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December 10, 2019

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

Submitted via email: rule-comments@sec.gov

Re: Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments (Release No. 34-87193; File Number S7-15-19)

Dear Ms. Countryman:

Bloomberg L.P. respectfully submits these comments on the above-referenced proposal ("Proposal") by the Securities and Exchange Commission. Bloomberg applauds the Commission in proposing this common sense measure to reform the process by which National Market System Plans are permitted to impose new and increased fees that become legally effective without Commission action and before market participants even have notice or an opportunity to comment. The Proposal would eliminate a procedural exception whose main effect is to remove constraints on persistently increasing fees for sole-source market data. By promulgating the Proposal, the Commission can take a limited but important step to help investors by reforming market data fees.[1]

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Bloomberg Supports the Commission's Common Sense Proposal

Under Rule 608(b)(3), a National Market System Plan ("NMS Plan") may treat any proposed new fee or fee change as immediately effective upon filing with the Commission ("Fee Exception"). Although other types of NMS Plan amendments require Commission approval before taking effect, under this Fee Exception, a proposed fee is not subject to the standard notice and comment prior to Commission approval.

[1] *See* Proposal at 23 (question 1).

The collection, consolidation, and distribution of real-time core data is essential to investors and others who wish to participate in the market.[2] *See Order Granting Motion for Stay, Consolidating Proceedings, and Scheduled Briefs*, Exchange Act Release No. 83755, at 2–4 (July 31, 2018) ("SEC SAPI Order"), *available at* https://www.sec.gov/litigation/opinions/2018/34-83755.pdf. As the Commission notes throughout the Proposal, the public comment period is important, particularly with regard to NMS Plans. The comment period provides interested persons an opportunity to submit their views and data, and it allows the Commission to meaningfully evaluate public opinion and potential flaws in a fee proposal before that fee has already been imposed on market participants.

This public comment and approval process is particularly important when it relates to fees for essential core data, given the broad effect that NMS Plans have on the market. *See*, *e.g.*, Regulation NMS Release, 70 Fed. Reg. at 37,503, 37,560; *see also* 1999 Concept Release, 64 Fed. Reg. 70,613, 70,614 (December 17, 1999) ("This consolidated, real-time stream of market information has been an essential element in the success of the U.S. securities markets."). The NMS plans are intended to function as the market's broadest and most fundamental means of transparency and access. Yet, as the Commission notes, revenues generated through fees charged for core data totaled more than $500 million in 2017. *See* Proposal at 5. These core data fees, moreover, are paid by a wide range of market participants, including investors, broker-dealers, data vendors, and others. Retail investors who receive core data through their broker-dealers are affected by core data fees because fees paid by their broker-dealers can affect their ready access to full NBBO market information at reasonable prices passed on by broker-dealers.

Further, and as the Commission previously has noted, the plans responsible for providing core data are monopolistic providers of that data, so there is no market competition that can be relied upon to set competitive prices. Proposal at 21.[3] These fees result from the collective action of self-regulatory organizations that, generally speaking, face no competition from any substitute data product.[4] The Commission has previously stated that investors must have core data to participate

[2] Proposal at 5.

[3] The Commission has consistently and for many years recognized the lack of competitive constraints on "central processors of core data," which "have monopoly pricing power for such mandated data." SEC, ArcaBook Order, Exchange Act Release No. 59039 (Dec. 2, 2008), 73 Fed. Reg. 74,779, 74,786-88 & nn.244-45. "[S]erious antitrust questions would be posed if access to" core consolidated data "were not available on reasonable and nondiscriminatory terms to all in the trade or its charges were not reasonable." *Id.*; *see also* 1999 Concept Release, 64 Fed. Reg. at 70,627; *NetCoalition v. SEC*, 615 F.3d 525, 536 (D.C. Cir. 2010).

