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December 17, 2021

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

Re: Joint Industry Plan; Notice of Filing of 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 (Release No. 34-93618; File No. S7-24-89)

Consolidated Tape Association; Notice of Filing of the Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan (Release No. 34-93625; File No. SR-CTA/CQ-2021-03)

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. ("FINRA") appreciates the opportunity to provide comments on the above-captioned proposed amendments to the Consolidated Tape Association ("CTA"), Consolidated Quotation ("CQ"), and Nasdaq UTP ("UTP") National Market System ("NMS") Plans (collectively, the "SIP Plans").[1] The Amendments were filed on November 5, 2021 pursuant to the Securities and Exchange Commission's ("SEC's" or "Commission's") final Market Data Infrastructure rule,[2] which, among other things, required the operating committees of the SIP Plans ("Operating Committees") to file amendments proposing fees for the data content underlying consolidated market data.[3]

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1 *See* Securities Exchange Act Release No. 93618 (November 19, 2021), 86 FR 67562 (November 26, 2021) (Joint Industry Plan; Notice of Filing of 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) (the "UTP Amendment"); Securities Exchange Act Release No. 93625 (November 19, 2021), 86 FR 67517 (November 26, 2021) (Consolidated Tape Association; Notice of Filing of the Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan) (the "CTA/CQ Amendment" and, together with the UTP Amendment, the "Amendments").

2 *See* Securities Exchange Act Release No. 90610 (December 9, 2020), 86 FR 18596 (April 9, 2021) (the "MDI Rule").

3 *See id.* at 18686.

As FINRA has stated previously, FINRA strongly supports the Commission's goals in adopting the MDI Rule of enhancing transparency, improving the public market data feeds, reducing information asymmetries among market participants, and facilitating the ability of broker-dealers to provide best execution for customers.[4] The establishment of fees that are fair, reasonable, and not unreasonably discriminatory is critical to ensuring that the Commission's goals in adopting the new market data framework under the MDI Rule are met. While FINRA continues to strongly support the goals of the MDI Rule, FINRA opposes the fees proposed in the Amendments because they do not meet the standards established by statute and set forth in the MDI Rule, as discussed below.[5]

I. Background

FINRA is the only national securities association registered with the Commission under Section 15A of the Securities Exchange Act of 1934 (the "Exchange Act")[6] and is organized as a not-for-profit corporation. FINRA has statutory responsibility for the regulation and supervision of FINRA member broker-dealers, including members' over-the-counter activity in both listed and unlisted securities.[7] FINRA's responsibilities include providing FINRA members with a mechanism for reporting transactions in exchange-listed securities effected otherwise than on an exchange. Members may report trades to FINRA through one of the three Trade Reporting Facilities ("TRFs") or through the Alternative Display Facility) ("ADF") (together, "FINRA

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4 *See* Letter from Marcia E. Asquith, Executive Vice President, Board and External Relations, FINRA, to Vanessa Countryman, Secretary, SEC, dated May 26, 2020, at 1.

5 As stated in the transmittal letters accompanying the Amendments (the "Transmittal Letters"), FINRA did not join in the decision to file the Amendments. *See* Transmittal Letters; s*ee also* UTP Amendment at 67564 n.14; and CTA/CQ Amendment at 67519 n.14. In addition to the Amendments discussed herein, the MDI Rule also required the Operating Committees to file amendments conforming the SIP Plans to reflect the changes to the collection, consolidation, and dissemination of consolidated market data under the MDI Rule and other specific provisions listed in new Rule 614(e) of Regulation NMS. *See* MDI Rule at 18813-14. FINRA joined in the unanimous decision of the Operating Committees to submit those separate, non-fee-related conforming amendments. *See* Securities Exchange Act Release No. 93620 (November 19, 2021), 86 FR 67541 (November 26, 2021) (Joint Industry Plan; Notice of Filing of the Fifty-First 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); Securities Exchange Act Release No. 93615 (November 29, 2021), 86 FR 67800 (November 29, 2021) (Consolidated Tape Association; Notice of Filing of the Thirty-Seventh Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Eighth Substantive Amendment to the Restated CQ Plan).

6 *See* 15 U.S.C. 78o-3.

7 In general, broker-dealers are required by the Exchange Act to become members of a national securities association. There are two cases where broker-dealers may instead be exchange-only members. First, there is a statutory exception for a broker-dealer that transacts business solely on an exchange of which it is a member. *See* 15 U.S.C. 78o(b). Second, there is a rule-based exemption for firms that carry no customer accounts and conduct limited off-exchange business, which has become used primarily by proprietary trading firms. *See* 17 C.F.R. 240.15b9-1.

