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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-95851; File No. SR-CTA/CQ-2021-03]

Consolidated Tape Association; Order Disapproving the Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan

September 21, 2022.

I. INTRODUCTION

On November 5, 2021,[1] certain participants in the Second Restatement of the Consolidated Tape Association ("CTA") Plan and Restated Consolidated Quotation ("CQ") Plan (collectively "CTA/CQ Plans" or "Plans")[2] filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 11A of the Securities Exchange Act of 1934 ("Act")[3] and Rule 608 of Regulation National Market System ("NMS") thereunder,[4] a proposal

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1 See Letter from Robert Books, Chair, CTA/CQ Operating Committee, to Vanessa Countryman, Secretary, Commission (Nov. 5, 2021) ("Cover Letter"), available at https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/110000392367/CTA%20MDIR%20Fee%20Filing%20-%2011.5.21.pdf.

2 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 of Regulation NMS, 17 CFR 242.601, and a "national market system plan" under Rule 608 of Regulation NMS, 17 CFR 242.608. The CQ Plan, pursuant to which markets collect and disseminate bid/ask quotation information for non-Nasdaq-listed securities, is a "national market system plan" under Rule 608 under the Act, 17 CFR 242.608. 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 (Aug. 7, 1978) (temporarily authorizing the CQ Plan); and 16518 (Jan. 22, 1980), 45 FR 6521 (Jan. 28, 1980) (permanently authorizing the CQ Plan).

3 15 U.S.C 78k-1.

4 17 CFR 242.608.

(the "Proposed Amendments") to amend the Plans.[5] The Proposed Amendments were published for comment in the Federal Register on November 26, 2021.[6]

On February 24, 2022, the Commission instituted proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,[7] to determine whether to disapprove the Proposed Amendments or to approve the Proposed Amendments with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.[8] On May 19, 2022, the Commission designated a longer period within which to conclude proceedings regarding the Proposed Amendments.[9] On July 21, 2022, the Commission again designated a longer period within which to conclude proceedings regarding the Proposed Amendments.[10]

The Proposed Amendment seeks to set fees for the data content underlying consolidated market data offerings pursuant to the Commission's Market Data Infrastructure Rules ("MDI Rules"),[11] which expand the content of consolidated market data and require the introduction of a

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5 The Proposed Amendments were, as required by the Plans, approved and executed by at least two-thirds of the self-regulatory organizations ("SROs") that are participants of the Plans. The participants that approved and executed the amendments (the "Filing Participants") are: Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe Exchange, Inc.; Nasdaq ISE, LLC; Nasdaq PHLX LLC; The Nasdaq Stock Market LLC; New York Stock Exchange LLC; NYSE American LLC; NYSE Arca, Inc.; NYSE Chicago, Inc.; and NYSE National, Inc. The other SROs that are participants in the Plans and that did not approve or execute the amendments are (the "Non-Supporting Participants"): Financial Industry Regulatory Authority, Inc.; Investors Exchange LLC; Long-Term Stock Exchange, Inc.; MEMX LLC; MIAX PEARL, LLC; and Nasdaq BX, Inc.

6 See Securities Exchange Act Release No. 93625 (Nov. 19, 2021), 86 FR 67517 (Nov. 26, 2021) ("Notice"). Comments received in response to the Proposed Amendments are available at https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103.htm.

7 17 CFR 242.608(b)(2)(i).

8 See Securities Exchange Act Release No. 94309 (Feb. 24, 2022), 87 FR 11763 (Mar. 2, 2022).

9 See Securities Exchange Act Release No. 94952 (May 19, 2022), 87 FR 31921 (May 25, 2022).

10 See Securities Exchange Act Release No. 95346 (July 21, 2022), 87 FR 45142 (July 27, 2022).

11 The "MDI Rules" as used in this Order, and as relevant to the Proposed Amendments, are Rules 600, 603, and 614 of Regulation NMS. 17 CFR 242.600, 603, 614. See also

competitive decentralized consolidation model. The Filing Participants propose what they characterize as "value-based" fees for top-of-book data, depth-of-book data, auction data, professional and non-professional users, non-display use, access, and redistribution. Below, the Commission provides an overview of the MDI Rules requirement pursuant to which the Proposed Amendment was filed and then examines the proposed "value-based" methodology underlying the proposed fees and each of the proposed fees in turn, finding that, in each case, the Filing Participants have not demonstrated that the proposed fees are fair, reasonable, and not unreasonably discriminatory.

This order disapproves the Proposed Amendments.[12]

II. OVERVIEW

Pursuant to Regulation NMS and the Equity Data Plans,[13] the national securities exchanges and national securities association ("self-regulatory organizations" or "SROs") must

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Securities Exchange Act Release No. 90610 (Dec. 9 2020), 86 FR 18596 (Apr. 9, 2021) (File No. S7-03-20) ("MDI Rules Release"); Securities Exchange Act Release No. 90610A (May 24, 2021), 86 FR 29195 (June 1, 2021) (File No. S7-03-20) (technical correction to MDI Rules Release). Several exchanges filed petitions for review challenging the MDI Rules Release in the U.S. Court of Appeals for the District of Columbia Circuit, which were denied on May 24, 2022. See The Nasdaq Stock Market LLC, et al. v. SEC, No. 21-1100 (D.C. Cir. May 24, 2022).

12 The Filing Participants have filed similar amendments 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"), which the Commission is also disapproving. See Securities Exchange Act Release No. 95849 (Sep. 21, 2022) (File No. S7-24-89). Further, the participants of the CTA/CQ Plans and the Nasdaq/UTP Plan have also filed amendments to implement the non-fee-related aspects of the Commission's MDI Rules. See Securities Exchange Act Release Nos. 93615 (Nov. 19, 2021), 86 FR 67800 (Nov. 29, 2021) (File No. SR-CTA/ CQ-2021-02); 93620 (Nov. 19, 2021), 86 FR 67541(File No. S7-24-89) ("Proposed Non-Fee Amendments"). The Commission is, by separate orders, also disapproving the Proposed Non-Fee Amendments. See Securities Exchange Act Release Nos. 95848 (Sep. 21, 2022) (File No. S7-24-89); 95850 (Sep. 21, 2022) (File No. SR-CTA/ CQ-2021-02).

13 The three effective national market system plans that govern the collection, consolidation, processing, and dissemination of certain NMS information are: (1) the CTA Plan; (2) the CQ Plan; and (3) the Nasdaq/UTP Plan (collectively, the "Equity Data Plans"). Each of the Equity Data Plans is an effective national market system plan under 17 CFR 242.608 (Rule 608) of Regulation NMS. See also Securities Exchange Act

provide certain information with respect to quotations for and transactions in for each NMS stock ("NMS information") to an exclusive plan securities information processor ("exclusive SIP"), which consolidates this information and makes it available to market participants on the consolidated tapes. The purpose of the Equity Data Plans is to facilitate the collection and dissemination of SIP data so that the public has ready access to a "comprehensive, accurate, and reliable source of information for the prices and volume of any NMS stock at any time during the trading day."[14] Because the infrastructure for the collection, consolidation, and dissemination of this data had not been significantly updated since its initial implementation in the 1970s, the Commission adopted amendments to Regulation NMS that increase the content of NMS information and amend the manner in which such NMS information is collected, consolidated, and disseminated by the Equity Data Plans.[15] In the MDI Rules Release, the Commission stated, "[w]idespread availability of timely market information promotes fair and efficient markets and facilitates the ability of brokers and dealers to provide best execution to their customers."[16]

The adoption of the MDI Rules increases the content of NMS information and modifies the manner in which NMS information is collected, consolidated, and disseminated by the Plans. Significantly, under the MDI Rules, the Commission required the introduction of a competitive decentralized consolidation model under which competing consolidators and self-aggregators will replace the exclusive SIPs that collect, consolidate, and disseminate equity market data under the existing NMS plans for equity market data. Although the exclusive SIPs will no longer disseminate all consolidated information for an individual NMS stock, the Plans will continue to

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Release Nos. 10787 (May 10, 1974), 39 FR 17799 (May 20, 1974) (declaring the CTA Plan effective); 15009 (July 28, 1978), 43 FR 34851 (Aug. 7, 1978) (temporarily authorizing the CQ Plan); and 16518 (Jan. 22, 1980), 45 FR 6521 (Jan. 28, 1980) (permanently authorizing the CQ Plan).

14 Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3593 (Jan. 21, 2010).

15 See MDI Rules Release, supra note 11, 86 FR at 18598–600.

16 See id. at 18599.

play an important role—they will develop and propose fees for the data content underlying consolidated market data, collect and allocate revenues collected for this data, develop the monthly performance metrics for competing consolidators, and provide an annual assessment of the competing consolidator model.

Rule 614(e)(1) directs the participants of the effective national market system plan(s) for NMS stocks to file an amendment pursuant to Rule 608 of Regulation NMS to conform the Plans to reflect the provision of information with respect to quotations for and transactions in NMS stocks that is necessary to generate consolidated market data by the SROs to competing consolidators and self-aggregators. As the MDI Rules Release states, this means that the operating committees of the plan(s) will "need to propose the new fees that will be charged for the quotation and transaction information that is necessary to generate consolidated market data that is required to be made available by the SROs under Rule 603(b) to competing consolidators and self-aggregators."[17] The Proposed Amendment was filed by the Filing Participants pursuant to this requirement.[18]

As explained below, the Filing Participants have not demonstrated that the proposed "value-based" fee methodology, or the specific proposed fees themselves, meet the statutory

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17 See MDI Rules Release, supra note 11, 86 FR at 18682.

18 Rule 614(e) requires the participants to "the effective national market system plan(s) for NMS stocks" to file an amendment to implement the MDI Rules. 17 CFR 242.614(e). The Filing Participants have filed the required amendment under the existing CTA/CQ Plans and the Nasdaq/UTP Plan. See supra note 12. While the Commission issued an order on August 6, 2020, approving, as modified, a new national market system plan regarding equity market data—the CT Plan—to replace the existing CTA/CQ Plans and Nasdaq/UTP Plan, that order was stayed on October 13, 2021, see Nasdaq Stock Mkt. LLC v. SEC, No. 21-1167 (D.C. Cir. Oct. 13, 2021), which was before the Filing Participants filed this amendment. The Commission's order approving the CT Plan was subsequently vacated. See The Nasdaq Stock Market LLC, et al. v. Securities and Exchange Commission, Nos. 21-1167, 21-1168, 21-1169 (D.C. Cir., July 5, 2022) (vacating Securities Exchange Act Release No. 92586 (Aug. 6, 2021), 86 FR 44142 (Aug. 11, 2021) (Order Approving, as Modified, a National Market System Plan Regarding Consolidated Market Data)).

standard of being fair, reasonable, and not unreasonably discriminatory.[19] The Commission is thus disapproving the Proposed Amendment under Rule 608(b)(2) of Regulation NMS because it cannot find that the proposed fees are 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 Act.[20]

III. SUMMARY OF THE PROPOSED AMENDMENTS[21]

Under the Proposed Amendments, the Filing Participants propose to amend the Plans to adopt fees for the data content underlying consolidated market data offerings pursuant to the Commission's MDI Rules. All of the SROs that are participants in the Plans have also filed a separate amendment to implement the non-fee-related aspects of the MDI Rules.[22]

The Filing Participants propose a fee structure for the following three categories of data content underlying consolidated market data offerings, which would collectively constitute the amended definition of core data, as that term is defined in Rule 600(b)(21) of Regulation NMS[23]:

(1) Level 1 Core Data, which would include Top of Book Quotations, Last Sale Price Information, and odd-lot information (as defined in Rule 600(b)(59)).[24] Currently, Plan fees for Level 1 Core Data include the provision of Top of Book Quotations and Last Sale Price Information, as well as administrative data (as defined

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19 See Sections 11A(c)(1)(C)–(D) of the Act, 15 U.S.C 78k-1(c)(1)(C)–(D); see also Rule 603(a) of Regulation NMS, 17 CFR 242.603.

20 17 CFR 242.608(b)(2).

21 The full text of the Proposed Amendments appear as Attachment A to the Notice. See Notice, supra note 6, 86 FR 67521–23.

22 See Proposed Non-Fee Amendments, supra note 12.

23 17 CFR 242.600(b)(21).

24 17 CFR 242.600(b)(59).

in Rule 600(b)(2)),[25] regulatory data (as defined in Rule 600(b)(78)),[26] and SRO-specific program data (as defined in Rule 600(b)(85)).[27] The Filing Participants propose that Level 1 Core Data would include all information that subscribers currently receive via the exclusive SIP and would add odd-lot quotation information to that content[28];

(2) Depth of book data (as defined in Rule 600(b)(26))[29]; and

(3) Auction information (as defined in Rule 600(b)(5)).[30]

Professional and Nonprofessional Fee Structure

For each of the three categories of data described above, the Filing Participants propose a Professional Subscriber Charge and a Nonprofessional Subscriber Charge.[31]

With respect to Level 1 Core Data, the Filing Participants propose to apply the Professional Subscriber and Nonprofessional Subscriber fees currently set forth in the Plans to the data content underlying Level 1 Service under the distributed consolidation model. Access to odd-lot information would be made available to Level 1 Core Data Professional and Nonprofessional Subscribers at no additional charge.

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25 17 CFR 242.600(b)(2).

26 17 CFR 242.600(b)(78).

27 17 CFR 242.600(b)(85).

28 Transactions in odd-lots are already reported via the consolidated feeds.

29 17 CFR 242.600(b)(26).

30 The Filing Participants state that they propose to price the three subsets of data that constitute core data separately so that data subscribers have flexibility to choose how much consolidated market data content they wish to purchase. For example, the Filing Participants state that they understand that certain data subscribers may not wish to add depth-of-book data or auction information, or may want to add only depth-of-book information but not auction information. The Filing Participants state, however, that they expect that competing consolidators would purchase all core data. See Notice, supra note 6, 86 FR at 67517 n.10.

31 The terms Professional Subscriber and Nonprofessional Subscriber are currently defined in the Plan, and the Filing Participants do not propose to amend those definitions. See Notice, supra note 6, 86 FR at 67518.

With respect to depth-of-book data, Professional Subscribers would pay $99.00 per device per month for each Network's data, and Nonprofessional Subscribers would pay $4.00 per subscriber per month for each Network's depth-of-book data. The Filing Participants do not propose to offer per-quote packet charges or enterprise rates for the use of depth-of-book data by either Professional Subscribers or Nonprofessional Subscribers.

Finally, with respect to auction information, the Filing Participants propose that both Professional Subscribers and Nonprofessional Subscribers would pay $10.00 per device/subscriber per month for each Network's auction information data.

Non-Display Use Fees

The Filing Participants propose to apply Non-Display Use Fees relating to the three categories of data described above: (1) Level 1 Core Data; (2) depth-of-book data; and (3) auction information.

With respect to Level 1 Core Data, the Filing Participants propose to apply the Non-Display Use fees currently set forth in the Plans.

With respect to non-display use of depth-of-book data, subscribers would pay Non-Display Use Fees of $12,477.00 per month for each category of Non-Display Use per Network.[32]

With respect to non-display auction information, subscribers would pay Non-Display Use fees of $1,248.00 per month for each category of Non-Display Use per Network.

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[32] The three categories of Non-Display Use are as follows: Category 1 applies when a datafeed recipient's Non-Display Use is on its own behalf. Category 2 applies when a datafeed recipient's Non-Display Use is on behalf of its clients. Category 3 applies when a datafeed recipient's Non-Display Use is for the purpose of internally matching buy and sell orders within an organization. Matching buy and sell orders includes matching customer orders on the data recipient's own behalf and/or on behalf of its clients. Category 3 includes, but is not limited to, use in trading platform(s), such as exchanges, alternative trading systems ("ATS"), broker crossing networks, broker crossing systems not filed as ATS's, dark pools, multilateral trading facilities, and systematic internalization systems. See Exhibit E (Schedule of Market Data Charges) to the CTA Plan; Section IX(b)(ii) to the CQ Plan.

Access Fees

Finally, in addition to the charges described above, the Filing Participants propose to charge Access Fees to all subscribers for the use of the three categories of data: (1) Level 1 Core Data; (2) depth-of-book data; and (3) auction information.

With respect to Level 1 Core Data, the Filing Participants propose to apply the Access Fees currently set forth in the Plans.

With respect to depth-of-book data, subscribers would pay a monthly Access Fee of $9,850.00 per Network.

With respect to auction information, subscribers would pay a monthly Access Fee of $985.00 per Network.

The Filing Participants also propose to add language to the fee schedules for the Plans regarding the applicability of various fees to the expanded market data content required by the MDI Rules.[33] First, the Filing Participants propose to specify that the Per-Quote-Packet Charges and the Broker-Dealer Enterprise Cap will not apply to the expanded content of core data, and will only be available for the receipt and use of Level 1 Core Data. The Filing Participants state that, under the current Price List, the Per-Quote-Packet Charges and Enterprise Cap serve as alternative fee schedules to the normally applied Professional and Nonprofessional Subscriber Charges, and, further, that the proposed changes to the fee schedules are designed to clarify that these alternative fee schedules are only available with respect to the use of Level 1 Core Data, and that the fees for the use of depth-of-book data and auction information must be determined pursuant to the Professional and Nonprofessional fees described above.