[4] The availability of so-called proprietary data products sold by some SROs does not mitigate the Commission's well-taken concerns regarding the lack of competitive constraints on market-data fees. Proposal at 25 (question 10). Because exchanges generate revenue from the SIP plans, plus additional (unshared) revenue from their proprietary data fees, they have no incentive whatsoever to cannibalize their own revenue streams by positioning them as more competitively priced alternatives to core data. *Id.* at 26. The Commission noted similar concerns with a lack of

in the U.S. equity markets. See SEC SAPI Order at 4. All broker-dealers are required to purchase core data to meet their regulatory obligations. Some use this information to comply with the requirements of Rule 611 or Regulation NMS to prevent trade-throughs. Pursuant to Rule 603(c) of Regulation NMS, known as the "Vendor Display Rule," if a broker-dealer displays any information with respect to quotations for or transactions in an NMS stock in certain contexts, it must also provide a consolidated display for such stock. Broker-dealers typically meet this regulatory requirement by paying for and using core data.

The Commission identified a number of the Proposal's benefits, with which we concur.[5] First, by eliminating the Fee Exception, no fees will be charged to market participants until after Commission approval. This benefits Plans and market participants alike by giving the Plans' fees (which are often considerable) the sanction and weight of the Commission's authority under the Exchange Act. Second, the Proposal will reduce the artificial pressure on the Commission to review and summarily abrogate a Proposed Fee Change within 60 days after filing. Abrogation of an NMS Plan amendment is rare. The Proposal notes (at pp. 32) that only two amendments have been abrogated since 2010. Requiring approval before a change in the status quo, rather than reversal of a new status quo after its unilateral imposition, allows the Commission to consider proposed amendments and seek out necessary information or input, rather than feeling pressure to engage in a suboptimal decision-making process as a result of an arbitrary and self-imposed deadline. Third, by providing notice and comment prior to effectiveness of any proposed fee, market participants will have the opportunity to prepare for any changes in the administration of the NMS Plan. Under the current regime, market participants regularly incur new or increased fees before they are even aware of them – not to mention have a chance to object to the Commission.[6]

One of the most noteworthy benefits of the Proposal is its rejection of the unorthodox burden-flipping now mandated by the Fee Exception. The Exception shifts the ordinary administrative burden in which agency action is necessary to approve, rather than arrest, quasi-regulatory action. Currently, NMS Plans (like SROs) bear the burden of justifying their fees as reasonable under the Exchange Act. *See* 17 C.F.R. § 201.700(b)(3); *In re BOX Options Exchange LLC*, Release No. 34-84168, at 7 (Sept. 17, 2018). Yet Rule 608's immediate-effectiveness regime effectively flips that burden: it allows fees to take effect without a Commission determination that the NMS Plan has met its burden. Indeed, the burden counterintuitively falls on the *Commission* to take action to intervene and disturb the new status quo as dictated by the NMS Plan. And if the Commission

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competitive pricing constraints surrounding the competing-consolidator proposal considered as part of the Reg NMS rulemaking. *See* Regulation NMS, Exchange Act Release No. 51808 (June 9, 2005), 70 Fed. Reg. 37,495, 37,570 (June 29, 2005) ("The overall level of fees would not be reduced unless one or more of the SROs or Nasdaq was willing to accept a significantly lower amount of revenues than they currently are allocated by the Plans. It seems unlikely that any SRO or Nasdaq would voluntarily propose to lower just its own fees and reduce its own current revenues, and some might well propose higher fees to increase their revenues, particularly those with dominant market shares whose information is most vital to investors.").

[5] Proposal at 23 (questions 1–2).

[6] *Id.* at 23 (question 3–4).

exercises its limited resources to review and suspend any fee or instituting proceedings, like any agency, it does so subject to reasoned decision-making requirements.[7] In effect, the Plan's burden to justify a fee transforms into the agency's burden to justify a suspension.[8]

The effective-upon-filing regime has concerned market participants for some time. Dating back to at least 2004, when the Commission was in the process of promulgating Reg NMS, several commenters "advocated eliminating the effective-upon-filing procedure."[9] They argued that the process "gave excessive power to self-interested parties and did not facilitate informed and meaningful public and industry participation and comment."[10] Market participants more recently have identified the effective-upon-filing provision as a source of unfairness and dysfunction in the markets. In 2017 and 2018, a number of market participants petitioned the Commission requesting, in part, that the Fee Exception be rescinded.[11] One of the petitions was submitted by 24 firms representing a broad cross section of market participants, including institutional investors, broker-dealers, and data vendors. Proposal at 16.

