Bloomberg

Bloomberg LP 731 Lexington Avenue New York, NY 10022 Tel +1 212 318 2000

May 3, 2018

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

Re: **Notice of Supplemental Authority in Support of Bloomberg's Applications to Review and Stay the Effectiveness of CTA's Fee Amendments (SEC Release No. 34-82071; File No. SR-CTA/CQ-2017-04)**

Dear Mr. Fields,

Bloomberg L.P. writes to inform the Commission and interested parties of Bloomberg's Notice of Supplemental Authority, filed today, in support of Bloomberg's pending applications to review and stay the "SAPI Amendment," Release No. 34-82071, to the Consolidated Tape Association (CTA) National Market System Plan.

On May 1, 2018, the Commission issued orders rejecting amendments to the CTA and Unlisted Trading Privileges (UTP) Plans, Release Nos. 34-83148, -83149, that would have increased the monthly fees some firms pay for consolidated core data. The Commission concluded that the Plan Participants had not provided sufficient data "concerning the basis for, the anticipated revenue effects of, and the effects on market participants from" the amendments to allow the Commission to determine whether the amendments were consistent with Section 11A of the Exchange Act. Bloomberg's Notice of Supplemental Authority calls the Commission's attention to the May 1, 2018 orders because the same considerations apply in the proceedings concerning the SAPI Amendment.

Bloomberg's Notice of Supplemental Authority and supporting exhibits have been filed with the Commission, shared with CTA, and attached to this letter.

Respectfully submitted,

By: Greg Babyak
Bloomberg LP

Enclosures

cc: Brett Redfearn, Director, Division of Trading & Markets
John Roeser, Associate Director, Division of Trading & Markets

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of BLOOMBERG L.P. For Review of Amendments of the CTA Limiting Access to Its Services	Admin. Proc. File No. 3-18316

NOTICE OF SUPPLEMENTAL AUTHORITY

Bloomberg L.P. respectfully submits this notice of supplemental authority in connection with Bloomberg's pending applications to review and stay the effectiveness of the "SAPI Amendment," Release No. 34-82071, to the Consolidated Tape Association (CTA) National Market System Plan. *See* Admin. Proc. File No. 3-18316; *see also Spring Hill Capital Markets, LLC*, Release No. 919, 2015 WL 7730856, at *1 (Nov. 30, 2015) (Commission "consider[ation]" of supplemental authority). The Commission's May 1, 2018 Orders abrogating amendments to the CTA and Unlisted Trading Privileges (UTP) Plans, Release Nos. 34-83148, -83149 ("CTA Order" or "UTP Order," attached here), bear directly on the Commission's review of CTA's SAPI Amendment and resolution of Bloomberg's challenge.

The Commission's Orders rejected CTA and UTP "Enterprise Cap" Amendments that would, most notably, have increased monthly fees some firms pay for consolidated core data. *E.g.*, CTA Order 8. The Commission expressed "concer[n] that "the information and justifications provided by the Participants are not sufficient for the Commission to determine whether the Amendment is consistent with the" requirements of § 11A of the Exchange Act that market-data fees be fair, reasonable, not unreasonably discriminatory, and not unduly burdensome on competition. *Id.* at 6–7. The Commission concluded that the Plan Participants had not "provided

sufficient information regarding, or adequate justification for," the fee changes, and specifically cited the Plan Participants' failure to supply the underlying data or information concerning "the anticipated revenue effects of, and the effects on market participants from, the [Enterprise Cap] Amendment." *Id.* at 7.

The same considerations that led the Commission to reject the Enterprise Cap Amendment apply to the CTA amendment at issue in this proceeding. The SAPI Amendment, like the CTA Enterprise Cap Amendment, concerns fee changes for consolidated core data offered exclusively by CTA. CTA Order 5 n.20. Both amendments are subject to the requirements of § 11A and were filed as "immediately effective" under SEC Rule 608(b)(3). *Id.* at 3, 7. Both amendments were similarly characterized by CTA as either "revenue neutral," *id.* at 7, or "not motivated by a plan to increase fees or revenues," SAPI Amendment at 22. And both amendments drew critiques from the same commenters—SIFMA and Healthy Markets—for failing to substantiate CTA's claims with data, concerns which the Commission's Orders echoed. CTA Order 4–7.

