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Brent J. Fields
Secretary
U.S. 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 (SEC Release No. 34-82071; File No. SR-CTA/CQ-2017-04)**

Dear Mr. Fields,

Bloomberg L.P. ("BLP") appreciates the opportunity to comment on the Proposed Amendment captioned above. On November 14, 2017, the Consolidated Tape Association ("CTA") Plan Participants gave notice of their filing of the Proposed Amendment with the Securities and Exchange Commission. CTA seeks to amend its fee schedule and non-display use policy to substantially broaden the applicability of the non-display fee and the access fee. This would impose a massive fee increase—exceeding 6,000% for many small and mid-size firms—on a specific BLP product.

In response to the Commission's November 20, 2017 notice and request for comment, 82 Fed. Reg. 55130, this letter sets forth several of the reasons why BLP opposes CTA's badly flawed proposal. BLP offers these views based on its deep expertise in providing market data to its customers, including broker-dealers, retail and professional investors, and other consumers of market data who would be harmed by the Proposed Amendment.

By unilaterally implementing a fee increase that reaches 6,000% or more for core, top-of-book data that CTA exclusively provides, this proposal violates the law in at least five ways:

1. Arbitrarily expanding the definitions of "non-display use," "date feed," and "access fee" far beyond their 2014 context and justification, which focused on algorithmic and automated trading functions that replaced human users, so that these fees would reach human use of data displayed on a computer screen;
2. Imposing—without even mentioning costs—a massive fee increase for core, top-of-book trade and quotation data that the D.C. Circuit, the Commission, and CTA's member exchanges repeatedly have acknowledged are unconstrained by market forces and therefore subject to cost-based regulation;
3. Unfairly discriminating against a single vendor, product, and set of customers by imposing a targeted fee increase, through a quasi-regulatory process, without

identifying any factual basis or similarly situated product or customers subject to this undue burden on competition;

4. Disserving the public interest by increasing burdens on capital formation and mid- and small-sized firms, and the retail and other investors they serve, through unnecessary fees not tied to any demonstrated costs of the CTA exchanges, particularly in view of recent public statements regarding the importance of constraining market-data fees; and

5. Failing to offer any meaningful economic-impact or cost-benefit analysis, or even notice specific enough to allow affected parties to analyze the proposal on their own, in violation of Commission Rule 608.

Accordingly, CTA's proposed amendment contravenes the Securities Exchange Act and Regulation NMS, and inappropriately limits access to the services of a registered securities information provider. BLP respectfully requests that the Commission abrogate the effectiveness of the Proposed Amendment under Rule 608(b)(3). BLP is separately filing an application for review, under Section 11A(b)(5) of the Exchange Act, which will ask the Commission to set aside the proposal after notice and a hearing.

CTA'S REPEATED EFFORTS TO EXPAND FEES FOR CORE DATA

The highly irregular nature of CTA's efforts to amend its access and non-display use fees casts serious doubt on the validity and necessity of the Proposed Amendment. CTA's description of the Bloomberg SAPI product also contains many errors, which call into question the proposal's description of the market-data marketplace under CTA's 2014 non-display fee amendment. The facts set forth in this section support the five legal reasons, set forth below, why the Commission should suspend or set aside the Proposed Amendment.

Crucially, CTA's proposal addresses fees for core, top-of-book data that is displayed for real-time use by humans viewing data using server applications on their computers. Core data is provided by only one supplier, must be purchased by many market participants, faces no market-based pricing constraints from competing products, and is priced subject to Commission regulation. At a minimum, therefore, CTA's unorthodox and improper approach reflects the need for the Commission to closely scrutinize this massive fee increase for core data, rather than allowing it to take effect on the exchanges' own say-so.

A. Bloomberg SAPI. Contrary to the implication of the CTA proposal, BLP's Server Application Program Interface ("SAPI") product is not a non-display program akin to a black-box, algorithmic, or high-frequency trading system. SAPI subscribers use it as an extension of the familiar Bloomberg Terminal—the consummate setting for the use of displayed market data. SAPI supplies market data to subscribers who can view it through approved server applications on the same device the subscribers used to log into the Bloomberg Terminal.

The CTA proposal suggests that the receipt and use of SAPI data is uncontrolled. That is wrong. This data is supplied for individual use by specifically authorized individuals—not for enterprise use, as is the case for data-feed and non-display users. Non-display use of SAPI data, moreover, is contractually prohibited. SAPI is not designed to supply the amount of data

necessary for algorithmic or high-frequency trading. And SAPI technology actively monitors subscribers' download volumes to ensure customers do not engage in such trading: unreasonably high volumes trigger BLP's product-oversight team to determine whether SAPI subscribers are misusing their market data. SAPI users, furthermore, are identified through biometric authentication to ensure they are entitled to access and view the market data. BLP and the exchanges have worked together to improve SAPI's encryption and authentication, and BLP reviews and approves all applications to ensure SAPI data is used only for approved uses and only by approved persons.

The whole point of this product is to view market data and derived data in the most useful ways on a computer screen—specifically through third-party applications selected by customers and approved by BLP. SAPI's essential features have remained constant since BLP introduced the product in 2004. It does not facilitate rapid or automated trading independent of human eyeballs and decisionmaking; rather, it facilitates useful presentation of data for humans to view.