That consistent frustration is easy to understand. Since NMS Plan fees represent a private action that effectively has the force of law, one would expect a requirement of agency action *beforehand*, not the mere absence of intervention after the fact. Nothing about the fees' promulgation by the exchanges' operating committee – which function without transparency or representation – ensures

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[7] *See generally Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29 (1983); *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir.2011).

[8] For this reason, Bloomberg agrees that the Commission's Proposal is superior to a modified abrogation approach in which fees would not be effective immediately upon filing, but would automatically take effect some time period after filing. Such an alternative approach (while an improvement over the current Fee Exception) would not address the burden-shifting problems discussed above that diminish the NMS Plans' explanatory obligations and increase the Commission's and commentators' obligations to intervene. *See* Proposal at 24 (question 5).

[9] Proposal at 15.

[10] *Id.*

[11] *See Petition for Rulemaking Regarding Market Data Fees and Request for Guidance on Market Data Licensing Practice* (Aug. 22, 2018) (SEC 4-728) at 2, 11, *available at* https://www.sec.gov/rules/petitions/2018/petn4-728.pdf (noting that Section 11A does not mandate that SIP fee increases be effective upon filing and expressing the public's need for time to comment); *Petition for Rulemaking Concerning Market Data Fees* (Dec. 6, 2017) (SEC 5-716) at 8, *available at* https://www.sec.gov/rules/petitions/2017/petn4-716.pdf ("December 6, 2017 Petition") (similarly noting that Section 11A of the Exchange Act does not speak to the immediate effectiveness of SIP fee filings, and proposing that the Commission remove paragraph (b)(3)(i) from Rule 608); *see also* Letter from Melissa MacGregor, SIFMA (May 21, 2018) at 1, *available at* https://www.sec.gov/comments/4-716/4716-3678964-162455.pdf (endorsing the December 6, 2017 Petition's proposal, among other things, that the Commission repeal immediate effectiveness for SIP fee filings).

or even suggests that fees are trustworthy or benign in a way that renders them presumptively compliant under the Act.

The Proposal's framework, by contrast, reflects a number of improvements:

- From the Commission's perspective, the new process would provide i) more information, ii) at an earlier point in the agency decision-making process, iii) from perspectives besides that of the SROs on the operating committees, and iv) before the status quo has been shifted by the imposition of new fees. Rather than relying on self-serving information from the Plans and rushed comments from market participants seeking to overturn an action, the new process allows the Commission to regain control of its docket and make decisions based on information and timing that facilitates reasoned decision-making.
- From market participants' perspective, the new process would i) allow for notice *before* fees have already been imposed, ii) foster a more meaningful comment process, and iii) shift the burden of persuading the Commission to act back to the NMS Plan, which bears the legal burden and possesses the most relevant information.
- And from the investors' perspective, the new process should over time result in simpler, clearer, and more reasonably priced fees. Rather than create incentives to enact more fees with ambiguous terms that Plans can later clarify through enforcement, the Proposal creates incentives to enact fewer amendments with clearer and better-justified fees.

The current effective-upon-filing regime is subject to abuse.

As the Proposal makes clear, the issue of NMS Plan fees is more important today than it was prior to the demutualization of the exchange SROs. Proposal at 22.[12] Demutualized, for-profit SROs are no longer disciplined by their membership to charge reasonable fees tied to the costs of distributing market data. *NetCoalition I*, 615 F.3d 525 (D.C. Cir. 2010). To the contrary, they are motivated to maximize every source of revenue. This increases the urgency and importance of Commission scrutiny under the Act. *See Rulemaking Petition Concerning Market Data Fees* (December 6, 2017), *available at* https://www.sec.gov/rules/petitions/2017/petn4-716.pdf.

Rule 608's Fee Exception is subject to abuse or perverse policy incentives in several respects.

First, the NMS Plans offer a critical single-source product not constrained in its pricing by market competition. "SIPs have significant market power in the market for core and aggregated market data products and are monopolistic providers of certain information, which means that for all such products they would have the market power to charge supracompetitive prices." Proposal at 33 (internal citations omitted). Not only is the full aggregated complement of core data across exchanges available only through the SIP, but certain information within that set, such as the Limit Up Limit Down plan price bands, is not available anywhere else besides the SIP.

