December 10, 2019

Mrs. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Secretary Countryman:

Better Markets[1] appreciates the opportunity to comment on the above-captioned rule proposal ("Release" or "Proposal") published for public comment by the Securities and Exchange Commission ("SEC" or "Commission"). The Release[2] proposes to repeal SEC Rule 608(b)(3)(i) in effect removing the ability of the sponsors of National Market System Plans ("NMS Plan") to file self-effectuating (or effective-upon-filing) fees imposed on market participants to access certain market data. As a result, NMS Plan sponsors—self-regulatory organizations ("SROs") such as exchanges and the Financial Industry Regulatory Organization ("FINRA")—would follow the standard procedures of rule filing by filing the fee-setting rule which would then require the Commission to release the filing for public noticing and comment before approving or denying the fee-setting rule.

SUMMARY

We support this rescission as we believe these self-effectuating fee filings impose substantial costs on investors without giving them or the public an opportunity to comment and inform the Commission on the reasonableness of the fees. We further believe the NMS Plan sponsors suffer from conflicts of interests in setting these fees, therefore the Commission, in its furtherance of investor protection and promotion of market integrity, would benefit by releasing these fee filings for public assessment and comment and would further promote its statutory mandates by serving as an important check on the SRO's conflicts of interest. Finally, we do not agree with the analysis—as offered by some—that Section 916 of the Dodd-Frank Wall Street

[1] Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans' jobs, savings, retirements, and more.

[2] *See* Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments, Release Nos. 34–87193, File No. S7–15–19, 84 Fed. Reg. 54794 (October 11, 2019) *available* at https://www.federalregister.gov/documents/2019/10/11/2019-21770/rescission-of-effective-upon-filing-procedure-for-nms-plan-fee-amendments.

Reform and Consumer Act of 2010 applies equally to individual SRO fee-setting rule filings *and* consortium-based filings, such as those filed by NMS Plans like the Consolidated Audit Trail NMS Plan ("CAT NMS Plan") or the Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA") Plan.

While we support this Proposal, we urge the Commission to go further and significantly improve how these NMS Plans are governed and controlled. We offer some comments in this regard at the end of this letter.

BACKGROUND AND DESCRIPTION OF PROPOSAL

As part of the National Market System, the SEC requires SROs to establish certain facilities and gather and consolidate certain market data that is used by market participants, including investors both retail and institutional, to make informed investment decisions and trades. These facilities include the securities information processors ("SIPs") and in the future will include the CAT NMS.

These SIPs currently gather and consolidate the so-called "core data" that market participants are either regulatorily obligated to obtain or need to meaningfully participate in the markets. This core data includes: "(1) the price, size, and exchange of the last sale; (2) each exchange's current highest bid and lowest offer, and the shares available at those prices; and (3) the national best bid and offer (i.e., the highest bid and lowest offer currently available on any exchange)."[3] Additionally, these SIPs "collect, calculate, and disseminate certain regulatory data, including information required by the National Market System Plan to Address Extraordinary Market Volatility (''LULD Plan''), information relating to regulatory halts and market-wide circuit breakers (''MWCBs'')", and information regarding short-sale circuit breakers.[4]

The SROs are authorized to charge reasonable fees to market participants (*i.e.*, subscribers of the data feeds) to access this core data, and, importantly, these fees could be in excess of the cost of producing such data. The SROs are permitted to distribute the excess "profits" among the sponsors of the particular NMS Plan. Total fees generated by the various NMS Plans, excluding the CAT NMS, from market participants (including investors) exceeded $500 million in 2017.[5]

Importantly, currently, the NMS plan sponsors fee-setting rules are self-effectuating, in that they are effective immediately upon filing with the Commission. The NMS Plan sponsors can begin charging users of their facility or data immediately after filing with the Commission and *before* these users—or anyone else—have an opportunity to read, review or comment to the Commission whether the fees are reasonable. The Commission can abrogate the filing within 60 days and require the plan sponsors to re-file according to a standard procedure which would in turn require the Commission to publish the fee-setting rule filing for notice and comment. But because commenters seldom comment on fee-filings that are effective-upon-filing (and often they do not even know a fee change is coming), the Commission seems to lack the knowledge and basis

