



December 6, 2019

Via Electronic Mail

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Dear Ms. Countryman:

Managed Funds Association¹ (“**MFA**”) appreciates the opportunity to submit comments to the Securities and Exchange Commission (“**SEC**” or “**Commission**”) on its proposed “Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments” (the “**Proposal**”).² MFA supports the Proposal and believes that it would help ensure that fees are fair and reasonable before they go into effect. The Proposal would achieve one of the recommendations from the petition MFA and AIMA submitted on August 22, 2018 to amend Regulation NMS to allow for public notice and comment prior to the Commission’s approval or disapproval of securities information processor (“**SIP**”) plan fee changes.³

I. The Proposal

The Proposal would amend Regulation NMS under the Securities Exchange Act of 1934 by rescinding Rule 608(b)(3)(i), which allows a proposed amendment to a national market system

¹ Managed Funds Association (“MFA”) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has cultivated a global membership and actively engages with regulators and policymakers in Asia, Europe, North and South America, and many other regions where MFA members are market participants.

² Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments, 84 Fed. Reg. 54,794 (Oct. 11, 2019) (the “**Proposal**”), available at: <https://www.govinfo.gov/content/pkg/FR-2019-10-11/pdf/2019-21770.pdf>.

³ See letter from the Honorable Richard H. Baker, President and CEO, MFA, and Jiří Król, Deputy CEO, Global Head of Government Affairs, AIMA, to Brent Fields, Secretary, SEC, dated August 22, 2018, regarding Petition for Rulemaking Regarding Market Data Fees and Request for Guidance on Market Data Licensing Practices; Investor Access to Market Data, available at: https://www.managedfunds.org/wp-content/uploads/2018/08/MFA-AIMA-Mkt-Data-Petition.final_8.22.18.pdf.

plan (“**NMS plan**”) that establishes or changes a fee or other charge to become effective upon filing (“**effective-upon-filing procedure**”).⁴ Under the Proposal, a proposed NMS plan amendment concerning a fee change or other charge would be subject to Rule 608(b)(1) and (2) (the “**standard procedure**”), which requires the Commission to publish a proposed NMS plan amendment for notice and comment and for the Commission to approve such amendment before it becomes effective.⁵

II. Comments

A. MFA Supports Rescission of the Effective-Upon-Filing Procedure

MFA members are concerned that NMS plan fees are inconsistent with Section 11A of the Securities Exchange Act of 1934 (“**Exchange Act**”) requirements that NMS plan participants distribute data or establish fees on terms that are “fair and reasonable” and “not unreasonably discriminatory”.⁶ The NMS plans that currently charge or will charge fees are the core data plans (i.e., the Consolidated Tape Association Plan (“**CTA Plan**”) and the Consolidated Quotation Plan (“**CQ Plan**”)) and the consolidated audit trail plan (“**CAT Plan**”). MFA has raised concerns with the governance of these plans in that the operating committees should include market participants, such as institutional investors or broker-dealers, as the fee/financial decisions of operating committees may have a significant impact on market participants.⁷ MFA has also raised concerns with the lack of transparency on the maintenance of NMS plans, particularly with the significant market data price increases over the last several years. Together, the lack of market participant engagement in the governance of NMS plans and the lack of transparency in the maintenance of NMS plans, in our view, have contributed to unfair and unreasonable fees.

We support the Proposal as we believe the standard procedure will help bring greater transparency to the fee proposal or amendment process. The standard procedure will allow investors and other market participants to provide their views on new or amended fee plans and seek clarification with respect to fee plans before they are effective. We believe the current effective-upon-filing procedure deters market participants from submitting comments. In addition, market participants are likely to perceive fee changes that are subject to an effective-upon-filing

⁴ *Id.*

⁵ *Id.*

⁶ 15 U.S.C. §78k-1.

