persons of an ActiveShares ETF to deposit securities into, and receive securities from, the ActiveShares ETF in connection with the purchase and redemption of creation units. The relief in the Order would incorporate by reference terms and conditions of the same relief of a previous order granting the same relief sought by applicants, as that order may be amended from time to time (''Reference Order'').[1]

APPLICANTS: Northern Lights Fund Trust IV, First Manhattan Co. and Northern Lights Distributors, LLC.

FILING DATES: The application was filed on November 10, 2021, and amended on February 4, 2022.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email, if an email address is listed for the relevant applicant below, or personally or by mail, if a physical address is listed for the relevant applicant below. Hearing requests should be received by the Commission by 5:30 p.m. on March 21, 2022, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Wendy Wang, Northern Lights Fund Trust IV, *wwang@ultimusfundsolutions.com;* Benjamin Clammer, First Manhattan Co., *bclammer@firstmanhattan.com;* Kevin Guerette, Northern Lights Distributors, LLC, *kguerette@ultimusfundsolutions.com;* JoAnn M. Strasser, Esq. and Bibb L. Strench, Esq., Thompson Hine LLP, *JoAnn.Strasser@ThompsonHine.com, Bibb.Strench@ThompsonHine.com.*

FOR FURTHER INFORMATION CONTACT: Deepak T. Pai, Senior Counsel, or Trace W. Rakestraw, Branch Chief, at (202) 551–6825 (Division of Investment Management, Chief Counsel's Office).

[1] Precidian ETFs Trust, *et al.,* Investment Company Act Rel. Nos. 33440 (April 8, 2019) (notice) and 33477 (May 20, 2019) (order).

SUPPLEMENTARY INFORMATION: For applicants' representations, legal analysis, and conditions, please refer to applicants' amended application, dated February 4, 2022, which may be obtained via the Commission's website by searching for the file number at the top of this document, or for an Applicant using the Company name search field, on the SEC's EDGAR system. The SEC's EDGAR system may be searched at *https://www.sec.gov/edgar/searchedgar/legacy/companysearch.html.* You may also call the SEC's Public Reference Room at (202) 551–8090.

For the Commission, by the Division of Investment Management, under delegated authority.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2022–04312 Filed 3–1–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94307; File No. S7–24–89]

Joint Industry Plan; Order Instituting Proceedings To Determine Whether To Approve or Disapprove the Fifty-Second Amendment to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis

February 24, 2022.

I. Introduction

On November 5, 2021,[1] certain participants in the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis (''Nasdaq/UTP Plan'' or ''Plan'') [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 (the ''Proposed Amendment'') to amend the Nasdaq/UTP Plan.[5] The Proposed Amendment was published for comment in the **Federal Register** on November 26, 2021.[6]

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,[7] to determine whether to approve or disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment.

II. Summary of the Proposed Amendment [8]

Under the Proposed Amendment, the 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 Market Data Infrastructure Rule (''MDI Rule'').[9] The Participants have submitted a separate amendment to implement the non-fee-related aspects of the MDI Rule.[10]

The Participants propose a fee structure for the following three categories of consolidated equity market data, which collectively constitute the amended definition of core data, as that term is defined in amended Rule 600(b)(21) of Regulation NMS: [11]

(1) Level 1 Service, which would include Top of Book Quotations, Last Sale Price Information, and odd-lot

[1] *See* Letter from Robert Books, Chair, UTP Operating Committee, to Vanessa Countryman, Secretary, Commission (Nov. 5, 2021) (''Cover Letter'').

[2] The Plan governs the collection, processing, and dissemination on a consolidated basis of quotation information and transaction reports in Eligible Securities for its Participants. The Plan serves as the required transaction reporting plan for its Participants, which is a prerequisite for their trading Eligible Securities. *See* Securities Exchange Act Release No. 55647 (Apr. 19, 2007), 72 FR 20891 (Apr. 26, 2007).

[3] 15 U.S.C 78k–1.

[4] 17 CFR 242.608.

[5] The Proposed Amendment was approved and executed by more than the Plan's required two-thirds of the self-regulatory organizations (''SROs'') that are participants of the UTP Plan. The participants that approved and executed the amendment (the ''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, Inc., 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 UTP Plan are: Financial Industry Regulatory Authority, Inc., The Investors' Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, MIAX PEARL, LLC, and Nasdaq BX, Inc.

[6] *See* Securities Exchange Act Release No. 93618 (Nov. 19, 2021), 86 FR 67562 (Nov. 26, 2021) (''Notice''). Comments received in response to the Notice are available at *https://www.sec.gov/comments/s7-24-89/s72489.shtml.*

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

[8] The full text of the Proposed Amendment appears as Attachment A to the Notice. *See* Notice, *supra* note 6, 86 FR 67566–68.

[9] *See* Securities Exchange Act Release No. 90610, 86 FR 18596 (April 9, 2021) (File No. S7–03–20) (''MDI Rule Release'').

[10] *See* Securities Exchange Act Release No. 93620 (Nov. 19, 2021), 86 FR 67541 (Nov. 26, 2021).

[11] 17 CFR 242.600(b)(26).

information (as defined in amended Rule 600(b)(59)). Plan fees to subscribers currently are for Top of Book Quotations and Last Sale Price Information, as well as what is now defined as administrative data (as defined in amended Rule 600(b)(2)), regulatory data (as defined in amended Rule 600(b)(78)), and self-regulatory organization-specific program data (as defined in amended Rule 600(b)(85)). The Participants propose that the fees for Level 1 Service would remain unchanged and that Level 1 Service would continue to include all information that subscribers currently receive and would add odd-lot information;

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

(3) Auction information (as defined in amended Rule 600(b)(5)).[12]

Professional and Nonprofessional Fee Structure

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

With respect to Level 1 Service, the Participants do not propose to change the Professional Subscriber and Nonprofessional Subscriber fees currently set forth in the UTP Plan. Access to odd-lot information would be made available to Level 1 Service Professional and Nonprofessional Subscribers at no additional charge.

With respect to depth-of-book data, Professional Subscribers would pay $99.00 per device per month, and Nonprofessional Subscribers would pay $4.00 per subscriber per device per month. The Participants do not propose at this time 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, both Professional Subscribers and Nonprofessional Subscribers would pay $10.00 per device per month.

Non-Display Use Fees

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

With respect to Level 1 Service, the Participants do not propose to change the Non-Display Use fees currently set forth in the UTP Plan. Access to odd-lot information would be made available to Level 1 Service subscribers at no additional charge.

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.

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.

Access Fees

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

With respect to Level 1 Service, the Participants do not propose to change the Access Fees currently set forth in the UTP Plan. Access to odd-lot information would be made available to Level 1 Service subscribers at no additional charge.

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

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

Clarifications Related to Expanded Content

The Participants also propose to add clarifying language to the fees for UTP services regarding the applicability of various fees to the expanded market data content required by the MDI Rule.

First, the Participants propose to clarify that the Per Query Fee will not apply to the expanded content, and will only be available for the receipt and use of Level 1 Service. The Participants state that, under the current Price List, the Per Query Fee serves as an alternative fee schedule to the normally applied Professional and Nonprofessional Subscriber Charges, and, further, that the proposed changes are designed to clarify that Per Query Fee is only available with respect to the use of Level 1 Service, 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 Participants propose to clarify that Level 1 Service would include Top of Book Quotation Information, Last Sale Price Information, odd-lot information, administrative data, regulatory data, and self-regulatory organization program data. The Participants state that this proposed amendment would use terms defined in amended 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.

Third, the Participants propose to clarify that the existing Redistribution Fees would apply to all three categories of core data (*i.e.,* Level 1, depth-of-book, and auction information), including any subset thereof. According to the 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 Participants propose to amend this description to make it applicable to core data, as that term is defined in amended Rule 600(b)(21). The Participants do not propose to change the amount of the Redistribution Fees themselves.

Fourth, the Participants propose that the existing Redistribution Fees would be charged to competing consolidators. The Participants argue (1) that the comparison the Commission made in the MDI Rule 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 discriminatory; and (2) that the Participants do not believe that the Commission's comparison is consistent with the current long-standing practice that redistribution fees are charged to any entity that distributes data externally.[13] The Participants state

[12] The Participants state that they propose to price subsets of data that constitute core data separately so that data subscriber users have flexibility in how much consolidated market data content they wish to purchase. For example, the 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, Participants are proposing to price subsets of data to provide flexibility to data subscribers. However, the Participants state that they expect that competing consolidators would purchase all core data.