3 *See* Release at 54795.
4 *See* Release at 54795.
5 *See* Release at 54794.

to abrogate filings. Indeed, since 2010, of the 38 fee-setting filings, the Commission has only abrogated a total of three filings (and all three of these were in 2017 and 2018).[6]

The Commission now is proposing to eliminate this effective-upon-filing provision of Rule 608, and therefore subject all NMS Plan fee-setting rule filings to standard procedure. Standard procedure would in turn require the Commission to publish for notice and comment these fee filings. The Commission would benefit from the feedback of those impacted by the fees and the public. The Commission then would approve or deny the filing, only once it finds the fee filing to be "necessary or appropriate in the public interest, for the protection of investors and 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 Exchange Act."[7]

COMMENTS

**The Fees Imposed by NMS Plans Are Substantial Therefore Investors and the Public Must Have an Opportunity to Comment Before They are Effective.**

The fees imposed by NMS Plans are substantial and investors must pay them either directly or indirectly through their brokers. All broker-dealers are under regulatory obligations to obtain access to "core data" produced by SIPs, and because, as noted above, the information contained in the package is often unavailable anywhere else, those producing such data have monopolistic economic power in setting its price. Because this data is (1) critical, (2) required, and (3) its costs can be substantial, users of the data must be given an opportunity to provide input to the Commission about the reasonableness of the fee.

Currently, users of such data cannot provide feedback *before* the rule becomes effective and they begin paying for it. And given the Commission's history of abrogating less than 1 out of 10 fee filings, users of the core data have little confidence that their after-the-fact feedback will persuade the Commission to abrogate the rule filing and assess whether the fees are necessary or appropriate in the public interest. By repealing the ability to file fee-setting rules that are self-effectuating, and therefore, subjecting all NMS plan fee-setting rules to Commission's notice and comment, the Commission would encourage market participants and the public to review the proposals, offer their views and better inform the Commission. This will result in a better policy making and decisions regarding whether the fees are reasonable and in the public interest.

**The Exchanges Suffer from Conflicts of Interest in Setting the Fee, and Commission Should Serve as a Check on this Conflict by Soliciting Comments from Impacted Parties and Independent Observers.**

Currently, the NMS Plan sponsors are the national securities exchanges (except the newly organized Long Term Stock Exchange) and FINRA. Of these 24 sponsors, all but one are profit-seeking exchanges. Of the 23 stock exchanges operating in the United States, 19 are owned by only three publicly traded conglomerates with their own shareholders and boards of directors that

6 *See* Release at 54801.
7 *See* Release at 54795.

are focused on maximizing profits.[8] This means three entities *de facto* control 19 of the 24 votes on NMS Plans, which gives them dominant power to set prices for accessing core data and reporting into CAT NMS.

Importantly, given the authority to impose fees beyond the cost necessary to produce the data or run the facilities *and* the sponsors' authority to share among themselves this excess revenue, the sponsors have all the incentives to use their participation in NMS plans as an opportunity to increase the profits of their owners, the publicly traded holding companies. Some of these sponsors have a long rap-sheet for violating SEC rules and securities laws, in some cases harming their own members.[9] It is in this environment that a Commission—statutorily mandated to protect investors and prioritize the public's interest in perfecting the mechanisms of the securities markets—would serve as a vital check against the clear conflicts of interest present in this arrangement.

The Commission could better serve this role by publishing these fee-setting rule proposal, along with its own analysis and assessment as warranted, for notice and comment. Investors, market participants, academics, and other observers could then offer informed views and perspectives, which would enable the Commission to arrive at a decision that prioritizes the public's interest above the parochial economic interests of the exchanges.

