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December 10, 2019

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

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

Dear Ms. Countryman:

The Investment Company Institute<sup>1</sup> strongly supports the Securities and Exchange Commission amending Regulation NMS under the Securities Exchange Act of 1934 to no longer allow a proposed fee amendment to any national market system plan-- including securities information processors-- to become effective upon filing.<sup>2</sup> Registered investment companies (“funds”) have a significant interest in this proposal as they subscribe, and pay fees, to these SIPs.<sup>3</sup> SIPs are the exclusive SEC-approved providers of key market data, including information on national best bids and offers, last sales, and regulatory trading halts. Many market participants must use SIPs to trade, and SIPs charge fees that,

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<sup>1</sup> The [Investment Company Institute](#) (“ICI”) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds, closed-end funds, and unit investment trusts in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI’s members manage total assets of US\$24.1 trillion in the United States, serving more than 100 million US shareholders, and US\$7.1 trillion in assets in other jurisdictions. ICI carries out its international work through [ICI Global](#), with offices in London, Hong Kong, and Washington, D.C..

<sup>2</sup> See SEC Release No. 34-87193 (October 1, 2019) (“Release”), available at <https://www.sec.gov/rules/proposed/2019/34-87193.pdf>. This letter hereinafter refers to national market system plans as “NMS plans” and securities information processors as “SIPs”.

<sup>3</sup> The other is the CAT NMS plan. ICI members do not have a direct interest in the fees assessed by the CAT NMS plan, because ICI members will not be CAT reporters.

overall, amount to hundreds of millions of dollars a year.<sup>4</sup> The proposal, if adopted, would provide SIP subscribers, for the first time, with advance notice and a say in fee changes.

We applaud the Commission for taking this important first step and recommend improving the transparency and functioning of SIPs. We also urge further reform that would permit entities other than self-regulatory organizations (“SROs”) to play a role in the governance of SIPs. We explain each of these points below.

### **Support for Eliminating Effective-When Filed Fees**

If the proposal is adopted, going forward, the Commission would publish any proposed change to SIP fees, provide an opportunity for public comment, and then determine whether to approve the proposed fee. This change would enhance greatly the fairness of the fee setting process, and very likely lead to more reasonable fees being assessed, because funds (and other subscribers) would be able to provide input, and the Commission could evaluate any new or changed fee, *before* it is set. The proposed process also has the tremendous benefit of providing subscribers with advance notice and time to plan for a fee change. This is essential given the fee pressures that the fund industry has been experiencing.<sup>5</sup>

In contrast, today, a SIP may begin charging a new or higher fee immediately upon filing notice of the change with the Commission. The effective-upon filing provision is an illogical process that places too much autonomy in the hands of the SIP operators at the expense of market participants. We agree with the Commission that it is essential that this regulatory approval process be changed “given the substantial amount and broad effect of NMS plan fees, as well as the need of many market participants to obtain core [market] data.”<sup>6</sup>

### **Support for Greater Transparency and Overall Functioning**

The Commission should amend Regulation NMS further to require complete transparency into any revenue generated by NMS plans, particularly those dealing with market data. SIPs are the exclusive SEC-approved providers of key market data that many market participants must use to trade, and they charge hundreds of millions of dollars a year in fees. Despite that, SIPs do not disclose publicly even rudimentary information concerning the allocation of this revenue among SROs or the amounts expended for SIPs’ operating costs.

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<sup>4</sup> See Release at p. 5.

<sup>5</sup> See *2019 Investment Company Fact Book, ICI*, at Chapter 6, available at [https://www.icifactbook.org/ch6/19\\_fb\\_ch6](https://www.icifactbook.org/ch6/19_fb_ch6)

<sup>6</sup> See Release at p. 7. We similarly would support the Commission reconsidering the current procedures used to approve, or institute proceedings to disapprove, SRO rule filings that seek to increase fees. We recognize that the Commission would have to do so within the confines of the authority granted in Section 916 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*. See, e.g., SEC Release No. 34-63723 (January 14, 2011) available at <https://www.sec.gov/rules/final/2011/34-63723.pdf> (describing the Commission’s new rules of practice designed to implement Section 916 of the Dodd-Frank Act, which established new statutory deadlines for the Commission’s publication and review of proposed SRO rule changes).

At a minimum, the SEC should require these SIPs to disclose:

- the amount of revenue generated;
- the sources of that revenue;
- the allocation of the revenue (including amounts invested in technology); and
- the amount of any revenue distributed to a plan participant, along with the participant's identity.

We also recommend that the SEC require these SIPs to disclose more detail about their performance to enable market participants to assess the functioning of these critical market utilities.

### **Support for Broad Reform of NMS Plan Governance**

We also strongly recommend that the Commission address the outdated and unfair governance practices of NMS plans. The rules that authorize SROs to prepare and file NMS plans have allowed SROs to administer key aspects of market structure without consulting—and often to the detriment of—other market participants. No legal authority requires SROs to monopolize NMS plan governance, and the NMS plan governing bodies would be far better informed—and less influenced by conflicts of interest—if they included entities other than SROs.<sup>7</sup> The proliferation of NMS plans in recent years as mechanisms to regulate the equity markets heightens these plan governance concerns.<sup>8</sup> We therefore urge the Commission to modify Regulation NMS to require all NMS plans to include as voting members a range of market participants, including representatives of funds.<sup>9</sup>

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<sup>7</sup> The transition of exchanges from member-owned entities to demutualized, for-profit corporations created incentives for SROs to operate NMS plans in a manner that potentially advantages their commercial interest at the expense of other market participants.

<sup>8</sup> Recent examples of market structure matters that the Commission has addressed through NMS plans include the CAT, tick size pilot program, and measures to blunt extraordinary market volatility.

<sup>9</sup> Although the Commission holds a public comment period before it adopts a new NMS plan, including entities other than SROs on plan operating committees would ensure that a plan's ongoing operations reflect more diverse views. The Commission also could improve NMS plan governance by requiring all NMS plans to publish minutes of operating committee meetings—including information about votes held—on a public website.

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We strongly recommend that the Commission improve Regulation NMS to increase the fairness and transparency of US equity markets for funds and other investors. If you have any questions on our letter, please feel free to contact me at (202) 218-3563.

Sincerely,

/s/

Dorothy M. Donohue

Deputy General Counsel, Securities Regulation

cc: The Honorable Jay Clayton, Chairman  
The Honorable Hester Peirce, Commissioner  
The Honorable Robert Jackson, Commissioner  
The Honorable Elad Roisman, Commissioner  
The Honorable Alison Lee, Commissioner

Rick Fleming, Investor Advocate

Brett Redfearn, Director, Division of Trading and Markets