December 11, 2017

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

Re: **Notice of Filing and Immediate Effectiveness of the Twenty-Second Charges Amendment to the Second Restatement of the CTA Plan and the Thirteenth Charges Amendment to the Restated CQ Plan (Release No. 34-82071; File No. SR-CTA/CQ-2017-04)**

Dear Mr. Fields,

SIFMA[1] appreciates the opportunity to submit comments in response to the above-referenced Notice of Filing and Immediate Effectiveness of the amendments ("Amendments") to the CTA Plan and the CQ Plan (collectively, the "Plan"), which was published in the Federal Register on November 20, 2017 (the "Notice"). As described in greater detail in the Notice, the CTA has amended the Plan's fee schedule and non-display use policy to expand the applicability of the non-display fee and the access fee. SIFMA respectfully requests that the Commission abrogate the Amendments pursuant to Regulation NMS Rule 608(b)(3).

The Amendments, as published and as currently interpreted by the CTA Plan administrator, the New York Stock Exchange ("NYSE"), represent a massive fee increase to market participants, particularly small and mid-size firms. The Amendments constitute a set of incoherent definitions and fees, the applicability of which are entirely dependent upon and subject to the CTA's unilateral interpretations. We believe the fees represent an abuse of the CTA's control over monopoly data, as well as a violation of long-standing policy on characterization and treatment of this data, and an unfortunate rejection of the Trump Administration's recent guidance on market data. In this letter, we provide our views on the Amendments as well as our views on the current shortcomings of the governance and procedures to amend NMS plans.

SIFMA has long been concerned about both the lack of accountability and transparency regarding the maintenance of the CTA and UTP Plans and the extraordinary fees charged for

[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

market data. These concerns are inextricably linked. The lack of transparency as to process makes possible the usurious fees and epitomizes how markets and investors are ill-served by our failing market data regime as presently administered. Of course, the data which is the subject of this massive fee increase is top-of-book data -- a monopoly product.

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

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

On March 23, 2017, the Commission published the Notice of Filing and Immediate Effectiveness of the Plan Amendments to the Commission's website. According to this Notice, the CTA had filed a "clarification" regarding "certain fees relating to display and non-display use and when access fees are applicable."[2] The Notice stated that the fee schedules would be amended to "explicitly state that any use of data that does not make data visibly available to a data recipient on a device is a Non-Display Use." Additionally, the Access fee would now apply to non-display use, and where "the data recipient receives the data in such a manner that the data can be manipulated and disseminated to one or more devices, display or otherwise, regardless of encryption or instruction from the redistribution vendor…".

While the scope and target of these fees were unclear in the public filings, NYSE separately provided non-public correspondence which provided enormous clarity.[3] While we do not know whether multiple vendors received multiple and potentially conflicting letters, we do know that in a letter to at least one vendor dated March 27, 2017, a New York Stock Exchange Director explained to Bloomberg LP's Exchange Business Manager that customer use of Bloomberg's Server API product ("SAPI") would now be considered Non-Display Use.[4] Consequently, SAPI users would be subject to the Non-Display fee and the Access fee.

As we observed at the time, SAPI is perhaps the quintessential display product. It had been treated as a display, non-datafeed terminal product since 2004. That treatment as a display/non-datafeed terminal product continued with the inception of the Display/Non-Display distinction in 2014. Based on NYSE's letter that SAPI is now a Non-Display product, we cannot imagine a product that would qualify as Display Use.

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

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

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

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

In 2014, arguing that black box computers were depriving the exchanges of revenue, the exchanges imposed a new fee for non-display use of data. The amendment took effect upon filing, and defined Non-Display Use as "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. It does not apply to the creation and use of derived data."[5] Consequently, at the time the definition of Non-Display Use was adopted by the CTA, it was clear that Non-Display Use would not apply when the data was visibly available, including, without limitation, the creation and use of derived data.

As noted above, in March 2017, the Participants filed the Proposed Amendments purportedly clarifying the fees relating to display and non-display use and when the access fees are applicable. In at least one letter to a vendor, NYSE ignored the visual display aspect of the definition of Non-Display Use.[6] In its March 27, 2017 letter to Bloomberg, NYSE offered an interpretation that seemed to obliterate the difference between "display" and "non-display" by deeming SAPI as a Non-Display Use. Under the terms of the letter, "display uses" as everyone has understood them would inexplicably be now defined as "non-display," regardless of whether the data was visibly available.