[13] The Participants state that the current exclusive securities information processor (''SIP'') is not charged a Redistribution Fee. The Participants state, however, that unlike competing consolidators, the processor has been retained by the UTP Plan to serve as an exclusive SIP, is subject to oversight by both the UTP Plan and the Commission, and neither pays for the data nor engages with data subscriber customers. The Participants state that, by contrast, under the competing consolidator model, the UTP Plan would have no role in either oversight of 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 Participants argue that competing consolidators

that a self-aggregator, by definition, would not be distributing data externally and therefore would not be subject to such fees, which, according to the Participants, is consistent with current practice that a subscriber to consolidated data that only uses data for internal use is not charged a Redistribution Fee.

The Participants state 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 Participants state that vendors are and still would be subject to Redistribution Fees when redistributing data to market data subscribers, and that it would be unreasonably discriminatory for competing consolidators—which would be competing with downstream market data vendors for the same data subscriber customers—to not be charged a Redistribution Fee for exactly the same activity. The Participants argue that, consequently, it would be unreasonably discriminatory and would impose a burden on competition to not charge competing consolidators the Redistribution Fee.[14]

Third, the Participants state that the UTP Plan fee schedule currently permits the redistribution of UTP Level 1 Service on a delayed basis for $250.00 per month. The Participants propose adding a statement that depth-of-book data and auction information may not be redistributed on a delayed basis.

Finally, the Participants propose to make non-substantive changes to language in the fee schedules to take into account the expanded content. For example, the Participants propose updating various fee descriptions to either add or remove a reference to UTP Level 1 Service. Additionally, the Participants state that, while FINRA OTC Data will not be provided to competing consolidators, it is still being provided to the UTP Processor for inclusion in the consolidated market data made available by the UTP Processor. Accordingly, the Participants propose adding clarifying language to make clear that UTP Level 1 Service obtained from the Processor will include FINRA OTC Data but will not include odd-lot information.

III. Summary of Comments

The Commission has received 16 comment letters on the Proposed Amendment.[15] Fourteen commenters object to the Proposed Amendment,[16] and two commenters support the Proposed Amendment.[17]

A. Comments Regarding the Methodology Used To Justify the Proposed Fees

Some commenters oppose the Proposed Amendment, arguing that the proposed fees are based on a flawed methodology that, inconsistent with the MDI Rule Release, fails to provide a cost-based justification.[18] These commenters state that the proposal 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 prices for core data fees.[19]

Some commenters also state that the methodology used has resulted in proposed fees that are unreasonably high.[20] 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,[21] stating that such a method is inconsistent with the MDI Rule's goal of expanding access to consolidated data [22] and with statements in the MDI Rule Release that the proposed fees should bear a reasonable relationship to the cost of producing the data.[23]

Some commenters also state that they disagree with the Participants' views in the proposal 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.[24] These commenters state that the Commission has stated that a reasonable relation to cost is a

would be more akin to vendors than the current exclusive SIPs. The Participants state that if any entity that is currently an exclusive SIP chooses to register as a competing consolidator, such entity would be subject to the Redistribution Fee.

[14] The Participants argue that it would be more appropriate to compare competing consolidators and self-aggregators with respect to the fees charged for *receipt* and use of market data from the Participants and to address the fees for the usage of consolidated market data based on their actual usage, which, the Participants argue, is consistent with the statutory requirements of the Act that the data be provided on terms that are not unreasonably discriminatory. The Participants state that, for instance, Participants have proposed to charge a data access fee to competing consolidators that would be the same fee to self-aggregators.

[15] *See* Letters to Vanessa Countryman, Secretary, Commission from Hope M. Jarkowski, General Counsel, NYSE Group, Inc. (Jan. 22, 2022) (''NYSE Letter''); Christopher Solgan, Senior Counsel, MIAX Exchange Group (Jan.12, 2022) (''MIAX Letter''); Emil Framnes and Simon Emrich, Norges Bank Investment Management (Jan. 5, 2022) (''NBIM Letter''); James Angel, Ph.D., CFP, CFA, Associate Professor of Finance, Georgetown University (Dec. 21, 2021) (''Angel Letter''); Luc Burgun, President and CEO, NovaSparks S.A.S. (Dec. 17, 2021) (''NovaSparks Letter''); Joe Wald, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group, BMO Capital Markets and Ray Ross, Managing Director, Co-Head of Electronic Trading, BMO Capital Markets Group (Dec. 17, 2021) (''BMO Letter''); Erika Moore, Vice President and Corporate Secretary, Nasdaq Stock Market LLC (Dec. 17, 2021) (''Nasdaq Letter''); John Ramsay, Chief Market Policy Officer, Investors Exchange LLC (Dec. 17, 2021) (''IEX Letter''); Ellen Greene, Managing Director, Equity & Options Market Structure, Securities Industry and Financial Markets Association and William C. Thum, Managing Director and Associate General Counsel, Asset Management Group, Securities Industry and Financial Markets Association (Dec. 17, 2021) (''SIFMA Letter''); Marcia E. Asquith, Executive Vice President, Board and External Relations, Financial Industry Regulatory Authority, Inc. (Dec. 17, 2021) (''FINRA Letter''); Patrick Flannery, Chief Executive Officer, MayStreet (Dec. 17, 2021) (''MayStreet Letter''); Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, BlackRock and Samantha DeZur, Director, Global Public Policy, BlackRock (Dec. 16, 2021) (''BlackRock Letter''); Jonathan Hill, CEO, Cutler Group, LP Anand Prakash, CTO, Cutler Group, LP Nader Sharabati, CFO, Cutler Group, LP and Doug Patterson, CCO, Cutler Group, LP *(Dec. 16, 2021)* (''Cutler Letter''); Quinton Pike, CEO, Polygon.io, Inc. (Nov. 30, 2021) (''Polygon.io Letter''); Allison Bishop, President, Proof Services LLC (Nov. 22, 2021) (''Proof Letter''); Adrian Griffiths, Head of Market Structure, MEMX LLC, (Nov. 8, 2021) (''MEMX Letter'').

[16] *See* MIAX Letter, *supra* note 15; NBIM Letter, *supra* note 15; Angel Letter, *supra* note 15; NovaSparks Letter, *supra* note 15; BMO Capital Letter, *supra* note 15; IEX Letter, *supra* note 15; SIFMA Letter, *supra* note 15; FINRA Letter, *supra* note 15; MayStreet Letter, *supra* note 15; BlackRock Letter, *supra* note 15; Cutler Letter, *supra* note 15; Polygon.io Letter, *supra* note 15; Proof Letter, *supra* note 15; MEMX Letter, *supra* note 15.

[17] *See* Nasdaq Letter, *supra* note 15; NYSE Letter, *supra* note 15.

[18] *See* MIAX Letter, *supra* note 15, at 3; IEX Letter, supra note 15, at 2–3. *See also* BMO Letter, *supra* note 15, at 2–3; SIFMA Letter, *supra* note 15, at 4–5 (noting that the fees charged by monopolistic providers, such as exclusive SIPs, 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 Letter, *supra* note 15, at 6; BlackRock Letter, *supra* note 15, at 2; Proof Letter, *supra* note 15, at 2, 3; MEMX Letter, *supra* note 15, at 18.

[19] *See* IEX Letter, *supra* note 15, 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 15, at 3. *See also* BMO Letter, *supra* note 15, at 2–3; SIFMA Letter, *supra* note 15, at 4–5 (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); MayStreet Letter, *supra* note 15, at 6; BlackRock Letter, *supra* note 15, at 2; Proof Letter, *supra* note 15, at 2, 3; MEMX Letter, *supra* note 15, at 18.

[20] *See* MIAX Letter, *supra* note 15, at 3; MayStreet Letter, *supra* note 15, at 6; BlackRock Letter, *supra* note 15, at 2, 4–5; IEX Letter, *supra* note 15, at 4; Proof Letter, *supra* note 15, at 3; MEMX Letter, *supra* note 15, at 8, 11–12.

[21] *See* MIAX Letter, *supra* note 15, at 4; SIFMA Letter, *supra* note 15, at 4, 5; IEX Letter, *supra* note 15, at 4.

[22] *See* MIAX Letter, *supra* note 15, at 4.

[23] *See* MIAX Letter, *supra* note 15, at 3; SIFMA Letter, *supra* note 15, at 4, 5; IEX Letter, *supra* note 15, at 1, 2–3.