Facilities").[8] FINRA Facility data is provided to the SIPs for inclusion in the consolidated public equity market data feeds. FINRA does not retain any revenue for the market data provided to the SIPs via the TRFs,[9] and FINRA does not offer or sell proprietary data products involving exchange-listed securities.[10] As a result, unlike the other self-regulatory organization ("SRO") participants in the SIP Plans (*i.e.*, the national securities exchanges), FINRA does not expect to retain any significant portion of revenues generated by the proposed fees set forth in the Amendments.[11]

FINRA, along with the other SIP Plan participants ("Participants") and members of the SIP Plan advisory committee ("Advisory Committee"), participated in discussions regarding developing the relevant fees. However, FINRA does not believe that the fees ultimately supported by the Participants that joined in submitting the Amendments (the "Submitting Participants") were fair, reasonable, and not unreasonably discriminatory, as required under the Exchange Act and the MDI Rule, and therefore FINRA did not join in approving the submission of the Amendments. FINRA agrees with the Advisory Committee statement included in the Transmittal Letters that "the core principle of fees being fair and reasonable was not achieved"

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8 Currently, one member is connected to the ADF for back-up trade reporting purposes only. The member does not use the ADF as their primary facility for trade reporting.

9 FINRA operates the TRFs via the "Business Members," Nasdaq, Inc. and NYSE Market (DE), Inc. While FINRA is entitled in the first instance to SIP data revenue for transactions in exchange-listed stocks effected otherwise than on an exchange, pursuant to the contractual arrangements establishing the TRFs, FINRA has agreed not to retain such SIP revenues. The Business Members are entitled to the SIP revenues and share a percentage of those revenues with FINRA member TRF participants in the form of transaction credits. *See, e.g.*, FINRA Rules 7610A and 7610B. FINRA would retain any revenue for market data provided to the SIPs via the ADF.

10 TRF data is provided to the SIPs for consolidation and dissemination via the SIP data feeds. While TRF data is also offered as part of certain proprietary data products sold by the Business Members' exchange affiliates, FINRA itself does not sell or offer the TRF data. FINRA has no role in developing or setting pricing for the products offered by the Business Members' exchange affiliates and does not have access to any individual proprietary data customer information via the TRF relationships.

11 While the SIP Plan Operating Committees have not yet developed a new revenue allocation formula to account for the new proposed fee structure, FINRA does not expect to retain any significant revenues under any new formula due to the categories of data for which fees will be charged under the Amendments. Specifically, the Amendments would not alter the existing fees for last sale information reported through the TRFs and as noted above, FINRA does not retain any revenue for the market data provided via the TRFs in any case (though FINRA would retain any revenue for last sale information reported through the ADF). In addition, although the new odd-lot quotation data would be included along with existing top-of-book ("TOB") quotation data at no additional charge, the only existing FINRA Facility with quotation functionality - the ADF - does not currently support odd-lot quotations. Therefore, FINRA does not expect to receive any revenues in connection with odd-lot quotation data. The Amendments also propose to set new fees for auction data, but FINRA does not operate any auctions so does not expect to receive any corresponding revenues. The only remaining category of new fees is for the new depth-of-book ("DOB") quotation data. If there were any quoting activity occurring on the ADF, FINRA would be entitled to some portion of revenues resulting from the new DOB data fees (along with a portion of revenues resulting from existing TOB fees); however, the ADF does not currently have any quoting participants.

in the fees as ultimately proposed in the Amendments.[12] FINRA therefore urges the Commission to disapprove the Amendments.[13]

II. Discussion

New Rule 614(e) of Regulation NMS requires the Participants to file amendments to the SIP Plans by November 5, 2021 to, among other things, conform the SIP Plans as necessary to achieve the provision of consolidated market data by the Participants to competing consolidators and self-aggregators.[14] The Commission noted in the MDI Rule that, among other responsibilities, the SIP Plans will be responsible for developing the fees for the data content underlying consolidated market data going forward.[15] Accordingly, the Commission clarified that the fees required pursuant to Rule 614(e) must reflect: (i) that consolidated market data includes additional new content (*i.e.*, DOB data, auction information, and certain odd-lot quotation information), (ii) that the SIP Plans are no longer operating the exclusive SIPs, and (iii) that the SROs are no longer responsible for the connectivity and transmission services required for providing data to the exclusive SIPs.[16]

One of the key purposes of the MDI Rule is to help ensure that core data is "widely available for reasonable fees"[17] and the Commission stated its belief that, to fulfill that purpose, "the Operating Committee will consider the needs of investors and the different use cases for consolidated market data when developing the proposed fees for the data content underlying consolidated market data."[18] More specifically, the Commission noted that the fees for the data underlying consolidated market data "must satisfy the statutory standards of being fair, reasonable and not unreasonably discriminatory."[19] While there may be multiple ways to demonstrate that fees meet the statutory "fair and reasonable" standard, the Commission noted that it has "historically assessed fees for data such as the data content underlying consolidated market data using a reasonably related to cost standard"[20] and that "fees for consolidated SIP Data can be shown to be fair and reasonable if they are reasonably related to costs."[21] Further, the Commission stated its belief that "the fees for the data content underlying consolidated market data should not include redistribution fees for competing consolidators" because doing

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12 *See* UTP Amendment at 67564 n.14; CTA/CQ Amendment at 67519 n.14.