In addition, and because the data recipient's use is considered to be Non-Display Use, recipients of the data would also be charged the Access fee. Consequently, the "no-fee increase," as the Amendments were originally touted, had become massive fee increases imposed on end users of *top of book* data. The Amendment was withdrawn on April 27, 2017.

Redefining "Datafeed" and Vastly Expanding Access Charges

Unfortunately, the re-proposal Notice does little to cure the legal infirmities of the initial proposal, but creates a host of new problems. While including the Plan Administrator's interpretation of the Amendment in the Notice -- rather than as a private letter to a single vendor -- represents some modest procedural progress, the portions of the Notice that are understandable violate the Act. Other portions of the Notice are ambiguous.

Indeed, it should be noted that these Amendments represent a significant change from the policy of 2014. If a vendor were in violation of an existing policy, we would expect the CTA to take the

[5] https://www.sec.gov/rules/sro/nms/2014/34-73278.pdf

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

audit and contractual steps necessary to enforce the existing policy against that vendor. Instead we are seeing a major policy change packaged as an effort to enforce existing policy.

The changes being proposed are significant. The Non-Display Use fees and Access fees are vastly increased and they will have a disproportionately large impact on small- and mid-size firms. For example, a firm that previously received Network A data from the CTA, and made the data available to 10 professional devices for display use only, would have paid approximately $270 per month. Instead, the professional devices would now be considered a non-display use, and the firm would thus need to pay the Network A access fee of $2,000 per month and the Non-Display Use fee of $4,000 per month merely to obtain the same last sale price and quotation information. For this hypothetical firm, the fee will have increased $6,000 per month, or over 2,000%, for the same top of book data. [7] If the firm also receives last sale price and quotation information for Network B securities, the firm will have to pay an additional $1,000 in Access fees and $2,000 in Non-Display Use fees on top of the professional device fees. Overall, fees for both Network A and Network B securities could increase by as much as $9,000 per month.[8]

Every firm that is subject to a similar NYSE interpretation of the Amendments will experience a similar price increase, depending on the number of professional users for each firm. We can be sure that an extraordinary number of investors will be facing a significant impediment to their ability to access core data.[9]

Additionally, the NYSE CTA fees apply "per NYSE market data account."[10] Thus the fee increases could be higher for those affected firms (of any size) that do not have a single global account number with NYSE.

The redefinition of "datafeed" will increase the number of market participants bearing these significant and unjustified costs as well as their administrative burden. Rather than engage in what the CTA dismissively characterizes as a "technical discussion" of whether a feed is a "datafeed per se", the CTA simply dispenses with that analysis and expands the definition of "datafeed" beyond previously known bounds. With the additional fees, come additional obligations, including a monthly reporting obligation to the CTA. Direct reporting and payment obligations to NYSE can impose tremendous administrative burdens on firms, especially for smaller customers. Such administrative burdens coupled with significant fee increases may

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[7] Since standard practice is for professional device fees to be paid at the entity level, we have calculated the percentage increase in fees conservatively by choosing the aggregate device fees payable by the entity as the basis. A firm that makes data available to fewer professional devices would experience a greater increase in fees on a percentage basis.

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

[9] SIFMA does not know the intentions of the NMS plan sponsors for Network C securities or the exchanges that provide depth of book data, but it is reasonable to assume that others may undertake similar rulemakings if this is permitted to stand. In fact, the participants of the UTP Plan filed with the Commission an amendment to the UTP Plan which appears to initiate fees for the Non-Display Use of derived data. SIFMA will likewise challenge that fee increase. *See* Securities Exchange Act Release No. 82072 (Nov. 14, 2017), 79 FR 55137 (Nov. 20, 2017).

[10] *See* CTA Market Data Non-Display Use Policy available at: https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Policy%20-%20CTA%20Non%20Display.pdf

deprive smaller customers of the opportunity to continue to receive and use CTA data in the way they were permitted before the Proposed Amendments.

The amended definition of "display/non-display" is also problematic. The initial rationale of display/non-display was to ensure that algorithmic trading boxes were not replacing eyeballs. But Bloomberg's SAPI provides encryption and entitlement that technologically ensure that no eyeballs are lost, and usage that exceeds volume caps triggers warnings and audits. SAPI is clearly a display product, which is why SIFMA fears that display products are being defined out of existence without any rationale consistent with the Exchange Act.