**Section 916 of the Dodd-Frank Act Applies Solely to Individual SRO Filings and Not NMS Plan Filings.**

Section 916 of the Dodd-Frank Act required the Commission to approve or trigger a process of disapproval of SRO rule filings (including fee-setting rule filings). If the Commission does not act within 45 days (or seek an extension to decide whether to act), the SRO rule filing would become effective. The Proposal discusses how some exchanges have argued that Section 916 should also apply to NMS Plan fee-setting filings.[10]

The Commission rejects that argument and we agree with the Commission's analysis and conclusion. Section 916 of the Dodd-Frank Act amends Section 19(b) of the Securities Exchange Act of 1934, which applies to *individual* SRO filings, whereas Rule 608 is authorized under Section 11A(a)(3)(B), which applies to consortium-based NMS Plans. Section 916 was enacted in response to a particular problem the exchanges had raised with Congress: the Commission's practice of "sitting on" rule filings and letting them linger for long periods of times, sometimes for years.

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8 *See* Release at 54802, fn. 95. Cboe Global Markets, Inc. controls BYX, BZX, C2, EDGA, EDGX and CBOE; Miami Internal Holdings, Inc. controls Miami International, MIAX Emerald and MIAX PEARL; NASDAQ, Inc. controls BX, GEMX, ISE, MRX, PHLX and Nasdaq; Intercontinental Exchange, Inc. controls NYSE, Arca, American, Chicago and National. The three entities that control a single-exchange are IEX Group which controls IEX, a consortium of broker-dealers which controls BOX, and Long Term Stock Exchange, Inc. which controls LTSE.

9 *See*, for example, "SEC Charges Direct Edge Exchanges [owned by BATS Exchange] With Failing to Properly Describe Order Types." Penalty: at least $14 million. See, also, "SEC Charges NYSE, NYSE ARCA, and NYSE MKT for Repeated Failures to Operate in Accordance With Exchange Rules." Penalty: at least $4.5 million. See, also, "SEC Charges NASDAQ for Failures During Facebook IPO." Penalty: at least $10 million. See, also, "SEC Charges New York Stock Exchange for Improper Distribution of Market Data." Penalty: at least $5 million.

10 *See* Release at 54796-7.

The Senate Report accompanying the Dodd-Frank Act discusses how the Senate Banking Committee "has heard concerns about current SEC processes for action on rule changes by exchanges and other self-regulatory organizations [*i.e.*, FINRA]" and that the Committee expects "that the changes will encourage the SEC to employ a more transparent and rapid process for consideration of rule changes."[11] The Report further cites testimony from the exchanges and how the change would "streamline SEC's process for making a determination on ***an exchange rule proposal***."[12] It is abundantly clear that Congress did not extend this provision over consortium-based NMS Plans and only intended it for individual SRO filings.

**The Commission Must Do More to Rid Conflicts of Interests Present in NMS Plans.**

As a threshold matter, for-profit businesses should not be put in charge of and in control of the NMS Plans and its data. These facilities, including SIPs and CAT NMS, house (or will house) information that has commercial value for any for-profit company seeking to maximize profits (as opposed to the SEC with its mission of upholding the public interest and protecting investors). The Commission must do more to eliminate or mitigate the industry's conflicts of interest. To that end, the SEC must reconstitute the governance structure to reduce the industry's and SROs' dominance and increase the SEC's and the public's representation in the governance of NMS Plans, specifically—

- The Commission must alter the charter and corporate identity of the NMS Plans, turning them into a not-for-profit organization, and align their mission to that of the SEC. As currently constituted, NMS Plans are for-profit corporations with no discernable organizational mission. If these facilities are to be used to protect investors and perfect the mechanisms of the securities markets, then their charter must reflect that mission and purpose.

- The not-for-profit then must be led by a Board, the majority of which will be strictly independent directors with impeccable reputations and integrity. The benefits of including independent board members on corporate boards has been extensively studied. Independent board members increase a firm's operating performance,[13] companies with independent board members are more innovative,[14] and, firms with independent board members more effectively hold CEOs and other executives

11 *See* S. Rep. No. 111-176, at 106.