[12] *See also* Proposal at 25 (question 7).

Second, an immediately effective fee filing can artificially create pressure and urgency on market participants and the Commission to act, when an effective-upon-*approval* regime would allow for more reflective and efficient decision-making. One example is CTA's "SAPI proposal." *See* SEC Release No. 34-82071 (Nov. 14, 2017) (File No. SR-CTA/CQ-2017-04). The full and tortured history of this twice-withdrawn fee filing is set forth in the Commission's well-reasoned decision staying the filing and will not be rehashed here.

In short, years after CTA imposed high new fees for "non-display" use of core data (itself a hugely important rule change that the Commission, because of Rule 608, has not affirmatively approved), the NMS Plan sought to "clarify" that the fees applied to a display-based API. In order to avoid a unilateral reclassification that would have drastically imposed fees (potentially after the fact) upon unwitting investors, Bloomberg had to file a challenge under Rule 608 and Section 11 of the Act, prepare and lodge a stay application with the Commission, and prepare its business and customers in the event the Commission decided not to take immediate action before the new fees took effect. In this instance, the Commission issued a well-reasoned and timely decision that highlighted many of these problems caused by the Fee Exception and stayed the rule change before it could take effect. But that represented a tremendous disruption for the marketplace and investment of resources by Bloomberg and the Commission that is simply untenable for each and every suspect fee filing. Under the Proposal, the NMS Plan would have rationally borne the burden of explaining and persuading why its retroactive fee "clarification" was justified *before* imposing these costs on others.

Third, other SRO fee filings outside the NMS context illustrate these same procedural problems that exist with the effective-upon-filing regime for NMS Plans. In recent years, some SROs have filed new fees that fall short of the standards set forth in the Commission's *In re SIFMA* decision and the staff's guidance for new fee filings. *See* Exchange Act Release No. 84432 (October 16, 2018); Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019).[13] *See also, e.g., In re BOX*, Release No. 34-85459, at 23 (Mar. 29, 2019); *Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule*, Exchange Act Release No. 34-86342 (July 10, 2019) (File No. SR-MIAX-2019-31), *available at* sec.gov/rules/sro/miax/2019/34-86342.pdf (filing for the fifth time an increase to connectivity fees where the first four filings failed for a lack of sufficient data and information to justify the fee increase). Because of the effective-upon-filing regime under Section 19 of the Act, which mirrors that of Rule 608, the burden effectively shifts from the SROs to justify those fees onto the Commission to suspend them in light of their insufficient justification under the Act.[14]

[13] The Proposal is correct to connect compliance with staff guidance with the speed and effectiveness of fee filings. Proposal at 25 (question 9). Whether additional guidance is necessary to streamline the process is questionable given that existing SEC staff guidance sets forth the cost-based and other data necessary to justify new and increased fees under the Exchange Act. *Id.*

[14] We appreciate the difference in the legal basis for the fee-filing requirements of NMS and SRO amendments. But the Commission has long recognized that Rule 608's regulatory filing requirements for NMS Plans differ from the Section 19's statutory filing requirements for SROs. *See* Securities Exchange Act Release No. 17580 (Feb. 26, 1981), 46 Fed. Reg. 15866 (Mar. 10, 1981) ("The Commission does not believe that it was the intent of Congress to treat NMS Plans as

The Commission and its staff have done an admirable job in "holding the line" against unjustified filings. But those repeated efforts to suspend fees, often in the face of petitions for review that seek to take advantage of an "automatic stay" provision, *see* SEC Rules of Practice, Rule No. 341(e), come at a cost in agency and market resources that would never have been required absent the unorthodox effective-upon-filing regime.

Fourth, the Fee Exception creates perverse incentives for NMS Plans to promulgate unclear rules that need clarification after the fact. In many cases these ambiguities may be innocent or inadvertent; in others perhaps less so.[15] The critical point is not that these amendments are necessarily justified or unjustified under the Act; it is that they each purported to become effective *before* key questions about their scope and effect had to be asked and answered *after* the status quo had already shifted. This creates problematic questions about retroactivity and the need for wholesale Commission suspension in order to resolve issues that perhaps could have been identified and resolved during the normal administrative process before amendments took effect in the first place.