[24] *See* MIAX Letter, *supra* note 15, at 3; SIFMA Letter, *supra* note 15, at 5;

primary basis for justifying core data fees.[25] One commenter states that specific information, including quantitative information, should be provided to support the Participants' claims that the proposed fee is fair and reasonable because it will permit the recovery of SRO costs or will not result in excessive pricing or profits.[26] Additionally, some commenters state that they disagree with the Participants' statement in the proposal that the Plan's Operating Committee ''has no knowledge of any costs associated with consolidated market data,'' stating that Participants know how much it costs to collect and disseminate market data because they already perform this function, including in connection with proprietary feeds.[27]

One commenter states that a demonstration of costs is not required because neither the Exchange Act nor Commission rules requires that market data fees to be supported by a showing of costs.[28] The commenter stated 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 which the commenter states were not justified on the basis of cost.[29]

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 amended Rule 603(b), and thus has no information about how each exchange would generate core data under that rule.[30] The commenter states that, in its view, it remains impossible to separate the costs of producing market data from other costs of operating an exchange.[31]

Another commenter opposes the use of cost as a basis for setting the proposed fees.[32] 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,[33] 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.[34] 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.' '' [35]

Some commenters oppose the use of the value-based methodology used to determine the fees under the Proposed Amendment.[36] 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 ''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.[37] One commenter states that basing the proposed pricing of the Plans' fees on the proprietary feeds pricing does not seem appropriate because exchange proprietary data feeds are complements to consolidated market data feeds for latency-sensitive market participants;[38] less-latency sensitive market participants find consolidated market data more useful than the propriety data feeds;[39] and latency-sensitive market participants will not view consolidated market data under the Plans to be a credible substitute for the proprietary data feeds even after the MDI Rule reforms are implemented.[40] 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.[41]

Two commenters 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 achieve the Commission's objective in Regulation NMS that prices for consolidated market data be set by market forces.[42] One commenter 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.[43] This commenter states that the pricing for exchange proprietary data feeds is constrained by the highly competitive markets for exchange trading and exchange market data.[44] It states that the proposed fees meet the Commission's objective for market forces to determine the overall level of fees.[45]

[25] *See* IEX Letter, *supra* note 15, at 1, 2–3; SIFMA Letter, *supra* note 15, at 5; MIAX Letter, *supra* note 15, at 3 (noting that the vast majority of such equity market data plan fees were adopted prior to issuance of the Commission's staff fee guidance, and multiple SROs have more recently included cost based analysis when proposing fees for a market data product).

[26] *See* MIAX Letter, *supra* note 15, at 3.

[27] *See* SIFMA Letter, *supra* note 15, at 5; MIAX Letter, *supra* note 15, at 3; MayStreet Letter, *supra* note 15, at 6.

[28] *See* NYSE Letter, *supra* note 15, at 3 (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).

[29] *See id.* at 3–4.

[30] *See id.* at 4.

[31] *See id.*

[32] *See* Nasdaq Letter, *supra* note 15, at 3.

[33] *See id.*

[34] *See id.*

[35] *See id.* at 5–6 (citing to ''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*). 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.*

[36] *See* Proof Letter, *supra* note 15; NBIM Letter, *supra* note 15; MayStreet Letter, *supra* note 15.

[37] *See* Proof Letter, *supra* note 15, at 3.

[38] *See* NBIM Letter, *supra* note 15, at 1–2.

[39] *See id.* at 2.

[40] *See id.* at 2.

[41] *See* MayStreet Letter, *supra* note 15, at 6.

[42] *See* NYSE Letter, *supra* note 15, at 5; Nasdaq Letter, *supra* note 15, at 5.

[43] *See* NYSE Letter, *supra* note 15, at 5.

[44] *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.

[45] *See id.* at 5. The commenter stated that by applying that established ratio to the current prices for consolidated top-of-book data, the fee proposals thus reflect the market forces 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.* The ratio between such 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 NYSE argues are fair, reasonable, and not unfairly discriminatory because they are based on this ratio, which is reflective of market forces. *See id.* at 7.

This commenter 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.[46] The commenter states that NMS Plans have historically used value as a fair and efficient basis for setting fees.[47] 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 competitive forces'' and therefore provide a good starting point for estimating the value of new core data and for setting fees at efficient levels.[48] The commenter argues that the value-based methodology 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.[49] The commenter states that exchanges cannot overprice the total prices of their services without potentially losing order flow and damaging its overall ability to compete.[50]According to this commenter, exchanges that produce more valuable market data generally charge higher fees, and those with less valuable data charge lower fees,[51] so fees vary according to the underlying value of the data, as measured by the liquidity available at the exchange.[52]

The commenter 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.[53] The commenter states that Commission staff has 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.[54] The commenter argues that, because they are tested by market competition, proprietary data fees provide good and indicative starting point for estimating the value of new core data and setting fees at their efficient level.[55] 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.[56]

Some commenters object to the way in which the Participants used the fees of proprietary depth-of-book products to calculate a ratio (or multiplier) between those fees and the fees for proprietary top-of-book products and then multiplied existing SIP core top-of-book data fees by that multiplier to calculate the proposed depth-of-book fees for expanded core data under the MDI Rule.[57] One commenter argues that the approach adopted is arbitrary because it presupposes that the fees exchanges charge for their proprietary market data are fair and reasonable.[58] One commenter states that calculating the proposed fee levels in this manner—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 inconsistent with the MDI Rule's goal of expanding access to consolidated data.[59] One commenter states that 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 mentions studies it has submitted to the Commission in the past that bolster their argument.[60]

Some commenters argue that the methodology used to calculate the fees does not account for the transfer of costs from the SROs to market participants under the decentralized consolidation model.[61] One commenter states that, while the proposal leaves fees for existing core data elements unchanged, the profits and operating costs of the exclusive securities information processors should be deducted from these fees to reflect the new role of competing consolidators.[62]

B. Comments Regarding the Proposed Fees

1. General Comments

Some commenters state the methodology used to calculate the proposed fees resulted in fees that are too high.[63] Some commenters state that the proposed fees have not been shown to be fair and reasonable and not unreasonably discriminatory.[64] One commenter states that the proposed fees for the content underlying consolidated market data are too high whether a cost-basis or value-basis were used as a justification by the Participants.[65] This commenter states that the cost of SIP data is too high relative to top-of-book proprietary feeds, and that market participants are currently choosing the less expensive option of top-of-book proprietary feeds,[66] which, according to the commenter, indicates that Level 1 consolidated market data is not priced in accordance with its value to the market.[67] Another commenter challenges the methodology and compares the proposed fees to fees currently charged for proprietary data fees and the proposed user and access fees for consolidated market data under the proposal to the prices that a firm would pay to obtain that data from

[46] *See* Nasdaq Letter, *supra* note 15, at 2.

[47] *See id.*

[48] *See id.* at 2, 6.

[49] *See id.* at 6.

[50] *See id.* at 4.

[51] *See id.*

[52] *See id.*

[53] *See id.* at 5–6.

[54] *See id.* (citing to ''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*).

[55] *See id.* at 6.

[56] *See id.*

[57] *See* MIAX Letter, *supra* note 15, at 4; SIFMA Letter, *supra* note 15, at 5.

[58] *See* SIFMA Letter, *supra* note 15, at 5.

[59] *See* MIAX Letter, *supra* note 15, at 4.

[60] *See* SIFMA Letter, *supra* note 15, at 5–6.

[61] *See* MEMX Letter, *supra* note 15, at 18; MIAX Letter, *supra* note 15, at 2; BlackRock Letter, *supra* note 15, at 2–3; Polygon.io Letter, *supra* note 15, at 1. On the other hand, one commenter stated that with respect to comments that the proposal should ''back out'' fees for the current Processors from the proposed fee structure, the MDI Rule requires the current Processors to continue operating for at least several more years, and that therefore, there are no savings to back out of any proposed fee structure at this time. *See* NYSE Letter, supra note 15, at 7.

[62] *See* BlackRock Letter, *supra* note 15, at 2, 3–4.

[63] *See* BlackRock Letter, *supra* note 15, at 1–5; FINRA Letter, *supra* note 15, at 7; MIAX Letter, *supra* note 15, at 2; Angel Letter, *supra* note 15, at 9; NovaSparks Letter, *supra* note 15, at 1; BMO Letter, *supra* note 15, at 2–3; IEX Letter, *supra* note 15, at 1, 5; SIFMA Letter, *supra* note 15, at 1, 4–5; IEX Letter, *supra* note 15, at 4; MEMX Letter, *supra* note 15, at 11–12.

[64] *See* IEX Letter, *supra* note 15, 1, at 2–3; MIAX Letter, *supra* note 15, at 2; MEMX Letter, *supra* note 15, at 22; SIFMA Letter, *supra* note 15, at 4–5; BMO Letter, *supra* note 15, at 3; FINRA Letter, *supra* note 15, at 7; MayStreet Letter, *supra* note 15, at 4; BlackRock Letter, *supra* note 15, at 2, 6; Polygon.io Letter, *supra* note 15, at 2.