B. Data fees before 2014. Through 2013, two relevant fees applied to consolidated top-of-book data offered by CTA: the access fee and the display fee. The access fee applied to high-volume "data feeds" that could be used for any number of purposes, including electronic or automated applications. The display fee, by contrast, applied to users or devices receiving data for visual display. Accordingly, NYSE (as the CTA administrator) approved SAPI as a display product, rather than as a data feed, when it was launched in 2004. Therefore a professional subscriber would pay between $20 and $50 per device for quotation and last-sale price information for Network A securities, depending on the number of devices covered by the subscription, and $24 per device for the same information for Network B securities.

In 2013, CTA increased the access fee for data feeds. CTA justified the increase on the ground that "data feeds have become more valuable, as recipients now use them to perform a far larger array of *non-display functions*. Some firms even base their business models on the incorporation of data feeds into black boxes and application programming interfaces that apply trading algorithms to the data …. [T]hese firms pay little for data usage beyond access fees, yet their data access and usage is critical to their businesses." 78 Fed. Reg. 17946, 17949 (March 25, 2013). Both before and after the 2013 amendment, SAPI was recognized as display product subject to the display fee, not as a data feed subject to the access fee.

C. CTA's 2014 Non-Display Use Amendment. In 2014, CTA invoked the same automated-trading explanation for a new "non-display use" fee. 79 Fed. Reg. 60536 (Oct. 7, 2014). The exchanges cited the increased volume of trading conducted by high-frequency, algorithmic, and black-box computer programs. Meanwhile, according to CTA, a decreasing number of subscribers were using displayed market data. The 2014 proposal expressly distinguished between non-display devices and terminals viewed by a human:

> Changes in regulation and advances in technology have had an impact on market data usage in recent years. Automated and algorithmic trading has proliferated, the numbers of quotes and trades have increased significantly and *Data Feeds* have become exponentially faster. Today, Non-Display Devices consume large amounts of data, and can process the data far more quickly than any *human being looking at*

a terminal.

Id. at 60537–38 (emphasis added).

As a result, according to CTA, the exchanges' market-data revenue was under pressure from a decline in revenue from display fees. CTA's proposal also asserted that the increased value market participants derived from data feeds justified its new fee. Accordingly, the proposal defined non-display use in a manner that emphasized the *use of a data feed* for reasons other than human display:

> Non-Display use refers to accessing, processing or consuming [data], whether delivered via direct and/or redistributor *data feeds*, … for a purpose other than solely facilitating the delivery of the data *to the Data Feed Recipient's* display or for the purpose of further internally or externally redistributing the data.

Id. at 60538 (emphasis added).[1] The proposal contained no economic analysis or factual support tying CTA's proposed fee categories and increases to the cost of producing and distributing core, top-of-book data.

As when CTA increased the access fee in 2013, its 2014 implementation of the non-display use fee did not change SAPI's treatment. CTA continued to categorize SAPI as subject to the display fee, not the access or non-display use fees.

The Commission itself has never approved the 2014 non-display use amendment, which became effective when filed under Rule 608(b)(3). SIFMA opposed the change as unlawful under the Exchange Act, and filed an application for Commission review of the amendment. SIFMA Application, File No. SR-CTA/CQ-2014-03 (Oct. 28, 2014). But SIFMA asked the Commission to hold the application in abeyance pending a decision in the *NetCoalition*/*In re SIFMA* proceeding. SIFMA's application for review remains pending.

D. March 2017 Attempt to Expand Non-Display and Access Fees. Following the 2014 amendment, CTA continued to categorize SAPI as a display product, not a data feed. Between 2014 and late 2016, CTA never challenged SAPI's classification as a display product or invoked its contractual rights to audit the use of CTA data by BLP users. Indeed, CTA did not audit BLP use or contact BLP with any concerns about potential non-display usage or circumvention before raising its complaints in the first instance with the Commission. BLP, for its part, has since 2014 continued to contractually require SAPI customers to use SAPI data for display use only, to monitor data consumption for potential non-display use, and to work with exchanges to strengthen the authentication and encryption functions that ensure appropriate data use.

[1] *See also* CTA Market Data Non-Display Use Policy at 2 ("any data recipient that receives a real time CTA Market Data data-feed is required to complete and submit the Non-Display Use declaration"), available at https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/Policy%20-%20CTA%20Non%20Display.pdf.

On March 23, 2017, CTA nevertheless filed with the Commission a notice of its filing of a fee amendment for immediate effectiveness. SEC Release No. 34-80300 (the "March Amendment"). The March Amendment would have expanded the reach of CTA's non-display use policy in a way that is nearly identical to the amendment now at issue. Curiously, it purported merely to "clarify" the scope of the *existing* non-display use definition, rather than impose any substantive change to that definition (though it did propose to alter the text of the plan). Also unlike the current proposed amendment, the March Amendment did not mention Bloomberg, SAPI, or any allegedly inequitable classification of data-vendor products.

In that regard, the purpose of the March Amendment became clear four days after its filing. CTA described the amendment in a side letter to BLP, which was apparently not filed with the Commission. That letter clarified that CTA considered SAPI a data feed subject to access and non-display use fees.[2] Plainly, CTA's decision to set forth its rationale in a private letter rather than a public filing prejudiced the Commission's ability to review the amendment. In response, BLP, SIFMA, and several other stakeholders and smaller broker-dealers commented to register their opposition.[3] Although CTA filed its own comment letter defending the amendment on April 25, shortly thereafter it withdrew the amendment.

