



Derrick Chan
Head of Equity Trading and Sales
Fidelity Capital Markets
155 Seaport Blvd, ZW11A, Boston MA 02210
[REDACTED]

December 10, 2019

Submitted electronically

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

Re: Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments; File No. S7-15-19

Dear Ms. Countryman,

Fidelity Investments (“Fidelity”)¹ appreciates the opportunity to provide comments on the Securities and Exchange Commission’s (“Commission” or “SEC”) proposed rescission of effective-upon-filing procedures for national market system (“NMS”) plan fee amendments (“Proposed Rule”).² The Proposed Rule would amend Regulation NMS under the Securities Exchange Act of 1934 (“Exchange Act”) to rescind a provision that allows a proposed amendment to a NMS plan to become effective upon filing if the proposed amendment establishes or changes a fee or other charge (the “Fee Exception”). As a result of rescinding the Fee Exception, such a proposed amendment instead would be subject to the procedures set forth in Rule 608(b)(1) and (2) that require the Commission to publish the proposed amendment, provide an opportunity for public comment, and preclude a proposed amendment from becoming effective unless approved by the Commission by order (the “Standard Procedure”).

¹ Fidelity and its affiliates are leading providers of mutual fund management and distribution, securities brokerage, and retirement recordkeeping services, among other businesses. Fidelity submits this letter on behalf of National Financial Services LLC (“NFS”), a Fidelity Investments company, a SEC registered broker-dealer clearing firm and FINRA member; Fidelity Brokerage Services LLC, a SEC registered introducing broker-dealer, FINRA member, and affiliate of NFS; and Fidelity Management & Research Company, the investment adviser to the Fidelity family of mutual funds.

² Securities and Exchange Commission *Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments*, 84 FR 54794 (October 11, 2019) available at: <https://www.govinfo.gov/content/pkg/FR-2019-10-11/pdf/2019-21770.pdf> (the “Proposal” or the “Proposed Rule”). Capitalized terms have the meaning ascribed to them in the Proposal.

Fidelity has an interest in the Proposed Rule as an entity subject to NMS plan fees. Fidelity pays considerable, and escalating, market data fees when it seeks to obtain access to real-time market information (“core data”) that is distributed through the CTA, CQ, Nasdaq/UTP and OPRA NMS Plans. Core data is necessary for us, and for our retail and institutional customers, to access the U.S. equity markets, to make informed investment decisions, and to meet our regulatory requirements.³ Fidelity is also an Industry Member to the CAT NMS Plan and has an interest in commenting on proposals by national securities exchanges (“SROs”) to allocate costs for the CAT system between the SROs and Industry Members, before we are subject to those costs.

Fidelity strongly supports the Proposed Rule and has previously advocated for the Commission to review and rescind the Fee Exception to allow public comment on NMS plan proposed fee changes before they are effective.⁴ Given the substantial amount, broad effect, and potential conflicts of interest in SROs setting NMS plan fees, we recommend that a proposed NMS plan fee change should only become effective after a public comment period and Commission approval by order is complete.

Executive Summary

- The SEC should update Rule 608(b)(3)(i) to reflect the modern status of SROs.
- The SEC should revise Rule 608(b)(3)(i) to ensure stakeholders have a meaningful opportunity to review and comment on proposed NMS plan fees, before the fees go into effect.
- In addition to updating Rule 608(b)(3)(i), the Commission should update rules concerning NMS plan governance.

Each of these items is discussed in further detail below.

The SEC should update Rule 608(b)(3)(i) to reflect the modern status of SROs.

³ Fidelity broker-dealers need access to core data to meet their regulatory obligations including but not limited to receipt of Limit Up, Limit Down Price Bands and information relating to regulatory halts and market-wide circuit breakers; to perform checks required by Rule 15c3-5 under the Exchange Act (“market access rule”); to comply with Rule 611 of Regulation NMS to prevent trade throughs and meet their duty of best execution for customer orders; as well as to meet regulatory obligations under Rule 603(c) of Regulation NMS, the Vendor Display Rule, which requires that if a broker-dealer displays any information with respect to quotations for or transaction in an NMS stock in certain contexts, it must also provide a consolidated display (using core data) for such stock.

⁴ *Petition for Rulemaking Concerning Market Data Fees* (Dec. 6, 2017)(SEC 5-716), available at: <https://www.sec.gov/rules/petitions/2017/petn4-716.pdf>; SEC Press Release *Roundtable on Market Data and Market Access— SEC Staff to Host Roundtable on Market Data and Market Access* (Sept. 24, 2018) available at: <https://www.sec.gov/news/press-release/2018-210>; Fidelity Comment Letter on Roundtable available at: <https://www.sec.gov/comments/4-729/4729-4566044-176136.pdf>

The role of SROs has changed significantly since the Fee Exception was adopted in 1981. In the intervening thirty-eight years, SROs have transitioned from member owned, not-for-profit organizations to for-profit, public companies. For-profit SROs now compete directly with their broker-dealer customers for order flow while maintaining their regulatory status. This means that competitors to broker-dealers set the price for core data that broker-dealers have a regulatory obligation to purchase. Similarly, SROs, as competitors to broker-dealers, are charged with allocating costs between SROs and Industry Members for the CAT, a market-wide audit trail system in which broker-dealers are regulatorily required to participate.