[65] *See* MayStreet Letter, *supra* note 15, at 6. This commenter states that the cost of SIP data is too high relative to top-of-book proprietary feeds, and that market participants are currently choosing the less expensive option of top-of-book proprietary feeds, which, according to the commenter, indicates that Level 1 consolidated market data is not priced in accordance with its value to the market. *See id.*

[66] *See* MayStreet Letter, *supra* note 15, at 6–7.

[67] *See id.* at 7. The commenter states that Level 1 data should be priced so as to make the content available at a price that is competitive to proprietary top-of-book offerings, and that the fact that the price levels are unchanged from the current SIP prices reflects a failure by the Participants to accurately assess the value of Level 1 data. The commenter states that the value of the depth-of-book data should focus on greater access and availability of this kind of data, and adds that the Operating Committee should consider what price point would increase availability of depth-of-book information, rather than charging a multiplier of proprietary data feeds. *See id.*

proprietary data products that offer similar information.[68] This commenter believes that at any given price a subscriber would be better off subscribing to the proprietary data fees listed instead of purchasing consolidated market data from the SIPs given the additional information included on those feeds.[69] The commenter states that, because the proposed fees are generally more expensive than current proprietary data offering, the Proposed Amendments clearly fail the ''fair and reasonable'' test required by the Exchange Act.[70]

Some commenters state that the proposed fees would have an adverse impact on competition, and on competing consolidators in particular.[71] One commenter 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.[72] Another commenter expresses concern that if the Proposed Amendment were approved the exchanges would entrench a high level of cost for market data that has no relation to their underlying expenses, is not subject to effective competitive forces, and serves as an formidable barrier to entry for newer firms.[73]

One commenter states that the Proposed Amendment conflates the prices that competing consolidators and self-aggregators pay the SROs for the underlying NMS information, and the prices that competing consolidators would charge for the consolidated data they generate.[74] This commenter believes 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.[75] The commenter argues that the Participants confuse the content of consolidated market data and the consolidated market data itself,[76] and states that the Proposed Amendment sets prices at levels that the SIPs currently charge for consolidated market data.[77]

One commenter believes 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.[78] One commenter believes 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.[79] This commenter believes 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.[80] Another commenter states 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.[81]

2. Fees for Top-of-Book Data

Some commenters believe that the proposed fees for Level 1 core data, which include expanded content to include odd-lot quotations, are too high.[82]

One commenter states that the proposed fees for top-of-book data should be substantially lower to allow competing consolidators to operate their business.[83] This commenter states that exchanges will no longer have to pay for the current processors and will not have the burden of maintaining custom feeds in specific formats since the proprietary data feeds would be used by the competing consolidators to distribute the new SIP market data.[84]

One commenter states that the net effect of the proposal is to make core data fees more expensive that proprietary data feeds, adding that it seems clear the purpose of the proposal is ''to protect existing proprietary market data fee revenues by making market data from competing consolidators prohibitively expensive and their business non-viable.'' [85] Another commenter states that the cost of SIP data is too high relative to top-of-book proprietary feeds and that market participants are choosing the less expensive option of top-of-book proprietary feeds.[86] This commenter believes this indicates that Level 1 consolidated market data is not priced in accordance with its value to the market.[87] According to the commenter, Level 1 data should be priced as to make the content available at a price that is competitive to proprietary top-of-book offerings.[88] This commenter further states that the fact that the price levels are unchanged from the current SIP prices reflects a failure by the Participants to accurately assess the value of Level 1 data.[89] Another commenter opposes the proposal and asks the Commission disapprove it as 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.[90]

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.[91] Moreover, some commenters expressed support for the proposed inclusion of odd-lot information free of charge in the expanded Level 1 core data,[92] 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.[93]

One commenter states that the proposed Level 1 core data fees should be adjusted to reflect the new role of competing consolidators.[94] The commenter states that the MDI Rule fundamentally alters the ecosystem for market data by transitioning from exclusive SIPs to competing consolidators and that the Commission intended that this change would unbundle the data fees for consolidated

[68] *See* MEMX Letter, *supra* note 15, at 6.

[69] *See id.* at 7.

[70] *See id.* at 8.

[71] *See* MIAX Letter, *supra* note 15, at 1, 3; 4; MEMX Letter, *supra* note 15, at 2, 9; 15–17, 21–22, 25; NBIM Letter, *supra* note 15, at 2; NovaSparks Letter, *supra* note 15, at 1; IEX Letter, *supra* note 15, at 5; SIFMA Letter, *supra* note 15, at 8; FINRA Letter, *supra* note 15, at 5; MayStreet Letter, *supra* note 15, at 5; BlackRock Letter, *supra* note 15, at 1–4; Polygon.io Letter, *supra* note 15, at 3; Proof Letter, *supra* note 15, at 3; Cutler Letter, *supra* note 15, at 1.

[72] *See* MEMX Letter, *supra* note 15, at 9. The 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. This, the commenter argues, would limit the potential customer base for competing consolidators and inappropriately impede the viability of competing consolidators under the infrastructure rule. *See* MEMX Letter, *supra* note 15, at 17.

[73] *See* Proof Letter, *supra* note 15, at 1.

[74] *See* MayStreet Letter, *supra* note 15, at 2.

[75] *See id.*

[76] *See id.* at 3.

[77] *See id.* at 6.

[78] *See* MEMX Letter, *supra* note 15, at 20.

[79] *See* NovaSparks Letter, *supra* note 15, at 1.

[80] *See id.* at 1–2.

[81] *See* BlackRock Letter, *supra* note 15, at 2–3.

[82] *See* NovaSparks Letter, *supra* note 15; IEX Letter, *supra* note 15; MayStreet Letter, *supra* note 15; BlackRock Letter, *supra* note 15; MIAX Letter, *supra* note 15.

[83] *See* NovaSparks Letter, *supra* note 15, at 1.

[84] *See id.*

[85] *See* IEX Letter, *supra* note 15, at 5.

[86] *See* MayStreet Letter, *supra* note 15, at 6–7.

[87] *See id.* at 7.

[88] *See id.*

[89] *See id.*

[90] *See* Cutler Letter, *supra* note 15, at 1–2.

[91] *See* BlackRock Letter, *supra* note 15, at 1, 3.

[92] *See* MIAX Letter, *supra* note 15, at 2; BlackRock Letter, *supra* note 15, at 1, 3; MayStreet Letter, *supra* note 15, at 2, 3, 6.

[93] *See* BlackRock Letter, *supra* note 15, at 1, 3.

[94] *See id.* at 2–4.

market data from the fees for its consolidation and distribution because the prospective fees charged by competing consolidators would now include fees for aggregation of consolidated market data products and transmission of such products to subscribers.[95] This commenter states that in leaving fees for existing core data elements unchanged, the Proposed Amendment fails to consider, as the Commission stated in the MDI Rule Release, that the effective national market system plan for NMS stocks will no longer be operating an exclusive SIP or performing aggregation and other operational functions.[96] The commenter argues that the proposed fees should not have been left unchanged from existing core data elements fees, but rather, should have been reduced by at least 4%—the estimated SIP operating expenses excluding profits—to reflect the new role of competing consolidators, and deduct both SIP profits and operating costs from the price. According to the commenter, this 4% discount is derived directly from Commission estimates of SIP operating expenses ($16 million) and revenues ($390 million) in 2018 without any consideration of possible profits. The commenter adds that exclusive SIP profits should also be subtracted from the proposed fees for core data content, as ''any markup for consolidation services should transition to be within the purview of competing consolidators.'' [97] According to the commenter, keeping core data fees the same as the proposal purports to do would effectively ''opaquely raise prices'' for this data content.[98]

3. Fees for Depth-of-Book Data

Some commenters argue that the calculation used by the Participants to determine the proposed depth-of-book fees is flawed and inconsistent with the MDI Rule Release because the calculation uses exchange proprietary data feeds that include full order-by-order depth-of-book, inclusive of top-of-book information, rather than the more limited depth information prescribed by the MDI Rule Release.[99] These commenters point out that while the proprietary market data depth-of-book feeds used to calculate fees for the consolidated depth-of-book information include top-of-book data as part of those offerings, fees for the consolidated depth-of-book data product under the proposal do not include top-of-book.[100] Consequently, some commenters argue, subscribers to the new core data would need to pay an additional surcharge to receive top-of-book data at current rates to obtain the same data content that is available today through proprietary feeds.[101]

Some commenters question the determination of the ratio (or multiplier) used by the Participants to set the depth-of-book feeds.[102] 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 Level 1 and depth of book data ''would be paying twice for top of book content.'' [103]

Some commenters state that an additional problem with the adopted approach is that the proprietary depth-of-book products, such as those used in the calculation, are primarily structured as comprehensive order-by-order feeds, which do not aggregate orders at each price level.[104] According to these commenters, the depth-of-book elements prescribed by the MDI Rule warrant a lower price because they prescribe only the aggregated quotes available at the next five prices beyond the NBBO and thus include much less content than these proprietary feeds.[105] One commenter states that complete, 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.[106] 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.[107] One commenter argues that the proposal fails to consider pricing for other proprietary data feeds that are aggregated by price level and would therefore serve as a more logical proxy for setting core data fees.[108]

One commenter 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 commenter's fees used do not include individual per user fees, but apply only on a per firm basis for firms subscribing to ''real time data.'' [109]

Some commentators believe that the proposed fees for depth-of-book data should be lower than proposed. 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.[110] This commenter states that displaying depth-of-book data can give investors a better understanding of how prices are formed.[111] The commenter believes that the ability for an investor to see buying and selling interests 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.[112] 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.[113] According to this commenter, if depth-of-book data is expensive, it will not

[95] *See id.* at 3–4.