Given these similarities, the Commission's conclusion that CTA "did not provide the Commission with sufficient data to support their assertion[s]" under § 11A regarding the cost and revenue impact of the Enterprise Cap Amendments, *id.* at 8, bears directly on Bloomberg's central claims regarding the SAPI Amendment. Bloomberg's challenge asserts "that CTA has not provided any ... cost-based justification," offered "no justification for enlarging the definition of 'non-display fee,'" and "does not even address the expanded 'access fee.'" Reply Br. 1. These claims implicate the Commission's concern that the Plan Participants' failure to support the Enterprise Cap Amendments with data prevented the Commission from "closely scrutiniz[ing]" those fees to determine their "fairness and reasonableness," any "unreasonably discriminatory" effect, and any unnecessary "burden on competition." CTA Order 7–8. *See* Opening Br. 12–13;

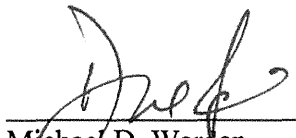
Opposition Br. 10; Reply Br. 1, 4–8. Finally, similar to the Enterprise Cap Amendments, factual disputes between CTA and Bloomberg regarding the SAPI Amendment's support and impact render record-based review under § 11A denial-of-access proceedings "a more appropriate mechanism" than immediately-effective filings under Rule 608(b)(3) "for determining whether the Amendment is consistent with the Act." CTA Order 8.

In order to facilitate the Commission's ongoing review of CTA's SAPI Amendment, Bloomberg respectfully calls the Commission's attention to these important considerations addressed in the CTA and UTP Orders.

Dated: May 3, 2018

Respectfully submitted,

SIDLEY AUSTIN LLP



Michael D. Warden
Benjamin Beaton
Daniel J. Feith
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
emcarthur@sidley.com

Counsel for Bloomberg, L.P.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of BLOOMBERG L.P. For Review of Amendments of the CTA Limiting Access to Its Services	Admin. Proc. File No. 3-18316

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2018, I caused a copy of the foregoing Notice to be served by hand on the parties listed below.

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
(via hand delivery)

Douglas W. Henkin
Seth T. Taube
Joseph Perry
Baker Botts LLP
30 Rockefeller Plaza
New York, NY 10112
douglas.henkin@bakerbotts.com

Dated: May 3, 2018

Daniel J. Feith

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83148; File No. SR-CTA/CQ-2018-01)

May 1, 2018

Consolidated Tape Association; Order of Summary Abrogation of the Twenty-Third Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan

I. Introduction

Notice is hereby given that the Securities and Exchange Commission ("Commission"), pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 608 thereunder,[2] is summarily abrogating the Twenty-Third Charges Amendment to the Second Restatement of the Consolidated Tape Association ("CTA") Plan and the Fourteenth Charges Amendment to the Restated Consolidated Quotation ("CQ") Plan (collectively, "Plans").[3]

On March 5, 2018[4] the participants of the Plans ("Participants")[5] filed with the Commission a proposal to amend the Plans ("Amendment"), pursuant to Section 11A of the

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1 15 U.S.C. 78k-1.

2 17 CFR 242.608.

3 See Securities Exchange Act Release Nos. 10787 (May 10, 1974), 39 FR 17799 (May 20, 1974) (declaring the CTA Plan effective); 15009 (July 28, 1978), 43 FR 34851 (August 7, 1978) (temporarily authorizing the CQ Plan); and 16518 (January 22, 1980), 45 FR 6521 (January 28, 1980) (permanently authorizing the CQ Plan). The most recent restatement of both Plans was in 1995. The CTA Plan, pursuant to which markets collect and disseminate last sale price information for non-NASDAQ listed securities, is a "transaction reporting plan" under Rule 601 under the Act, 17 CFR 242.601, and a "national market system plan" under Rule 608 under the Act, 17 CFR 242.608. The CQ Plan, pursuant to which markets collect and disseminate bid/ask quotation information for listed securities, is a national market system plan.