E. November 2017 Proposed Amendment. CTA filed notice of the Proposed Amendment on November 14, 2017. It has not yet filed, however, the amendment's actual text or otherwise published the specific changes CTA proposes to make. The Proposed Amendment is accompanied by a lengthier notice than was the case in March, but does not meaningfully change the substance of its withdrawn amendment. The principal difference between the March and November filings is the Proposed Amendment's explicit targeting of BLP's SAPI product in the text of the notice. Rather than sending BLP a side letter asserting that the Proposed Amendment covers SAPI, CTA has laid bare its targeting of BLP on the pages of the SEC Release and Federal Register.

As demonstrated below, this definitions set forth in this proposal would result in an extraordinary fee increase unrelated to any change in the data's use or the processor's cost.[4]

Non-Display Use Fees — The Proposed Amendment changes the definition of non-display use in footnote eight of the Plan's fee schedules. It states that any use of data that does not make data visibly available to a data recipient on a device is a non-display use. It also amends footnote two "to state that the device fee will only be applicable where the data is visibly available to the data recipient; any other data use on a device will be considered Non-Display

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[2] *See* Attachment A (letter from Margaret Sullivan, NYSE, to Gadi Goldress, Bloomberg LP) (March 27, 2017).

[3] *See* comments submitted at SEC Docket, Release No. 34-80300, available at https://www.sec.gov/comments/sr-ctacq-2017-02/ctacq201702.htm.

[4] Fees the CTA proposal imposes on non-professional users are beside the point. *Cf.* Letter of Jay Froscheiser, DTN, SEC Release No. 34-82071 (Dec. 7, 2017). Non-professional users do not subscribe to the SAPI product targeted by the Proposed Amendment. That is not to say that SAPI's professional subscribers serve only large investors. As described above, they regularly serve all manner of retail investors.

Use." [5] Consequently, the non-display use fee would no longer be linked to the concept of "data feeds" and, under CTA's application of this rule, products like SAPI that involve computer-based applications would trigger the non-display use fee even though the outputs of these applications—the derived data CTA says is *display* use—are displayed for viewing by human subscribers.

Access Fees — The Proposed Amendment also transforms the concept of data feeds and expands the applicability of access fees. The proposal states that access fees will apply if the recipient uses the data in a non-display manner or has the *ability* to "manipulate[e] and disseminat[e]" the data "to one or more devices, display or otherwise, regardless of encryption or instructions."

"Data feed," therefore, is reconceived as "information transmitted in a format that is not controlled or can be manipulated and integrated into their own systems." This is a vague and potentially quite broad definition covering a wide variety of potential uses by human traders and other natural persons. To the extent the definition overlaps with the category of non-display use, access fees do nothing more than double-charge customers for use already covered by the non-display use fee. CTA further states "if the data is delivered in a format that *allows for* non-display use, then such data delivery is tantamount to a data feed." And the proposal makes very clear the product it most intends to reach—SAPI. Indeed, SAPI is the only product identified. This product, which for years CTA has said was not a data feed, would be subject to access fees because CTA now (incorrectly) asserts it is "tantamount to a data feed."

[5] Like the March Amendment, the current version purports to "clarify" the 2014 definitions, 82 Fed. Reg. 55130, 55130, implying that SAPI would qualify as non-display use even under the previous terms. But that is plainly wrong. The 2014 amendment defined a "display use" as any use "in support of a data recipient's display." 79 Fed. Reg. 60536, 60538. That definition clearly applies to SAPI because, as explained above, SAPI *only* facilitates the display of market and derived data in a format useful to human viewers.

The fee increases for professional subscribers previously receiving display CTA data are massive:

Non-Display Fees (monthly) [6]				
Network	**Output Feed**	**Category 1**	**Category 2**	**Category 3**
Network A	Last Sale	$2,000	$2,000	$2,000
Network A	Bid/Ask	$2,000	$2,000	$2,000
Network B	Last Sale	$1,000	$1,000	$1,000
Network B	Bid/Ask	$1,000	$1,000	$1,000

Access Fees (monthly)[7]			
Network	**Output Feed**	**Direct Fees**	**Indirect Fees**
Network A	Last Sale	$1,250	$750
	Bid-Ask	$1,750	$1,250
Network B	Last Sale	$750	$400
	Bid-Ask	$1,250	$600

Previously, firms not considered data-feed recipients paid between $19 and $45 per professional device per month for quotation and last-sale information for Network A securities, and $23 per professional device per month for quotation and last-sale information for Network B securities. Under the Proposed Amendment, such firms would be required to pay at least an additional $6,000 per month in non-display use fees[8] and access fees for Network A securities, and an additional $3,000 per month for Network B securities.[9]

Small and mid-size customers would be disproportionately harmed by these fee increases. For a non-data-feed firm that previously paid to receive quotation and last-sale information for both Network A and Network B securities on 2 professional devices (roughly the average number of devices for a firm receiving Network A and B data through SAPI), these new fees would amount to an increase of more than 6,000%.[10]

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[6] For categories 1 and 2, a flat fee applies. For category 3, the fees are based on the number of platforms declared.

[7] These fees cover a data recipient's receipt of one primary data feed and one back-up data feed. Additional data feeds require payment of additional fees, as set forth in footnote 10 of the Plan's fee schedule, at https://www.ctaplan.com/pricing#45487110.