[96] *See id.* (citing to MDI Rule Release, 86 FR at 18685).

[97] *See id.* at 4, note 12.

[98] *See id.* at 4.

[99] *See* IEX Letter, *supra* note 15, at 3–4; MEMX Letter, *supra* note 15, at 11–12. BlackRock Letter, *supra* note 15, at 4–5; FINRA Letter, *supra* note 15, at 6.

[100] *See id.*

[101] *See* IEX Letter, *supra* note 15, at 4; MEMX Letter, *supra* note 15, at 6, 11–12; BlackRock Letter, *supra* note 15, at 4–5.

[102] *See* IEX Letter, *supra* note 15; MEMX Letter, *supra* note 15; BlackRock Letter, *supra* note 15; FINRA Letter, *supra* note 15; Angel Letter, *supra* note 15; NovaSparks Letter, *supra* note 15.

[103] *See* BlackRock Letter, supra note 15, at 4–5. *See also* IEX Letter, *supra* note 15, at 4; MEMX Letter, *supra* note 15, at 6, 11–12.

[104] *See* IEX Letter, *supra* note 15, at 4; MEMX Letter, *supra* note 15, at 11–12; BlackRock Letter, *supra* note 15, at 4–5; FINRA Letter, *supra* note 15, at 6.

[105] *See* IEX Letter, *supra* note 15, at 4; MEMX Letter, *supra* note 15, at 11–12. BlackRock Letter, *supra* note 15, at 4–5.

[106] *See* BlackRock Letter, *supra* note 15, at 4–5.

[107] *See* BlackRock Letter, *supra* note 15, at 4–5. *See also* IEX Letter, *supra* note 15, at 4; MEMX Letter, *supra* note 15, at 11–12.

[108] *See* IEX Letter, *supra* note 15, at 4.

[109] *See id.* The commenter also points out that its 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 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 this particular commenter does not charge any fees on an individual per user basis for either of the two 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.*

[110] *See* Angel Letter, *supra* note 15, at 3.

[111] *See id.* at 7.

[112] *See id.*

[113] *See id.* at 8.

help most retail investors because they will not be able to afford to see it.[114]

Another commenter states that fees for depth-of-book are unreasonably high.[115] The commenter states that, while the Participants decided on an alternative method in establishing fees and sought to demonstrate that the proposed fees are ''related to the value of the data to subscribers,'' [116] the proprietary depth-of-book price inputs used by the Participants were not properly calibrated and thus are over inclusive, resulting in depth-of-book fees that are unreasonably high.[117]

One commenter agrees with the notion that that depth-of-book data should be priced higher than top-of-book data.[118] This commenter, however, believes that the charges for depth-of-book data from the Plans should be much lower than 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.[119] The commenter states that the 4x ratio used by the Participants to determine the fees for accessing depth-of-book data is too high.[120]

One commenter opposes the proposed depth-of book data fees, because they, as well as all 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 Rule.[121] 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 multiplier of proprietary data feeds.[122]

One commenter expresses support for the proposed and ''moderately priced'' non-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.[123]

4. Fees for Auction Data

Some commenters believe that the proposed auction information fee would result in double charging for subscribers who purchase both auction and depth-of-book information.[124] According to these commenters, information about auction order imbalances is included with the proprietary depth-of-book data products used to calculate the depth-of-book prices; therefore the proposed depth-of-book prices already incorporate the fees for auction imbalance data.[125] Thus, these commenters argue that the proposed fees would result in double charging consumers who purchase both auction and depth-of-book information from competing consolidators.[126] One commenter states that depth-of-book 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 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.[127] One commenter states that while the pricing rationale in the proposal uses traded volumes to arrive at a 10% multiple for auction data, this ratio, however, is applied to the depth-of-book feed, which conveys information about displayed liquidity not trading activity. According to the commenter, (1) it would have been more congruent with the SROs' 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.[128]

Some commenters argue that the fees for auction information under the Proposed Amendment should be lower.[129] One commenter states that retail investors should get free or moderately priced auction data because it is in the interests of retail investors, the industry and the Commission.[130] The commenter believes that opening and closing auction data are important in the securities markets and that providing auction data to retail investors will increase retail investor participation in the market.[131] The commenter also opines that it makes no sense for the Participants to charge professional and non-professionals the same amount for auction data.[132] 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.[133]

5. Fees for Professional and Non-Professional Users

Some commenters question the classification of users by professional or non-professional to develop the fees under the Proposed Amendment.[134]

One commenter states that it is unreasonably discriminatory against non-professional users to pay the same as professional users for auction data because professionals make far more use of the data.[135] The commenter states that the filing contains no justification as to why the Participants propose to charge professionals the same as non-professionals for auction data.[136]

Some commenters support moderately priced or free non-professional user fees. One commenter supports the proposed ''moderately priced'' non-professional rate for depth-of-book information, because, in the

[114] *See id.*

[115] *See* FINRA Letter, *supra* note 15, at 5–6.

[116] *See id.* at 5.

[117] *See id.* at 6. Specifically, the commenter states that (1) the proprietary depth-of-book product fees used in determining the ratio also include proprietary top-of-book data and auction data—both of which would be charged separately from depth-of-book data; (2) the depth-of-book product fees also included order-by-order depth information—which is typically considered more valuable, instead of aggregated—resulting in a higher ratio and overstatement of value; and (3) the proposed depth-of-book data product fees also included full depth information, *i.e.,* all prices levels (also typically considered more valuable), rather than just the top five price levels required under the MDI Rule, resulting in a higher ratio and fees that are not aligned with the value of the new depth-of-book data to subscribers. The commenter argues that, as a result, the method employed by the Participants does not align the proposed fees for the new depth-of-book data to the value of the data to subscribers. *See id.*

[118] *See* NovaSparks Letter, *supra* note 15, at 1.

[119] *See id.*

[120] *See id.*

[121] *See* Cutler Letter, *supra* note 15, at 1. This comment further states that the level of the proposed fees would make it difficult for such competing consolidators to offer products at prices competitive to those of proprietary feeds thereby placing competing consolidators at a disadvantage. *See id.*

[122] *See* MayStreet Letter, *supra* note 15, at 7.

[123] *See* BlackRock Letter, *supra* note 15, at 3, 5.

[124] *See* MEMX Letter, *supra* note 15, at 11–12. BlackRock Letter, *supra* note 15, at 4–5; FINRA Letter, note 15, at 6.

[125] *See id.*

[126] *See* BlackRock Letter, *supra* note 15, at 4–5; MEMX Letter, *supra* note 15, at 11–12; FINRA Letter, *supra* note 15, at 6.

[127] *See* BlackRock Letter, *supra* note 15, at 5.

[128] *See id.*

[129] *See* Angel Letter, *supra* note 15; Cutler Letter, *supra* note 15; BlackRock Letter, *supra* note 15.

[130] *See* Angel Letter, *supra* note 15, at 3.

[131] *See id.* at 9.

[132] *See id.*

[133] *See* Cutler Letter, *supra* note 15, at 1–2.

[134] *See* Angel Letter, *supra* note 15; BlackRock Letter, *supra* note 15; MIAX Letter, *supra* note 15; Polygon.io Letter, *supra* note 15.

[135] *See* Angel Letter, *supra* note 15, at 9–10.

[136] *See id.* at 10.