4 See Securities Exchange Act Release No. 823937 (March 23, 2018), 83 FR 13539 (March 29, 2018) ("Notice of Filing").

5 The Participants are: Cboe BYX Exchange; Inc.; Cboe BZX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Chicago Board Options Exchange, Incorporated; Chicago Stock Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors Exchange LLC; Nasdaq BX, Inc.; Nasdaq ISE, LLC; Nasdaq PHLX LLC;

Act,[6] and Rule 608 thereunder.[7] The Amendment, which was effective upon filing pursuant to Rule 608(b)(3)(i) of Regulation NMS,[8] modified the Plans' fee schedules to adopt changes to the Broker-Dealer Enterprise Maximum Monthly Charge and Per-Quote-Packet Charges.

II. Description of the Amendment

A. Amendments to Enterprise Cap

The Amendment modified the Plans' fee schedules to increase the Broker-Dealer Enterprise Maximum Monthly Charge ("Enterprise Cap") from $686,400 to $1,260,000 for Network A and from $520,000 to $680,000 for Network B. The Participants stated that as a result of industry consolidation, the Nonprofessional Subscriber base for entities subject to the Enterprise Cap may suddenly increase, and whereas before two entities may have benefited slightly from the Enterprise Cap, a combined entity could achieve a substantial decrease in fees by using the Enterprise Cap. Consequently, the Participants stated, the increase of the Enterprise Cap was designed to maintain the status quo and should not have, in conjunction with the Per-Quote-Packet Charges described below, resulted in an increase of revenue to the Plans or fees for any particular entity.[9]

In addition, the Amendment modified the Plans to remove a provision relating to annual increases of the Enterprise Cap after a two-thirds vote of the Participants. In 2013,[10] the Participants amended the mechanism by which the Enterprise Cap would increase, from an

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The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE Arca, Inc.; NYSE American LLC; NYSE National, Inc.

6 15 U.S.C. 78k-1.

7 17 CFR 242.608.

8 17 CFR 242.608(b)(3)(i).

9 The Participants noted that very few entities take advantage of the Enterprise Cap.

10 See Securities Exchange Act Release No. 70010 (July 19, 2013), 78 FR 44984 (July 25, 2013).

automatic increase based on volume, to a requirement for an affirmative vote of the Participants. The Participants have not used this mechanism to increase the Enterprise Cap. The Participants believe that any future changes to the Enterprise Cap should be filed with the Commission and subject to public comment. Consequently, the Participants proposed to delete this provision.

B. Amendments to the Per-Quote-Packet Charges

The Participants stated that because of the increase in the Enterprise Cap, there could have been broker-dealers that used the Enterprise Cap that, without a corresponding offset, could have faced an increase in fees. To offset the potential fee increase, the Amendment modified the text of the Plans' fee schedules to reduce the Plans' Per-Quote-Packet Charges for broker-dealers with 500,000 or more Nonprofessional Subscribers from $.0075 to $.0025.

The Participants stated that by implementing a tiered structure for Per-Quote-Packet Charges, the proposal was designed to provide an offset to those firms most likely affected by the Enterprise Cap increase (i.e., those with a large Nonprofessional Subscriber base). Additionally, the Participants stated that the proposal would align the tiered structures for Networks A and B with those of Network C.

Pursuant to Rule 608(b)(3)(i) under Regulation NMS,[11] the Participants designated the Amendment as establishing or changing a fee or other charge collected on their behalf in connection with access to, or use of, the facilities contemplated by the Plans. As a result, the Amendment was effective upon filing with the Commission. The Amendment was published for comment in the Federal Register on March 29, 2018.[12]

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11 17 CFR 242.608(b)(3)(i).

