

Via Email

December 5, 2019

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-15-19

Dear Madam Secretary:

The Council of Institutional Investors (CII), appreciates the opportunity to provide comments to the United States (U.S.) Securities and Exchange Commission (SEC or Commission) in response to the Proposed Rule on Rescission of Effective-Upon-Filing Procedure for [National Market System] NMS Plan Fee Amendments (Proposed Rule).¹

CII is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$35 trillion in assets under management.²

CII generally supports the Proposed Rule. We note our membership approved policies state:

[Institutional investors have the] duty to communicate the interests and desires of the institutional investor community to regulators, to the public and to the industry regarding trading practices and commissions.

Like any other expense of the plan, trading costs need to be managed to minimize the cost and ensure that maximum value is received. But current . . . industry practices of bundled pricing for services . . . may be antithetical to the fiduciary obligation of obtaining best execution, and hold too much potential for conflicts of interest and abuses.

¹ Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments, Exchange Act Release No. 87,193, 84 Fed. Reg. 54,794 (proposed rules Oct. 11, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-10-11/pdf/2019-21770.pdf>.

² For more information about the Council of Institutional Investors (“CII”), including its board and members, please visit CII’s website at https://www.cii.org/about_us.

. . . .
Clarity and transparency of disclosure of all money management and brokerage arrangements is essential, and it is up to plan sponsors to require it.³

Consistent with that policy, we believe the Proposed Rule would provide for greater transparency regarding market data fees—fees that our members and ultimately their retiree and worker beneficiaries pay. The Proposed Rule is particularly important because the stock exchanges have a natural monopoly over market data and collectively control the governance of and the setting of fees. The Proposed Rule is a modest but important first step in creating more transparency for market data fees and the pursuit of a more optimal market for those fees that could benefit investors and the capital markets generally.

The following are more detailed responses to select questions in the “Requests for Comment” contained in the Proposed Rule⁴:

1. Do commenters agree that the Commission should rescind the Fee Exception? Why or why not?⁵

CII generally supports rescinding the “Fee Exception.”⁶ We agree with the Commission “that eliminating the Fee Exception and instead requiring the standard procedure for Proposed Fee Changes⁷ would help ensure that fees are fair and reasonable *before* they go into effect.”⁸ We also agree with the Commission that the “substantial fees charged by [national market system (NMS)] . . . plans to a wide range of market participants [including CII members] heightens the need for full review of the Proposed Fee Changes prior to the time a new or altered fee is charged to market participants.”⁹

In his March 28th remarks to the SEC Investor Advisory Committee on the topic of “Discussion Regarding Stock Exchanges: Investor Protection Under The Modern Exchange Regulatory Structure,” (IAC Remarks) CII Executive Director Ken Bertsch said:

Sunlight on revenue and expense information with respect to data fees, technology fees and connectivity fees facilitates more robust assessments of whether proposed fee hikes are reasonable. Additionally, *we believe a rule ensuring that Notice and*

³ Guiding Principles for Trading Practices, Commission Levels, Soft Dollars and Commission Recapture (adopted Mar. 31, 1998), https://www.cii.org/policies_other_issues#principles_trading_commission_softdollar.

⁴ 84 Fed. Reg. at 54,799.

⁵ *Id.*

⁶ Paragraph (b)(3)(i) of Rule 608 of Regulation NMS under the Exchange Act of 1934 “provides an exception to the standard procedure for Proposed Fee Changes . . . [and] [u]nder the Fee Exception, a Proposed Fee Change may be put into effect upon filing with the Commission, and an NMS plan may begin charging the new fee prior to an opportunity for public comment and without Commission action.” *Id.* at 54,795.

⁷ “Proposed Fee Changes” are defined as “proposed NMS plan amendments to establish or change a fee or other charge collected on behalf of all the plan participants in connection with access to, or use of, any facility contemplated by the plan or amendment (including changes in any provision with respect to distribution of any net proceeds from such fees or other charges to the participants).” *Id.* at 54,794.

⁸ *Id.* at 54,798.

⁹ *Id.*

*Comment periods occur prior to fee increases would likely enhance the fulfillment of this objective.*¹⁰

Finally, we also agree with the Commission conclusion that market participants, including CII members, would benefit from the proposed amendments because “under the proposed amendments, changes to NMS plan fees and charges could not be immediately imposed, and market participants [including CII members] would not have to pay fees (even temporarily) that the Commission may later determine do not meet the standard for approval.”¹¹

7. Do commenters believe that the fact that nearly all exchange [Self-Regulatory Organizations] SROs are public companies that have demutualized raises concerns about immediate effectiveness of Proposed Fee Changes? Do commenters believe that, currently, investors and other market participants that are not plan participants do not have a meaningful opportunity to influence Proposed Fee Changes before they become effective under the Fee Exception? Do commenters believe that such an opportunity is provided under the Rule 608(b)(1) and (2)?¹²

