because all NMS stocks have a round lot of 100 shares, the NBBO is typically the same as the best protected bid and best protected offer ("PBBO"). Under the Proposal, only quotations of at least 100 shares would be protected for purposes of the Order Protection Rule").[44] As a result, stocks with a round lot of less than 100 shares could frequently have a different NBBO and PBBO under the Proposal. This divergence will make routing decisions and fulfilling best execution obligations significantly more complicated for broker-dealers and RIAs reviewing the relative quality of their executions by different broker-dealers.

For example, assume stock XYZ has a round lot quantity of 20 shares and a broker-dealer is seeking to execute a 500 share sell order on behalf of its customer as soon as possible. If possible, the broker-dealer would prefer to execute on Exchange A (*e.g.*, to help achieve volume-based fee discounts). The current bid prices for stock XYZ are as follows:

Bid Prices	Exchange A - Size	Exchange B - Size	Exchange C - Size
$75.00	20	20	**20**
$74.99	20	**100**	**20**
$74.98	100	**20**	**40**
$74.97	300	20	20
$74.96	300	20	20

We can broadly consider two ways in which the broker-dealer might execute this order. In Scenario 1, the broker-dealer seeks only to comply with the Order Protection Rule while in Scenario 2, the broker-dealer seeks to execute against all of the best quotations available for the order whether or not they are protected.

[43] Consistent with the Proposal, we believe these the round lots applicable to each stock should be based off of the average closing price of the stock during the previous month of trading, as reported by its primary listing market.

[44] 17 CFR 242.611.

- Scenario 1: the broker-dealer routes 120 shares to Exchange B to execute against the 100 share protected quotation in blue (plus the 20 share quote above the protected quote) and then executes the remainder of the order on Exchange A.
    - Consequently, the broker-dealer trades through the 100 shares of better priced quotations (noted in red) that it could have accessed.
    - The resulting average price for this execution would be: $74.9792.
- Scenario 2: in addition to routing 120 shares to Exchange B to comply with the Order Protection Rule, the broker-dealer routes to all of the better-priced quotations (noted in red) on Exchanges B and C to satisfy the order.
    - The resulting average price for this execution would be: $74.9824.

The difference in the execution price between Scenario 1 and 2 is $1.60 on a total transaction of approximately $37,500 (roughly 0.004% of the total value of the transaction). While the difference may seem small, in Scenario 1, the broker-dealer could have received price improvement on 20% (100 shares of a 500 share order) of the order by routing to the better priced unprotected round lots by adopting Scenario 2.

A broker-dealer in this situation must weigh the relative costs and benefits of executing pursuant to these two scenarios or some other third scenario where it seeks some, but not all of the better priced, unprotected quotations. This calculus may include the fee discounts that might be available by executing on Exchange A, which may in turn allow the broker-dealer to provide executions at a lower cost to its customers, the likelihood of reaching those other quotations in a timely manner, and the fees associated with executions on Exchanges B and C. The complexity of such determinations increases by an order of magnitude when 10 other equity exchanges and the hypersonic speed of trading are added to the equation.

In adopting Regulation NMS, the Commission stated that the "duty of best execution requires broker-dealers to execute customers' trades at the most favorable terms reasonably available under the circumstances, *i.e.*, at the best reasonably available price."[45] The Commission has not interpreted the duty of best execution as "requiring automated routing on an order-by-order basis to the market with the best quoted price at the time."[46] Rather the Commission states that the duty "requires broker-dealers to periodically assess the quality of competing markets to assure that order flow is directed to the markets providing the most beneficial terms for their customer orders."[47]

In light of this guidance, Scenario 1 could be viewed as consistent with the duty of best execution depending on the surrounding facts and circumstances, notwithstanding that 100 shares of better priced liquidity is traded through. However, a broker-dealer executing orders pursuant to Scenario 1 is likely to expose itself to regulatory inquiry to explain why it traded through 100 shares of better priced liquidity on the order, even where it can demonstrate that the customer may

[45] Regulation NMS Adopting Release at 37538.