12 See Notice of Filing, supra note 4.

III. Summary of Comments

The Commission received two comment letters in response to the Notice of Filing,[13] and a response thereto from the Participants.[14] Healthy Markets[15] urged the Commission to summarily abrogate the Amendment on grounds that it is not appropriately justified, is discriminatory, and is contrary to the original purpose of the Enterprise Cap. Healthy Markets also stated that the Enterprise Cap should be eliminated as part of the broader process of modernizing the CTA and CQ fee schedules.

Specifically, Healthy Markets stated that the Participants failed to support their representations regarding industry consolidation and noted that the Amendment lacks any detailed justification or analysis.[16] In addition, Healthy Markets stated that the Participants' representation that the Amendment may be revenue neutral does not demonstrate that the Amendment is consistent with the Act whose goal is to protect the public interest by, amongst other things, promoting competition, the reasonable allocation of fees, and non-discrimination.[17] Healthy Markets also argues that the Amendment is discriminatory in that it appears to target a very small segment of firms, possibly a single firm.[18] Lastly, Healthy Market stated that the

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13 See letters from Tyler Gellasch, Executive Director, Healthy Markets Association ("Healthy Markets"), dated April 11, 2018 ("Healthy Markets Letter"), and Melissa MacGregor, Managing Director, Securities Industry and Financial Markets Association ("SIFMA"), dated April 19, 2018 ("SIFMA Letter"), to Brent J. Fields, Secretary, Commission.

14 See Letter from Emily Kasparov to Brent J. Fields, Secretary, Commission, dated April 27, 2018 ("Participants' Response").

15 Healthy Markets also commented on other items that are not germane to the instant filing, such, as SR-CTA/CQ-2017-14 and broader recommendations for NMS Plans and Securities Information Processor Fees.

16 See Healthy Markets Letter, supra note 13 at 6.

17 See id. at 6-7.

18 See id. at 6.

Enterprise Cap should be eliminated as part of the broader process of modernizing the CTA and CQ fee schedules to simply allow for the non-discriminatory, consistent access and pricing of public market data.[19]

In its comment letter, SIFMA stated that the information provided by the Participants in the Amendment with respect to, among other things, cost, revenue, and customer data, is insufficient to permit the Commission to determine whether the Amendment is consistent with the Act.[20] SIFMA stated that only the Participants, and not SIFMA or other market participants, possess the information necessary to evaluate the Amendment.[21] SIFMA also stated that, costs, and not revenue neutrality as the Participants suggest, is the relevant factor in assessing whether the Amendment is consistent with the Act.[22]

In response, the Participants stated that the comments received are misguided or incorrect, and require no further response from the Participants.[23] In addition, the Participants stated that market participants have access to the information necessary to assess the impact of the Amendments on revenue,[24] asserting that data subscribers can readily apply the new fee schedule to their historical usage to project future usage and thereby determine whether the

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19 See id. at 8.

20 See SIFMA Letter, supra note 13 at 1-3. SIFMA also stated that absent data demonstrating a reasonable relationship between core data revenues and the costs of collecting and disseminating data, it is doubtful that maintaining the status quo with respect to market data fees is consistent with the Act. According to SIFMA, the governance structure for NMS plans is broken and market data fees are not restrained by competitive forces, thus maintaining the status quo with respect to market data fees could impose a burden on competition. See id. at 3.

21 See id. at 1-3.

22 See id. at 2.

23 See Participants' Response, supra note 14 at 1-2.

24 See Participants' Response, supra note 14 at 1.

Participants' representations concerning the effect on revenue hold true.[25] The Participants also noted that only industry associations commented on the Amendments, and that individual market data subscribers could have commented on the Amendments had the Participants'analysis been incorrect.[26]

IV. Discussion

Pursuant to Section 11A of the Act[27] and Rule 608(b)(3)(iii) of Regulation NMS thereunder,[28] at any time within 60 days of the filing of any such amendment, the Commission may summarily abrogate the amendment and require that the amendment be re-filed in accordance with paragraph (a)(1) of Rule 608[29] and reviewed in accordance with paragraph (b)(2) of Rule 608,[30] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act. The Commission is concerned that the information and justifications provided by the Participants are not sufficient for the Commission to determine whether the Amendment is consistent with the Act. Accordingly, the Commission believes that the procedures set forth in Rule 608(b)(2)[31] will provide a more appropriate mechanism for determining whether the Amendment is consistent with the Act.