[8] The numbers are calculated based on the assumption that the firm only performs one of the three categories of non-display use. But there are three categories of non-display use of market data. Data recipients can be charged separately for each of the three categories of non-display uses.

[9] BLP offers last-sale and bid/ask data as a bundled product via SAPI. Therefore customers receiving Network A and/or Network B pay both fees.

[10] The SIFMA comment letter correctly observes that for a larger firm with 10 SAPI users, rather than 2, the additional $6,000 of monthly fees would represent an approximately 2000% increase. *See* Letter from Melissa MacGregor, SIFMA, SEC Docket, Release No. 34-82071. Yet even that eye-popping figure understates the true impact on the typical SAPI customer: a small or mid-size firm with just two authorized users.

	Before Amendment	After Amendment	Increase
Typical firm (2 users, Networks A and B)	$136/month	$9,136/month	6,617%

It is important to note that a SAPI customer can be liable for more than one of the three non-display categories CTA has created. That means the customer would pay the non-display fee more than one time. For example, if the firm listed in the table above receives two categories of non-display use, the above-mentioned $9,136 monthly fee would increase another $6,000 per month for the second category of non-display use. This would result in a total fee of $15,136 per month, or a 10,791% increase compared to the firm's pre-Amendment fee.

REASONS TO REJECT CTA'S PROPOSED AMENDMENT

1. The Amendment's Categorization of SAPI as a Non-Display Use Product Is Erroneous, Arbitrary, and Unsupported

CTA's attempt to extend the scope of access and non-display fees from algorithmic and automated trading to traditional human- and terminal-based activities is arbitrary, capricious, and unlawful. The limited reasoning and lack of evidence set forth by the Exchanges could not withstand scrutiny before any administrative or judicial tribunal.

The premise of CTA's Proposed Amendment is that BLP has mischaracterized SAPI as a display-use product. Yet for more than a decade, CTA and the exchanges consistently recognized that SAPI is a display product not subject to access or non-display fees. And since the 2014 amendment, nothing relevant about the SAPI product has changed. Indeed, the most relevant developments are further *limits* on permitted usage of SAPI that BLP has imposed since the product's 2004 launch and approval as a display product.[11] SAPI remains a product that is useful only if humans view and act on its displayed data. CTA points to no evidence controverting these facts or suggesting any misrepresentation of SAPI use.

The reality is that BLP has accurately described SAPI since SAPI was developed and approved for use in 2004. Neither CTA nor its administrator (NYSE) has ever challenged SAPI's technical safeguards, administrative controls, or use restrictions. CTA has never altered its initial 2004 approval of SAPI as a "display service" (*i.e.*, not a data feed). Since then, BLP has only made SAPI more restrictive. For example, black box usage is explicitly prohibited under SAPI customer contracts. Crucially, CTA never once asserted that SAPI amounted to a data feed or non-display use when it focused on algorithmic and automated use in supporting the 2013 access fee and 2014 non-display fee amendments. Even if there had been confusion about the proper classification, the appropriate response would be fact-gathering and negotiation by CTA and BLP over this specific product,[12] rather than unilateral imposition at the Commission

[11] SAPI's contractual prohibition of non-user-based, non-display applications was introduced shortly after BLP launched SAPI in 2004.

[12] The Commission repeatedly has emphasized that it relies, at least in the first instance, on consensus and negotiation regarding core-data pricing. *E.g.*, 69 Fed. Reg. 71272. This approach is impossible if

of a far-reaching rules change. If SAPI really amounted to a data feed or non-display product, CTA would not have had to "clarify" the definition; it simply could have enforced its fee plan under the rules in place during 2014, 2015, or 2016.

This pattern of silence and inaction, up until CTA's unsupported 2017 filings, belies the story CTA tells about exploitation of a regulatory loophole. And it shows the Proposed Amendment for what it really is: an effort by CTA to harvest more revenue for its member exchanges.

The breadth of the new proposed definitions, moreover, provides additional cause for concern. Under CTA's proposal, what was once an exception—non-display use for non-human trading activity—has become the rule. If approved, it threatens to swallow the definition of display use; it is hard to imagine what activity would not be susceptible for reclassification by CTA as "integrating" or "manipulating" data by someone sitting at a computer terminal.

2. CTA's Fees for Core Data Bear No Relationship to Costs and Cannot Be Sustained as Fair and Reasonable

The Proposed Amendment does not even attempt to meet the statutory standard for fair and reasonable fees for core market data. The Exchange Act, numerous Commission orders, and the D.C. Circuit all recognize that this exclusively-sourced data requires regulatory supervision. As a result, the fees must be set aside.

Core top-of-book data, consolidated by a SIP, is "the heart of the national market system."[13] But it is not subject to competitive constraints. The Exchange Act gives the exchanges a monopoly over this data, which market participants must purchase for trade-through and best-execution purposes. Investors of all stripes depend on its wide dissemination. Because core data is both uniquely valuable and uniquely monopolized, the Commission has recognized that it is particularly important to constrain the fees charged by a SIP like CTA.

The absence of effective market constraints has led the Commission and the courts to recognize that SIP pricing requires government regulation to ensure prices remain fair and reasonable. Accordingly, the Commission has required a reasonable relationship between the price and the cost of producing and disseminating this data.[14] The decisions in *NetCoalition I* and *NetCoalition II* both recognized this basic requirement.[15] The D.C. Circuit specifically

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exchanges unilaterally impose fee changes without meaningful engagement or notice.