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.[137] 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.[138] The commenter further believes that free or moderately priced non-professional data is in the best interest of the Commission as well because ''[p]roviding 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.'' [139]

Two commenters state they supported the part of the Proposed Amendment that consists of low non-professional user fees.[140] One commenter states that it believes the proposed non-professional user fees were a step in the right direction, but states that the Plan would charge fees for professional and non-professional users that are often higher than the fees charged by all of the exchange combined for proprietary products, creating disincentives for firms to take SIP data.[141] The commenter advocates for fees that would expand access to consolidated market data including free access to odd-lot quotation information as well as cheaper access to depth-of-book quotation information for non-professional users.[142]

Some commenters suggest that the Participants should not categorize fees based on user type and suggest on ways to improve the Proposed Amendment as it relates to these types of user classifications. One commenter urges the Commission to disapprove the Proposed Amendment and any future amendment that maintains non-professional and professional user classifications because such classifications prevent competing consolidators from being able to offer products at competitive prices compared to the proprietary data feeds.[143] One commenter recommends easier-to-track proxies for usage-based charges by utilizing data already reported by firms, such as FOCUS Reports.[144] 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.[145] One commenter states that the proposed professional user fees are based on a flawed methodology that fails to provide a cost based justification, and results in excessive fee levels which would discourage firms from registering as competing consolidators and hinder the formation of the decentralized consolidation model that the MDI Rule seeks to create.[146]

Another commenter believes 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.[147] This commenter argues that the Proposed Amendment should be disapproved because, for some firms, the professional fees proposed may be higher than if the firms purchased certain proprietary data products.[148] However, another commenter responds 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 disregards that the Proposed Amendment includes much lower fees for non-professionals.[149] The commenter states that it is fair, reasonable, and not unreasonable discriminatory for ''Wall Street to pay higher fees than Main Street.'' [150]

6. Fees for Non-Display Use

Some commenters state that the proposed Non-Display Use fees are based on a flawed methodology that fails to provide a cost based justification, results in excessive fee levels which would discourage firms from registering as competing consolidators and hinder the formation of the decentralized consolidation model that the MDI Rule seeks to create.[151] 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.[152]

One commenter asks that the Commission reject that Amendment and any future proposal that maintains display/non-display and professional/non-professional classifications.[153] 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.[154]

7. Access Fees

One commenter states that the proposed Access fees are based on a flawed methodology that fails to provide a cost based justification, and results in excessive fee levels which would discourage firms from registering as competing consolidators and hinder the formation of the decentralized consolidation model that the MDI Rule seeks to create.[155] Another commenter stated that the proposed access fees are not fair and reasonable because they are more expensive than those fees charged by exchanges in the proprietary products.[156]

8. Redistribution Fees

Two commenters suggest that the imposition of redistribution fees on competing consolidators would place competing consolidators at a competitive disadvantage.[157] Another commenter states that by charging redistribution fees to competing consolidators, the filing creates a barrier to entry to technology solution vendors to become competing consolidators.[158]

One commenter states that the Proposed Amendment should treat competing consolidators as replacements to the exclusive SIPs, not as data vendors.[159] It states that subjecting competing consolidators to the same fees as data vendors and subscribers that receive consolidated market data from the exclusive SIP fails to recognize that competing consolidators are SIPs and not similarly situated to today's data vendors.[160] This

[137] *See* BlackRock Letter, *supra* note 15, at 1, 3.

[138] *See* Angel Letter, *supra* note 15, at 11.

[139] *See id.* at 11.

[140] *See* MIAX Letter, *supra* note 15, at 2; MEMX Letter, *supra* note 15, at 3.

[141] *See* MEMX Letter, *supra* note 15, at 3, 18–19.

[142] *See id.* at 2.

[143] *See* Polygon.io Letter, *supra* note 15, at 2–3.

[144] *See* MayStreet Letter, *supra* note 15, at 8.

[145] *See* Angel Letter, *supra* note 15, at 11.

[146] *See* MIAX Letter, *supra* note 15, at 3.

[147] *See* MEMX Letter, *supra* note 15, at 20.

[148] *See id.*

[149] *See* NYSE Letter, supra note 15, at 8.

[150] *See id.*

[151] *See* MIAX Letter, *supra* note 15, at 3; Polygon.io Letter, *supra* note 15, at 2–3.

[152] *See* Cutler Letter, *supra* note 15, at 1–2.

[153] *See* Polygon.io Letter, *supra* note 15, at 2.

[154] *See id.* at 3.

[155] *See* MIAX Letter, *supra* note 15, at 3.

[156] *See* MEMX, *supra* note 15, at 6, 8. *See also* Cutler Letter, *supra* note 15, at 1–2 (noting that it supports the comment letter written by MEMX and that the Proposed Amendment makes market data less accessible).

[157] *See* NBIM Letter, *supra* note 15, at 2; Cutler Letter, *supra* note 15, at 1–2.

[158] *See* NovaSparks Letter, *supra* note 15, at 1.

[159] *See* MayStreet Letter, *supra* note 15, at 3.

[160] *See id.* at 3–4.

commenter further states that that competing consolidators should not be charged redistribution fees because they are not redistributing consolidated market data, but generating and distributing it for the first time.[161] According to this commenter, these fees for redistribution should not be charged by the Plan because the Plan no longer would govern the distribution of consolidated market data.[162] The commenter states that by not recognizing competing consolidators as SIPs, competing consolidators are placed 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.[163]

One commenter states that the proposed redistribution fee that would be charged to competing consolidators is inconsistent with the purposes and structure of the MDI Rule, and that this aspect of the proposal represents a ''further indication that the intent of the majority was to subvert the purpose of the Commission's order.'' [164] Another commenter states that the redistribution fee for competing consolidators is inconsistent with the MDI Rule, not fair and reasonable, and unreasonably discriminatory.[165] One 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 Rule, competing consolidators would be ''stepping into the role that the SIPs hold today as the primary sources of consolidated market data.'' [166] According to this commenter, to charge a redistribution fee on top of the other proposed fees 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.[167]

One commenter states the Proposed Amendment directly contradicts the Commission's directive in the MDI Rule that competing consolidators not be treated the same as market data vendors.[168] It believes that Participants are attempting to undermine the Commission's authority over market data as enumerated in the CT Plan and MDI Rule in order to preserve their current revenues from proprietary and SIP data.[169] It states that the Participants have taken the position that the competing consolidators should be charged redistribution fees just like any market data vendor. It believes this undermines the efforts of the MDI Rule.[170] The commenter reiterates the Commission's statement in the MDI Rule Release that ''the Commission believes that the fees for the data content underlying consolidated market data should not include redistribution fees for competing consolidators. Competing consolidators will take the place of the exclusive SIPs in the dissemination of consolidated market data, which today do not pay redistribution fees for the consolidation and dissemination of SIP data.'' [171] The commenter argues that by treating competing consolidators differently than the exclusive SIPs, the Participants are acting in an unreasonably discriminatory manner, effectively disregarding the Exchange Act mandates in addition to the Commission's directive in the MDI Rule.[172] The commenter argues that imposing redistribution fees on competing consolidators imposes an undue burden on competition in contravention of the standards under Section 3(f) of the Exchange Act that the Commission must consider in connection with any Commission rulemaking or review of SRO rules.[173]

Two commenters state that the redistribution fees charged to competing consolidators are in contravention of the Commission's express direction in the MDI Rule and that the Proposed Amendment disregards the directive.[174]

One commenter states that, although the Commission compared competing consolidators to self-aggregators, a more appropriate comparison would be between competing consolidators and downstream vendors.[175] According to this commenter, because such vendors would be subject to redistribution fees when redistributing data to its subscribers, it would impose a burden on competition and be unfair to vendors not to charge a redistribution fee for exactly the same activity to competing consolidators.[176]

9. Broker-Dealer Enterprise Cap

One commenter favors expanding the broker-dealer enterprise cap that is part of the current fee schedule of the Plan. The commenter states that the Proposed Amendment provides no depth-of-book enterprise cap and the Level 1 enterprise caps are out of reach for most market Participants.[177] In particular, this commenter recommends that enterprise caps be implemented at multiple tiers levels.[178]

C. NMS Plan Governance

Some commenters state that the MDI Rule should be implemented through the CT Plan, as opposed to the existing market data equity plans (*i.e.,* the CTA/CQ, and Nasdaq/UTP Plans).[179] One commenter reiterated its continued support for the provisions of the CT Plan overall.[180] The commenter states that the real and potential conflicts of interest that currently exist relating to the provision of market data directly relate to the decision-making problems at the Plans' Operating Committees.[181] The 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.[182] The commenter believes the Commission cannot approve the Proposed Amendment given the inherent conflicts of interests of the SROs who developed the proposals.[183] The commenter states that, if the Commission approved the Proposed Amendment, it would be giving tacit approval to the shortcomings in the governance structure of the current Plans.[184]

This commenter also notes that the proposed fee amendments are explicitly stated by the Participants to be unrelated to the cost of providing the

[161] *See id.*

[162] *See id.,* at 5.