CII agrees with the Commission “that it is more important today than it was prior to the demutualization of the exchange SROs for members and other interested parties to have an opportunity, via the standard procedure, to express their views on a Proposed Fee Change after it is filed with the Commission but before it is effective and can be charged to market participants.”¹³ As we have indicated in prior comments to the SEC, we believe “[a]ccountability for transparency in market data . . . is particularly necessary because exchanges have a natural monopoly over market data their members generate with their trading activity, as well as a monopoly over access to their own markets, and they collectively control the governance of and the setting of fees for the Plans.”¹⁴

¹⁰ Ken Bertsch, Executive Director, Council of Institutional Investors, Remarks to the SEC Investor Advisory Committee, Discussion Regarding Stock Exchanges: Investor Protection Under the Modern Exchange Regulatory Structure 3 (Mar. 28, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/20190328%20IAC%20CII%20statement%20proposed%20v3.pdf (emphasis added); see Council of Institutional Investors et al. to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission 1 (Sept. 17, 2019), https://www.cii.org/files/issues_and_advocacy/correspondence/2019/SIP%20Transparency%20Petition%20-%20September%2017,%202019%20.pdf (CII and other petitioners requesting that securities information processors “fee filings be subject to notice and comment before they may become effective.”).

¹¹ 84 Fed. Reg. at 54,803.

¹² *Id.* at 54,800.

¹³ *Id.* at 54,799.

¹⁴ Council of Institutional Investors et al. to Ms. Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission at 1-2.

Our views on the impact of demutualization on stock exchange fee changes is but one element of our broader concerns about the existing regulatory framework for the stock exchanges in light of their for-profit status.¹⁵ On this point, the IAC Remarks of our Executive Director included the following comments:

There have been various times in recent decades when market participants have discussed whether the regulatory framework for securities exchanges in general is adequate in an era of commercial, for-profit exchanges that compete globally. We think it is time to revisit this topic. . . . We believe the exchanges have commercial interests that pose conflicts of interest affecting policy outcomes.

At one time, the New York Stock Exchange championed investor interests, for example in creating an effective regime for timely disclosure of material information from issuers, and in establishing the principal of one-share, one-vote.

Today's exchanges fundamentally differ from that model, focusing their ingenuity on ways to monetize their role as gatekeepers and holders of information that is critical to high-functioning capital markets, or expanding global market share in listings – and cross-selling other services to listed companies – with help from conducive listing standards.

CII has seen problems most clearly with reference to company listing standards, since CII has a strong corporate governance focus, and our members have a keen interest in listing standards for public companies. While exchanges can distinguish themselves by the strength of listing standards and the resultant quality of listed issuers, we see increasing evidence that for-profit exchanges globally compete in a race to the bottom, made clear with relation to dual-class stock by the Hong Kong Exchange, which in permitting dual class listings in 2018 cited pressures from competition with NYSE and NASDAQ.¹⁶

10. Does the availability of proprietary data products sold by some SROs mitigate the Commission's preliminary concerns about subjecting market participants to new fees prior to any review by the Commission or opportunity for comment? Do those proprietary data products represent viable, competitively-priced alternatives to the core data distributed by the NMS plan processors?¹⁷

We do not believe that the proprietary data products sold by some SROs represent viable, competitively-priced alternatives to the core data distributed by the NMS plan processors. As indicated in the IAC Remarks of our Executive Director: “With a handful of exchange

¹⁵ See Ken Bertsch, Executive Director, Council of Institutional Investors, Remarks to the SEC Investor Advisory Committee, Discussion Regarding Stock Exchanges: Investor Protection Under the Modern Exchange Regulatory Structure at 1-2.

¹⁶ *Id.* (footnote omitted); see generally Press Release, Council of Institutional Investors, Investors Petition NYSE, NASDAQ to Curb Listings of IPO Dual-Class Share Companies (Oct. 24, 2018), https://www.cii.org/files/issues_and_advocacy/correspondence/FINAL%20Dual%20Class%20Petition%20Press%20Release%20Oct%2024,%202018.pdf.

¹⁷ 84 Fed. Reg. at 54,800.

conglomerates controlling the dissemination and sale of essential market data [proprietary and core], market forces of supply and demand cannot independently provide a viable path for ensuring an optimal market.”¹⁸

If you have any questions regarding this letter or need additional information, please do not hesitate to contact me at [REDACTED] or [REDACTED].
Sincerely,



Jeffrey P. Mahoney
General Counsel

¹⁸ Ken Bertsch, Executive Director, Council of Institutional Investors, Remarks to the SEC Investor Advisory Committee, Discussion Regarding Stock Exchanges: Investor Protection Under the Modern Exchange Regulatory Structure at 3.