Second, the Filing Participants propose to add language to the fee schedule to specify that Level 1 Core Data would include Top of Book Quotation Information, Last Sale Price Information, odd-lot information, administrative data, regulatory data, and SRO program data.

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[33] See proposed Exhibit E to the CTA Plan; proposed Section IX(b)(ii) of the CQ Plan.

The Filing Participants state that this proposed change would use terms defined in Rule 600(b) to reflect both data currently made available to subscribers and the additional odd-lot information that would be included at no additional charge.

Third, the Filing Participants propose to add language to the fee schedule to provide that the existing Redistribution Fees would apply to all three categories of core data (i.e., Level 1 Core Data, depth-of-book, and auction information), including any subset thereof. According to the Filing Participants, Redistribution Fees are currently charged to any entity that makes last-sale information or quotation information available to any other entity or to any person other than its employees, irrespective of the means of transmission or access. The Filing Participants propose to amend this description to make it applicable to core data, as that term is defined in Rule 600(b)(21). The Filing Participants do not propose to change the amount of the existing Redistribution Fees. The Filing Participants also propose that the existing Redistribution Fees would be charged to competing consolidators.

Finally, the Filing Participants propose to make non-substantive changes to language in the fee schedules to take into account the expanded content of core data. For example, the Filing Participants are proposing to add headings referencing Level 1 Core Data. Additionally, under Data Access Charges and Multiple Feed Charges, the Participants are proposing to amend "Bid-Ask" to refer to "Top of Book and odd-lot information."[34]

The Filing Participants state that the Proposed Amendments would be implemented to coincide with the phased implementation of the MDI Rules as required by the Commission.

With respect to the method used to develop the proposed fees, the Filing Participants state that in the absence of cost information being available to the Operating Committee, fees

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[34] The Filing Participants further state that they are not proposing any changes to the Multiple Feed Charges, Late/Clearly Erroneous Reporting Charges, and Consolidated Volume Data Non-Compliance Fee. According to the Participants, these current fees are administrative fees and would continue to apply to any data usage. See Notice, supra note 6, 86 FR at 67519.

for consolidated market data are fair and reasonable and not unreasonably discriminatory if they are related to the value of the data to subscribers. The Filing Participants state that the value of depth-of-book data and auction information is well established, as this content has been available to market participants directly from the exchanges for years, and in some cases decades, at prices constrained by direct and platform competition. According to the Filing Participants, exchanges have filed fees for this data pursuant to the standards specified in Section 6(b)(5) of the Act.

The Filing Participants state that, to determine the value of depth-of-book data, the Filing Participants considered a number of methodologies, based on the current fees charged for depth-of-book data products offered by exchanges, to determine the appropriate level at which to set fees for the expanded data content. The Filing Participants state they reviewed (1) an ISO Trade-Based Model[35]; (2) a Depth to Top-Of-Book Ratio Model ("Depth-to-TOB Model"); and (3) a Message-Based Model.[36] Ultimately, the Filing Participants selected a Depth-to-TOB Model to determine the appropriate fees for the expanded data content.

The Filing Participants state that they reviewed the depth to top-of-book ratios of Professional device rates on Nasdaq (Nasdaq TotalView compared to Nasdaq Basic), Cboe (Cboe Full Depth compared to Cboe One) and NYSE (NYSE Integrated compared to NYSE BQT). The Filing Participants state that they also reviewed the ratio proposed by IEX between its proposed fees for real-time top-of-book and depth feeds (TOPS compared to DEEP). The Filing Participants state that using the ratios calculated for Nasdaq, NYSE, and IEX resulted in an average ratio of 3.94x between the prices of depth-of-book and top-of-

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35 According to the Filing Participants, the ISO-Based model analyzed the number of intermarket sweep orders executing through the NBBO, looking at the number of intermarket sweep orders executed in the first five levels of depth as compared to all ISOs executed. See Notice, supra note 6, 86 FR at 67520 n.18.

36 According to the Filing Participants, the Message-based model looked at the total number of orders displayable in the first five levels of depth as compared to all displayable orders. See Notice, supra note 6, 86 FR at 67520 n.19.

book feeds.[37] The Filing Participants then applied this 3.94x ratio to the current fees charged for consolidated market as more specifically described below.

With respect to the fees for auction information, the Filing Participants state that they looked to the number of trades that occur during the auction process as compared to the trading day and determined that roughly 10% of daily trading volume takes place during auctions. Consequently, the Filing Participants concluded that charging a fee that was 10% of the fee charged for depth-of-book data was an appropriate proxy for determining the value of auction information. As a result, the Filing Participants have proposed a $10.00 fee per Network for auction information, which the Filing Participants state is fair and reasonable and not unreasonably discriminatory.

With respect to the fees for Level 1 Core Data, the Filing Participants state that it is fair and reasonable and not unreasonably discriminatory to include access to odd-lot information at no charge in addition to the current fees, which the Filing Participants state they are not proposing to change.

Finally, as described above, the Filing Participants propose that the existing Redistribution Fees would apply to the amended core data and that Redistribution Fees would also apply to competing consolidators.

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[37] The Filing Participants state that they also conducted alternative calculations by including a broader range of products or those products offering more robust depth fees. These alternative calculations resulted in ratios greater than 3.94x and were not selected by the Filing Participants. The Filing Participants state that the 3.94x ratio represents the difference in value between top-of-book and five levels of depth that would be required to be included in consolidated market data under Rule 603(b) Because the alternate methodologies, which focused on only the top five levels of depth, resulted in higher ratios, the Filing Participants state that the more conservative 3.94x ratio would be a fair and reasonable ratio between the proposed fees for depth-of-book data required to be included in the consolidated market data and the current fees for the existing Top of Book Quotation information. See Notice, supra note 6, 86 FR at 67520.

IV. DISCUSSION

A. The Applicable Standard of Review

Under Rule 608(b)(2) of Regulation NMS, the Commission shall approve a national market system plan or proposed amendment to an effective national market system plan, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is 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 Act.[38] The Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.[39] Furthermore, under Rule 700(b)(3)(ii) of the Commission's Rules of Practice,

> The burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans is on the plan participants that filed the NMS plan filing. Any failure of the plan participants that filed the NMS plan filing to provide such detail and specificity may result in the Commission not having a sufficient basis to make an affirmative finding that an NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans.[40]

In addition, the fees proposed in the Proposed Amendments for data content underlying consolidated market data offerings must be assessed against the statutory standard, including Sections 11A(c)(1)(C)–(D) of the Exchange Act and Rule 603(a) under Regulation NMS.[41] Such fees must satisfy the statutory standards of being fair and reasonable and not unreasonably

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38 17 CFR 242.608(b)(2).

39 Id.

40 17 CFR 201.700(b)(3)(ii).

41 See Sections 11A(c)(1)(C)–(D) of the Exchange Act, 15 U.S.C 78k-1(c)(1)(C)–(D); Rule 603(a) of Regulation NMS, 17 CFR 242.603. See also MDI Rules Release, supra note 11, 86 FR at 18650.

discriminatory.[42] In making this assessment, the Commission must have "sufficient information before it to satisfy its statutorily mandated review function" to determine that the fees meet the standard.[43]

For the reasons discussed below, the Commission finds that the Filing Participants have not demonstrated that the Proposed Amendment is consistent with the Act.[44] Accordingly, the Commission cannot find that the Proposed Amendment is 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 Act.[45]

In the discussion that follows, the Commission analyzes the methodology selected by the Filing Participants to develop the proposed fees for data content underlying consolidated market data, as well as the implementation of that methodology, and discusses in turn each of the proposed fee categories for content underlying consolidated market data.

B. "Cost-Based" vs. "Value-Based" Fees for Data Content Underlying Consolidated Market Data

The "value-based" fee methodology proposed by the Filing Participants, and opposed by certain commenters, would apply to each of the specific proposed fees,[46] and the Commission therefore discusses this issue before addressing each of the proposed fees.

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42 See Sections 11A(c)(1)(C)–(D) of the Act, 15 U.S.C 78k-1(c)(1)(C)–(D); Rule 603(a) of Regulation NMS, 17 CFR 242.603. See also MDI Rules Release, Section III.E.2(c), supra note 11, 86 FR at 18684–87 (discussing the statutory requirements applicable to consolidated market data and the standards the Commission has historically applied to assessing compliance with the statutory requirements).

43 See MDI Rules Release, supra note 11, 86 FR at 18685 (citing to In the Matter of the Application of Bloomberg L.P., Securities Exchange Act Release No. 83755 (July 31, 2018), 2018 WL 3640780, at *9 ("Bloomberg Order")).

44 17 CFR 201.700(b)(3).

45 17 CFR 242.608(b)(2).

46 See Notice, supra note 6, 86 FR at 67519–21.

In the MDI Rules Release, the Commission stated that the Operating Committee of the Plan "should continue to have an important role in the operation, development, and regulation of the national market system for the collection, consolidation, and dissemination of consolidated market data."[47] The Commission further stated that "the fees for data content underlying consolidated market data, as now defined, are subject to the national market system process that has been established," and that the "Operating Committee(s) have plenty of experience in developing fees for SIP data."[48]

The Filing Participants state that the Operating Committee has brought this experience to bear to determine the fees for the new core data elements.[49] In the Cover Letter,[50] the Filing Participants also acknowledge that the fees established for consolidated market data must be fair and reasonable and not unreasonably discriminatory, and they state that they are proposing fees that are fair and reasonable and not unreasonably discriminatory. Additionally, the Filing Participants argue that, while the Commission has stated that one way to demonstrate that fees for consolidated market data are fair and reasonable is to show that they are reasonably related to costs, the Exchange Act does not require a showing of costs and historically the Plan has not demonstrated that its fees are fair and reasonable on the basis of cost data.[51]

The Filing Participants further represent that, under the decentralized competing consolidator model, the Operating Committee has no knowledge of any of the costs associated with consolidated market data.[52] According to the Filing Participants, under the current exclusive SIP model, the Operating Committee (1) specifies the technology that each Participant must use to provide the SIPs with data, and (2) contracts directly with a SIP to collect, consolidate, and

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47 MDI Rules Release, supra note 11, 86 FR at 18682.

48 MDI Rules Release, supra note 11, 86 FR at 18683.

49 See Notice, supra note 6, 86 FR at 67519.

50 See Cover Letter, supra note 1, at 6; see also Notice, supra note 6, 86 FR at 67519.

51 See Notice, supra note 6, 86 FR at 67519.

52 See id.

disseminate consolidated market data, and the Operating Committee therefore has knowledge only of the costs associated with collecting and consolidating market data, as opposed to the costs associated with producing the data.[53] By contrast, the Filing Participants state, under the decentralized competing consolidator model, the Plans will no longer have a role either in specifying the technology associated with exchanges providing data or in contracting with a SIP. Rather, the Filing Participants state, each national securities exchange will be responsible, as specified in Rule 603(b), for determining the methods of access to and format of data necessary to generate consolidated market data.[54] Moreover, the Filing Participants argue, competing consolidators will be responsible for connecting to the exchanges to obtain data directly from each exchange, without any involvement of the Operating Committee, and the Operating Committee will not have access to information about how each exchange would generate the data it would be required to disseminate under Rule 603(b).[55] Accordingly, the Filing Participants argue, the Operating Committee does not and will not have access to any information about the cost of providing consolidated market data under the decentralized competing consolidator model.[56]

The Filing Participants state that, in light of the absence of cost information available to the Operating Committee, fees for consolidated market data are fair and reasonable and not unreasonably discriminatory if they are related to the value of the data to subscribers. The Filing Participants argue that the value of depth-of-book data and auction information is well-established, as this content has been available to market participants directly from the exchanges for years, and in some cases decades, at prices constrained by direct and platform competition. The Filing Participants further state that exchanges have filed fees for this data pursuant to the

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53 See id.

54 See id.

55 See id.

56 See id.

standards specified in Section 6(b)(5) of the Act and that the fees in the Proposed Amendment were filed using a value-based methodology.

Some commenters oppose the Proposed Amendment, arguing that the proposed fees are based on a flawed methodology that, inconsistent with the MDI Rules, fails to provide a cost-based justification.[57] These commenters state that the proposed fees should bear a reasonable relationship to the cost of producing the market data, which, they argue, is the primary basis the Commission has identified for justifying the fees for core data.[58]

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57 See Letter from Christopher Solgan, Senior Counsel, MIAX Exchange Group, to Vanessa Countryman, Secretary, Commission, at 3 (Jan. 12, 2022) ("MIAX Letter") (comment from a Non-Supporting Participant); Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, to Vanessa Countryman, Secretary, Commission, at 2–3 (Dec. 17, 2021) ("IEX Letter") (comment from a Non-Supporting Participant). See also Letter from Joe Wald, Managing Director, Co-Head of Electronic Trading, and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group, to Vanessa Countryman, Secretary, Commission, at 2–3 (Dec. 17, 2021) ("BMO Letter"); Letter from Ellen Greene, Managing Director, Equity & Options Market Structure, and William C. Thum, Managing Director and Associate General Counsel, Asset Management Group, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, at 4–5 (Dec. 17, 2021) ("SIFMA Letter I") (noting that the fees charged by monopolistic providers, such as exclusive SIPs, need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low); Letter from Patrick Flannery, Chief Executive Officer, MayStreet, to Vanessa Countryman, Secretary, Commission, at 6 (Dec. 17, 2021) ("MayStreet Letter I"); Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, and Samantha DeZur, Director, Global Public Policy, BlackRock, to Vanessa Countryman, Secretary, Commission, at 2 (Dec. 16, 2021) ("BlackRock Letter"); Letter from Allison Bishop, President, Proof Services LLC, to Vanessa Countryman, Secretary, Commission, at 2–3 (Nov. 22, 2021) ("Proof Services Letter"); Letter from Adrian Griffiths, Head of Market Structure, MEMX LLC, to Vanessa Countryman, Secretary, Commission, at 18 (Nov. 8, 2021) ("MEMX Letter"); Letter from Ellen Greene, Managing Director, Equity & Options Market Structure, and William C. Thum, Managing Director and Associate General Counsel, Asset Management Group, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, at 2 (Apr. 27, 2022) ("SIFMA Letter II").

58 See IEX Letter, supra note 57, at 1, 2–3 (stating that the proposal fails to establish that the fees for the data content underlying consolidated market data meet the statutory standards of being fair, reasonable, and not unreasonably discriminatory); MIAX Letter, supra note 57, at 3. See also BMO Letter, supra note 57, at 2–3; SIFMA Letter I, supra note 57, at 4–5 (stating that the fees charged by monopolistic providers, such as exclusive SIPs, need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low); MayStreet

Some commenters also state that the methodology used has resulted in proposed fees that are unreasonably high.[59] In making this argument, some commenters object to using the current prices for the exchanges' proprietary data products as the basis for calculating the proposed core data fees,[60] stating that such a method is inconsistent with the MDI Rules' goal of expanding access to consolidated data[61] and with statements in the MDI Rules Release that the proposed fees should bear a reasonable relationship to the cost of producing the data.[62] One commenter states that without fair and reasonable pricing for the underlying content of consolidated market data, implementation of the MDI Rules cannot proceed, nor can improvements to price transparency and best execution, because the use of top-of-book proprietary feeds provided by exchanges—often marketed as SIP alternatives and widely used in place of the SIP due to both direct and administrative costs—deprives retail investors of a complete view of the NMS

Letter I, supra note 57, at 6; BlackRock Letter, supra note 57, at 2; Proof Services Letter, supra note 57, at 2, 3; MEMX Letter, supra note 57, at 18; Letter from Manisha Kimmel, Chief Policy Officer, MayStreet, Inc., to Vanessa Countryman, Secretary, Commission, at 13 ("MayStreet Letter II") (stating that fees based on cost are the best approach to achieve robust competition for consolidated market data and meet Regulation NMS and other standards under the Exchange Act); SIFMA Letter II, supra note 57, at 2.

59 See MIAX Letter, supra note 57, at 3; MayStreet Letter I, supra note 57, at 6; BlackRock Letter, supra note 57, at 2, 4–5; IEX Letter, supra note 57, at 4; Proof Services Letter, supra note 57, at 3; MEMX Letter, supra note 57, at 8, 11–12.

60 See MIAX Letter, supra note 57, at 4; SIFMA Letter I, supra note 57, at 4–5 (stating that the exchanges' "platform competition" argument—that competition for order flow constrains pricing for market data—does not demonstrate that the fees are reasonable and that studies the commenter has submitted to the Commission in the past bolster the commenter's argument); IEX Letter, supra note 57, at 4; SIFMA Letter II, supra note 57, at 2.