[46] *Id.*

[47] *Id.*

have been better off overall.[48] Such regulatory inquiries come with substantial costs (to both broker-dealers and regulators) associated with document productions, analysis of trading data and fees, and internal resources that could be devoted to more productive uses.

In stark contrast, if the Order Protection Rule is applied uniformly to all stocks irrespective of their applicable round lot size, the broker-dealer's obligation is clear: it must use Scenario 2 and attempt to route to better priced quotations on away markets. The broker-dealer can have certainty with respect to its regulatory compliance, trade throughs can be avoided, and costly regulatory inquiries averted. Importantly, the certainty also benefits investors; it provides a familiar baseline for execution quality and lets RIAs focus their best execution reviews on holistic assessments of broker selection in light of client mandates and under the particular circumstances occurring at the time of the transaction.[49] For these reasons, we believe that in whatever tiers of round lot quantities the Commission adopts, the Order Protection Rule should apply to all round lots.

Simplification to Three Round Lot Tiers from Five

Regarding the proposed simplification to three tiers instead of five, we note that many market participants will need to monitor changes to the round lot quantity applicable to each stock each month and adjust their systems accordingly. For example, under the Proposal, a market participant sending a 50 share order in a stock with a 100 share round lot in month one can be assured that the order would not be displayed (unless aggregated with other odd-lots to form a round lot). If, however, in month two that stock has a 20 share round lot, a 50 share order would be displayed. This may impact the particular venue to which the order might be routed (e.g., because it is displayable, the market participant may want to send it to a venue offering a high rebate for displayed liquidity). Routing logic and related surveillance reports may thus need to be modified each month. Regulators, such as FINRA and the exchanges might similarly face challenges in modifying their surveillance systems to accommodate changes to a security's round lot over time.

Certain broker-dealers, such as market makers, might face similar challenges that directly implicate their compliance with Regulation NMS. For example, pursuant to Rule 604 under the Exchange Act, an exchange market maker that receives a customer order that matches or improves its displayed quotation generally must add that customer limit order to its displayed quotation.[50] This requirement, however, does not apply to customer limit orders that are odd-lots.[51] Thus, using

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[48] Moreover, as the Commission has noted, there "are at least three parties affected by every trade-through transaction: (1) The party that received an inferior price; (2) the party whose superior-priced limit order was traded through; and (3) the contra party to the trade-through transaction that received an advantageous price." *Id.* at 37352. As a result, even if the broker-dealer fulfilled its best execution obligation with respect to its customer, it may still face regulatory scrutiny regarding the harm to the unknown market participants whose orders were traded through.

[49] *See* Investment Advisers Act Release No. 5248, 84 FR 33669, 33674-75 (July 12, 2019) (describing RIAs duty of care to include a duty to seek best execution of a client's transactions "with the goal of maximizing value for the client under the particular circumstances occurring at the time of the transaction").

[50] 17 CFR 242.604.

[51] 17 CFR 242.604(b)(4).

the same example above, a market maker receiving a 50 share customer limit order in month one that improves its displayed quotation would not have an obligation to revise its displayed quotation. In month two, the market maker would violate Rule 604 for failing to update its displayed quotation when in receipt of the same 50 share customer limit order that matches or improves its displayed quotation. As a result, careful monitoring and changes to the programming of market makers systems will likely be necessary each month. There may also be more trade throughs in a market with greater variation in round lot sizes among different securities. Accordingly, we believe that a more simplified structure using just three tiers of round lots, and where most stocks continue to have a 100 share round lot quantity, would reduce the burden on market participants associated with month-to-month changes in round lot quantities for individual securities.

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We appreciate the opportunity to provide these comments on the Proposal, which we believe offers substantial improvements to the existing market data infrastructure. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Jennifer Han at (202) 730-2600.

Respectfully Submitted,

/s/ Jennifer W. Han

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CC: The Honorable Jay Clayton, Chairman
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner
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