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25 See id.

26 See id.

27 15 U.S.C. 78k-1.

28 17 CFR 242.608.

29 17 CFR 242.608(a)(1).

30 17 CFR 242.608(b)(2).

31 Id.

The Commission believes that the Amendment raises questions as to whether the changes will result in fees that are fair and reasonable, not unreasonably discriminatory,[32] and that will not impose an undue or inappropriate burden on competition under Section 11A of the Act.[33]

The Commission does not believe that the Participants have provided sufficient information regarding, or adequate justification for, the changes described in the Amendment. While the Participants represent that they used certain data to calibrate the fee changes to achieve a revenue neutral outcome [34] none of that data is provided in the Amendment, nor do the Participants provide any such information in their response.[35] The Commission is also concerned that the Participants provided little information concerning the basis for, the anticipated revenue effects of, and the effects on market participants from, the Amendment. The Participants have not provided sufficient information for the changes to be closely scrutinized for fairness and reasonableness and the Amendment lacks support for the basis of, as well as the application and likely effect of, the fees to determine that the Amendment is not unreasonably discriminatory.

In addition, the Enterprise Cap is approximately doubled for Network A, while it is being raised by substantially less than half from $520,000 to $680,000 for Network B. The Participants have provided no justification for this difference. Similarly, the Participants did not provide information to support their assertion that the increase of the Enterprise Cap is designed to maintain the status quo and should not, in conjunction with the Per-Quote Packet fee changes,

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32 17 CFR 242.603(a)(1)-(2), 17 CFR 242.608, and 15 U.S.C. 78k-1(a)(1)(C).

33 15 U.S.C. 78k-1

34 See Notice of Filing, supra note 4 at 13541.

35 See Participants' Response, supra note 14.

result in an increase of revenue to the Plans or of fees to any particular entity.[36] The Participants lowered the Per-Quote Packet fee for firms with at least 500,000 non-professional accounts. However, the filing does not indicate why the Participants chose to limit the lower fee to firms that have 500,000 non-professional subscribers. The Participants state that the Amendment does not impose any burden on competition that is not necessary or appropriate because the fees are revenue neutral and maintain the status quo. Because the Participants did not provide the Commission with sufficient data to support their assertion that the fee change should not result in an increase of revenue to the Plans or to fees for any particular entity, the Commission is unable to evaluate the Participants' assertions that the Amendment does not impose any burden on competition that is not necessary or appropriate.

V. Conclusion

For the reasons stated above, the Commission believes it necessary or appropriate to summarily abrogate the Amendment and terminate its status as immediately effective. The Commission believes that the procedures set forth in Rule 608(b)(2) of Regulation NMS[37] will provide a more appropriate mechanism for determining whether the Amendment is consistent with the Act. Therefore, the Commission believes that it is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act, to summarily abrogate the Amendment.

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36 Id. at 13540.

37 17 CFR 242.608(b)(2).

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act,[38] and Rule 608 thereunder,[39] that the Twenty-Third Charges Amendment to the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan (SR-CTA/CQ-2018-01) be, and hereby is, summarily abrogated. If the Participants choose to re-file the Amendment, they must do so pursuant to Section 11A of the Act and the Amendment must be re-filed in accordance with paragraph (a)(1) of Rule 608 of Regulation NMS[40] for review in accordance with paragraph (b)(2) of Rule 608 of Regulation NMS.[41]

By the Commission.

Brent J. Fields
Secretary

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38 15 U.S.C. 78k-1.

39 17 CFR 242.608.

40 17 CFR 242.608(a)(1).

41 17 CFR 242.608(b)(2).

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83149; File No. S7-24-89)

May 1, 2018

Joint Industry Plan; Order of Summary Abrogation of the Forty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis

I. Introduction

Notice is hereby given that the Securities and Exchange Commission ("Commission"), pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 608 thereunder,[2] is summarily abrogating the Forty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis ("Nasdaq/UTP Plan" or "Plan").[3]

On March 5, 2018[4] the participants of the Plans ("Participants")[5] filed with the Commission a proposal to amend the Nasdaq/UTP Plan ("Amendment"), pursuant to Section

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1 15 U.S.C. 78k-1.