[163] *See id.*

[164] *See* IEX Letter, *supra* note 15, at 5.

[165] *See* MIAX Letter, *supra* note 15, at 2 (citing the MDI Rule Release which stated 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.'').

[166] *See id.*

[167] *See id.*

[168] *See* SIFMA Letter, *supra* note 15, at 4–5.

[169] *See id.* at 6.

[170] *See id.* at 7.

[171] *See id.*

[172] *See id.,* at 8.

[173] *See id.*

[174] *See* FINRA Letter, *supra* note 15, at 5; MEMX Letter, *supra* note 15, at 21.

[175] *See* NYSE Letter, supra note 15, at 7.

[176] *See id.*

[177] *See* MayStreet Letter, *supra* note 15, at 8.

[178] *See id.* at 8.

[179] *See* BMO Letter, *supra* note 15; MEMX Letter, *supra* note 15; MIAX Letter, *supra* note 15; IEX Letter, *supra* note 15; and Polygon.io Letter, *supra* note 15.

[180] *See* BMO Letter, *supra* note 15, at 1.

[181] *See id.* at 2.

[182] *See id.*

[183] *See id.*

[184] *See id.*

data, but rather to subscriber value.[185] 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.[186] The commenter states that further evidence of the failure of the governance structure on 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 the D.C. Circuit.[187] The commenter states that it is surprised that the proposals were filed without broader participation, given that certain members of the Operating Committee have stated publicly that the proposals contradict the Exchange Act standards for consolidated data which requires that the fees be fair, reasonable, and not unreasonably discriminatory.[188]

Another commenter also encourages the Commission to consider whether the CT Plan is a more appropriate body for setting fees for consolidated market data.[189] This commenter believes 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 impacted by this filing, including non-SRO representatives.[190] A second commenter states that the fee proposals are ''the result of a conflicted and unbalanced voting process,'' adding that it agreed with the recommendation that the responsibility for setting the proposed fees should be placed on the CT Plan.[191] A third commenter recommends that the Commission disapprove the proposal and reassign the 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,'' a change that, as this proposal shows, is ''badly'' needed.[192]

One commenter asks the Commission to reevaluate the process that led to the creation of the Proposed Amendment and make substantive changes to avoid the amendment process being used to derail timely implementation of the MDI Rule.[193]

D. 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.[194] 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.'' [195]

One commenter believes that it would be inconsistent with the Exchange Act and Rule 608 for the Commission to *sua sponte* change any or all of the proposed fees, as any such change would be material to the Proposed Amendment.[196] The commenter states that, in its view, if the Commission intends to revise the Proposed Amendment in any material way, it must do so through rule-making under Rule 608(b)(2), by providing public notice of the specific changes it proposes and giving the Participants and general public an opportunity to comment.[197]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Amendment

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,[198] and Rule 700 of the Commission's Rules of Practice,[199] to determine whether to approve or disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate after considering public comment. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the Proposed Amendment to inform the Commission's analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission ''shall approve a . . . proposed amendment to a 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 . . . 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.'' [200] Rule 608(b)(2) further provides that the Commission shall disapprove a proposed amendment if it does not make such a finding.[201] Pursuant to Rule 608(b)(2)(i) of Regulation NMS,[202] the Commission is providing notice of the grounds for disapproval under consideration:

- Whether the Proposed Amendment is consistent with the Commission's MDI Rule; [203]
- Whether, 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; [204]
- Whether, consistent with Rule 603(a) and 614(d)(3) of Regulation NMS, the Proposed Amendment provides 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;
- Whether modifications to the Proposed Amendment, or conditions to its approval, would be required to make the Proposed Amendment 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; [205]
- Whether the Proposed Amendment is consistent with Congress's finding, in

[185] *See id.*

[186] *See id.* at 2–3.

[187] *See id.* at 3.

[188] *See id.* (citing note 14 of the Notice, which states in part: ''FINRA, IEX, LTSE, MIAX, and MEMX have not joined in the decision to approve the filing of the proposed amendment, and Nasdaq BX is also withholding its vote at this time.'').

[189] *See* MEMX Letter, *supra* note 15, at 23–24.

[190] *See id.*

[191] *See* MIAX Letter, *supra* note 15, at 5.

[192] *See* IEX Letter, *supra* note 15, at 5.

[193] *See* Polygon.io Letter, *supra* note 15, at 3.

[194] *See* SIFMA Letter, *supra* note 15, at 2.

[195] *See id.*

[196] *See* NYSE Letter, *supra* note 15, at 8.

[197] *See id.*

[198] 17 CFR 242.608.

[199] 17 CFR 201.700.

[200] *See* 17 CFR 242.608(b)(2).

[201] *See id.*

[202] 17 CFR 242.608(b)(2)(i). *See also* Commission Rule of Practice 700(b)(2), 17 CFR 201.700(b)(2).

[203] *See* MDI Rule Release, *supra* note 9.

[204] *See* 17 CFR 242.608(b)(2).

[205] *See id.*

Section 11A(1)(C)(iii) of the Act, 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 or information with respect to quotations for and transactions in securities''; [206] and

• Whether, consistent with the purposes of Section 11A(c)(1)(B) of the Act,[207] the Proposed Amendment's provisions are drafted to support the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in NMS securities, and the fairness and usefulness of the form and content of such information.

Under 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 . . . is on the plan participants that filed the NMS plan filing.'' [208] The description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.[209] 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 the NMS plan filing is consistent with the Exchange Act and the applicable rules and regulations thereunder.[210]

V. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 11A or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,[211] any request for an opportunity to make an oral presentation.[212] The Commission asks that commenters address the sufficiency and merit of the Participants' statements in support of the Proposed Amendment,[213] in addition to any other comments they may wish to submit about the proposed rule changes. In particular, the Commission seeks comment on the following:

1. In the MDI Rule Release, the Commission stated that ''the fees for the data content underlying consolidated market data must satisfy the statutory standards of being fair, reasonable and not unreasonably discriminatory.'' [214] What are commenters' views as to each of the fees proposed?

2. In the Cover Letter,[215] the Participants state that ''under the decentralized competing consolidator model, the Operating Committee has no knowledge of any of the costs associated with consolidated market data.'' The Participants further state that, under the decentralized competing consolidator model described in the MDI Rule Release, the Plan's Operating Committee no longer has a role in either specifying the technology associated with exchanges providing data or contracting with a SIP and that each national securities exchange will be responsible for determining the methods of access to and format of data necessary to generate consolidated market data. The Participants also state that the Operating Committee will not have access to information about how each exchange would generate the data that they each would be required to disseminate under amended Rule 603(b). According to the Participants, the Operating Committee does not have access to any information about the cost of providing consolidated market data under the decentralized competing consolidator model.

Do commenters agree with the statements that the Participants have made with respect to their ability, current or future, to determine the costs of generating consolidated market data?

3. What are commenters' views on the Participants argument that a ''value-based'' methodology is an appropriate basis to determine the fees for core data? What are commenters' views on the methodology proposed by the Participants?

4. What are commenters' views on whether the comparison of exchanges' proprietary depth-of-book fees to the current SIP feeds is an appropriate means to calculate the ''value'' of consolidated market data? Do commenters believe that the pricing for individual exchange market data products can serve as an appropriate means for justifying the proposed fees? What are commenters' views on the prices of the depth-of-book feeds—whether by reference to cost or to prices set by a competitive market for equity market data as opposed to market power?

5. What are commenters' views on the Participants' calculation of the appropriate ratio to be applied to current SIP fees to generate the proposed fees for content underlying consolidated market data? Were appropriate depth-of-book products selected for the calculation? What are commenters' views about the ratios and methodology used generate fees?

6. Under the Proposed Amendment, the consolidated market data depth-of-book product would not include top-of-book data. What are commenters' views on basing the price of depth-of-book consolidated market data on the fees for proprietary products that do not include top-of-book data?

7. In the Cover Letter,[216] the Participants state that they reviewed the depth-of-book to top-of-book ratios of Professional device rates on Nasdaq (Nasdaq Basic/Nasdaq TotalView), Cboe (Cboe Full Depth), NYSE (BQT/NYSE Integrated), and IEX (TOPS/DEEP) to determine an appropriate ratio between the fees of depth-of-book core data products and the current Level 1 (top-of-book) data. The Participants further state that they believe that the 3.94x ratio represents the difference in value between top-of-book data and five levels of depth that would be required to be included in consolidated market data under amended Rule 603(b). What are commenters' views on setting fees under the Proposed Amendment based on the ratio of fees for depth-of-book and top-of-book proprietary data products?