[13] *Net Coalition v. SEC*, 615 F.3d 525, 529 (D.C. Cir. 2010) (quoting Regulation NMS, 70 Fed. Reg. at 37503 (quoting H.R. Rep. No. 94-229, at 93 (1975 Conference Report))).

[14] *See Institutional Networks Corp.*, Exchange Act Release No. 20874, 1984 WL 472209, at *4–5 (Apr. 17, 1984) (data fees charged by an exclusive processor "can only appropriately be based on the costs of collecting, validating and processing quotations," not on the "value-of-service"), *aff'd sub nom. Nat'l Ass'n of Secs. Dealers, Inc. v. SEC*, 801 F.2d 1415 (D.C. Cir. 1986).

[15] See *NetCoalition v. SEC*, 615 F.3d 525, 536 (D.C. Cir. 2010); *NetCoalition v. SEC*, 715 F.3d 342, 345 (D.C. Cir. 2013).

noted the "mandatory nature of the regime" and the role of the exchanges as sole-source providers of the data.[16]

Yet CTA's proposal did not even mention costs, the *NetCoalition* decisions, or the Commission's requirement that core data prices bear a reasonable relationship to cost.[17] Much less did the proposal offer any evidence or analysis that could support a massive increase in core-data pricing.[18] Even if it had tried, it is inconceivable that a fee increase of more than 6,000% could bear any reasonable relationship to the exchanges' costs of collecting and disseminating this data.

Given this lack of evidence or reasoning, the Proposed Amendment surely could not survive scrutiny in a Section 11A review proceeding. Nor could it pass muster at the D.C. Circuit—which has rejected most evidence the exchanges have offered in support of competitive price constraints even for *non-core* data.[19] Because CTA has not shown any relationship between its price increase and its costs, the Proposed Amendment must be set aside.

3. The Amendment Unfairly Discriminates Against BLP and Its Customers

CTA's amendment also violates the Act's prohibition against unfair discrimination by targeting a specific BLP product and its customers with a fee increase. As part of the regulatory bargain authorizing the exchanges to jointly and exclusively sell core market data, Congress required exclusive processors such as CTA to make quotation and transaction information available on terms that are "not unreasonably" or "unfairly" discriminatory. 15 U.S.C. § 78k-1(b)(5)(B), (c)(1)(D); *Institutional Networks Corp.*, Release No. 20874, 1984 WL 472209, at *11

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[16] *NetCoalition I*, 615 F.3d at 529 n.2. For this reason, the current challenge is distinct from the SIFMA litigation and should not be held for a decision on whether arguments about the competition and substitutability of exchanges' depth-of-book data constrain pricing for proprietary data. There is not any argument that competition or other market constraints apply to consolidated top-of-book data.

[17] *See, e.g.*, *In re Bunker Ramo Corp.*, Release No. 15372 (Nov. 29, 1978) (OPRA Order indicating costs are a relevant factor in determining the reasonableness of a fee for market information); *Instinet*, 1984 WL 472209, at *4–5 (concluding fee was an unwarranted denial of access because it was not supported by an adequate cost-based justification); Regulation of Market Information Fees and Revenues, 64 Fed. Reg. 70613, 70619 (Dec. 17, 1999) ("One standard commonly used to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the amount of costs incurred to provide the service."); Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71256, 71273 (Dec. 8, 2004) (1999 Market Data Concept Release recognized "that 'the total amount of market information revenues should remain reasonably related to the cost of market information.'") (quoting 64 Fed. Reg. at 70627); Regulation NMS, 70 Fed. Reg. 37496, 37567 (June 29, 2005) ("Under Section 11A(c)(1)(C), the more stringent ''fair and reasonable'' requirement is applicable to an ''exclusive processor'' … that distributes the market information of an SRO on an exclusive basis."); NYSE ArcaBook Order, 73 Fed. Reg. 74770, 74779 (Dec. 9, 2008) ("the mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees"); *id.* at 74779–80, 74786.

[18] Nor did the 2014 Amendment justify its new non-display fee with any such data. On that basis and others, Bloomberg continues to object to the lawfulness of the 2014 rule change.

[19] *See NetCoalition I*, 615 F.3d at 537–44.

("*Instinet*"). CTA's proposed amendment violates that standard in three crucial respects.

First, it uses CTA's quasi-regulatory pricing authority to unfairly target a single product by a single company. The notice repeatedly invokes Bloomberg and SAPI by name, mentioning them dozens of times in its short proposal. No other firm or product is identified. Although CTA's proposal at times suggests that the amendment to the definition of "non-display use" applies more broadly,[20] it never actually names any other affected product or vendor. What is more, CTA claims authority (citing no statutory or regulatory provision) to "make the sole determination as to whether a data recipient's use is subject to the Non-Display Use fee."[21] Thus, under the guise of "clarify[ing]" the definition of "non-display use," CTA is singling out SAPI for a price increase often exceeding 6000%, and claiming sole authority to target this or other products in the same discriminatory fashion in the future.

That ICE/NYSE has its own data vendor only heightens these concerns about discrimination and self-dealing. Interactive Data Corporation, owned by ICE, currently offers multiple potentially competing data products—a fact never mentioned in the proposal. This clearly warrants extra scrutiny of CTA's fees, as the Commission has recognized in its *Instinet* decision[22] and other market-data rulings.[23] Indeed, these concerns about discriminatory treatment would apply even if NYSE, as CTA administrator, applied the non-display use and access fees to competing products as well as SAPI. Because a competitor's corporate parent would receive the increased fees that its market-data customers would pay, any profits the exchange might lose as a data vendor could be recouped by its gains as a CTA member. Given CTA's lack of transparency, of course, BLP has no way of knowing whether the same fees would apply.