2 17 CFR 242.608.

3 The Plan governs the collection, processing, and dissemination on a consolidated basis of quotation information and transaction reports in Eligible Securities for each of its Participants. This consolidated information informs investors of the current quotation and recent trade prices of Nasdaq securities. It enables investors to ascertain from one data source the current prices in all the markets trading Nasdaq securities. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Eligible Securities. See Securities Exchange Act Release No. 55647 (April 19, 2007), 72 FR 20891 (April 26, 2007).

4 See Securities Exchange Act Release No. 82938 (March 23, 2018), 83 FR 13542 (March 29, 2018) ("Notice of Filing").

5 The Participants are: Cboe BYX Exchange; Inc.; Cboe BZX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Chicago Board Options Exchange, Incorporated; Chicago Stock Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors Exchange LLC; Nasdaq BX, Inc.; Nasdaq ISE, LLC; Nasdaq PHLX LLC;

11A of the Act,[6] and Rule 608 thereunder.[7] The Amendment, which was effective upon filing pursuant to Rule 608(b)(3)(i) of Regulation NMS,[8] modified the Plan's fee schedule to adopt changes to the Nonprofessional Subscriber Enterprise Cap and Per Query Fees.

II. Description of the Amendment

A. Amendments to Enterprise Cap

The Amendment modified the Plan's fee schedule to increase the Nonprofessional Subscriber Enterprise Cap ("Enterprise Cap") from $686,400 to $1,260,000. The Participants stated that as a result of industry consolidation, the non-professional subscriber base for entities subject to the Enterprise Cap may suddenly increase, and whereas before two entities may have benefited slightly from the Enterprise Cap, a combined entity could achieve a substantial decrease in fees by using the Enterprise Cap. Consequently, the Participants stated, the increase of the Enterprise Cap was designed to maintain the status quo and should not have, in conjunction with the Per-Query Fee change described below, resulted in an increase of revenue to the Plan or fees for any particular entity.[9]

In addition, the Amendment modified the Plan to remove a provision relating to annual increases of the Enterprise Cap after a two-thirds vote of the Participants. In 2014[10] the Participants amended the mechanism by which the Enterprise Cap would increase, from an automatic increase based on volume, to a requirement for an affirmative vote of the Participants.

The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE Arca, Inc.; NYSE American LLC; NYSE National, Inc.

6 15 U.S.C. 78k-1.

7 17 CFR 242.608.

8 17 CFR 242.608(b)(3)(i).

9 The Participants noted that very few entities take advantage of the Enterprise Cap.

10 See Securities Exchange Act Release No. 73279 (October 1, 2014), 79 FR 60522 (October 7, 2014) (describing the history of the Per-Query Fees).

The Participants have not used this mechanism to increase the Enterprise Cap. The Participants believe that any future changes to the Enterprise Cap should be filed with the Commission and subject to public comment. Consequently, the Participants proposed to delete this provision.

B. Amendments to the Per-Query Fee

The Participants stated that because of the increase in the Enterprise Cap, there could have been broker-dealers that used the Enterprise Cap that, without a corresponding offset, could have faced an increase in fees. To offset the potential fee increase, the Amendment modified the text of the Plan's fee schedule to reduce the Plan's Per-Query Fee for broker-dealers with 500,000 or more non-professional subscribers from $.0075 to $.0025.

The Participants stated that by implementing a tiered structure for Per-Query Fees, the proposal was designed to provide an offset to those firms most likely affected by the Enterprise Cap increase (i.e., those with a large non-professional subscriber base). Additionally, the Participants stated that the proposal would align the tiered structures for Network C with those of Networks A and B.