Even the efforts to provide reassurance underscore the lack of clarity. For example, the Amendment notes:

> "The device fee contemplates that once that data has been visibly displayed via a graphical user interface, it can be exported via a data delivery exchange to a format such as Excel for further display use. For example, for a Professional Subscriber, use of Bloomberg's Excel add-in features, would be subject to the existing device fee, currently set at a maximum of $45 per unit, and it would not be considered Non-Display Use. As described above, this category would not subject a subscriber to any access fees."

While we would oppose the reclassification of Excel, we do note that data is not exported to Excel for display only. It is exported to Excel to carry out calculations on the data. Indeed, calculations on the data can usually be carried out within the "graphical user interface" itself. These changes create business and legal uncertainty without adequate notice for customers or for the Commission.

The impact of these amendments on third party software providers is also troubling. Third-party software providers that use Bloomberg SAPI to reach their broker-dealer clients will be disadvantaged, but the broader impact of these Amendments relating to third-party software providers and vendors is unclear. The Amendments provide:

> "Additionally, if a subscriber is able to access a vendor's servers, choose what data to download onto its own system, and then incorporate that data into the subscriber's system and software, then the subscriber will be subject to the access fee. If, however, a subscriber is accessing a platform provided by a third-party where the data is being incorporated into and manipulated by the third-party's software, then the subscriber accessing that platform will not be subject to the access fee; instead the third-party software provider will be subject to the access fee."

Thinking along the lines of a modular container based desktop, this seems to be saying that if a firm creates an application (e.g., a simple heat map which utilizes the data being supplied to the desktop) which functions within a desktop container (assuming it cannot move or redistribute data outside of the container) then the party who created that application would be liable for the Access fee as well. Would that party pay one Access fee for all their desktops, and then if they allowed third-party developers/subscribers to create bespoke applications within that desktop, those developers would then have to pay the Access fee as well?

For example, if a vendor creates a platform allowing the data to be incorporated into and manipulated by applications provided by Microsoft (e.g., Excel, etc.) would this mean Microsoft would also need to pay the Access fee in addition to that paid by the vendor or would they be covered under the fee which the vendor has already paid?

Historically, the exchanges have created multiple, non-cost based, non-justified fees, even in instances where there was no ambiguity or interpretation to be had. For example, NYSE Arca recently filed for immediate effectiveness a fee increase of 50% for non-display use of certain depth of book data.[11] The exchanges have also attempted to limit the Commission's ability to review exchange fee increases through the legislative process.[12] The lack of clarity surrounding the Amendments at hand compounds the exchanges' collusion to control access and reap unwarranted gains from their control of this most basic information firms and their customers need in order to make informed investing and trading decisions – information that firms and their customers are responsible for creating in the first place.

Top-of-Book Data, Capital Formation, and the Trump Administration

As the Commission is aware, SIFMA has been engaged in the so-called "*NetCoalition/SIFMA*" litigation for more than a decade. In the course of this litigation, the U.S. Court of Appeals for the District of Columbia has held -- based on the extensive record relating to the contested depth-of-book fees before the Court -- that the Commission's previous justifications did not demonstrate that competitive forces constrained prices for depth-of-book data. SIFMA has pursued this litigation, which is now on remand before the Commission, because of the critical import of depth-of-book data.

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

Not only must top of book data be readily available, but the SEC has also long held that top of book data fees must bear a reasonable relationship to cost. The Court of Appeals adopted this view. Specifically, "The SEC has determined that because of the mandatory nature of this regime, core data fees should bear some relationship to cost."[13] The SEC has determined that fees charged for core data "need to be tied to some sort of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low."[14]

To date, there has been no demonstration of a cost-based justification for any fee increase, let

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[11] *See* Securities Exchange Act Release No. 82100 (Nov. 16, 2017), 82 FR 55660 (Nov. 22, 2017). See also

[12] *See* Exchange Regulatory Improvement Act: Unintended Consequences for U.S. Exchange Regulation? available at https://www.hoganlovells.com/en/blogs/fision/exchange-regulatory-improvement-act-unintended-consequences-for-us-exchange-regulation

[13] *NetCoalition v. SEC*, 615 F.3d 525, 529, n. 2 (D.C. Cir. 2010)("*NetCoalition/SIFMA I"*).