⁷ *See, e.g.*, letter from Stuart J. Kaswell, Executive Vice President & Managing Director, MFA, to Brent J. Fields, Secretary, SEC, on July 18, 2016, regarding the Consolidated Audit Trail; File No. 4-698, available at: <https://www.managedfunds.org/wp-content/uploads/2016/07/MFA-Letter-on-SEC-Consolidated-Audit-Trail.pdf>; letter from Stuart J. Kaswell, Executive Vice President & Managing Director, MFA, to Brent J. Fields, Secretary, SEC, on June 23, 2017, regarding Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt a Fee Schedule to Establish the Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail, available at: <https://www.managedfunds.org/wp-content/uploads/2017/06/MFA-Ltr-CAT-Funding-Model.pdf>; and letter from Stuart J. Kaswell, Executive Vice President & Managing Director, MFA, to Brent J. Fields, Secretary, SEC, on July 28, 2017, regarding Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Establish Fees for Industry Members to Fund the Consolidated Audit Trail, available at: https://www.managedfunds.org/wp-content/uploads/2017/07/MFA-Ltr-SEC-Review-of-CAT-Fees.final_7.28.17.pdf.

procedure as a *fait accompli*, and be less willing to spend time to submit comments or raise concerns.

By providing market participants with time to submit comments prior to Commission approval and NMS plan implementation of fee changes, the Proposal would encourage market participants to comment and seek clarification on proposed NMS plan fee changes. In turn, the Commission would benefit in its review of NMS plan fees from receiving greater public comment and feedback, which, ultimately, should help the Commission ensure that fee proposals are fair and reasonable before they go into effect. Thus, MFA supports rescission of the Effective-Upon-Filing Procedure for NMS plan fee amendments.

The Commission requested comment on an alternative approach where the Commission would amend Rule 608(b)(3)(i) of Regulation NMS to provide that the fee filings would become effective automatically at the end of a 60-day period. MFA believes such approach would suffer from the same defects as the current Effective-Upon-Filing Procedure – specifically, it would discourage market participants from submitting comments because the fee change would be viewed as a *fait accompli*. MFA believes that the concerns for diminished efficiency have less merit in the context of NMS plans that are monopolistic providers of market-wide services.

B. The Commission Should Require NMS Plans to File Costs Related to Fee Amendments

The Commission should take this opportunity to codify or at least formally incorporate by reference its guidance on the content of Proposed Fee Changes to improve the process for handling such filings.⁸ The Commission has a responsibility to oversee that NMS plans are in compliance with the Exchange Act requirements, and that with respect to market data provided by NMS plans, fees are “fair and reasonable” and not “unreasonably discriminatory”.⁹ The Commission has previously stated that core data plans are monopolistic providers of such data, and as such fees charged for SIP data “need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high.”¹⁰ In our view, the Commission cannot make a determination as to the fairness and reasonableness of fees, or whether fees are tied to some type of cost-based standard, without understanding the NMS plan costs.

Similarly, without greater cost transparency to the public, it can be challenging for market participants to understand whether NMS plan fee changes are justifiable. Accordingly, MFA recommends that the Commission require NMS plans or NMS plan participants (*i.e.*, self-regulatory organizations that are participants in an NMS plan) to file costs related to NMS plan

⁸ See Staff Guidance on SRO Rule Filings Relating to Fees, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

⁹ 15 U.S.C. §78k-1.

¹⁰ Proposal *supra* n. 2 (stating “that where plans responsible for providing core data are monopolistic providers of such data, there is no market competition that can be relied upon to set competitive prices”); Concept Release on the Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613, 70,627 (Dec. 17, 1999), available at: <https://www.gpo.gov/fdsys/pkg/FR-1999-12-17/pdf/99-32471.pdf>.

fee amendments or fee changes, including new fees, as part of an NMS plan amendment. Neither NMS plans nor NMS plan participants should be able to rely on conclusory statements about additional administrative costs, or the availability of alternative products.

The Commission should also provide guidance on the metrics to assess the potential impact of fee changes. In the past, NMS plans have presented fee increases as “revenue neutral” by assuming that fewer people would subscribe to the more expensive service, but that assumption is inconsistent with the nature of the services provided by NMS plans. As the Commission rightly notes in its Proposal, the data distributed by the NMS plans is necessary and essential to all investors who wish to participate in the U.S. equity and options markets. In the case of the consolidated audit trail, “Industry Members” under the plan have no alternative but to pay the required fees. Fee proposals for NMS plans should be assessed from both the perspective of the NMS plan costs and revenues overall, as well as from the perspective of an individual client firm, with no change in client behavior and no attendant diminution of client usage.

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We would welcome the opportunity to discuss our comments with the Commission or its staff in greater detail. If the staff has any questions or comments, please do not hesitate to contact Jennifer Han, Associate General Counsel, at (202) 730-2600.

Respectfully submitted,

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