Pursuant to Rule 608(b)(3)(i) under Regulation NMS,[11] the Participants designated the Amendment as establishing or changing a fee or other charge collected on their behalf in connection with access to, or use of, the facilities contemplated by the Plan. As a result, the Amendment was effective upon filing with the Commission. The Amendment was published for comment in the Federal Register on March 29, 2018.[12]

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11 17 CFR 242.608(b)(3)(i).

12 See Notice of Filing, supra note 4.

III. Summary of Comments

The Commission received two comment letters in response to the Notice of Filing[13] and a response thereto from the Participants.[14] In its comment letter, SIFMA stated that the information provided by the Participants in the Amendment with respect to, among other things, cost, revenue, and customer data, is insufficient to permit the Commission to determine whether the Amendment is consistent with the Act.[15] SIFMA stated that only the Participants, and not SIFMA or other market participants, possess the information necessary to evaluate the Amendment.[16] SIFMA also stated that, costs, and not revenue neutrality as the Participants suggest, is the relevant factor in assessing whether the Amendment is consistent with the Act.[17]

Healthy Markets[18] urged the Commission to summarily abrogate the Amendment on grounds that it is not appropriately justified, is discriminatory, and is contrary to the original

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13 See letters from Melissa MacGregor, Managing Director, Securities Industry and Financial Markets Association ("SIFMA"), dated April 19, 2018 ("SIFMA Letter"), and Tyler Gellasch, Executive Director, Healthy Markets Association ("Healthy Markets"), dated April 30, 2018 ("Healthy Markets Letter"), to Brent J. Fields, Secretary, Commission.

14 See Letter from Emily Kasparov to Brent J. Fields, Secretary, Commission, dated April 27, 2018 ("Participants' Response"). The Participants responded to the comments received on this Amendment, as well as on SR-CTA/CQ-2018-01, which amended the CTA/CQ plan in a parallel fashion.

15 See SIFMA Letter, supra note 13 at 1-3. SIFMA also stated that absent data demonstrating a reasonable relationship between core data revenues and the costs of collecting and disseminating data, it is doubtful that maintaining the status quo with respect to market data fees is consistent with the Act. According to SIFMA, the governance structure for NMS plans is broken and market data fees are not restrained by competitive forces, thus maintaining the status quo with respect to market data fees could impose a burden on competition. See id. at 3.

16 See id. at 1-3.

17 See id. at 2.

18 Healthy Markets also commented on other items that are not germane to the instant filing, such as broader recommendations for NMS Plans and Securities Information Processor Fees.

purpose of the Enterprise Cap. Healthy Markets also stated that the Enterprise Cap should be eliminated as part of the broader process of modernizing the UTP fee schedules.

Specifically, Healthy Markets stated that the Participants failed to support their representations regarding industry consolidation and noted that the Amendment lacks any detailed justification or analysis.[19] In addition, Healthy Markets stated that the Participants' representation that the Amendment may be revenue neutral does not demonstrate that the Amendment is consistent with the Act whose goal is to protect the public interest by, amongst other things, promoting competition, the reasonable allocation of fees, and non-discrimination.[20] Healthy Markets also states that the Amendment is discriminatory, and that it adds complexity to an already complex process.[21] Lastly, Healthy Market stated that the Enterprise Cap should be eliminated as part of the broader process of modernizing the UTP fee schedules to simply allow for the non-discriminatory, consistent access and pricing of public market data.[22]

In response, the Participants stated that the comments received are misguided or incorrect, and require no further response from the Participants.[23] In addition, the Participants stated that market participants have access to the information necessary to assess the impact of the Amendment on revenue,[24] asserting that data subscribers can readily apply the new fee schedule to their historical usage to project future usage and thereby determine whether the

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19 See Healthy Markets Letter, supra note 13 at 3-4.