In addition to SROs setting prices for the core data and CAT fees that their broker-dealer competitors must pay, the SROs have no competition for the NMS plans they oversee, nor the NMS plan fees that they charge. The SEC has noted that where NMS plans responsible for providing core data are the sole providers of such data, there is no market competition that can be relied upon to set competitive prices.⁵ Similarly, the SROs are the sole administrators of the CAT. The only constant since the Fee Exception was adopted is the regulatory status of SROs. In the context of core data and CAT fees, the regulatory status of SROs presents a potential conflict of interest, notably the potential for misaligned incentives when a competitor is also a regulator.

The transition of SROs from member owned utilities to for-profit public companies has also resulted in less opportunity for broker-dealers to provide their comments on NMS plan proposed fee changes before they become effective. It is thus even more important today for broker-dealers and other interested parties to have an opportunity to express their views on a proposed NMS plan fee change, before that fee becomes effective.

Rule 608(b)(3)(i) should be revised to ensure stakeholders have a meaningful opportunity to review and comment on proposed NMS plan fees, before the fees go into effect.

A positive implication of the Proposal to rescind the Fee Exception is that it would give commenters an opportunity to provide their views on a proposed NMS plan fee change *before* they are charged a new or altered fee. NMS plan fees affect a wide variety of market participants and comments from market participants should be an important part of the SEC's review of a proposed fee change. Market participants can provide practical, on-the-ground observations regarding a new or amended fee that may not be evident to SEC staff during their review. Unfortunately, these industry comments may be lost in the current environment where market participants often only learn of a new or altered fee upon its immediate effectiveness when filed with the SEC.

⁵ Proposal at 54799 quoting *In the Matter of the Application of Bloomberg L.P.*, Securities Exchange Act Release No. 83755 at 3 (July 31, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-83755.pdf>. "Because the CTA, CQ, and Nasdaq/UTP plans establish the only processors to whom exchanges and associations are required to report their NMS stock data under Rule 603(b) of Regulation NMS, they effectively have a monopoly over core data."

Similarly, under the current environment, investors and market participants may not have adequate notice or opportunity to prepare for an NMS plan fee change before it is charged. Under the Fee Exception today, even if the SEC subsequently abrogates a proposed fee change, the NMS plan fee is effective immediately upon filing and remains effective during the time period between its SEC filing and abrogation, leaving little opportunity to prepare for a new expense to business operations.

In addition to a public comment period, Commission approval by order should be required before a proposed NMS plan fee change can become effective. We do not believe that it would be appropriate for the Commission to modify the abrogation procedures in Rule 608(b)(3)(iii) such that proposed NMS plan fee changes become automatically effective some time period (e.g., 60 or 90 days) after filing if the Commission does not take specific action. We have seen an example of this alternative process developed as a part of the Dodd-Frank Act's changes to Exchange Act Section 19(b)(2).⁶ This alternative process was designed to address SRO competitive concerns with SEC administrative delays when reviewing individual SRO proposed rule changes. We do not see the same competitive concerns with proposed NMS plan fee changes given the lack of competition for NMS plan fees. Commission review and approval by order should be required before an NMS plan fee is effective, given the lack of competition for NMS plan fees.

The Commission should update rules concerning NMS plan governance.

NMS plans are overseen by Operating Committees, comprised of the SROs, and an Advisory Committee which includes, among others, broker-dealer, asset manager and vendor representatives. NMS plan Operating Committees typically meet in an executive session to analyze, discuss and vote on important market structure initiatives, including votes on proposed fees. NMS plan Advisory Committee members act in a consultative role on select issues that the Operating Committees choose to bring to them, and Advisory Committee members are not invited to, nor do they have a vote on, matters discussed in Operating Committee meetings.

Similar to the Fee Exception, the SEC should update NMS plan governance to reflect modern markets. Given changes to U.S. equity market structure since the NMS plan governance model was first established, notably the changed status of SROs, it is critical that broker-dealers and asset managers have representation on NMS plan Operating Committees to help ensure accountability and to help promote better outcomes for all market participants.

#

⁶ H.R. 4173, *the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* ("Dodd-Frank Act") Section 916(a) amended Section 19(b) of the Exchange Act to update the filing and approval procedures applicable to rule changes proposed by SROs. Under this process, among other items, a proposed SRO rule change will be deemed approved by the SEC if the SEC fails to approve it or begin proceedings to disapprove, or if it fails to issue an order approving or disapproving the change, within the prescribed time periods (Exchange Act Section 19(b)(2)(D)).

Secretary, Securities and Exchange Commission

December 10, 2019

Page 5 of 5

Fidelity would be pleased to provide further information and participate in any direct outreach efforts the Commission undertakes regarding the Proposed Rule.

Sincerely,

A handwritten signature in blue ink, appearing to read "Derrick Chan".

Derrick Chan

cc: The Honorable Jay Clayton, Chairman
The Honorable Robert J. Jackson, Jr., Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Allison Herren Lee, Commissioner

Brett Redfearn, Director, Division of Trading & Markets
David S. Shillman, Associate Director, Division of Trading & Markets