61 See MIAX Letter, supra note 57, at 4.

62 See id. at 3 (stating "the [p]roposals do not provide a cost based justification to support that the fees are reasonable despite the Commission directly stating in the MDI Rule[s Release] that any proposed fees must be reasonably related to cost"); SIFMA Letter I, supra note 57, at 4, 5 (citing the statement in the MDI Rules Release that "a reasonable relation to cost has … been the principal method discussed by the Commission for assessing the fairness and reasonableness of … fees for core data."); IEX Letter, supra note 57, at 1, 2–3 (arguing that the methodology used to set fees is faulty and inconsistent with MDI Rules Release).

marketplace, which is required to fulfill the Congressional mandate in the 1975 amendments to the Act.[63]

Some commenters also disagree with the Filing Participants' statements in the Proposed Amendment that a cost-based justification is not required because the Act does not require a showing of costs and that cost analysis has not been provided in past equity market data plan proposals.[64] These commenters state that the Commission has stated that a reasonable relation to cost is a primary basis for justifying core data fees.[65] One commenter states that specific information, including quantitative information, should be provided to support the Filing Participants' claims that the proposed fees are fair and reasonable because they will permit the recovery of SRO costs or will not result in excessive pricing or profits.[66] Additionally, some commenters disagree with the Filing Participants' statement in the proposal that the Plan's Operating Committee "has no knowledge of any costs associated with consolidated market data," stating that the Filing Participants know how much it costs to collect and disseminate market data because they already perform this function, including in connection with proprietary feeds.[67]

One commenter states that a cost-based approach is best for achieving robust competition for consolidated market data and reducing administrative plan costs.[68] According to the commenter, pricing of the underlying content for the creation of consolidated market data should

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63 See MayStreet Letter II, supra note 58, at 2–4.

64 See MIAX Letter, supra note 57, at 3; SIFMA Letter I, supra note 57, at 5.

65 See IEX Letter, supra note 57, at 1, 2–3; SIFMA Letter I, supra note 57, at 5; MIAX Letter, supra note 57, at 3 (stating that the vast majority of equity market data plan fees were adopted prior to issuance of the Commission's staff fee guidance and that multiple SROs have more recently included cost based analysis when proposing fees for a market data product).

66 See MIAX Letter, supra note 57, at 3.

67 See SIFMA Letter I, supra note 57, at 5; MIAX Letter, supra note 57, at 3; MayStreet Letter I, supra note 57, at 6; Letter from Katie Adams, Chief Product Officer, Polygon.io, Inc., to Vanessa Countryman, Secretary, Commission, at 1–2 (Mar. 22, 2022) ("Polygon.io Letter II").

68 See MayStreet Letter II, supra note 58, at 10–14.

be based on the marginal cost of supporting competing consolidators, a cost that the commenter states is quantifiable and fixed for each participant. The commenter states that the lowest cost approach would be for each Participant to offer competing consolidators and self-aggregators a depth-of-book feed at their current proprietary feed prices, with added access fees and redistribution fees but not usage fees.[69] The commenter states that a comparison of total annual revenues that the plans would receive under a cost-based model (using current depth-of-book proprietary feeds pricing as a proxy for costs of supplying proprietary feeds to a single entity) to total annual revenues currently received by the plans would serve to demonstrate that current fees for consolidated market data are unrelated to cost.[70]

One Filing Participant states that a demonstration of costs is not required because neither the Exchange Act nor Commission rules require market data fees to be supported by a showing of costs.[71] This commenter states that the Commission's standard for evaluating consolidated market data fees has not required a showing of the relationship between the proposed fees and the cost of producing the data, as illustrated by past equity market data plan proposals for consolidated market data fees that were not justified on the basis of cost.[72] This commenter argues that it is not clear how the Plan could support the fee proposals based on costs, because the Operating Committee plays no role in the creation or dissemination of core data under Rule

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69 The commenter states that depth-of-book feed pricing is an adequate proxy for the cost of supplying a proprietary feed to a single entity since it is unlikely that the Filing Participants lose money on supplying their proprietary depth of book feeds to subscribers. See id.

70 See MayStreet Letter II, supra note 58, at 10–13.

71 See Letter from Hope M. Jarkowski, General Counsel, NYSE Group, Inc., to Vanessa Countryman, Secretary, Commission, at 3 (Jan. 22, 2022) ("NYSE Letter") (stating that the legislative history of the 1975 amendments to the Exchange Act, and particularly Section 11A, reflects that Congress's principal concern was promoting competition between exchanges, not regulating market data pricing, and that economic studies have demonstrated that separating out the costs of producing market data from the other costs of operating an SRO is an impossible task that would enmesh the Commission in a continuous ratemaking process that would produce arbitrary results).

72 See id. at 3–4.

603(b) and thus has no information about how each exchange would generate core data under that rule.[73] The commenter argues that it remains impossible to separate the costs of producing market data from other costs of operating an exchange.[74]

Another Filing Participant also opposes the use of cost as a basis for setting the proposed fees.[75] This commenter dismisses other commenters' suggestions that fees should be based on costs, rather than value, because, according to the commenter, the Commission has not offered guidance with respect to such a cost-based ratemaking system,[76] and because any cost allocation between joint products would therefore be unworkable, inherently arbitrary, and inconsistent with the Congressional mandate that the Commission rely on competition whenever possible in meeting its regulatory responsibilities.[77] The commenter states that the proposed fees have been tested by competition and that "Commission staff have indicated that they would look at factors beyond the competitive environment, such as cost, only if a 'proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'"[78]

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73 See id. at 4.

74 See id.

75 See Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq Stock Market LLC, to Vanessa Countryman, Secretary, Commission, at 3 (Dec. 17, 2021) ("Nasdaq Letter I"); Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq Stock Market LLC, to Vanessa Countryman, Secretary, Commission, at 4 (Mar. 29, 2022) ("Nasdaq Letter II").

76 See Nasdaq Letter I, supra note 75, at 3; Nasdaq Letter II, supra note 75, at 4.

77 See Nasdaq Letter I, supra note 75, at 3; Nasdaq Letter II, supra note 75, at 4.

78 See Nasdaq Letter I, supra note 75, at 5–6 (citing to "Staff Guidance on SRO Rule Filings Relating to Fees" (May 19, 2019)). The Staff Guidance on SRO Rule Filings Relating to Fees in fact states: "If a Fee Filing proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces, the SRO must provide a substantial basis, other than competitive forces, demonstrating that the fee is consistent with the Exchange Act. One such basis may be the production of related revenue and cost data, as discussed further below." See "Staff Guidance on SRO Rule Filings Relating to Fees" (May 19, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees. Staff documents represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of this staff document and, like all staff statements, it has no legal force or effect, does not alter or amend applicable law, and creates no new or additional obligations for any person.

Some commenters oppose the use of the value-based methodology used to determine the fees under the Proposed Amendment.[79] One commenter states that comments suggesting that a cost-based approach is not possible or not supported by precedent should take into account that introducing competition to consolidated market data is also without precedent and that to rely on past interpretations of the Exchange Act with respect to what is fair and reasonable will threaten the viability of establishing a vibrant competing consolidator marketplace.[80] One commenter states that, if the objective is to have the SIPs provide a service that is more affordable and accessible than the data products offered by individual exchanges, then the "value to subscribers" should not be sole determinant of SIP fees, because the current fees for exchange proprietary data products are not a reasonable gauge of the value of core data offered under the Plan.[81]

Another commenter states that basing the proposed fees on value instead of cost does not work because the mandate under the Exchange Act is to price SIP data at levels that maximize its availability.[82] One commenter states that there can be no fair and reasonable fee structure with value-based pricing of core data because certain market participants are required by regulation to display consolidated data, which requires having core data from all exchanges.[83] Because those participants will always be required to obtain this data regardless of the cost, this commenter argues, a value-based approach will never lead to fees that are fair, reasonable, and not unreasonably discriminatory.[84]

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79 See Proof Services Letter, supra note 57; Letter from Emil Framnes and Simon Emrich, Norges Bank Investment Management, to Vanessa Countryman, Secretary, Commission (Jan. 5, 2022) ("NBIM Letter"); MayStreet Letter I, supra note 57; MayStreet Letter II, supra note 58, at 1; SIFMA Letter II, supra note 57, at 2.

80 See MayStreet Letter II, supra note 58, at 14.

81 See Proof Services Letter, supra note 57, at 3.

82 See MayStreet Letter I, supra note 57, at 6.

83 See Polygon.io Letter II, supra note 67, at 1.

84 See id.

One commenter states that if value-based pricing is the only feasible approach, value should be assessed based on the value of the data to competing consolidators—specifically, the ability of competing consolidators to compete against comparable proprietary feed offerings.[85] The commenter states that a value-based approach to pricing the underlying content associated with consolidated top-of-book market data must work backwards and first consider the prices that competing consolidators will charge for Level 1 data and then the value of the underlying content to the competing consolidator.[86]

Two Filing Participants argue that the proposed fees are fair and reasonable and not unreasonably discriminatory because they are reasonably related to the value that subscribers gain from the data, and that the proposed fees achieve the Commission's objective in Regulation NMS that prices for consolidated market data be set by market forces.[87] One Filing Participant argues that the pricing for exchange proprietary data feeds—including the depth-of-book data, top-of-book data, and auction information on which the proposed fees are based—is constrained by competitive forces, in that they have a history of being constrained by direct competition and by platform competition among the exchanges.[88] This commenter states that pricing for exchange proprietary data feeds is constrained by the highly competitive markets for exchange trading and exchange market data,[89] and that the proposed fees meet the Commission's objective for market forces to determine the overall level of fees.[90]

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85 See MayStreet Letter II, supra note 58, at 15–16.

86 See id.

87 See NYSE Letter, supra note 71, at 5; Nasdaq Letter I, supra note 75, at 5.

88 See NYSE Letter, supra note 71, at 5.

89 See id. The commenter further argues that exchanges compete against each other as platforms and that, as such, no exchange can raise its prices to supracompetitive levels on one side of the platform, such as market data, without losing sales on the other, such as trading volume. The commenter argues that given this inter-exchange platform competition, the exchanges' filed prices for depth-of-book data and auction information are constrained by market forces. See id. at 6–7.

90 See id. at 5. The commenter states that by applying that established ratio to the current prices for consolidated top-of-book data, the fee proposals thus reflect the market forces

Another Filing Participant also argues that basing fees on the value of the underlying data is the fairest and most economically efficient method for setting fees, because setting fees according to the value of the data leads to optimal consumption: fees that are too low do not allow for producers to remain profitable, while fees that are too high lead to underutilization.[91] The commenter states that NMS Plans have historically used value as a fair and efficient basis for setting fees.[92] The commenter argues that the best basis for determining the value of core data are the fees currently charged for proprietary data fees, which, according to the commenter, have been "tested by market competition" and therefore provide a good starting point for estimating the value of new core data and for setting fees at efficient levels.[93] The commenter states that exchanges cannot overprice the total price of their services without potentially losing order flow and damaging their overall ability to compete.[94] According to this commenter, exchanges that produce more valuable market data generally charge higher fees, and those with less valuable data charge lower fees,[95] so fees vary according to the underlying value of the data, as measured by the liquidity available at the exchange.[96]

This commenter also argues that the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably discriminatory.[97] The commenter argues that, because they are

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that drive the pricing of depth-of-book information in relation to top-of book information and the value that the data has to market participants. Id. This commenter argues that the ratio between these filed proprietary depth-of-book fees and proprietary top-of-book data therefore provides the Commission with a benchmark for evaluating the proposed fees, which are fair, reasonable, and not unreasonably discriminatory because they are based on this ratio, which is reflective of market forces. See id. at 7.

91 See Nasdaq Letter I, supra note 75, at 2; Nasdaq Letter II, supra note 75, at 2.

92 See Nasdaq Letter I, supra note 75, at 2; Nasdaq Letter II, supra note 75, at 2.

93 Nasdaq Letter I, supra note 75at 6.

94 See id. at 4.

95 See id.

96 See id.

97 See id. at 5–6.

tested by market competition, proprietary data fees provide a good and indicative starting point for estimating the value of new core data and setting fees at their efficient level.[98] This, according to the commenter, provides a substantial basis for showing that current proprietary fees—and, by extension, the proposed fees for new core data—are equitable, fair, reasonable, and not unreasonably discriminatory.[99]

Under Section 11A of the Act and Rule 603(a) of Regulation NMS, the Commission must assess whether the fees for content underlying consolidated data are offered on terms that are "fair and reasonable" and "not unreasonably discriminatory."[100] And a threshold issue presented by the Proposed Amendment—and debated by many of the commenters, including Filing Participants, Non-Supporting Participants, and others—is whether the fees for consolidated data must be cost-based or whether they may be based on the value of the data to subscribers.

Several commenters, including Non-Supporting Participants, have argued that cost-based pricing must be used with respect to the fees in the Proposed Amendment.[101] While the Commission has stated that a "reasonable relation to costs" has been the "principal method discussed by the Commission for assessing the fairness and reasonableness" of fees for core data,[102] the Commission has also acknowledged that "[t]his does not preclude the Commission from considering in the future the appropriateness of another guideline to assess the fairness and reasonableness of core data fees in a manner consistent with the Exchange Act."[103] The

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98 See id. at 6.

99 See id.

100 Sections 11A(c)(1)(C)–(D) of the Act, 15 U.S.C 78k-1(c)(1)(C)–(D); Rule 603(a) of Regulation NMS, 17 CFR 242.603.

101 See supra notes 57–70 and accompanying text.

102 MDI Rules Release, supra note 11, 86 FR at 18685 (citing Bloomberg Order, supra note 43, 2018 WL 3640780, at *9).

103 MDI Rules Release, supra note 11, 86 FR at 18685 (citing Bloomberg Order, supra note 43, 2018 WL 3640780, at *9 n.63).

Commission, therefore, does not believe that a cost-based methodology is the only acceptable method for setting the fees for consolidated data under the MDI Rules.

It does not follow, however, that cost-based pricing could not be used here. The Proposed Amendment, supported by comments from Filing Participants, argues that using cost-based pricing is not required by statute, has not been used historically for consolidated data, and, further, is not possible because the Operating Committee of the Plan has no knowledge of any of the costs associated with consolidated market data.[104] Further, a Filing Participant argues that, because the Commission has not offered guidance for cost-based pricing, allocating costs would be unworkable, arbitrary, and inconsistent with relying on competition when possible, and states that, according to Staff Guidance, cost factors are relevant only in the absence of persuasive evidence that prices are constrained by significant competition.[105]

While cost-based pricing is not required by statute, a "reasonable relation to costs" is, as stated above, the principal method discussed by the Commission for assessing the fairness and reasonableness of fees for core data.[106] Moreover, the argument that the Operating Committee of the Plan cannot use cost-based pricing because it has no knowledge of relevant costs[107] rests on the questionable proposition that a group of exchanges acting jointly lacks information that each of the exchanges would possess individually. If cost information is unavailable, that is because the exchanges on the Operating Committee have not shared it. And while one Filing Participant argues that the Commission has failed to provide guidance on cost-based pricing,[108] the Filing Participants have not attempted to show that the proposed fees are reasonably related to those costs, and they have not demonstrated that a cost-based approach is infeasible.

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104 See Notice, supra note 6, 86 FR at 67519.

105 See supra notes 77–78 and accompanying text.

106 See supra note 102 and accompanying text.

107 See Notice, supra note 6, 86 FR at 67519.

108 See Nasdaq Letter I, supra note 75, at 3.

Instead, the Filing Participants have elected to file the proposed fees for the content underlying consolidated market data using what they term a "value-based" methodology, and in Section IV.C. below the Commission examines whether the fees proposed by the Filing Participants through the application of this methodology meet the requirement of being fair, reasonable, and not unreasonably discriminatory.[109] As an initial matter, however, the Filing Participants have failed to demonstrate that value-based pricing is appropriate for content underlying consolidated market data offerings. The Filing Participants argue that the value of the data to subscribers is a fair and reasonable basis for setting the fees for consolidated data. They calculate that value by comparison to the prices of certain proprietary data feeds,[110] and they argue that the prices for those proprietary data feeds are constrained by both direct competition and "platform" competition (i.e., the theory that the exchanges compete as unified platforms for both order flow and data revenue).[111]

In authorizing the Commission to establish a national market system for the trading of securities, Congress found that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to ensure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.[112] In furtherance of these purposes, the Commission has sought through its rules and regulations to ensure that certain core data is widely available for reasonable fees.[113] And as the

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109 See Sections 11A(c)(1)(C)–(D) of the Act; Rule 603(a) of Regulation NMS.

110 As discussed throughout Section IV.C, infra, the proprietary data feeds differ in material ways from consolidated depth-of-book data under the MDI Rules.

111 See NYSE Letter, supra note 71, at 5–7; Nasdaq Letter I, supra note 75, at 4–6; Nasdaq Letter II, supra note 75, at 1, 2.

112 15 U.S.C. 78k-1(a)(1)(C); see also MDI Rules Release, supra note 11, 86 FR at 18598.

113 See MDI Rules Release, supra note 11, 86 FR at 18598; see also, e.g., Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37560 (June 29, 2005) (Regulation NMS Adopting Release) ("In the Proposing Release, the Commission emphasized that one of its primary goals with respect to market data is to assure reasonable fees that promote the wide public availability of consolidated market data.").