Second, CTA asserts that this amendment is necessary to "level the competitive imbalance that currently exists" among vendors under the 2014 non-display use amendment. 82 Fed. Reg. at 55135. Policing competition among vendors, however, is not part of CTA's responsibilities under the Exchange Act; its obligation is to ensure exclusive market data is disseminated on terms that are fair, reasonable, and nondiscriminatory. 15 U.S.C. § 11A(b). CTA goes so far as to suggest that some SAPI customers may not need the "unnecessary functionality" of SAPI—a product those customers have freely chosen to purchase in a competitive marketplace. 82 Fed. Reg. at 55133, 55136. This is presumptuous, unsupported, and completely irrelevant to the critical question whether CTA's own monopoly pricing is fair, reasonable, and nondiscriminatory under the Act. If allowed to stand, CTA's approach would set

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[20] *See, e.g.*, 82 Fed. Reg. 55130, 55130, 55132 (contending that the proposal addresses conduct by "some vendors" or "certain vendors").

[21] *Id.* at 55133.

[22] *See Instinet*, 1984 WL 472209, at *10 (recognizing that even the potential that an exclusive processor has anti-competitive motivations "requires the Commission to scrutinize [the processor's] fees carefully to ensure that they do not have inappropriate competitive effects").

[23] *Cf.* ArcaBook Order, 73 Fed. Reg. 74770, 74782 (Dec. 9, 2008) ("an exchange proposal that seeks to penalize market participants for trading in markets other than the proposing exchange would present a substantial countervailing basis for finding unreasonable and unfair discrimination and likely would prevent the Commission from approving an exchange proposal").

a dangerous precedent for any company or product that develops valuable ways of disseminating core market data.

To be clear, BLP favors a level playing field, in which similar products receive the same treatment. To the extent other vendors offer the same features as SAPI, these should be categorized the same way. It does not follow, however, that because *different* products pay the access and non-display use fees, BLP's display product should be subject to those fees as well. That one of BLP's competitors may offer a competing product says nothing about whether that product is similar to SAPI, whether it is subject to non-display or access fees (BLP has no way of knowing), or whether CTA's fees should be gerrymandered to include SAPI. *See* Thomson Reuters, SEC Comment Letter, Release No. 34-82071 (Nov. 28, 2017) (aggressively supporting the Proposed Amendment without indicating whether its data product is subject to the fees CTA seeks to impose on SAPI).

Third, CTA's proposed amendment unfairly discriminates against Bloomberg and its customers by misclassifying SAPI with dissimilar non-display and data-feed products. As discussed above, under the 2014 amendment, the products subject to the non-display and access fees are those used for "algorithmic trading" and other "automated" processes; those fees do *not* apply to uses "in support of a data recipient's display," or to "creation and use of derived data." 79 Fed. Reg. 60536, 60537–38. [24] The essential attributes of non-display use repeatedly cited by the exchanges—"consum[ing] large amounts of data," "*process[ed] … far more quickly than any human being looking at a terminal*"—no more apply to SAPI customers sitting at their computers than to customers using other display products.[25] Yet the 2017 Proposed Amendment would group SAPI with other automated uses that would not be allowed through SAPI.

The Proposed Amendment would impose this non-display use fee based on SAPI's purported "functionality." It is illogical to apply a *use* fee based on anything other than the way the product is used. Regardless, CTA offers no evidence that SAPI is ever used for a non-display purpose even under its revised definition, let alone any evidence that would justify treating SAPI in every case as a non-display use. CTA's proposal incorrectly "presum[es]" BLP customers subscribe to SAPI "because they are using the data for purposes other than just display of the data." 82 Fed. Reg. at 55133. The gerrymandering of the non-display definition to target one particular product unfairly and unreasonably targets SAPI, and SAPI alone, for treatment as automated non-display use. That is the essence of unfair and unreasonable discrimination.

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[24] *See also* 78 Fed. Reg. 21688, 21670 (Apr. 11, 2013) (NYSE filing defining non-display use as "accessing, processing, or consuming [data] … for a purpose *other than in support of its display* or further internal or external redistribution"); 76 Fed. Reg. 35498, 35499 n.12 (June 17, 2011) ("Non-display devices *do not graphically show … market data* but instead use the data for performance of analytic or calculative functions (e.g. algorithms."); *In re Application of SIFMA*, Admin Proc. File No. 3-15350, Jurisdictional Br. of NYSE, at 16 (Aug. 19, 2014) (contrasting a "display use," which "display[s] the data to users," with a "non-display use," which "use[s] the data for trading purposes, such as using the data as an input into high frequency trading or other algorithmic models" (citations omitted)).

[25] *See* 78 Fed. Reg. at 21670 (NYSE notice applying non-display fees).

4. Increasing Market-Data Fees Disserves the Public Interest

CTA's proposal erects a convoluted regulatory structure atop an already complex web of regulations and interpretations. The result is increased costs and barriers to entry for market participants—particularly smaller entities which may lack the resources to navigate CTA's self-serving regime. Because the proposal would hinder capital formation, increase costs for retail investors, and disserve the public interest in broad dissemination of core market data, the Commission should abrogate and set aside the Proposed Amendments.