12 *Ibid.*

13 *See* Knyazeva, Anzhela, Diana Knyazeva, and Ronald W. Masulis. "The supply of corporate directors and board independence." The Review of Financial Studies 26, no. 6 (2013): 1561-1605, *available* at https://www.researchgate.net/profile/Anzhela_Knyazeva/publication/250107467_The_Supply_of_Corporate_Directors_and_Board_Independence/links/02e7e51e95688dff83000000/The-Supply-of-Corporate-Directors-and-Board-Independence.pdf.

14 *See* Chen, Chung-Jen, Bou-Wen Lin, Ya-Hui Lin, and Yung-Chang Hsiao. "Ownership structure, independent board members and innovation performance: A contingency perspective." Journal of Business Research 69, no. 9 (2016): 3371-3379, *available* at https://www.semanticscholar.org/paper/Ownership-structure%2C-independent-board-members-and-Chen-Lin/043a6b0315c70813620e31e7fc280e086a6e12e9.

accountable.[15] All firms that issue registered securities in the U.S. (public companies, investment companies, etc.) are required to have some independent board members. Additionally, all quasi-governmental bodies regulating the securities markets have board members that represent the public interest and are independent of the industry they regulate. For example, FINRA, the Municipal Securities Rulemaking Board (MSRB), and the Public Company Accounting Oversight Board (PCAOB) all have majority public, independent board members (in the cases of FINRA and MSRB) and **all** independent board members, in the case of PCAOB. There is no compelling reason why the NMS Plans—responsible for creating and operating mission-critical facilities that can become the most powerful regulatory tool and repository of information in SEC's history—should not have majority independent board members who pursue investor protection and market integrity.

- The chair of the Board must be a person without past, present or future conflicts who is appointed by the SEC in an open, public process. To avoid industry capture of the executive functions of the NMS Plans, including the CAT NMS, and to ensure that the leadership of the Plans are solely focused on advancing the mission of investor protection and market integrity, the Commission should appoint the Chair of the Board through an open and public nominations process. Importantly, the Commission has extensive experience constituting Advisory Committees tasked with assessing complex, highly technical matters of our securities markets. These Advisory Committees invariably have non-industry yet highly capable, knowledgeable and public-interest-oriented individuals. The Commission has all the contacts and experience necessary to select a conflict-free individual as Chair of the Board.

- The Director of the Division of Trading and Markets must serve on the Board as the permanent sole vice-Chair. One of the significant challenges the SEC is facing with the CAT NMS is that it has no direct involvement in decision-making of the CAT NMS. With a permanent seat at the board table, the Commission would be maximally informed of the undertakings, successes, and failures of the CAT NMS, and be in a position to quickly react to such developments. The Division of Trading and Markets has the technical expertise to guide the Board and could offer regulatory user's perspectives that could help make the CAT user-friendly.

- The SEC should increase its control access and usage of the facilities, including the CAT system. Given the nature of the data and how it can serve a commercial purpose, the profit-seeking exchanges should not have any access to the CAT. If the regulatory arms of the exchanges have a demonstrable regulatory need for access, they should request it on an as needed basis. The SEC may also consider granting permanent access to FINRA to be used to pursue FINRA's mission of investor protection and market integrity.[16]

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15 *See* Weisbach, Michael S. "Outside directors and CEO turnover." Journal of financial Economics 20 (1988): 431-460, *available* at https://www.sciencedirect.com/science/article/abs/pii/0304405X88900530.

16 *See* "About FINRA" webpage where it succinctly describes its role in the securities markets, "Every investor in America relies on one thing: fair financial markets. To protect investors and ensure the market's integrity, FINRA is a government-authorized not-for-profit organization that oversees U.S. broker-dealers.

CONCLUSION

We hope our comments are helpful to the Commission as it deliberates this Proposal and the comment file. We support the Commission's decision to repeal Rule 608(b)(3)(i).

Sincerely,

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