Commission has recognized, core data differ from proprietary data feeds in a critical way: "[B]ecause core data must be purchased, their fees are less sensitive to competitive forces."[114]

Here, the Filing Participants propose to base prices for the data content underlying consolidated market data on an estimate of the value of the data to subscribers, and to estimate that value from the prices for selected proprietary market data products, which they argue are constrained by competitive forces. The Filing Participants, however, have not demonstrated that prices for core data that are based on an estimated value of the data to subscribers are consistent with the statutory standard of being fair, reasonable, and not unreasonably discriminatory.[115] Additionally, as discussed in detail below, the proprietary market data products used by the Filing Participants to derive their "value based" pricing are not comparable to consolidated market data offerings pursuant to the MDI Rules.[116] And while one Filing Participant argues that value-based fees are the most economically efficient,[117] this argument too does not address whether basing prices for core data on an estimated value of the data to the subscribers is consistent with the statutory standard. Moreover, even if value-based prices were efficient, the Filing Participants have not established that they would not be unreasonably discriminatory.

With respect to the specific proposed fees for various categories of data, in Section IV.C. below, this Order discusses how the Filing Participants have failed to demonstrate that those fees are fair, reasonable, and not unreasonably discriminatory.

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114 Securities Exchange Act Release No. 59039 (Dec. 2, 2008), 73 FR 74770, 74782 (Dec. 9, 2008) (File No. SR-NYSEArca-2006-21); see also MDI Rules Release, supra note 11, 86 FR at 18685.

115 See Sections 11A(c)(1)(C)–(D) of the Act; Rule 603(a) of Regulation NMS.

116 See infra Section IV.C.2 (discussing, among other things, the ways in which the data content of proprietary depth-of-book feeds differs from the data content underlying consolidated market data offerings pursuant to the MDI Rules).

117 See supra note 91, and accompanying text.

C. The Plan's Proposed Fees for Data Content Underlying Consolidated Market Data

As described above, the Filing Participants propose to amend the Plan to adopt fees for the receipt of the expanded content of consolidated market data pursuant to the Commission's MDI Rules.[118] Specifically, the Filing Participants propose to charge separately for each of the three categories of consolidated equity market data that collectively constitute the amended definition of core data under Rule 600(b)(21) of Regulation NMS[119]: Level 1 Core Data (Top-of-book Data), Depth of Book Service, and Auction Information. In addition to the fees for the receipt of the three categories of data, the Filing Participants propose to charge subscribers certain additional fees, including, as applicable, Professional and Non Professional Charges, Non-Display Use Fees, Access Fees, and Redistribution Fees.[120]

1. Fees for Top-of-Book Data

As noted above, the Filing Participants propose to apply the current fees for Level 1 Core Data to the data content underlying consolidated market data in the new Level 1 Core Data offering and to add odd-lot information (as defined in Rule 600(b)(59)) to the data provided.[121] Accordingly the Filing Participants propose to amend the fee schedule to provide that the new Level 1 Core Data would include Top of Book Quotation Information, Last Sale Price Information, odd-lot information, administrative data, regulatory data, and self-regulatory

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118 See, e.g., MDI Rules Release, supra note 11, 86 FR at 18680; Rule 614(e) of Regulation NMS, 17 CFR 242.614(e).

119 17 CFR 242.600(b)(26).

120 In the Proposed Amendments, the Filing Participants also propose to make certain other changes to the Plan's fee schedules in connection with the expanded data content. See Notice, supra note 6, 86 FR at 67518–19. The Commission agrees that these changes are non-substantive.

121 The Filing Participants state that current Plan fees for Level 1 Core Data are for Top of Book Quotations and Last Sale Price Information, as well as administrative data (as defined in Rule 600(b)(2)), regulatory data (as defined in Rule 600(b)(78)), and self-regulatory organization-specific program data (as defined in Rule 600(b)(85)). The Filing Participants propose that the new Level 1 Core Data under the distributed consolidation model would continue to include all information that subscribers receive for current fees and would add odd lot information. See Notice, supra note 6, 86 FR at 67517.

organization program data.[122] The Filing Participants state they are not proposing to change the following fees for the Level 1 Core Data currently set forth in the CTA/CQ Plans: the Professional Subscriber and Nonprofessional Subscriber fees, the Non-Display Use Fees, and Access Fees.[123] The Filing Participants are proposing that the existing Redistribution Fees[124] would apply to all three categories of core data, including the new Level 1 Core Data, and any subset thereof. The Filing Participants are also proposing that the existing Redistribution Fees would apply to competing consolidators.

Several commenters, including certain Non-Supporting Participants, state that the proposed fees for the new Level 1 Core Data are too high.[125] Several commenters also argue that the proposed fees do not account for the transfer of costs from the SROs to market participants under the decentralized consolidation model.[126] With respect to comments that the proposal should "back out" fees for the current Processors from the proposed fee structure, however, one Filing Participant states that the MDI Rules require the current Processors to continue operating

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122 The Filing Participants state that the Proposed Amendments would use terms defined in Rule 600(b) to reflect both current data made available to data subscribers and the additional odd-lot information that would be included at no additional charge. See Notice, supra note 6, 86 FR at 67518.

123 The Filing Participants propose that access to odd-lot information would be made available to Level 1 Core Data Professional and Nonprofessional Subscribers at no additional charge. See Notice, supra note 6, 86 FR at 67518.

124 See infra Section IV.C.8. discussing the proposed Redistribution Fees with respect to the proposed Auction Data and all other categories of data underlying consolidated market data.

125 See Letter from Luc Burgun, President and CEO, NovaSparks S.A.S., to Vanessa Countryman, Secretary, Commission, at 1 (Dec. 17, 2021) ("NovaSparks Letter"); IEX Letter, supra note 57; MayStreet Letter I, supra note 57; MEMX Letter, supra note 57, at 7; BlackRock Letter, supra note 57; MIAX Letter, supra note 57; MayStreet Letter II, supra note 58.

126 See MEMX Letter, supra note 57, at 18; MIAX Letter, supra note 57, at 2; BlackRock Letter, supra note 57, at 2–3; Letter from Quinton Pike, CEO, Polygon.io, Inc., to Vanessa Countryman, Secretary, Commission, at 1 (Nov. 30, 2021) ("Polygon.io Letter I"); MayStreet Letter II, supra note 58, at 1–2, 4–5.

for at least several more years and that, therefore, there are no savings to back out of any proposed fee structure at this time.[127]

One commenter states that the Proposed Amendment conflates the prices that competing consolidators and self-aggregators pay the SROs for the underlying NMS information with the prices that competing consolidators would charge for the consolidated data they generate.[128] This commenter states that the proposals do not make clear that the proposed fees are for the content underlying the consolidated market data, as opposed to the consolidated market data itself.[129] The commenter argues that the Filing Participants confuse the content of consolidated market data with the consolidated market data itself,[130] and states that the Proposed Amendment sets prices at levels that the SIPs currently charge for consolidated market data.[131]

One commenter states that the proposed fees for top-of-book data should be substantially lower to allow competing consolidators to operate their business.[132] This commenter states that the proposed fees should be lower in the new decentralized model because exchanges will no longer have to pay for the current processors and will not have the burden of maintaining custom feeds in specific formats.[133] Another commenter opposes the proposal and asks the Commission to disapprove it because it represents an overall increase in costs, including access fees, to end users as well as competing consolidators, thereby making market data less accessible and putting competing consolidators at a disadvantage.[134] One

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127 See NYSE Letter, supra note 71, at 7.

128 See MayStreet Letter I, supra note 57, at 2.

129 See id. at 2.

130 See id. at 3.

131 See id. at 6.

132 See NovaSparks Letter, supra note 125, at 1.

133 See id.

134 See Letter from Jonathan Hill, CEO, Anand Prakash, CTO, Nader Sharabati, CFO, and Doug Patterson, CCO, Cutler Group, LP, to Vanessa Countryman, Secretary, Commission, at 1–2 (Dec. 16, 2021) ("Cutler Group Letter").

commenter states that any value-based approach must acknowledge that competing consolidators will be competing against exchange-provided top-of-book feeds that are marketed as SIP alternatives.[135] The commenter states that fees for competing consolidators would need to be a fraction of the amounts currently charged to allow for a sustainable profit margin for competing consolidators.[136]

One commenter supports certain aspects of the proposal, including its a la carte fee structure and the inclusion of odd-lot quotations free of charge.[137] Moreover, some commenters, including a Non-Supporting Participant, express support for the proposed inclusion of odd-lot information free of charge in the expanded Level 1 Core Data,[138] with one commenter stating that this would result in top-of-book information that is more comprehensive, which should, in turn, strengthen best execution and enhance transparency and price discovery.[139]

The Commission finds that the Filing Participants have not demonstrated that the proposed fees for Level 1 core data are fair, reasonable, and not unreasonably discriminatory. Including in the new Level 1 Service the odd-lot quotation data that would be of the most interest to investors and other market participants—namely, odd-lot quotations that offer pricing at or superior to the NBBO—will help investors and other market participants to trade in a more informed and effective manner and to achieve better executions and reduce the information asymmetries that currently exist between subscribers to SIP data and subscribers to proprietary data,[140] consistent with the objectives of the MDI Rules. But the Filing Participants have not demonstrated how their approach for pricing the new Level 1 Core Data (which consists of data

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135 See MayStreet Letter II, supra note 58, at 15.

136 See id. at 16–17.

137 See BlackRock Letter, supra note 57, at 1, 3.

138 See MIAX Letter, supra note 57, at 2; BlackRock Letter, supra note 57, at 1, 3; MayStreet Letter I, supra note 57, at 2, 3, 6; Polygon.io Letter II, supra note 67, at 2.

139 See BlackRock Letter, supra note 57, at 1, 3.

140 See MDI Rules Release, supra note 11, 86 FR at 18612.

content underlying consolidated market data for several elements of core data under the decentralized consolidator model[141]) based on fees for the current Level 1 Core Data (which consists solely of already consolidated data content[142]) can be reconciled with the new Level 1 Core Data the Filing Participants are purporting to price.

The fees proposed by the Filing Participants are for a product independent from, and differing in content and function from, the current Level 1 Core Data under the Plan. Unlike the current Level 1 Core Data, the new Level 1 Core Data would include, in addition to top-of-book information, expanded data elements that form part of the definition of "core data," such as information about better priced quotations in higher-priced stocks (implemented through a new definition of "round lot" and the inclusion of certain odd-lot information). In addition, and unlike the current Level 1 Core Data, the data content underlying consolidated data for the new Level 1 Core Data would not be collected, consolidated, or disseminated by the exclusive SIP for the Plan, but instead by competing consolidators and self-aggregators. And unlike current Level 1 Core Data, which bundles several consolidated data elements into one product, the core data elements contained in the new Level 1 Core Data could have been, in a manner not inconsistent with the MDI Rules, unbundled and offered as separate data underlying consolidated data

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141 The Filing Participants propose that Level 1 Core Data would include Top of Book Quotation Information, Last Sale Price Information, odd-lot information, administrative data, regulatory data, and self-regulatory organization program data. See Notice, supra note 6, 86 FR at 67517.

142 For each NMS stock, the Equity Data Plans currently provide for the dissemination of top-of- book data and transaction information, generally defining consolidated market information (or "'core data"') as consisting of: (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 national best offer ("NBBO") (i.e., the highest bid and lowest offer currently available on any exchange). In addition to disseminating core data, the exclusive 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, and information regarding the short-sale price test pursuant to Rule 201 of Regulation SHO. They also collect and disseminate other NMS information and disseminate certain administrative messages. Together with core data, the Commission refers to this broader set of data for purposes of this release as "SIP data." See MDI Rules Release, supra note 11, 86 FR at 18599.

offerings by the Filing Participants. Moreover, the proposed enhanced data content underlying consolidated data for the new Level 1 Core Data would not be implemented upon approval of the Proposed Amendments, nor would it be implemented under the current centralized model, but rather would be implemented in accordance with the phased implementation of the new decentralized consolidation model, as required by the Commission.[143] The Filing Participants do not analyze or otherwise justify the proposed fees for the new Level 1 Core Data in a manner that is consistent with these facts.

In addition, the Filing Participants have not demonstrated how, if at all, the proposed fees have taken into account the transfer of costs for collection, consolidation, and dissemination of data content underlying consolidated market data in the new Level 1 Core Data to other market participants under the decentralized consolidation model. Similarly, the Filing Participants do not justify or otherwise explain how the proposed fees have been adjusted so as to exclude other operating costs or profits of the exclusive SIPs, as some commenters, including a Non-Supporting Participant, point out.[144] Though one Filing Participant argues that, because the MDI Rules require the current Processors to continue operating for at least several more years, there are no savings to back out of any proposed fee structure at this time,[145] this argument presents a false choice. This commenter ignores that the Plan could retain one price for the existing Level 1 Core Data, for as long as the current Processors continue to operate, and propose new fees that would apply only to the data content underlying consolidated data in the new Level 1 Core Data under the decentralized model.

The Filing Participants have not demonstrated that the proposed fees for the new Level 1 Core Data are fair, reasonable, and not unreasonably discriminatory consistent with Rule 603(a)

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143 See MDI Rules Release, supra note 11, 86 FR at 18698–701.

144 See BlackRock Letter, supra note 57, at 2, 3–4; MayStreet Letter II, supra note 58, at 8–9; NovaSparks Letter, supra note 125, at 1; MEMX Letter, supra note 57, at 15–17.

145 See NYSE Letter, supra note 71, at 7.

of Regulation NMS. Thus, the Commission cannot find that, consistent with Rule 608 of Regulation NMS, the Proposed Amendment is 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 Act.[146]

2. Fees for Depth-of-Book Data

The Filing Participants propose to set fees for depth-of-book data, as that term is defined in Rule 600(b)(26) of Regulation NMS.[147] With respect to depth-of-book data, the Filing Participants propose that Professional Subscribers would pay $99.00 per device per month for each Network's data, and that Nonprofessional Subscribers would pay $4.00 per subscriber per month for each Network's depth of book data.[148] The Filing Participants are also proposing a monthly charge for Non-Display Use of depth-of-book data of $12,477 for each of three types of Non-Display Use,[149] as well as an Access Fee of $9,850.00 per

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146 See 17 CFR 242.608(b)(2).

147 See 17 CFR 242.600(b)(26) ("Depth of book data means all quotation sizes at each national securities exchange and on a facility of a national securities association at each of the next five prices at which there is a bid that is lower than the national best bid and offer that is higher than the national best offer. For these five prices, the aggregate size available at each price, if any, at each national securities exchange and national securities association shall be attributed to such exchange or association.").

148 The Filing Participants state they applied the 3.94x ratio described in the Proposed Amendments to the current fees charged to Professional Subscribers taking all three Networks ($75.00). This resulted in the total fee level for depth of book data for Professional Subscribers equaling $296.00 (i.e., $75.00 x 3.94=$295.50, rounded to $296.00). This fee was then split evenly among the three Networks, resulting in a proposed Professional Subscriber fee of $99.00 per Network. The Filing Participants applied the 3.94x ratio to the current fees charged for Nonprofessional Subscribers taking all three Networks ($3.00). This resulted in the total fee level for depth of book data for Nonprofessional Subscribers equaling $12.00 (i.e., $3.00 x 3.94=$11.82, rounded to $12.00). This fee was then split evenly among the three Networks, resulting in a proposed Nonprofessional Subscriber fee of $4.00 per Network. See Notice, supra note 6, 86 FR at 67520.

149 See supra note 32 (describing the three types of Non-Display Use recognized under Exhibit E to the CTA Plan). The Filing Participants applied the 3.94x ratio described in the Proposed Amendments to the current fees charged for Non-Display Use for all three

month.[150] The Filing Participants further propose to add language to the Plan's fee schedule in connection with the expanded content, including: (1) that the existing Redistribution Fees[151] would apply to all three categories of core data, including Depth-of-Book Data, and any subset thereof, and (2) that the existing Redistribution Fees would apply to competing consolidators.

While one commenter supports the methodology selected by the Filing Participants, arguing that pricing for proprietary data feeds is a reasonable gauge of value because those fees are constrained by competition,[152] another commenter disagrees with that view,[153] and several commenters, including Non-Supporting Participants, have expressed concern about the use of prices for exchange proprietary data products as the basis for setting the proposed fees on several grounds.[154] Commenters state that the method used presupposes that fees for proprietary data products are fair and reasonable and not unreasonably discriminatory,[155] and they state that Filing Participants have not shown that pricing for proprietary data feeds are a

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Networks ($9,500.00). This resulted in the total fee level for depth-of-book data for Non-Display Use equaling $37,430.00 (i.e., $9,500.00 x 3.94=$37,430.00). This fee was then split evenly among the three Networks, resulting in a proposed Non-Display Use Fee of $12,477.00 per Network (including rounding). See Notice, supra note 6, 86 FR at 67520.