The inefficient and problematic nature of this regime is increasingly apparent to decisionmakers in the government and the financial-services industry. The Treasury Department's recent Report on Capital Markets[26] and the Recommendations of the Commission's own Equity Market Structure Advisory Committee,[27] for example, underscore why the Proposed Amendment should be rejected. By injecting higher costs into this particular segment of the market, these fee increases will disproportionately affect small and mid-size firms, small and mid-size businesses that work with those firms, and the retail and other investors they serve. They interfere with access to vital market information, particularly for the retail investors most in need of the Commission's protection. Heretofore, all sides of the extensive market-data debate have accepted that top-of-book data should be held to a cost-based standard of fair and reasonable rates. A potential increase in the cost of top of book market data in excess of 6,000% flouts this approach.

CTA also poses a problem for market participants by re-categorizing data for higher non-display fees even when the data is being utilized simply for best-execution purposes. This is significant because broker-dealers analyze the data to determine whether they are getting best execution for investors. This analysis combines several factors in a server-based application so the broker can see whether he or she will be getting best execution for the investor.

5. The Commission Should Abrogate the Effectiveness of This Procedurally Improper Amendment

The Proposed Amendment represents an attempt by CTA to drastically change the terms of its fee schedule without a Commission decision under Rule 608. The CTA designated the Proposed Amendment as "establishing or changing fees," thus permitting the amendment to become effective upon filing pursuant to Rule 608(b)(3)(i). As a result, the Proposed Amendment was not subject to a public notice and comment period or Commission approval prior to becoming effective. By abrogating the amendment, the Commission can demonstrate its commitment to transparency and public input for large, controversial fee changes.

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[26] U.S. Department of Treasury, A Financial System That Creates Economic Opportunities: Capital Markets (October 6, 2017), available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-Capital-Markets-FINAL-FINAL.pdf.

[27] *See* SEC Equity Market Structure Advisory Committee, Recommendations Regarding Enhanced Industry Participation in Certain SRO Regulatory Matters (July 8, 2016), available at https://www.sec.gov/spotlight/emsac/recommendations-enhanced-industry-participation-sro-reg-matters.pdf.

Automatic effectiveness under Rule 608(b)(3)(i) may sometimes be appropriate for amendments that simply alter fees. The changes proposed by CTA, however, are not "simple" fee increases; they are significant definitional changes designed to extract vastly increased fees from across the industry. Indeed, their substantive definitions will shape how core data vendors innovate and offer data products going forward. These definitional changes for sole-source core market data certainly warrant a legitimate public notice and a comment period.

CTA repeatedly insists that the Proposed Amendment is merely a "clarification" of an "ambiguity" of the fee schedule and use policy. *E.g.*, 82 Fed. Reg. at 55130, 55132, 55134, 55136. Rather than clarifying an ambiguity, the Proposed Amendment entirely redefines "data feed" and "non-display use" to include data usage that is clearly display only—and that has been treated as a display use, not a data feed, since at least 2004. As noted above, the machinations that led to this "clarification" becoming a "fee amendment" only heighten the need for scrutiny.

Under any standard, however, CTA has not provided sufficient information to demonstrate that the Proposed Amendment complies with the statutory requirements of the Exchange Act, particularly as required by *Susquehanna Int'l Group v. SEC*, No. 16-1061 (D.C. Cir. Aug. 8, 2017). CTA *admittedly* has not prepared a true cost-benefit or economic-impact analysis as required by Rule 608(b)(4)–(5).[28] CTA's unsupported attack on BLP's purported mischaracterization of SAPI cannot substitute for the economic analysis required of a SIP or self-regulatory organization. And CTA has not even posted the text of the fee plan amendment as required by Rule 608(a)(8). The Commission should therefore suspend or abrogate these Amendment to allow for public scrutiny and Commission review.

[28] In fact, CTA admits it "cannot conduct a precise analysis of what changes to revenue would accrue if this amendment were to go into effect." 82 Fed. Reg. at 55136.

CONCLUSION

BLP respectfully urges the Commission to abrogate or stay the effectiveness of the CTA Proposed Amendment, or, in the alternative, to scrutinize and then set aside the Amendment after public notice and comment.

We appreciate the opportunity to provide BLP'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 me at [redacted] or [redacted].

Respectfully submitted,

By: Greg Babyak
Head, Global Regulatory Affairs and Public Policy, Bloomberg LP

By: Brian Doherty
Global Head of Product Development, Realtime Content, Bloomberg LP

RESPONSES TO THE COMMISSION'S QUESTIONS

The Commission solicited comment on four questions, 82 Fed. Reg. at 55136–37, to which BLP is pleased to respond:

Q1: Whether the impact of the 2014 CTA/CQ Fee Amendments on market data users has been consistent with the representations of the Participants?

A1: No, experience under the 2014 nondisplay amendments has been entirely inconsistent with CTA's representations. The 2017 proposal states that "some vendors appear to be ignoring the import of the 2014 Fee Amendments in order to gain an advantage over other vendors, allowing them to profit from new or existing customers by offering them lower fees than such customers could obtain from vendors who apply the 2014 Fee Amendments correctly." 82 Fed. Reg. at 55130. BLP is entirely unaware of any such "loophole," "ambiguity," or "advantage." The fundamental use of top-of-book data by BLP's SAPI product has not changed since well before the 2014 amendments. Because that rule change focused on algorithmic and automated trading using non-display data, and expressly distinguished human-driven trading using display data, it had no impact on SAPI.