20 See id.

21 See id. at 5.

22 See id.

23 See Participants' Response, supra note 14 at 1-2.

24 See Participants' Response, supra note 14 at 1.

Participants' representations concerning the effect on revenue hold true.[25] The Participants also noted that only industry associations commented on the Amendment, and that individual market data subscribers could have commented on the Amendment had the Participants' analysis been incorrect.[26]

IV. Discussion

Pursuant to Section 11A of the Act[27] and Rule 608(b)(3)(iii) of Regulation NMS thereunder,[28] at any time within 60 days of the filing of any such amendment, the Commission may summarily abrogate the amendment and require that the amendment be re-filed in accordance with paragraph (a)(1) of Rule 608[29] and reviewed in accordance with paragraph (b)(2) of Rule 608,[30] if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act. The Commission is concerned that the information and justifications provided by the Participants are not sufficient for the Commission to determine whether the Amendment is consistent with the Act. Accordingly, the Commission believes that the procedures set forth in Rule 608(b)(2)[31] will provide a more appropriate mechanism for determining whether the Amendment is consistent with the Act.

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25 See id.

26 See id.

27 15 U.S.C. 78k-1.

28 17 CFR 242.608.

29 17 CFR 242.608(a)(1).

30 17 CFR 242.608(b)(2).

31 Id.

The Commission believes that the Amendment raises questions as to whether the changes will result in fees that are fair and reasonable, not unreasonably discriminatory,[32] and that will not impose an undue or inappropriate burden on competition under Section 11A of the Act.[33]

The Commission does not believe that the Participants have provided sufficient information regarding, or adequate justification for, the changes described in the Amendment. While the Participants represent that they used certain data to calibrate the fee changes to achieve a revenue neutral outcome[34] none of that data is provided in the Amendment, nor do the Participants provide any such information in their response.[35] The Commission is also concerned that the Participants provided little information concerning the basis for, the anticipated revenue effects of, and the effects on market participants from, the Amendment. The Participants have not provided sufficient information for the changes to be closely scrutinized for fairness and reasonableness and the Amendment lacks support for the basis of, as well as the application and likely effect of, the fees to determine that the Amendment is not unreasonably discriminatory.

In addition, the Participants did not provide information to support their assertion that the increase of the Enterprise Cap is designed to maintain the status quo and should not, in conjunction with the Per-Query fee changes, result in an increase of revenue to the Plan or of fees to any particular entity.[36] The Participants lowered the Per-Query fee for firms with at least 500,000 non-professional accounts. However the filing does not indicate why the Participants

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32 17 CFR 242.603(a)(1)-(2), 17 CFR 242.608, and 15 U.S.C. 78k-1(a)(1)(C).

33 15 U.S.C. 78k-1

34 See Notice of Filing, supra note 4 at 13543.

35 See Participants' Response, supra note 14.

36 Id.

chose to limit the lower fee to firms that have 500,000 non-professional subscribers. The Participants state that the Amendment does not impose any burden on competition that is not necessary or appropriate because it is revenue neutral and maintains the status quo. Because the Participants did not provide the Commission with sufficient data to support their assertion that the fee change should not result in an increase of revenue to the Plan or to fees for any particular entity, however, the Commission is unable to evaluate the Participants' assertions that the Amendment does not impose any burden on competition that is not necessary or appropriate.

V. Conclusion

For the reasons stated above, the Commission believes it necessary or appropriate to summarily abrogate the Amendment and terminate its status as immediately effective. The Commission believes that the procedures set forth in Rule 608(b)(2) of Regulation NMS[37] will provide a more appropriate mechanism for determining whether the Amendment is consistent with the Act. Therefore, the Commission believes that it is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act, to summarily abrogate the Amendment.

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37 17 CFR 242.608(b)(2).

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act,[38] and Rule 608 thereunder,[39] that the Forty-Second Amendment to the Nasdaq/UTP Plan (File No. S7-24-89) be, and hereby is, summarily abrogated. If the Participants choose to re-file the Amendment, they must do so pursuant to Section 11A of the Act and the Amendment must be re-filed in accordance with paragraph (a)(1) of Rule 608 of Regulation NMS[40] for review in accordance with paragraph (b)(2) of Rule 608 of Regulation NMS.[41]

By the Commission.

Brent J. Fields
Secretary

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38 15 U.S.C. 78k-1.

39 17 CFR 242.608.

40 17 CFR 242.608(a)(1).

41 17 CFR 242.608(b)(2).