150 The Filing Participants applied the 3.94x ratio described in the Proposed Amendments to the current fees charged for direct Data Access for all three Networks ($7,500.00). This resulted in the total fee level for depth of book data for Data Access Fees equaling $29,550.00 (i.e., $7,500.00 x 3.94=$29,550.00). This fee was then split evenly among the three Networks, resulting in a proposed Data Access Fees of $9,850.00 per Network. See Exhibit A to the Notice, supra note 6, 86 FR at 67521.

151 See infra Section IV.C.7. discussing the proposed Redistribution Fees with respect to the proposed Auction Data and all other categories of data underlying consolidated market data.

152 See Nasdaq Letter I, supra note 75, at 2.

153 See SIFMA Letter I, supra note 57, at 6.

154 See MIAX Letter, supra note 57, at 4; SIFMA Letter I, supra note 57, at 4, 5; IEX Letter, supra note 57, at 4; SIFMA Letter II, supra note 57, at 2; NBIM Letter, supra note 79, at 1–2.

155 See SIFMA Letter I, supra note 57, at 5.

reasonable gauge of value or that proprietary data feeds are appropriate proxies for data content underlying consolidated market data[156]

Some commenters, including Non-Supporting Participants, argue that the calculation used by the Filing Participants to determine the proposed depth-of-book fees is flawed and inconsistent with the MDI Rules Release because the proprietary data feeds used by the Filing Participants were inappropriate references for the calculation.[157] These commenters point out that while the proprietary market data depth-of-book feeds used to calculate fees for the depth-of-book information include top-of-book data as part of those offerings, the depth-of-book data product under the Proposed Amendment does not include top-of-book data.[158] Consequently, some of these commenters argue, subscribers to the new core data would need to pay an additional fee to receive top-of-book data at current rates to obtain the same data content that is available today through proprietary feeds.[159]

Some commenters, including Non-Supporting Participants, state that an additional problem with the proposed approach is that the proprietary depth-of-book products used in the calculation are primarily structured as comprehensive order-by-order feeds, which do not aggregate orders at each price level.[160] According to these commenters, the depth-of-book elements prescribed by the MDI Rules warrant a lower price because they would contain only

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156 See IEX Letter, supra note 57, at 3–4; MEMX Letter, supra note 57, at 11–12; BlackRock Letter, supra note 57, at 4–5; Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, Financial Industry Regulatory Authority, Inc., to Vanessa Countryman, Secretary, Commission, at 6 (Dec. 17, 2021) ("FINRA Letter"); MayStreet Letter II, supra note 58, at 17; Proof Services Letter, supra note 57, at 3.

157 See IEX Letter, supra note 57, at 3–4; MEMX Letter, supra note 57, at 11–12; BlackRock Letter, supra note 57, at 4–5; FINRA Letter, supra note 156, at 6; MayStreet Letter II, supra note 58, at 17.

158 See IEX Letter, supra note 57, at 3–4; MEMX Letter, supra note 57, at 11–12; BlackRock Letter, supra note 57, at 4–5; FINRA Letter, supra note 156, at 6; MayStreet Letter II, supra note 58, at 17.

159 See IEX Letter, supra note 57, at 4; MEMX Letter, supra note 57, at 6, 11–12; BlackRock Letter, supra note 57, at 4–5.

160 See IEX Letter, supra note 57, at 4; MEMX Letter, supra note 57, at 11–12; BlackRock Letter, supra note 57, at 4–5; FINRA Letter, supra note 156, at 6.

the aggregated quotes available at the next five price levels away from the NBBO and would thus include less content than the proprietary feeds.[161] One commenter states that complete, disaggregated order-by-order depth-of-book feeds, such as those used in the calculation, are likely to be associated with "additional operational costs because of increased message traffic with order by order data at all price levels."[162] Accordingly, the commenter argues that an aggregated feed with only five levels of depth should have been priced at a discount relative to the corresponding exchange offerings to compensate for differences in both information content and costs.[163]

A Non-Supporting Participant argues that the proposal fails to consider pricing for other proprietary depth-of-book feeds that are aggregated by price level and would therefore serve as a more logical proxy for setting core data fees.[164] Another commenter states that while the Proposed Amendment compared the aggregated depth-of-book data set with order-by-order data, the more appropriate comparison would be with Cboe One Premium, which offers top-of-book, last sale, and five levels of depth.[165] This commenter states that the proposed user fees for underlying market data content are not in line either with Cboe One Premium on its own or with a scaled charge based on Cboe's market share, even though the Cboe charges are for a product sold to end users, whereas the proposed Plan fees are only for underlying content.[166] One Non-Supporting Participant states that the proposal fails to acknowledge or account for the fact that the proposed methodology relies on this commenter's equity market data fees as one of the comparison points, notwithstanding that, unlike the other exchanges' market data prices, the

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161 See IEX Letter, supra note 57, at 4; MEMX Letter, supra note 57, at 11–12; BlackRock Letter, supra note 57, at 4–5.

162 See BlackRock Letter, supra note 57, at 4–5.

163 See BlackRock Letter, supra note 57, at 4–5. See also IEX Letter, supra note 57, at 4; MEMX Letter, supra note 57, at 11–12.

164 See IEX Letter, supra note 57, at 4.

165 See MayStreet Letter II, supra note 58, at 17.

166 See id. at 18.

commenter's proprietary data fees do not include individual per user fees but apply only on a per firm basis for firms subscribing to "real time data."[167]

Some commenters, including Non-Supporting Participants, question the determination of the ratio (or multiplier) used by the Filing Participants to set the depth-of-book feeds.[168] Several commenters state that the ratio used by the Filing Participants to determine the fees for accessing depth-of-book data is too high.[169] One commenter states that fees for depth-of-book information "should be adjusted to use a multiplier of 2.94x to eliminate the overcharging from double counting top-of-book data"; otherwise, those who subscribe to both the new Level 1 Core Data and depth-of-book data offering "would be paying twice for top of book content."[170] Another commenter states that the Filing Participants have created a completely unreasonable standard to justify the proposed fees and that the ratio used to calculate the proposed fees, "is completely arbitrary and in no way shows that the proposed fees are fair, reasonable, and not unreasonably discriminatory as required under the Exchange Act."[171]

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167 See IEX Letter, supra note 57, at 4. The commenter also points out that its proprietary market data fees do not vary depending on the type of use made by those firms, do not apply to data that is redistributed with a delay of as little as 15 milliseconds (whereas other exchanges typically require a 15-minute delay to avoid charges for real-time data), and were determined and justified based on costs. The commenter further states that, to the extent the commenter's fees are relevant at all, a more consistent approach would have been to reflect the commenter's fees as zero, since the commenter does not charge any fees on an individual per user basis for either of its two proprietary market data products. According to the commenter, the latter approach would substantially reduce the average ratio and multiplier, and thus substantially reduce the fees proposed to be charged for core data. See id.

168 See IEX Letter, supra note 57; MEMX Letter, supra note 57; MIAX Letter, supra note __; BlackRock Letter, supra note 57; FINRA Letter, supra note 156; Letter from James Angel, Ph.D., CFP, CFA, Associate Professor of Finance, Georgetown University, to Vanessa Countryman, Secretary, Commission, at 9-10 (Dec. 21, 2021) ("Angel Letter"); NovaSparks Letter, supra note 125; SIFMA Letter I, supra note 57; SIFMA Letter II, supra note 57.

169 See NovaSparks Letter, supra note 125, at 1; BlackRock Letter, supra note 57, at 4–5; FINRA Letter, supra note 156, at 5–6; MayStreet Letter II, supra note 58, at 3, 19.

170 BlackRock Letter, supra note 57, at 4–5. See also IEX Letter, supra note 57, at 4; MEMX Letter, supra note 57, at 6, 11–12.

171 SIFMA Letter II, supra note 57, at 5.

Several commenters state that, while the Filing Participants sought to demonstrate that the proposed fees were related to the value of the data, the method employed by the Filing Participants does not align the proposed fees for the new depth-of-book data to the value of that data to subscribers.[172] One Non-Supporting Participant states that calculating the proposed fee levels based on prices charged by the exchanges for their existing market data product is not the right starting point for setting the proposed fees and is inconsistent with the MDI Rules' goal of expanding access to consolidated data.[173]

Two Filing Participants state that the proposed fees are fair and reasonable and not unreasonably discriminatory because they are reasonably related to the value that subscribers gain from the data and because they achieve the Commission's objective in Regulation NMS that prices for consolidated market data be set by market forces.[174] One Filing Participant argues that the pricing for exchange proprietary data feeds—including the depth-of-book data, top-of-book data, and auction information on which the proposed fees are based—is constrained by competitive forces, in that they have a history of being constrained by direct competition and by platform competition among the exchanges.[175] This commenter argues that, because they are tested by market competition, proprietary data fees provide a good and indicative starting point for estimating the value of new core data and for setting fees at their efficient level.[176] This, according to the commenter, provides a substantial basis for showing that current proprietary fees—and, by extension, the proposed fees for new core data—are equitable, fair, reasonable, and not unreasonably discriminatory.[177]

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172 See BlackRock Letter, supra note 57, at 4. See also IEX Letter, supra note 57, at 4; MEMX Letter, supra note 57, at 6, 11–12; BlackRock Letter, supra note 57, at 4–5.

173 See MIAX Letter, supra note 57, at 4.

174 See NYSE Letter, supra note 71, at 5; Nasdaq Letter I, supra note 75, at 5.

175 See NYSE Letter, supra note 71, at 5.

176 See id. at 6.

177 See id.

The Filing Participants' methodology to justify the proposed fees is flawed, and the Commission concludes that, as a result, the Filing Participants have failed to demonstrate that the proposed fees are fair, reasonable, and not unreasonably discriminatory. The Filing Participants have chosen to justify the proposed fees by multiplying the existing fees for SIP data (which is top-of-book data) by a number derived from the ratio of the fees of several exchanges' proprietary depth-of-book feeds to the fees for the exchanges' proprietary top-of-book feeds. As a number of commenters, including Non-Supporting Participants, point out,[178] however, the proprietary depth-of-book products used as part of this methodology are materially different products from the new data content underlying consolidated data offerings, making the proprietary products an inappropriate simple benchmark for pricing. Unlike the new data content underlying consolidated data offerings, the proprietary depth-of-book data products typically include: (1) top-of-book data, for which the Filing Participants propose to charge separately; (2) auction data, for which the Filing Participants also propose to charge separately; (3) comprehensive order-by-order depth information, rather than just aggregated orders at each price level[179]; and (4) full depth information at all price levels, rather than just the five price levels outside the NBBO as prescribed under the MDI Rules. Notably, the Commission considered but declined to expand the definition of depth-of-book data to include complete, order-by-order depth of book information at all price levels, noting that the objectives of providing useful additional information to a broad cross-section of market participants and reducing informational asymmetries between users of proprietary data and SIP data must be balanced against the risk of, among other things, "additional operational costs and latency because of increased message traffic with order by order data at all price levels."[180]

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178 See IEX Letter, supra note 57, at 3–4; MEMX Letter, supra note 57, at 11–12; BlackRock Letter, supra note 57, at 4–5; FINRA Letter, supra note 156, at 6; MayStreet Letter II, supra note 58, at 17.

179 See supra notes 160–163 and accompanying text.

180 See MDI Rules Release, supra note 11, 86 FR at 18627.

While the Filing Participants have described the methodology used to set the proposed fees and have made certain arguments about their consistency with statutory standards for assessing fees for NMS Plans, they have not adequately explained: (1) how setting the proposed fees based on the ratio of fees for depth-of-book and top-of-book proprietary data is an appropriate method for setting the proposed fees; (2) how the ratio used in the calculation adequately represents the difference in value between top-of-book data and the five levels of additional depth that would be required under the MDI Rules; (3) how calculating the ratio based on proprietary depth-of-book data products that include content that would not be part of the consolidated depth-of-book product prescribed under the MDI Rules did not result in a ratio that is excessively high; or (4) how the fees generated by applying that ratio to the fees for current consolidated market data resulted in proposed depth-of-book fees that are fair, reasonable, and not unreasonably discriminatory. And while the Filing Participants state that alternative methodologies resulted in ratios greater than 3.94x and were thus not selected by the Filing Participants, the Filing Participants do not specify which other data feeds were considered in those methodologies or how feeds other than those considered—such as a proprietary feed with aggregated, rather than the more comprehensive order-by-order depth-of-book information — might have served as better proxies for the data content required under the MDI Rules.

Several commenters, including Non-Supporting Participants, state that the proposed fees, including the proposed fees for depth-of-book data, are too high.[181] One commenter states that retail investors should get free or very-low-cost depth-of-book data because it is in the best interest of retail investors, the industry, and the Commission.[182] This commenter states that displaying depth-of-book data can give investors a better understanding of how prices are

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181 See FINRA Letter, supra note 156, at 5–7; BlackRock Letter, supra note 57, at 1–5; MIAX Letter, supra note 57, at 2; Angel Letter, supra note 168, at 9; NovaSparks Letter, supra note 125, at 1; BMO Letter, supra note 57, at 2–3; IEX Letter, supra note 57, at 1, 5; SIFMA Letter I, supra note 57, at 1, 4–5; IEX Letter, supra note 57, at 4; MEMX Letter, supra note 57, at 11–12. See also MayStreet Letter II, supra note 58, at 18.

182 See Angel Letter, supra note 168, at 3.

formed.[183] The commenter states that the ability for an investor to see buying and selling interest at various price levels makes it easier for the investor to understand what determines the price of a particular security by seeing the interaction of market and limit orders.[184] The commenter argues that making depth-of-book data "cheap" would allow brokers to give the data to retail clients for no or low cost and that this, in turn, would increase retail participation in the securities markets because investors will not only understand markets better, but they will participate more in the markets.[185] According to this commenter, if depth-of-book data is expensive, it will not help most retail investors because they will not be able to afford to see it.[186] One commenter states that depth-of-book data should be priced higher than top-of-book data, but adds that charges for depth-of-book data from the Plans should be much lower than charges for consuming the market data directly from the exchanges, because the information provided under the Plan would still be a subset of what is provided by the proprietary data feeds.[187]

One commenter opposes the proposed depth-of book data fees, because they, as well as the other proposed fees, represent an overall increase in costs to end users, making market data less accessible, contrary to "the core precept of the" MDI Rules.[188] Another commenter states that the value of the depth-of-book data should focus on greater access and availability of this kind of data, and that the Operating Committee should thus consider what price point would increase availability of depth-of-book information, rather than charging a multiple of proprietary data feeds.[189] One commenter expresses support for the proposed and "moderately priced" non-

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183 See id. at 7.

184 See id.

185 See id. at 8.

186 See id.

187 See NovaSparks Letter, supra note 125, at 1.

188 See Cutler Group Letter, supra note 134, at 1. This commenter further states that the level of the proposed fees would make it difficult for competing consolidators to offer products at prices competitive to those of proprietary feeds thereby placing competing consolidators at a disadvantage. See id.

189 See MayStreet Letter I, supra note 57, at 7.

professional rate for depth-of-book information, because, in the commenter's view, this aspect of the proposal "levels the playing field" for retail investors by providing them with access to the same information that is available to professionals traders at an affordable price, which will help broaden adoption of this new category of data.[190] One commenter states that it is concerning that the Proposed Amendment, without explanation, precludes the redistribution of delayed depth-of-book data, adding that it sees no reason for prohibiting the redistribution of depth-of-book data on a delayed basis and that it does not object to offering snapshot pricing.[191]

The Commission acknowledges the concerns raised by some commenters that the proposed fees for depth-of-book data are too high and thus do not serve the goals of Section 11A of the Exchange Act or help to ensure broad availability to brokers, dealers, and investors of information with respect to quotations for and transactions in NMS stocks that is prompt, accurate, reliable, and fair. Here, however, as discussed above, the Commission has concluded that the Filing Participants have not demonstrated that the proposed fees for depth-of-book data are fair, reasonable, and not unreasonably discriminatory. Because the Filing Participants have not justified either the proposed fees or the methodology behind them, the Commission does not have a basis to make a finding in this Order as to what fair, reasonable, and not unreasonably discriminatory level of fees would be.

The Filing Participants have not demonstrated that the proposed fees for the content underlying consolidated depth-of-book data provide for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair, reasonable, and not unreasonably discriminatory consistent with Rule 603(a) of Regulation NMS. Thus, the Commission cannot find that, consistent with Rule 608 of Regulation NMS, the Proposed Amendment is 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

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190 See BlackRock Letter, supra note 57, at 3, 5.

191 See MayStreet Letter II, supra note 58, at 3, 19.

mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.[192]

3. Fees for Auction Data

The Filing Participants have proposed fees for Auction information (as defined in Rule 600(b)(5)).[193] The Filing Participants propose that, with respect to auction information, both Professional Subscribers and Nonprofessional Subscribers would pay $10.00 per device/subscriber per month for each Network's auction information.[194]

The Filing Participants state that, with respect to the fees for auction information, the Filing Participants looked to the number of trades that occur during the auction process as compared to the trading day and determined that roughly 10% of daily trading volume is concentrated in auctions.[195] The Filing Participants state that, consequently, a fee that is 10% of the fee charged for depth-of-book data is an appropriate proxy for determining the value of auction information. As a result, the Filing Participants have proposed a $10.00 fee per Network for auction information, which the Filing Participants state is fair and reasonable and not unreasonably discriminatory.[196]

Three commenters, including a Non-Supporting Participant, state that information about auction order imbalances is included with the proprietary depth-of-book data products that the Filing Participants used to calculate the consolidated depth-of-book fees. Therefore, these

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192 See 17 CFR 242.608(b)(2).