8. Under the Proposed Amendment, the consolidated market data depth-of-book product would include only aggregate order information at each price level, not order-by-order data. What are commenters' views on whether the price of depth-of-book consolidated market data should be based on the fees for proprietary products that include order-by-order data? What are commenters' views on the selection of the referenced

[206] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[207] *See* 15 U.S.C. 78k–1(c)(1)(B).

[208] 17 CFR 201.700(b)(3)(ii).

[209] *Id.*

[210] *Id.*

[211] 17 CFR 242.608(b)(2)(i).

[212] Rule 700(c)(ii) of the Commission's Rules of Practice provides that ''[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views.'' 17 CFR 201.700(c)(ii).

[213] *See* Notice, *supra* note 6.

[214] *See* MDI Rule Release, *supra* note 9, 86 FR at 18684.

[215] *See* Cover Letter, *supra* note 1.

[216] *See* Cover Letter, *supra* note 1.

proprietary data products used to price the fees in the Proposed Amendment, including other exchange fees considered but not selected as a reference for the development of pricing under the Proposed Amendment?

9. Under the Proposed Amendment, the consolidated market data depth-of-book product would not include auction data, which would be sold separately. What are commenters' views on whether the price of depth-of-book consolidated market data should be based on the fees for proprietary depth-of-book products that include auction data?

10. What are commenters' views on whether users should be classified as professionals and non-professionals under the Proposed Amendment? Should non-professional subscribers to pay the same fees as professional subscribers for the auction data under the Proposed Amendment? Why or why not? Should professionals to pay a different price than non-professionals for products other than auction data under the Proposed Amendment? Why or why not? If commenters believe that classification based on user type for the contents of the consolidated market data is appropriate, do commenters support or oppose low-cost non-professional user fees? Why or why not?

11. What are commenters' views on the non-display fees in the Proposed Amendment?

12. What are commenters' views on the access fees in the Proposed Amendment? What are commenters' views on whether the Participants should charge access fees? Should competing consolidators be required to pay access fees? Why or why not? Should access fees be treated like connectivity fees, market data fees, or something else? Why or why not?

13. What are commenters' views on how the cost of purchasing consolidated top-of-book, depth-of-book, and auction data under the Proposed Amendment compares to the cost of subscribing to the existing proprietary data feeds that would contain similar or more data? What are commenters' views regarding the relationship of this comparison to the fees under the Proposed Amendment?

14. The Commission stated in the MDI Rule Release 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,'' [217] and that ''fees proposed by the SROs should not contain redistribution fees for competing consolidators because this would hinder their ability to compete.'' [218] What are commenters' views on the justification offered by the Participants in favor of charging redistribution fees to competing consolidators? What are commenters' views regarding competing consolidators being treated similarly to data vendors and charged redistribution fees? Would charging redistribution fees to competing consolidators (and thus subjecting them to the same fees as vendors and subscribers) place them at a competitive disadvantage to the exchanges offering proprietary market data for sale? Why or why not? Do commenters believe that imposing redistribution fees on competing consolidators would impose a burden on competition? Why or why not? What are commenters' views on the level of redistribution fees in the Proposed Amendment?

15. What are commenters' views on the prices for Level 1 core data, which has been expanded to include odd-lot quotations?

16. What are commenters' views on whether the operating costs of the exclusive SIPs should be deducted from the Level 1 fees in the Proposed Amendment to reflect the new role of competing consolidators? If so, how should they be taken into account? What are commenter's views on whether the operating costs of the exclusive SIPs should be taken into account in determining the fees for depth-of-book core data? If so, how should they be taken into account? Do commenters believe that the new fees for Level 1 core data should have been proposed by the Participants? Why or why not? What are commenters' views on how any new fees for Level 1 data should have been determined?

17. Overall, what are commenters' views on the proposed prices for consolidated depth-of-book data? How do commenters believe the cost of depth-of-book data under the Plan should compare to consuming the same or similar data directly from the exchanges? Do commenters believe that the proposed price point for depth-of-book data would increase the availability of the information for investors? Why or why not? Do commenters believe that the calculation of the proposed depth-of-book data fee would essentially double-charge customers for top-of-book information that they would have to buy separately through the Level I feed? Why or why not? What are commenters' views on the statement in the Proposed Amendment that depth-of-book data may not be redistributed on a delayed basis?

18. What are commenters' views on the prices for auction information? Do commenters believe the proposed prices for auction information are priced too high, too low, or at the correct level? Why or why not? What are commenters' views on the lack of a distinction between prices charged to professional and non-professional users for auction information? What are commenters' views on the statement in the Proposed Amendment that auction information may not be redistributed on a delayed basis?

19. In the Cover Letter,[219] the Participants stated that, with respect to the fees for auction information, they looked to the percentage of average dialing trading volume that occurs during an auction process and determined that roughly 10% of the trading volume takes place in auctions. The Participants stated that they therefore believe that charging a fee for auction data that is 10% of the fee charged for depth-of-book data appropriately reflects the value of auction information. What are commenters' views about this method for determining the fees for auction data?

20. What are commenters' views on the lack of an enterprise fee cap in the proposal? Should enterprise caps have been proposed by the Participants for each category of data (*e.g.,* Level 1, depth-of-book, auction information)? Should multiples enterprise caps have been proposed to reflect different size enterprises? Why or why not?

21. What are commenters' views on the Participants' clarification in the Proposed Amendment that the Per Query Fee would not apply to the expanded market data content required by the MDI Rule and would only be available for the receipt and use of the Level 1 Service?

22. In the Cover Letter, the Participants state that FINRA OTC Data will not be provided to competing consolidators, although it is still being provided to the UTP Processor for inclusion in the consolidated market data made available by the UTP Processor. What are commenters' views on the Participants' proposal to add clarifying language to make clear that UTP Level 1 Service obtained from the Processor would include FINRA OTC

[217] *See* MDI Rule Release, *supra* note 9, 86 FR at 18685.

[218] *See id.,* 86 FR at 18682, n.1136.

[219] *See* Cover Letter, *supra* note 1.

Data but would not include odd-lot information?

23. What are commenters' views on the belief of some market participants that conflicts of interest by the Participants who also sell proprietary data products have resulted in proposed fees that are not fair, reasonable, and unreasonably discriminatory? [220] What are commenters' views on whether the opinions of the advisory committee members and SROs who did not vote in favor of the Proposed Amendment should have been accommodated in the Proposed Amendment?

24. Should the Commission approve or disapprove the Proposed Amendment? Why or why not? Should the Commission approve the Proposed Amendment with modifications? If so, what modifications would be appropriate and why?

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by March 23, 2022. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 6, 2022. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File No. S7–24–89 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File No. S7–24–89. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the Participants' principal offices. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number File No. S7–24–89 and should be submitted on or before March 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[221]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2022–04332 Filed 3–1–22; 8:45 am]

BILLING CODE 8011–01–P

[220] *See* Section III.C, *supra.*

[221] 17 CFR 200.30–3(a)(85).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17354 and #17355; NEBRASKA Disaster Number NE–00094]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Nebraska

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Nebraska (FEMA–4641–DR), dated 02/23/2022.

Incident: Severe Storms, Straight-Line Winds, and Tornadoes.

Incident Period: 12/15/2021.

DATES: Issued on 02/23/2022.

Physical Loan Application Deadline Date: 04/25/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 11/23/2022.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW, Suite 6050, Washington, DC 20416, (202) 205–6734.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 02/23/2022, Private Non-Profit organizations that provide essential services of a governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Adams, Buffalo, Burt, Cass, Cuming, Fillmore, Gage, Hamilton, Harlan, Jefferson, Johnson, Kearney, Nemaha, Nuckolls, Otoe, Pawnee, Platte, Polk, Richardson, Saline, Sarpy, Saunders, Thayer, Washington, Webster.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations with Credit Available Elsewhere ...	1.875
Non-Profit Organizations without Credit Available Elsewhere	1.875
For Economic Injury:	
Non-Profit Organizations without Credit Available Elsewhere	1.875

The number assigned to this disaster for physical damage is 17354 B and for economic injury is 17355 0.

(Catalog of Federal Domestic Assistance Number 59008)

Barbara Carson,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2022–04356 Filed 3–1–22; 8:45 am]

BILLING CODE 8026–03–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #17356 and #17357; IOWA Disaster Number IA–00110]

Presidential Declaration of a Major Disaster for Public Assistance Only for the State of Iowa

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the State of Iowa (FEMA–4642–DR), dated 02/23/2022.

Incident: Severe Storms, Straight-line Winds, and Tornadoes.

Incident Period: 12/15/2021.

DATES: Issued on 02/23/2022.

Physical Loan Application Deadline Date: 04/25/2022.

Economic Injury (EIDL) Loan Application Deadline Date: 11/23/2022.