[14] *NetCoalition v. SEC*, 715 F.3d 342, 346 (D.C. Cir. 2013)("*NetCoalition/SIFMA II"*).

alone a 2,000% fee increase. Indeed, the exchanges state the need to ensure "appropriate contributions to the costs of collecting, processing, and redistributing the data" but fail to understand that the first and essential step in that process is providing cost data that only they possess.[15]

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

As the administration focuses on instances of potentially excessive regulation, it is worth noting that self-regulatory organizations ("SROs") impose about 1,500 fees or regulatory changes annually. Some of these proposals are of little impact, but many -- including this fee "clarification" -- combine the toxic elements of being enormously burdensome and immediately effective without opportunity for public review. The cost and burden of ill-advised SRO regulation cannot be overstated.

In its recent report to the President entitled "A Financial System That Creates Economic Opportunities," the Treasury Department consulted with FSOC member agencies and noted that neither SIP nor depth-of-book data are subject to effective competitive forces; that depth-of-book data from one exchange is not substitutable for depth-of-book data from another exchange; and that the SEC has authority to ensure fees are "fair and reasonable," "not unreasonably discriminatory," and represent an "equitable allocation of reasonable fees among persons who use the data." The Treasury Department recommended that the SEC "consider these factors when determining whether to approve SRO rule changes that set data fees."[16]

A CTA Process That Thwarts the Public Interest

The CTA asserts that the Proposed Amendment was "discussed in length" and that "no Advisory Committee member voiced an opposition to the proposed amendment, and some were quite vocal in their support…" We are unaware of any discussion being held pertaining to the Amendment presently before the Committee. As to the original proposal that was withdrawn in April, this characterization of the "discussion" is not consistent with the recollection of the observing official or the non-vendor members of the Advisory Committee. Although "clarifying" display uses was raised in the November 16, 2016 Advisory Committee meeting, the scope, objectives, and potential impact could not be ascertained from the discussion.[17] The minutes

[15] Broker-dealers are required to provide this data immediately and for free to the Plans, then required by law under best execution obligations to buy it back. Redistributors bear the cost of redistributing, and pay a fee to do so. The cost borne by the exchanges are processing costs - and processing costs in the rest of the world are plummeting down, not skyrocketing up by 2,000%.

[16] *See* U.S. Dep't of Treasury, A Financial System That Creates Economic Opportunities 63-64 (Oct. 6, 2017), available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

[17] *See* Summary of CQ/CTA/UTP General Session of November 16, 2016, available at: https://www.nyse.com/publicdocs/ctaplan/notifications/trader-update/20161116_Summary_CTA-

show that the substantive discussion on this topic appears to have been reserved for the executive session without having any Advisory Committee members present.[18] Unfortunately, the SROs have a long history of conducting the meaningful NMS plan business in executive sessions or "executive subcommittee meetings," both of which exclude Advisory Committee members.

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

SIFMA has long advocated in favor of reform of the Plan process. We support the recommendations made by the Equity Market Structure Advisory Committee ("EMSAC") to provide a more meaningful role for NMS Plan Advisory Committees. The administration of the NMS Plans should be conducted in an open process. The NMS Plans' agendas, meetings, and minutes should be open to the public. These changes would make the governance of NMS Plans consistent with the statutory "fair representation" requirements governing the SROs themselves, and assure transparency in governance to further the public interest and the protection of all investors.

Unless and until industry is provided substantial participation -- with a real voice and number of votes to override self-serving exchange policies -- the governance of NMS Plans will continue to include onerous fee increases, such as those included in the Amendments.

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UTP_General_Session.pdf. "2. Non-Display Clarification. The meeting participants discussed recommended changes to clarify the pricing schedule and policy for non-display use."

[18] Id. See Agenda for November 16, 2016 Executive Session: "Fee/Policy Clarification for Non-Display and Device." No further information provided.

This Amendment does not meet the legal requirements for process and substance for a fee increase -- particularly a 2,000% fee increase. A fee increase of this nature and size should be scrutinized because it will have serious consequences for capital formation, investor protection, and the efficient operation of the markets.

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

Respectfully submitted,

/Melissa MacGregor/

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