193 The Filing Participants state that they propose to price subsets of data that constitute core data separately so that data subscribers have flexibility in how much consolidated market data content they wish to purchase. For example, the Filing Participants state that they understand that certain data subscribers may not wish to add depth-of-book data or auction information, or may want to add only depth-of-book information, but not auction information. Accordingly, the Filing Participants are proposing to price subsets of data to provide flexibility to data subscribers. However, the Filing Participants state that they expect that competing consolidators would purchase all core data. See Notice, supra note 6, 86 FR at 67517 n.10.

194 See id. at 67518.

195 See id. at 67520.

196 See id.

commenters argue, the proposed consolidated depth-of-book fees already incorporate the fees for auction imbalance data, and the proposed auction information fees would result in double charging consumers who purchase both auction information and depth-of-book products from competing consolidators.[197] One commenter states that proprietary depth-of-book product pricing is also inappropriately used to derive the value of auction data, because auction information is more closely aligned with top-of-book content, which provides only high-level information about aggregate order imbalances and does not include the order-by-order details or the data about multiple price levels that proprietary depth-of-book feeds include.[198] One commenter states that, while the pricing rationale in the proposal uses the ratio of auction volume to total trading volume to price the auction information feed, the Filing Participants incorrectly apply this ratio to the fees for the depth-of-book feed, which conveys information about displayed liquidity, not trading activity. According to this commenter, (1) it would have been more congruent with the Filing Participants' proposition to use Level 1 core data as the basis for pricing auction content as this feed is more closely associated with trade volume, and (2) the fees for auction information should be set to 10% of Level 1 core data prices.[199]

One commenter states that the best proxy for the value of auction data is the NYSE Order Imbalance feed, given that NYSE has the biggest auction market share.[200] The commenter recommends eliminating auction usage fees from the proposal because the most valuable auction data available today does not have such usage charges.[201] The commenter also states that it sees no reason for prohibiting the redistribution of auction data on a historical basis.[202]

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197 See BlackRock Letter, supra note 57, at 4–5; MEMX Letter, supra note 57, at 11–13; FINRA Letter, supra note 156, at 6.

198 See BlackRock Letter, supra note 57, at 5.

199 See id.

200 See MayStreet Letter II, supra note 58, at19.

201 See id. at 4, 19.

202 See id. at 19.

The Filing Participants have not shown that the proposed fees for auction data meet the statutory standard that fees for consolidated market data must be fair, reasonable, and not unreasonably discriminatory. The Filing Participants state that, to determine the proposed fees for auction data, they looked to the number of trades that occur during the auction process as compared to the trading day and determined that roughly 10% of the trading volume is concentrated in auctions. The Filing Participants then applied the 10% figure to the fees charged for depth-of-book data to determine the value of auction information. However, as several commenters, including Non-Supporting Participants, have pointed out, because information about auction order imbalances is included with the proprietary depth-of-book data products used as a benchmark for both the proposed depth-of-book fees and the proposed auction information fees,[203] the proposed auction information fee would essentially result in double charging subscribers who purchase both auction and depth-of-book information. Moreover, the Filing Participants have failed to respond to criticisms raised by a commenter that proprietary depth-of-book pricing was inappropriately used as a benchmark to derive the value of auction data because auction information is more closely aligned with top-of-book content, which only provides high-level information about aggregate order imbalances and does not include the order-by-order details or data about multiple price levels typically included in proprietary depth-of-book information products.[204] The Filing Participants, who have argued that their proposed fees are based on the value of the data products to subscribers, have failed to justify the assumption that the relative value of two materially different data products is based on the relative volume of trades during different periods of the day, without reference to the content of

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203 See MEMX Letter, supra note 57, at 11–12. BlackRock Letter, supra note 57, at 4–5; FINRA Letter, supra note 156, at 6.

204 See BlackRock Letter, supra note 57, at 5 (arguing that it would have been more congruent to use Level 1 core data fees as the benchmark). One commenter also argues that certain proprietary auction imbalance feeds, rather that the proprietary depth-of-book products selected, are a better proxy for the value of auction data. See MayStreet Letter II, supra note 58, at 19.

the two feeds. Because the rationale offered by the Filing Participants to support their methodology with respect to auction information fees is arbitrary, and because the methodology uses as a benchmark proprietary depth-of-book products that contain auction data along with a significant amount of other data, the Commission cannot find that the proposed fees are fair, reasonable, and not unreasonably discriminatory.

Some commenters argue that the fees for auction information under the Proposed Amendment should be lower.[205] One commenter states that retail investors should get free or moderately priced auction data because it is in the interest of retail investors, the industry, and the Commission.[206] The commenter states that opening and closing auction data is important in the securities markets and that providing auction data to retail investors will increase retail investor participation in the market.[207] Another commenter states that the filing should not be approved because the price levels do not contribute to a level playing field between competing consolidators and the current plan administrators, such that competing consolidators will be at a disadvantage because they will not be able to offer products at prices competitive with those of proprietary feeds.[208]

As noted above, the Commission has found that the Filing Participants have not justified the rationale they have used to set the proposed fees for auction information, and therefore it is not necessary for the Commission to make a finding about the absolute level of the proposed fees.

The Filing Participants have not demonstrated that the proposed fees for Auction Data provide for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair, reasonable, and not unreasonably discriminatory consistent with

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205 See Angel Letter, supra note 168; Cutler Group Letter, supra note 134; BlackRock Letter, supra note 57.

206 See Angel Letter, supra note 168, at 3.

207 See id. at 9.

208 See Cutler Group Letter, supra note 134, at 1–2.

Rule 603(a) of Regulation NMS. Thus, the Commission cannot find that, consistent with Rule 608 of Regulation NMS, the Proposed Amendment is 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 Act.[209]

4. Fees for Professional and Non-Professional Users

For each of the three categories of data described above, the Filing Participants propose a Professional Subscriber Charge and a Nonprofessional Subscriber Charge. With respect to Level 1 Core Data, the Filing Participants propose to charge the same Professional Subscriber and Nonprofessional Subscriber fees for the new Level 1 Core Data product under the distributed consolidation model as are charged for the existing Level 1 Core Data SIP data product that the Plans generate and disseminate. With respect to depth-of-book data, Professional Subscribers would pay $99.00 per device per month for each Network's data,[210] and Nonprofessional Subscribers would pay $4.00 per subscriber per month for each Network's depth-of-book data.[211] The Filing Participants are not proposing per-quote packet charges or enterprise rates for either Professional Subscribers or Nonprofessional Subscribers use of depth-of-book data.[212]

With respect to auction information, both Professional Subscribers and Nonprofessional Subscribers would pay $10.00 per device/subscriber per month for each Network's auction information data.[213]

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209 See 17 CFR 242.608(b)(2).

210 See Notice, supra note 6, 86 FR at 67518.

211 See id. The Filing Participants applied the 3.94x ratio to the current fees charged for Nonprofessional Subscribers taking all three Networks ($3.00). This resulted in the total fee level for depth-of-book data for Nonprofessional Subscribers equaling $12.00 (i.e., $3.00 x 3.94=$11.82, rounded to $12.00). This fee was then split evenly among the three Networks, resulting in a proposed Nonprofessional Subscriber fee of $4.00 per Network. See id. at 67520.

212 See id. at 67518.

213 See id.

Some commenters, including a Non-Supporting Participant, question the classification of fees by professional or non-professional user type under the Proposed Amendments.[214] One commenter states that it is unreasonably discriminatory to charge non-professional users the same fees as professional users for auction data because professionals make far more use of the data,[215] and that the filing contains no justification as to why the Filing Participants propose to charge professionals the same as non-professionals for auction data.[216] One commenter opposes non-professional and professional user classifications on the grounds that they prevent competing consolidators from being able to offer products at competitive prices compared to the proprietary data feeds.[217] One commenter states that the inclusion of multiple tiers, user types with bespoke definitions, and high compliance costs does not amount to fair and reasonable terms and in fact unreasonably discriminates against competing consolidators who seek to bring competition, innovation, and broader access to consolidated market data.[218] According to the commenter, simplifying the pricing structure to allow for enterprise caps at multiple tiers should be considered, along with easier-to-track proxies for usage based on data already reported by firms or other existing regulatory reporting.[219] Another commenter suggests slowing down the data feeds by 15 milliseconds to mitigate the risk of professionals "masquerading" as non-professionals utilizing the cheaper data.[220]

Some commenters support moderately priced or free non-professional user fees. Two Non-Supporting Participants support the proposed low fees for non-professional users.[221] One

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214 See Angel Letter, supra note 168; BlackRock Letter, supra note 57; MIAX Letter, supra note 57; Polygon.io Letter I, supra note 126, at 2–3; MayStreet Letter I, supra note 57.

215 See Angel Letter, supra note 168, at 9–10.

216 See id. at 10.

217 See Polygon.io Letter I, supra note 126, at 2–3.

218 See MayStreet Letter I, supra note 57, at 8.

219 See id.

220 See Angel Letter, supra note 168, at 11.

221 See MIAX Letter, supra note 57, at 2; MEMX Letter, supra note 57, at 3.

commenter supports the proposed "moderately priced" non-professional rate for depth-of-book information because this aspect of the proposal "levels the playing field" for retail investors by providing them with access to the same information that is available to professionals traders at an affordable price, which will help broaden adoption of this new category of data.[222] Another commenter states that free or moderately priced non-professional data, including depth-of-book and auction data, is in the best interest of brokers and exchanges because it may increase retail order flow and thus profits into the industry.[223] The commenter further states that free or moderately priced non-professional data is in the best interest of the Commission as well, because providing "better data to retail investors at low cost will reduce the amount of SEC resources devoted to dealing with complaints based on misunderstandings of market function."[224]

One Filing Participant states that distinguishing between professional and non-professional subscribers is fair, as well as efficient.[225] According to this commenter, professional fees are higher than those for non-professionals because professionals realize greater value from the data than non-professionals.[226] The commenter states that applying the same fees to both categories would result either in low-value users subsidizing high-value users, or in fees that are not economically sustainable for producers.[227] According to the commenter, setting professional and non-professional fees based on the value of the data is efficient, fair, and well established by the industry, and setting those fees based on cost is likely to be unworkable.[228] Another Filing

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222 BlackRock Letter, supra note 57, at 1, 3.

223 See Angel Letter, supra note 168, at 11.

224 Id.

225 See Nasdaq Letter II, supra note 75, at 3.

226 See id. The commenter further states that Non-Professionals are provided a discount to encourage their use of the data. See id.

227 See Nasdaq Letter II, supra note 75, at 3.

228 See id.

Participant states that it is fair, reasonable, and not unreasonable discriminatory for "Wall Street to pay higher fees than Main Street."[229]

With respect to the specific fees proposed, one Non-Supporting Participant states that the proposed professional user fees are based on a flawed methodology that results in excessive fee levels that would discourage firms from registering as competing consolidators and would hinder the formation of the decentralized consolidation model that the MDI Rules seeks to create.[230] Another Non-Supporting Participant states that the proposed fees are "plagued by double counting and other significant issues" that raise questions about the process used to design the Proposed Amendments.[231] For example, this commenter states that, as proposed, the $70 Professional User fee for depth-of-book information comes with access only to aggregated depth-of-book information and does not include top-of-book information, even though the calculation of that fee is based on a depth-of book product that includes top-of-book information.[232] This, the commenter states, "is straightforward double counting, plain and simple."[233] The commenter also states that while auction information is included in the depth-of-book feed used to calculate the proposed fees, the proposal also charges additional fees, including Professional and Non-Professional Fees, for auction information.[234] The commenter states that even exchanges that offer separate feeds for auction information generally do not charge Professional user fees.[235]

One Non-Supporting Participant states that the proposed non-professional user fees were a step in the right direction, but points out that, while the proposed fees would be lower for the

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229 NYSE Letter, supra note 71, at 8.

230 See MIAX Letter, supra note 57, at 4.

231 See MEMX Letter, supra note 57, at 10.

232 See id. at 12. According to the commenter, the value of top-of-book information is therefore already embedded in the cost proposed for depth-of-book information. See id.

233 See id.

234 See id. at 13–14.

235 See id.

limited subset of Non-Professional users that consume depth-of-book quotation information, the proposed fees are higher than the fees currently charged for proprietary data products that offer similar information.[236] This commenter adds that, even where the proposed fees are lower than the fees charged for comparable proprietary data—as is the case for Non-Professional users—the fact that the other fees are higher than proprietary offerings is likely to reduce incentives for competing consolidators to actually offer that data content to their customers.[237] According to the commenter, there is unlikely to be any demand for the new data elements included in consolidated market data at prices that exceed the fees charged for proprietary data feeds today.[238] In response to this commenter, a Filing Participant argues that this analysis does not account for the fact that purchasers of the new data would be receiving a consolidated data product that aggregates all exchanges' data together to determine an NBBO and the five best levels of depth among all the exchanges and that the analysis disregards that the Proposed Amendment includes much lower fees for non-professionals.[239]

The Commission finds that the Filing Participants have not demonstrated that the proposed fees for professional and non-professional subscribers are fair, reasonable, and not unreasonably discriminatory. With respect to Level 1 Core Data, the Filing Participants state they are not proposing to change the Professional Subscriber and Nonprofessional Subscriber fees currently set forth in the Plans. But, as discussed above,[240] in the context of the MDI Rules, the Proposed Amendment is in fact proposing fees applicable to a new data product—the data content underlying the top-of-book data product to be collected, consolidated, and disseminated by competing consolidators—that differs both with respect to content and administrative expense

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236 See id. at 7.

237 See id. at 9.

238 See id. at 17. The commenter further states that the Operating Committees should analyze whether it is fair and reasonable to continue to charge professional and non-professional user fees that exceed the fees charges for similar proprietary market data. See id.

239 See NYSE Letter, supra note 71, at 8.

240 See supra Section IV.C.1.

from the existing top-of-book product generated and disseminated by the exclusive SIP. In taking the position that they are not proposing to do more than add content to the existing Level 1 Core Data product offered by the exclusive SIP, however, the Filing Participants have not even attempted to explain or justify how the proposed Professional and Non Professional Fees for the new Level 1 Core Data satisfy the statutory standard of being fair, reasonable and not unreasonably discriminatory."[241] Significantly, the Filing Participants have not taken into account that the current consolidation, processing, and dissemination expenses incurred by the Equity Data Plans would be inapplicable to the data content underlying consolidated data offered through the new Level 1 Core Data product to be collected, consolidated, and disseminated by competing consolidators.[242]

With respect to depth-of-book data, the Filing Participants have not demonstrated that the proposed Professional and Non Professional depth-of-book fees are fair, reasonable, and not unreasonably discriminatory. The Filing Participants have attempted to justify the proposed Professional and Non-Professional fees for depth-of-book data by using the same multiplier (i.e., 3.94x) employed to calculate the proposed fees for data content underlying consolidated depth-of-book offerings,[243] but, as explained in detail above, the Filing Participants have not demonstrated that the use of this multiplier is appropriate in the first place because, among other things, the proprietary depth-of-book feeds contain top-of-book data and auction information, which the data content underlying consolidated depth-of-book feed would lack, leading to "double-counting," as several commenters have pointed out.[244] In addition, with respect to

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241 See MDI Rules Release, supra note 11, 86 FR at 18684.

242 See id. at 18682 (stating that "the proposed new fees [filed pursuant to Rule 614(e)] will need to reflect … that the effective national market system plan(s) is no longer operating the exclusive SIPs and is no longer performing collection, consolidation, and dissemination functions").

243 See supra note 211.

244 See supra Section IV.C.2 for a discussion on issues associated with the application of the multiplier used by the Filing Participants to generate certain proposed fees.

auction information, other than describing the proposal, explaining the methodology used to generate the proposed fees,[245] and arguing that the resulting fees are fair, reasonable, and not unreasonably discriminatory, the Filing Participants have not attempted to explain or otherwise justify why it is fair, reasonable, and not unreasonably discriminatory to set both the Professional Subscribers and Nonprofessional Subscribers fee at the same rate of $10.00 per device per month.

The Filing Participants have not demonstrated that the proposed fees for professional and non-professional users provide for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair, reasonable, and not unreasonably discriminatory consistent with Rule 603(a) of Regulation NMS. Thus, the Commission cannot find that, consistent with Rule 608 of Regulation NMS, the Proposed Amendment is 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 Act.[246]

5. Fees for Non-Display Use

The Filing Participants propose Non-Display Use fees relating to the three categories of data described above: (1) Level 1 Core Data; (2) depth-of-book data; and (3) auction information. With respect to Level 1 Core Data, the Filing Participants propose to apply the Non-Display Use fees currently set forth in the Plans to the data content underlying consolidated market data in the new Level 1 Core Data data product to be offered by the competing consolidators[247] for each of the three categories of Non-Display

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245 See Notice, supra note 6, 86 FR at 67517–18, 67520–21.