The proposal also describes "certain vendors" (presumably BLP) allegedly "characterizing the usage of their customer as subject to solely the device fees despite the fact that the vendors were not delivering the data in a controlled format." *Id.* at 55132. This is also false. CTA understands that BLP works diligently to control the data supplied to its customers via SAPI. This involves contractual, biometric, and design limits directed to the customers themselves, as well as consultation with exchanges regarding the controls BLP utilizes for SAPI applications and data.

Finally, the proposal alludes to vendor behavior "upset[ting] the competitive balance among vendors." *Id.* Given CTA's failure to identify any disadvantaged vendor or any assessment of competition either before or after the 2014 amendments, it is difficult to assess this broad and vague claim. Suffice it to say that BLP is unaware of any such development in the data-vendor marketplace, which unlike the market for exclusive SIP data remains robust and competitive. And CTA has failed to offer the Commission, commentators, or affected constituents any factual information on which to assess the accuracy or significance of its claim. The 2017 proposal, of course, goes far beyond the steps taken in 2014, based on far less analysis and factual support.

Q2: The number of market data users that would be impacted by these Amendments?

A2: Currently hundreds of firms subscribe to BLP's SAPI product using CTA data, either Network A or Network B. The number of users at these firms varies between 1 and 20 per firm. On average, a BLP SAPI firm has 2.6 users per firm for Network A data, and 1.7 users per firm for Network B data. BLP is unable to predict the ways in which CTA will exercise the authority it claims to define which additional BLP and competitor products may fall under its newly expended definitions of "access fee," "data feed," and

"non-display use fee" offered in the Proposed Amendment.

Q3: The impact these Amendments would have on, for example, the fees paid by market data users?

A3: The Proposed Amendment would require user firms currently paying display fees to pay non-display use fees and access fees. As stated above, for a non-data-feed firm that previously paid to receive quotation and last sale information for both Network A and B securities on 2 professional devices (roughly the average number of devices for a customer firm receiving Network A and B data with SAPI), these new fees could amount to a price increase of more than 6,000%.

Q4: Whether the Amendments would have a disproportionally greater impact on certain segments of users (e.g., small and midsize trading firms)?

A4: The Proposed Amendment would have a disproportionally greater impact on small and mid-size firms, as described above. The typical SAPI customer is a firm viewing CTA data on two or three devices. By any measure, this is a small or mid-size firm. Such firms regularly serve retail investors most in need of efficient service, broad information access, and effective Commission protection. Under the Proposed Amendment, these firms (and their customers) could experience an increase in prices in excess of 6,000%. Following this price spike, firms would face a choice between becoming less competitive by paying the Exchanges' high rents, dropping the data-display interface the firm had selected in favor of a less attractive market-data product, or paying even higher fees for data-feed functionality the small or mid-sized firm may not need. Even if firms switched to a lower-cost option, moreover, CTA could still choose later to single out another vendor display product as sufficiently "integrated" with a computer to warrant the high non-display use fee.

Attachment A

Margaret Sullivan
Director

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NYC, NY 10005
212-656-5553
Margaret.Sullivan@NYSE.com

March 27, 2017

Mr. Gadi Goldress
Bloomberg LP
120 Park Ave.
New York, NY 10165

Dear Gadi:

Please be advised that the Consolidated Tape Association ("CTA") filed with the Securities and Exchange Commission an immediately effective amendment to both the CTA Plan and Consolidated Quotation ("CQ") Plan that clarifies certain fees relating to Display and Non-Display Use and when access fees are applicable (the "CTA Fee Clarification") (see Securities Exchange Act Release No. 80300 (March 23, 2017) (File No. SR-CTA/CQ-2017-02)). The amended Fee schedule is available here: CTA Network A Pricing/Rate Schedule; CTA Network B Pricing/Rate Schedule

As described in greater detail in the CTA Fee Clarification, footnote 2 of the CTA Schedule of Market Data Charges (the "Schedule") provides that "display data use subject to the Network A and Network B Subscriber charges shall mean only data that is visibly available to the data recipient; any other data use on a Device shall be considered Non-Display Use." In addition, footnote 8 of the Schedule specifies that "any use of the Data that is not designed to make the Data visibly available to the Data recipient on a device is a Non-Display Use." Finally, footnote 10 of the Schedule now provides that the "access fee applies if (i) the data recipient uses the data for non-display; or (ii) 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 instructions from the redistribution vendor regarding who has authorized access to the data." The CTA Fee Clarifications, as filed, are applicable to all data recipients and supersede any prior understandings of the operation of the Schedule.

Based on your description of Bloomberg's Service API functionality ("SAPI"), it does not qualify as a Professional/Internal Device under the Schedule. You describe SAPI as allowing firms to "run server-based applications" and "make real-time data available internally" to users' devices. Both of these uses imply that SAPI does not make data visibly available to the data recipient; rather, SAPI is an extranet service that provides access to a data feed. Therefore, pursuant to the Schedule, as clarified consistent with the CTA Fee Clarification filed with the SEC, we consider use of SAPI to be Non-Display Use and subject data recipients to the applicable access fees. Any prior communications regarding SAPI are superseded by the fee clarification.

Sincerely,

Margaret M Sullivan