While the Proposal is a commendable step in the right direction, broader governance reform remains essential.

To be clear, Bloomberg supports the Proposal without reservation. We commend the Commission for undertaking the most serious and thoughtful reforms in the market-data space, many of which discuss the concerns Bloomberg and others have with the Fee Exception and provide independent evidence and support for this Proposal. *See* Equity Market Structure Roundtable on Market Data and Market Access (October 26, 2018), *available at* https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-marketdata-market-access-102618-transcript.pdf; *In re SIFMA*, Exchange Act Release No. 84432 (October 16, 2018). The Proposal comes at a time of rising market-data expenditures, *see* SIFMA comment letter, Market Data Roundtable comment file (No. 4-729) (attaching data-fees study), available at https://www.sec.gov/comments/4-729/4729-4559181-176197.pdf, even though the costs of relevant technology and the provision of market data should generate fees far lower than those imposed by the exchanges for both core and non-core data, *see* IEX, *The Cost of Exchange Services* (Jan. 2019), *available at*

analogous to SRO rules and thereby incorporate the provisions of Section 19 into Section 11A(a)(3)(B). To the contrary, the legislative history of the Securities Acts Amendments of 1975 ('1975 Amendments') indicates that Congress viewed the Commission's authority in Section 11A(a)(3)(B) as distinct from its authority contained in Section 19 or any other provision of the Act."). That many of the same considerations afflict the SRO fee-filing process is a reason why the Commission should continue to abrogate unsupported fee increases, not an argument against improving the NMS Plan fee-filing process.

[15] Examples include CTA's 2017 non-display fee "clarification" that was ultimately stayed in the SEC's SAPI Order, *see* Exchange Act Release No. 82071 (Nov. 14, 2017), 82 Fed. Reg. 55,130, 55,134; UTP's 2017 "derived-data" fee filing clarification, *see* Exchange Act Release No. 34-82072 (Nov. 14, 2017) (File No. S7-24-89); and the NMS Plans' original 2014 "non-display" fee filings, *see* Exchange Act Release No. 73278 (October 1, 2014), 79 Fed. Reg. 60,536.

https://iextrading.com/docs/The%20Cost%20of%20Exchange%20Services.pdf. Given those pressures and developments, Bloomberg agrees with the Commission that the benefits of this Proposal far exceed any conceivable costs. *See* Proposal at 36–40. Indeed, the Proposal is unlikely to have a significant immediate effect on the cost of core data, since the Proposal does not decrease, or otherwise amend, any particular fee currently in existence.

In light of that limited initial impact, Bloomberg reiterates its position—shared across the landscape of market participants—that broader NMS and SIP governance reforms remain warranted. *See generally* SIFMA Letter to SEC Market Data Roundtable file (Oct. 24, 2018) at 21–28, *available at* https://www.sec.gov/comments/4-729/4729-4559181-176197.pdf; *Rulemaking Petition Concerning Market Data Fees*, (December 6, 2017) *available at* https://www.sec.gov/rules/petitions/2017/petn4-716.pdf. Each of the NMS plans is governed by an operating committee composed of one voting representative from each SRO participant. Non-SROs are not represented on the operating committee and thus have no voice in how fees are established or amended. The process is not transparent or reflective of basic Exchange Act priorities related to wide access to and distribution of market data. 1999 Concept Release, No. 42208 (Dec. 9, 1999), 64 Fed. Reg. 70,613, 70,614. These NMS-specific issues are of course in addition to, not in lieu of, the broader concerns the industry and the Commission has raised with respect to non-core "proprietary" data fees. *In re SIFMA*, Exchange Act Release No. 84432 (October 16, 2018). The proliferation of both NMS and SRO fees serve as a burden on U.S. investors and market efficiency, and both amply deserve the Commission's commendable investment of its policymaking resources.

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Bloomberg respectfully urges the Commission to rescind the Fee Exception and approve the Proposal.

Very truly yours,

Gregory Babyak
Global Head of Regulatory Affairs, Bloomberg L.P.