246 See 17 CFR 242.608(b)(2).

247 See Exhibit E to the CTA Plan; Section IX(b)(ii) of the CQ Plan.

Use.[248] With respect to depth-of-book data, Subscribers would pay Non-Display Use Fees of $12,477.00 per month for each category of Non-Display Use per Network.[249] With respect to auction information, Subscribers would pay Non-Display Use fees of $1,248.00 per month for each category of Non-Display Use per Network[250]

Some commenters, including a Non-Supporting Participant, state that the proposed Non-Display Use fees result in excessive fee levels that would discourage firms from registering as competing consolidators, thereby hindering the formation of the decentralized consolidation model that the MDI Rules seeks to create.[251] One commenter states that the fees in the Proposed Amendment, including the non-display fees, would place competing consolidators at a disadvantage because they will not be able to offer products at prices competitive with those of proprietary feeds.[252] One commenter asks that the Commission reject the Proposed Amendment and any future proposal that maintains display/non-display classifications.[253] The commenter states that, if the Proposed Amendment is not rejected, competing consolidators will not be able to offer products at competitive prices to proprietary data feeds.[254]

One Filing Participant states that distinguishing between Display and Non-Display use is fair, as well as efficient.[255] According to this commenter, algorithms, dark pools, and electronic

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248 The Filing Participants propose that access to odd-lot information would be made available to Level 1 Core Data subscribers for the same fees currently charged for Level 1 Core Data provided by the exclusive SIP. See Notice, supra note 6, 86 FR at 67518. See also supra note 35 (describing the three categories of Non-Display Use recognized under Exhibit E to the CTA Plan).

249 See Notice, supra note 6, 86 FR at 67518.

250 The Filing Participants state that, as is the case today, Subscribers would be charged for each category of use of depth-of-book data and auction information. See Notice, supra note 6, 86 FR at 67518.

251 See MIAX Letter, supra note 57, at 3; Polygon.io Letter I, supra note 126, at 2–3.

252 See Cutler Group Letter, supra note 134, at 1–2.

253 See Polygon.io Letter I, supra note 126, at 2.

254 See id.

255 See Nasdaq Letter II, supra note 75, at 3.

traders pay higher fees than human professionals because they realize greater value from the data.[256] The commenter argues that, because Non-Display users realize greater value from the use of market data than Display users, applying the same fees to both categories would result either in low-value users subsidizing high-value users or fees that are not economically sustainable for producers.[257] The commenter states that the Proposed Amendment thus sets the Display Fee and Non-Display Fee according to the value of the data, which is efficient, fair, and well-established in the industry both nationally and globally.[258] According to the commenter, any alternative based solely on cost is likely to be unworkable.[259]

The Filing Participants have not explained or justified how the proposed Non-Display Fees are fair, reasonable, and not unreasonably discriminatory. With respect to the new Level 1 Core Data, the Filing Participants state they are proposing to charge the same fees for Non-Display Use of Level 1 data that are currently set forth in the Plans with respect to data disseminated by the exclusive SIP. But, as discussed above,[260] in the context of the MDI Rules the Proposed Amendment is in fact proposing fees applicable to a new data product—the top-of-book data product to be collected, consolidated, and disseminated by competing consolidators—that differs both with respect to content and administrative expense from the existing top-of-book product generated and disseminated by the exclusive SIP. In taking the position that they have not proposed to do more than add content to the existing Level 1 product offered by the exclusive SIP, however, the Filing Participants have not even attempted to explain how the proposed Non-Display Use fees for Level 1 Core Data satisfy the statutory standard of being fair, reasonable, and not unreasonably discriminatory.[261] Significantly, the Filing Participants have

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256 See id.

257 See id.

258 See id. at 2.

259 See id.

260 See supra Section IV.C.1.

261 See MDI Rules Release, supra note 11, 86 FR at 18684.

not taken into account that the current consolidation, processing, and dissemination expenses incurred by the Equity Data Plans would be inapplicable to the data content underlying the new Level 1 products to be offered by competing consolidators.[262]

With respect to the content underlying depth-of-book data, the Filing Participants state that they applied the 3.94x multiplier to the current fees charged for Non-Display Use for all three Networks, resulting in a proposed Non-Display Use fee of $12.477.00 per Network.[263] With respect to depth-of-book data, the Filing Participants have not demonstrated that the proposed Non-Display Use fees are fair, reasonable, and not unreasonably discriminatory. The Filing Participants have attempted to justify the proposed Non-Display Use fees for depth-of-book data by using the same multiplier (i.e., 3.94x) employed to calculate the proposed fees for the data underlying the consolidated depth-of-book feed, but, as explained in detail above, the Filing Participants have not demonstrated that the use of this multiplier is appropriate in the first place because, among other things, the proprietary depth-of-book feeds contain top-of-book data and auction information, which the consolidated depth-of-book feed would lack, leading to "double-counting," as several commenters have pointed out.[264]

With respect to auction information, Filing Participants propose that Subscribers would pay Non-Display Use fees of $1,248.00 per month for each category of Non-Display Use per Network.[265] The Filing Participants state that, as is the case today, Subscribers would be charged for each category of non-display use of auction information.[266] The Filing Participants, however, have not explained the basis for the proposed Non-Display Use fees for auction information, and

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262 See supra note 242 and accompanying text.

263 See Notice, supra note 6, 86 FR at 67520.

264 See supra Section IV.C.2.

265 The Filing Participants state that, as is the case today, Subscribers would be charged for each category of use of depth-of-book data and auction information. See Notice supra note 6, 86 FR at 67518.

266 See supra note 35 (describing the categories of Non-Display Uses recognized under Exhibit E to the CTA Plan).

the Commission therefore has no basis on which it can find that the proposed fees are fair, reasonable, and not unreasonably discriminatory. And even if the unstated rationale is that the proposed fees are 10% of the proposed Non-Display Use fees for depth-of-book data—consistent with the derivation of auction information fees from the fees for the content underlying depth-of-book data—that rationale would suffer from the same weaknesses as the rationale underlying the proposed fees for Non-Display Use of depth-of-book data and for the content underlying depth-of-book data. The Filing Participants have not demonstrated that is fair, reasonable, and not unreasonably discriminatory to calculate the fees by comparison to the current charges for proprietary depth-of-book products, which are substantially different products than those at issue in the Proposed Amendment.[267]

The Filing Participants have not demonstrated that the proposed fees for Non-Display Use provide for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair, reasonable, and not unreasonably discriminatory consistent with Rule 603(a) of Regulation NMS. Thus, the Commission cannot find that, consistent with Rule 608 of Regulation NMS, the Proposed Amendment is 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 Act.[268]

6. Access Fees

The Filing Participants propose to charge Access Fees to all subscribers for the use of the three categories of data: (1) Level 1 Core Data; (2) depth-of-book data; and (3) auction information. With respect to Level 1 Core Data, the Filing Participants to apply the same Access Fees that currently set forth in the Plans with respect to data disseminated by the exclusive SIP.

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[267] See supra Section IV.C.2 for a discussion on issues associated with the application of the multiplier used by the Filing Participants to generate certain proposed fees.

[268] See 17 CFR 242.608(b)(2).

With respect to depth-of-book data, the Filing Participants propose to charge Subscribers a monthly Access Fee of $9,850.00 per Network. With respect to auction information, the Filing Participants propose to charge Subscribers a monthly Access Fee of $985.00 per Network.

Some commenters oppose the access fees in the proposed fee schedule. One Non-Supporting Participant states that the proposed access fees result in excessive fee levels that would discourage firms from registering as competing consolidators and would hinder the formation of the decentralized consolidation model that the MDI Rules seeks to create.[269] Another Non-Supporting Participant states that the proposed access fees are not fair and reasonable because they are more expensive than those charged by exchanges for their proprietary products.[270]

The Filing Participants have not demonstrated that the proposed access fees for depth-of-book information are fair, reasonable, and not unreasonably discriminatory. With respect to Level 1 Core Data, the Filing Participants are proposing to charge the same Access Fees for Non-Display Use of Level 1 Core Data that are currently set forth in the Plans with respect to data disseminated by the exclusive SIP. But, as discussed above,[271] in the context of the MDI Rules, the Proposed Amendment is in fact proposing fees applicable to a new data product—the top-of-book data product to be generated and disseminated by competing consolidators—that differs both with respect to content and administrative expense from the existing top-of-book product generated and disseminated by the exclusive SIP. In taking the position that they have not proposed to do more than add content to the existing Level 1 Core Data product offered by the exclusive SIP, however, the Filing Participants have not even attempted to explain or justify how the proposed Access Fees for Level 1 Core Data satisfy the statutory standard of being fair,

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269 See MIAX Letter, supra note 57, at 3.

270 See MEMX Letter, supra note 57, at 6, 8. See also Cutler Group Letter, supra note 134, at 1–2 (noting that it supports the comment letter written by MEMX and that the Proposed Amendments make market data less accessible).

271 See supra Section IV.C.1.

reasonable and not unreasonably discriminatory."[272] Significantly, the Filing Participants have not taken into account that the current consolidation, processing, and dissemination expenses incurred by the Equity Data Plans would be inapplicable to the data content underlying the new Level 1 Core Data products to be offered by competing consolidators.

With respect to Access Fees for the content underlying depth-of-book data, the Filing Participants have attempted to justify the proposed Access Fees by using the same multiplier (i.e., 3.94x) to the Access Fees charged for all three Networks, resulting in a proposed Access Fee of $9,850.00 per Network.[273] But, as explained in detail above, the Filing Participants have not demonstrated that the use of this multiplier is appropriate in the first place because, among other things, the proprietary depth-of-book feeds contain top-of-book data and auction information, which the consolidated depth-of-book feed would lack, leading to "double-counting," as several commenters have pointed out.[274]

Finally, with respect to auction information, the Filing Participants have not explained the basis for the proposed Access Fees for auction information, and the Commission therefore has no basis on which it can find that the proposed fees are fair, reasonable, and not unreasonably discriminatory. And even if the unstated rationale is that the proposed fees are 10% of the proposed Access Fees for depth-of-book data, consistent with the derivation of auction information fees from the fees for the content underlying depth-of-book data, that rationale would suffer from the same weaknesses as the rationale for Non-Display Use of depth-of-book data and for the content underlying depth-of-book data. The Filing Participants have not demonstrated that is fair, reasonable, and not unreasonably discriminatory to calculate the fees

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272 See MDI Rules Release, supra note 11, 86 FR at 18684.

273 See Notice, supra note 6, 86 FR at 67520.

274 See supra Section IV.C.2 (discussing issues associated with the application of the multiplier used by the Filing Participants to generate certain proposed fees).

by comparison to the current charges for proprietary depth-of-book products, which are substantially different products than those at issue in the Proposed Amendment.[275]

The Filing Participants have not demonstrated that the proposed Access Fees provide for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair, reasonable, and not unreasonably discriminatory consistent with Rule 603(a) of Regulation NMS. Thus, the Commission cannot find that, consistent with Rule 608 of Regulation NMS, the Proposed Amendment is 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 Act.[276]

7. Redistribution Fees

The Filing Participants propose that the existing Redistribution Fees would apply to all three categories of core data (i.e., Level 1 Core Data, depth-of-book, and auction information), including any subset thereof.[277] The Filing Participants are not proposing to change the amount of the Redistribution Fees. The Filing Participants also specify that Redistribution Fees would be charged to competing consolidators.

In support of their proposal to charge Redistribution Fees to competing consolidators, the Filing Participants argue: (1) that the comparison the Commission made in the MDI Rules Release between self-aggregators (which would not pay Redistribution Fees) and competing consolidators is not appropriate in determining whether a redistribution fee is not unreasonably

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275 See id.

276 See 17 CFR 242.608(b)(2).

277 The Filing Participants state that, currently, Redistribution Fees are charged to any entity that makes last sale information or quotation information available to any other entity or to any person other than its employees, irrespective of the means of transmission or access. The Filing Participants propose to amend this description to make it applicable to core data, as that term is defined in Rule 600(b)(21). See Notice, supra note 6, 86 FR at 67518.

discriminatory; and (2) that the Commission's comparison is not consistent with the current long-standing practice of the Plan that redistribution fees are charged to any entity that distributes data externally.[278] The Filing Participants state that a self-aggregator, by definition, would not be distributing data externally and would therefore not be subject to such fees, which, according to the Filing Participants, is consistent with current Plan practice that a subscriber to consolidated data that only uses data for internal use is not charged a Redistribution Fee.

The Filing Participants argue that the more appropriate comparison would be between competing consolidators and downstream vendors, both of which would be selling consolidated market data directly to market data subscribers. The Filing Participants state that vendors are and would still be subject to Redistribution Fees when redistributing data to market data subscribers and argue that it would be unreasonably discriminatory and would impose a burden on competition if competing consolidators—which would be competing with downstream market data vendors for the same data subscriber customers—are not charged a Redistribution Fee for exactly the same activity.

One commenter states that the Proposed Amendment should treat competing consolidators as replacements to the exclusive SIPs, not as data vendors.[279] The commenter states that subjecting competing consolidators to the same fees as data vendors and subscribers

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278 See, e.g., Cover Letter, supra note 1, at 4; Notice, supra note 6, 86 FR at 67518. The Filing Participants state that the current exclusive SIP is not charged a Redistribution Fee. The Filing Participants state, however, that unlike competing consolidators, the processor has been retained by the Plans to serve as an exclusive SIP, is subject to oversight by both the Plans and the Commission, and neither pays for the data nor engages with data subscriber customers. The Filing Participants state that, by contrast, under the competing consolidator model: The Plans would have no role in either overseeing or determining which entities choose to be a competing consolidator; a competing consolidator would need to purchase consolidated market data just as any other vendor would; and competing consolidators would be responsible for competing for data subscriber clients. Accordingly, the Filing Participants argue, competing consolidators would be more akin to vendors than to the current exclusive SIPs. The Filing Participants state that if any entity that is currently an exclusive SIP chooses to register as a competing consolidator, that entity would be subject to the Redistribution Fee. See Cover Letter, supra note 1, at 4 n.7; Notice, supra note 6, 86 FR at 67518 n.12.

279 See MayStreet Letter I, supra note 57, at 3.

that receive consolidated market data from the exclusive SIP fails to recognize that competing consolidators are SIPs and are not similarly situated to today's data vendors.[280] This commenter further states that competing consolidators should not be charged redistribution fees because they are not redistributing consolidated market data, but are instead generating and distributing consolidated data for the first time.[281] According to this commenter, redistribution fees should not be charged by the Plan because the Plan would no longer govern the distribution of consolidated market data.[282] The commenter states that not recognizing competing consolidators as SIPs places competing consolidators at a competitive disadvantage relative to data vendors, given that they take on expenses and risks that data vendors do not, such as the costs for generating consolidated market data, disclosing operational and performance metrics, registering with the Commission, and complying with Rule 614 of Regulation NMS.[283]

One Non-Supporting Participant states that the redistribution fee for competing consolidators is inconsistent with the MDI Rules, is not fair and reasonable, and is unreasonably discriminatory.[284] This commenter states that the proposal's attempt to justify the redistribution fee based on the current centralized model that charges fees to downstream vendors is unsound because, under the decentralized MDI Rules, competing consolidators would be "stepping into the role that the SIPs hold today as the primary sources of consolidated market data."[285] According to this commenter, to charge a redistribution fee on top of the other proposed fees

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280 See id. at 3–4.

281 See id.

282 See id. at 5.

283 See id.

284 See MIAX Letter, supra note 57, at 2 (citing the MDI Rules Release statements that "imposing redistribution fees on data content underlying consolidated market data that will be disseminated by competing consolidators would be difficult to reconcile with the standards of being fair and reasonable and not unreasonably discriminatory in the new decentralized model," and that "fees proposed by the SROs should not contain redistribution fees for competing consolidators because this would hinder their ability to compete.").

285 Id.

would "unquestionably put competing consolidators at a further competitive disadvantage as compared to aggregated proprietary data products offered by exchanges," thus targeting them in an unfair and unreasonable manner.[286]

One commenter states the Proposed Amendment directly contradicts the Commission's directive in the MDI Rules that competing consolidators not be treated the same as market data vendors.[287] The commenter states that the Filing Participants are "engaged in a strategy to undermine the Commission's authority over market data as enumerated in the CT Plan and MDI Rule[s] in order to preserve their current revenues from proprietary and SIP data."[288] The commenter further states that the Filing Participants' position that the competing consolidators should be charged redistribution fees just like any market data vendor undermines the efforts of the MDI Rules.[289] The commenter cites the Commission's statement in the MDI Rules Release that the fees for the data content underlying consolidated market data should not include redistribution fees for competing consolidators."[290] The commenter argues that by treating competing consolidators differently than the exclusive SIPs, the Filing Participants are acting in an unreasonably discriminatory manner, effectively disregarding the Exchange Act mandates in addition to the Commission's directive in the MDI Rules.[291] The commenter argues that imposing redistribution fees on competing consolidators imposes an undue burden on competition.[292]

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286 Id.

287 See SIFMA Letter I, supra note 57, at 4–5.

288 Id. at 6; see also SIFMA Letter II, supra note 57, at 3.

289 See SIFMA Letter I, supra note 57, at 7; SIFMA Letter II, supra note 57, at 2.

290 See SIFMA Letter I, supra note 57, at 7; SIFMA Letter II, supra note 57, at 2.

291 See SIFMA Letter I, supra note 57, at 7; SIFMA Letter II, supra note 57, at 2.

292 See SIFMA Letter I, supra note 57, at 7; SIFMA Letter II, supra note 57, at 2.

Other commenters also suggest that the imposition of redistribution fees on competing consolidators would place competing consolidators at a competitive disadvantage.[293] One commenter states that by charging redistribution fees to competing consolidators, the Proposed Amendment creates a barrier to entry to technology solution vendors becoming competing consolidators.[294] Two other commenters, including a Non-Supporting Participant, also argue that the redistribution fees charged to competing consolidators are in contravention of the Commission's express direction in the MDI Rules.[295] Another Non-Supporting Participant states that the proposed redistribution fee that would be charged to competing consolidators is inconsistent with the purposes and structure of the MDI Rules, and that this aspect of the proposal represents a "further indication that the intent of the majority [of the exchanges] was to subvert the purpose of the Commission's order."[296]

One Filing Participant states that, although the Commission in the MDI Rules Release compared competing consolidators to self-aggregators, a more appropriate comparison would be between competing consolidators and downstream vendors.[297] According to this commenter, because these vendors would be subject to redistribution fees when redistributing data to their subscribers, it would impose a burden on competition and be unfair to vendors not to charge a redistribution fee for exactly the same activity by competing consolidators.[298]

As the Commission stated in the MDI Rules Release, "the fees for the data content underlying consolidated data should not include redistribution fees for competing consolidators,"[299] and imposing redistribution fees on competing consolidators "would be

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293 See NBIM Letter, supra note 79, at 2; Cutler Group Letter, supra note 134, at 1–2.

294 See NovaSparks Letter, supra note 125, at 1.

295 See FINRA Letter, supra note 156, at 5; MEMX Letter, supra note 57, at 21.

296 IEX Letter, supra note 57, at 5.

297 See NYSE Letter, supra note 71, at 7.

298 See id.

299 MDI Rules Release, supra note 11, 86 FR at 18685.

difficult to reconcile with statutory standards of being fair and reasonable and not unreasonably discriminatory in the new decentralized model."[300] The Filing Participants' attempt to justify the Redistribution Fee—basing it on the long-standing practice within a centralized model that charges fees to "any entity that distributes data"—is misplaced. Unlike current vendors that take consolidated data generated by the exclusive SIP, distribute it, and pay redistribution fees, the competing consolidators will "take the place of the exclusive SIP, which is not charged a redistribution fee."[301] The competing consolidators will take underlying data content from the exchanges and will themselves generate the consolidated data. Thus, there is no "redistribution" when a competing consolidator sells consolidated data—at fees set forth in the Plan—to a subscriber. Moreover, like the exclusive SIPs, competing consolidators will take on expenses, risks, and obligations that data vendors do not, such as the costs for collecting, consolidating, generating, and disseminating consolidated equity market data.[302] Additionally, like the exclusive SIPs and unlike vendors, competing consolidators will be subject to the registration, disclosure, and other regulatory requirements under Rule 614 and Form CC of Regulation NMS,[303] as well as to the requirements of Regulation SCI.[304]

Thus, the Filing Participants have not adequately explained or justified how the proposal to impose Redistribution Fees reflects, consistent with the MDI Rules, that "that the effective national market system plan(s) is no longer operating the exclusive SIPs and is no longer

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300 Id.

301 Id.

302 See id. at 18603–04, 18662–76 (discussing registration and responsibilities of competing consolidators).

303 See id. at 18603–04, 18662–76 (discussing registration and responsibilities competing consolidators).

304 In the MDI Rules Release, the Commission amended Regulation SCI to expand the definition of "SCI entities" to include "SCI competing consolidators" that are subject to the requirements of Regulation SCI after an initial transition period if they meet a threshold based on certain share of gross consolidated market data revenues. See id. at 18604–05.

performing collection, consolidation, and dissemination functions."[305] The Filing Participants have not explained how keeping the proposed Redistribution Fees unchanged from the current fees under the Plans is an appropriate means of establishing the proposed fees, or how the resulting fee levels are fair and reasonable and not unreasonably discriminatory. Additionally, the Filing Participants have not explained how charging Redistribution Fees—layered atop the other fees described above—to competing consolidators (thus subjecting them to the same fees as vendors and subscribers) is 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 Act.[306]

The Filing Participants have not demonstrated that the proposed Redistribution Fees provide for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair, reasonable, and not unreasonably discriminatory consistent with Rule 603(a) of Regulation NMS. Thus, the Commission cannot find that, consistent with Rule 608 of Regulation NMS, the Proposed Amendment is 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 Act.[307]

8. Other Comments Regarding the Proposed Fees[308]

One commenter states that the proposed fees for the content underlying consolidated market data would be too high whether a cost-basis or value-basis were used as a justification by

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305 Id. at 18682.

306 See 17 CFR 242.608(b)(2).

307 See 17 CFR 242.608(b)(2).

308 In addition to the other comments discussed in this Order, the Commission also received a letter in the comment file that is not germane to the Proposed Amendments. See Letter from Charles L. Groothoff (Apr. 13, 2022).

the Filing Participants.[309] A Non-Supporting Participant states that any analysis of current SIP fees should include a discussion of what structural changes could be made to SIP fees to eliminate or reduce the incentives that firms have today to avoid providing SIP data to their customers.[310] One commenter favors expanding the broker-dealer enterprise cap that is part of the current fee schedule of the Plan, stating that the Proposed Amendment provides no depth-of-book enterprise cap and that the Level 1 enterprise caps are out of reach for most market participants.[311] Another commenter states that it supports the proposed a la carte fee structure for the expanded elements of consolidated data because, in the commenter's view, market participants should be able to select from a variety of market data products and pay only for the content they consume.[312]

One Non-Supporting Participant compares the proposed fees for content underlying consolidated data to fees currently charged for proprietary data fees and argues that at any given price a subscriber would be better off subscribing to the proprietary data fees listed instead of purchasing data from the Plan, given the additional information included on those feeds.[313] This commenter states that, because the proposed fees are generally more expensive than current proprietary data offerings, the Proposed Amendments clearly fail the "fair and reasonable" test required by the Exchange Act.[314] This commenter further argues that it is unlikely that there will be any demand for the new data elements included in consolidated market data at prices that exceed the fees charged for proprietary data feeds today.[315]

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309 See MayStreet Letter I, supra note 57, at 6.

310 See MEMX Letter, supra note 57, at 20.

311 See MayStreet Letter I, supra note 57, at 8.

312 See BlackRock Letter, supra note 57, at 2–3.

313 See MEMX Letter, supra note 57, at 7.

314 See id. at 8.

315 See id. at 17.

The Commission in this Order is not taking a position on what structure or level of fees—either on an absolute basis or in comparison to existing proprietary data products—would be appropriate, but finds that the Filing Participants have failed to demonstrate that the proposed fees provide for the distribution of information with respect to quotations for and transactions in NMS stocks on terms that are fair and reasonable and not unreasonably discriminatory.[316]

Some commenters, including Non-Supporting Participants, also argue that the proposed fees would have an adverse impact on competition, and on competing consolidators in particular.[317] One Non-Supporting Participant states that, even where the proposed fees are lower than the fees charged for comparable proprietary data, the fact that other fees are higher than proprietary offerings is likely to reduce incentives for competing consolidators to actually offer that data content to their customers and would limit the potential customer base for competing consolidators and inappropriately impede the viability of competing consolidators under the infrastructure rule.[318] Another commenter expresses concern that if the Proposed Amendment were approved, the exchanges would entrench a high cost for market data that has no relation to underlying expenses, is not subject to effective competitive forces, and serves as a formidable barrier to entry for newer firms.[319] One commenter states that the current proposal will favor current market data vendors who already pay for these fees and have large customer bases, but will not necessarily use the most efficient data consolidation solutions.[320] This commenter states

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316 See Sections 11A(c)(1)(C)–(D) of the Exchange Act, 15 U.S.C 78k-1(c)(1)(C)–(D); Rule 603(a) of Regulation NMS, 17 CFR 242.603.

317 See MIAX Letter, supra note 57, at 1, 3; MEMX Letter, supra note 57, at 2, 9, 10–17, 21–22, 25; NBIM Letter, supra note 79, at 2; NovaSparks Letter, supra note 125, at 1; IEX Letter, supra note 57, at 5; SIFMA Letter I, supra note 57, at 8; FINRA Letter, supra note 156, at 5; MayStreet Letter I, supra note 57, at 5; BlackRock Letter, supra note 57, at 1–4; Polygon.io Letter I, supra note 126, at 3; Proof Services Letter, supra note 57, at 3; Cutler Group Letter, supra note 134, at 1.

318 See MEMX Letter, supra note 57, at 9, 17.

319 See Proof Services Letter, supra note 57, at 1.

320 See NovaSparks Letter, supra note 125, at 1.

that all of the equity market data plans should have a unified feed and price list because most end users today consume all of the plans' feeds.[321]

The Commission has considered these comments regarding the competitive challenges of the current market environment and the role the Plan and these proposed fees would play under the competing consolidator regime. As discussed above, the Commission has found that the Filing Participants have not demonstrated that the proposed fees for content underlying consolidated market data are fair, reasonable and not unreasonably discriminatory. The Commission agrees that unfair, unreasonable, or unreasonably discriminatory fees for this data content would decrease the likelihood that it would be economically feasible for firms to become competing consolidators. That in turn would undermine the Commission's goals in "fostering a competitive environment for the provision and dissemination of critical market data to investors and other market participants" that will "better achieve the goals of Section 11A of the Exchange Act and help to ensure broad availability to brokers, dealers, and investors of information with respect to quotations for and transactions in NMS stocks that is prompt, accurate, reliable, and fair."[322]

D. NMS Plan Governance

Some commenters, including Non-Supporting Participants, state that the MDI Rules should be implemented through the new CT Plan,[323] rather than through the existing equity market data plans (i.e., the CTA/CQ Plans and the Nasdaq/UTP Plan).[324] One commenter reiterated its continued support for the provisions of the CT Plan overall.[325] The commenter states that the real and potential conflicts of interest that currently exist relating to the provision

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321 See id. at 1–2.

322 MDI Rules Release, supra note 11, 86 FR at 18605–06.

323 See supra note 18 (describing CT Plan).

324 See BMO Letter, supra note 57; MEMX Letter, supra note 57; MIAX Letter, supra note 57; IEX Letter, supra note 57; and Polygon.io Letter I, supra note 126; Polygon.io Letter II, supra note 67.

325 See BMO Letter, supra note 57, at 1.

of market data directly relate to the decision-making problems at the Plan's Operating Committee.[326] One commenter states that the conflicts of interest that led to the creation of the Proposed Amendment are apparent from the resounding lack of support it has received from anyone but the exchange groups that stand to benefit from creating a system where competing consolidators are not viable.[327] According to this commenter, the exchange groups are disincentivized to create a fair and reasonable fee structure, so additional attempts under the same system are unlikely to create better results.[328]

Another commenter supports expanding the voting representation under the CT Plan to non-SROs and having them participate as full voting members of the Operating Committee.[329] The commenter states that the Commission cannot approve the Proposed Amendment given the inherent conflicts of interests of the Filing Participants that developed the proposals.[330] The commenter states that, if the Commission approves the Proposed Amendment, it would be giving tacit approval to the shortcomings in the governance structure of the current Plans.[331] This commenter also states that the proposed fee amendments are explicitly stated by the Filing Participants to be unrelated to the cost of providing the data, but instead related to subscriber value.[332] The commenter states that this is a clear example of the Plan's Operating Committee failing to ensure that the public service mandates of the SIPs are achieved and is a failure in governance through the unmitigated conflicts of interest by voting members who just want to maximize profits.[333] The commenter states that further evidence of the failure of the governance

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326 See id. at 2.

327 See id.

328 See Polygon.io Letter II, supra note 67, at 2.

329 See BMO Letter, supra note 57, at 2.

330 See id.

331 See id.

332 See id.

333 See id. at 2–3.

structure of the Operating Committee is that the fee proposals have been proposed while the remaining reforms of the CT Plan are stayed pending resolution of challenges in federal court.[334] The commenter states that it is "somewhat shocking" that the Proposed Amendment was filed notwithstanding that other members of the Operating Committee "have stated publicly that the proposals contradict the Exchange Act standards for consolidated data, which require that the fees be fair, reasonable, and not unreasonably discriminatory."[335]

A Non-Supporting Participant also encourages the Commission to consider whether the CT Plan is a more appropriate body for setting fees for consolidated market data.[336] This commenter states that placing the responsibility for setting fees in the hands of the CT Plan would allow SIP fees to be set by an operating committee that better reflects the constituencies affected by the Proposed Amendment, including non-SRO representatives.[337] Another Non-Supporting Participant states that the fee proposals are "the result of a conflicted and unbalanced voting process," adding that it agrees with the recommendation that the responsibility for setting the proposed fees should be placed on the CT Plan.[338] Another Non-Supporting Participant recommends that the Commission disapprove the proposal and reassign responsibility for the filing to the operating committee for the CT Plan, which the commenter states would have a "broader set of voting stakeholders and a fairer and less conflicted governance structure," and argues that the Proposed Amendment shows that this change is "badly" needed.[339]

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334 See id. at 3.

335 Id.

336 See MEMX Letter, supra note 57, at 23–24.

337 See id.

338 MIAX Letter, supra note 57, at 5.

339 IEX Letter, supra note 57, at 5.

One commenter asks the Commission to reevaluate the process that led to the creation of the Proposed Amendment and to make substantive changes to avoid the amendment process being used to derail timely implementation of the MDI Rules.[340]

While some commenters suggest that the CT Plan is the appropriate mechanism for implementing the changes required by the MDI Rules, that mechanism is not available at this time because the D.C. Circuit has vacated the Commission order approving the CT Plan.[341] And additional discussion on this topic in this Order is unnecessary, as it does not bear on the basis for the Commission's decision to disapprove the Proposed Amendment. On the record before us, for the independently sufficient reasons discussed in more detail above, we have concluded that the Filing Participants have not demonstrated that approval of the proposed NMS plan amendment is 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 Act.

E. Consideration of Other Actions Under Rule 608 of Regulation NMS

In connection with recommending disapproval of the Proposed Amendment, one commenter states the Commission could consider potential action under Rule 608(a)(2) of Regulation NMS, which allows the Commission to directly propose amendments to effective national market system plans.[342] The commenter states that in connection with a Commission disapproval of the Proposed Amendment, it would "support the Commission's efforts to ensure that the newly expanded consolidated market data (i.e., new core data) under the Commission's Infrastructure Rule is disseminated in a manner consistent with the Exchange Act standards to ensure the investing public and all market participants have fair and reasonable access to it."[343]

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340 See Polygon.io Letter I, supra note 126, at 3.

341 See The Nasdaq Stock Market LLC, et al. v. Securities and Exchange Commission, supra note 18.

342 See SIFMA Letter I, supra note 57, at 2.

343 Id.

One Filing Commenter states that it would be inconsistent with the Exchange Act and Rule 608 of Regulation NMS for the Commission to change sua sponte any or all of the proposed fees, as any such change would be material to the Proposed Amendment.[344] This commenter states that, if the Commission intends to revise the Proposed Amendment in any material way, it must do so through rulemaking under Rule 608(b)(2) of Regulation NMS, by providing public notice of the specific changes it proposes and giving the Plan's participants and the general public an opportunity to comment.[345]

One commenter states that the Commission should provide guidance in terms of the requirements of the MDI Rules as well as the application of the terms "fair and reasonable" and "not unfairly discriminatory" in the context of supplying competing consolidators with the underlying content of consolidated market data, adding that, without such guidance, any refiling of the amendments will result in proposals that do not meet standards under the Exchange Act.[346]

To the extent that these comments bear on potential future Commission action, rather than on the basis for the Commission's decision to disapprove the Proposed Amendment, further discussion on these topics is unnecessary in this Order.

V. CONCLUSION

For the reasons set forth above, the Commission does not find, pursuant to Section 11A of the Act, and Rule 608(b)(2) thereunder, that the Proposed Amendment is consistent with the

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344 See NYSE Letter, supra note 71, at 8.

345 See id.

346 See MayStreet Letter II, supra note 58, at 1–2, 4, 20.

requirements of the Act and the rules and regulations thereunder applicable to an NMS plan amendment.

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Act, and Rule 608(b)(2) thereunder, that the Proposed Amendment (File No. S7-24-89) be, and hereby is, disapproved.

By the Commission.

J. Matthew DeLesDernier,

Deputy Secretary.

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