13 FINRA looks forward to continuing discussions with the other Participants and Advisory Committee members on developing a fee structure that is consistent with the applicable statutory standards in furtherance of the important goals of the MDI Rule and the SIP Plans themselves.

14 *See* 17 C.F.R. 242.614(e)(1); MDI Rule at 18813-14.

15 *See* MDI Rule at 18681.

16 *See id.* at 18682.

17 *See id.* at 18598.

18 *See id.* at 18687.

19 *See id.* at 18684 (citing to Exchange Act Sections 11A(c)(1)(C) and 11A(c)(1)(D) and Rule 603(a) of Regulation NMS).

20 *See* MDI Rule at 18684.

21 *See id.* at 18685.

so "would be difficult to reconcile with statutory standards of being fair and reasonable and not unreasonably discriminatory in the new decentralized model."[22]

Below, FINRA notes two specific aspects of the proposed fees that it believes do not meet the applicable standards: (1) the proposed fees for DOB data are set at an unreasonably high level; and (2) redistribution fees would be charged to competing consolidators, in contravention of the Commission's express direction.

A. Fees for DOB Data are Unreasonably High

Among other changes, the Amendments propose new fees that would apply to the receipt of DOB data for various subscriber categories and use cases.[23] These fees would be charged separate from, and in addition to, existing fees for last sale and TOB data (including odd-lot data), as well as fees applicable to auction data. Specifically, the per-tape, monthly fee for DOB data is proposed to be set as follows:

- Professional Subscribers: $99
- Non-professional Subscribers: $4
- Non-Display Use: $12,477
- Direct Access: $9,850

The Submitting Participants acknowledge the Commission's statement that one way, among others, to establish that fees are fair and reasonable is by demonstrating that such fees are reasonably related to cost.[24] The Submitting Participants decided on an alternative method and sought to demonstrate that the proposed fees are "related to the value of the data to subscribers."[25] In establishing that the new DOB fees were based upon the value to subscribers, the Submitting Participants utilized fees currently charged in connection with existing proprietary data feeds that include DOB data by applying a DOB to TOB ratio model.[26]

The fees for the new DOB data generally were determined by: (i) selecting existing exchange proprietary data products that include TOB data; (ii) selecting existing exchange proprietary data products that include DOB data; (iii) calculating an average ratio between the existing fees for these two categories of proprietary data products; (iv) applying that ratio to the

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22 *See id.*; *see also id.* at 18682 n.1136 ("Further, as discussed below, the fees proposed by the SROs should not contain redistribution fees for competing consolidators because this would hinder their ability to compete.").

23 Under the MDI Rule, the DOB data required to be added to the SIP data feeds includes five levels of aggregated depth. Specifically, it includes all quotation sizes at each SRO at each of the next five prices at which there is a bid that is lower than the national best bid and offer that is higher than the national best offer. For each of these prices, the aggregate size available at each price, if any, at each SRO shall be attributed to such SRO. *See* 17 C.F.R.242.600(b)(26); MDI Rule at 18810.

24 *See* UTP Amendment at 67564; CTA/CQ Amendment at 67519.

25 *See* UTP Amendment at 67565; CTA/CQ Amendment at 67519.

26 *See* UTP Amendment at 67565; CTA/CQ Amendment at 67520.

existing SIP TOB data fees, aggregated across all three tapes; and (v) evenly allocating the resulting DOB fees to each of the three tapes. The ratio calculated by the Submitting Participants was 3.94x, which was used to determine the DOB fees for each of the categories noted above.

FINRA believes that even if a value-based method could have been used in developing fees for the new DOB data that met the statutory standards, the ratios applied by the Submitting Participants and described above were not appropriately calibrated to the value of the new DOB data to subscribers. Specifically, the proprietary DOB data price inputs that were used to calculate the ratio of 3.94x under the Amendments were overinclusive, and, as a result, the proposed fees for the new DOB data are unreasonably high. In particular:

- The proprietary DOB product fees used in determining the ratio also include proprietary TOB data. However, TOB data would continue to be charged separately from DOB data under the Amendments. Without appropriately reducing the price of the proprietary DOB products to exclude TOB data, the resultant fee is not aligned with the value of the new DOB data to a user (and TOB data is essentially double counted in the proposed fee framework).

- The proprietary DOB product fees used in determining the ratio also include auction data. Auction data would be charged separately from DOB data under the Amendments. Thus, the resultant fee is not aligned with the value of the new DOB data to a user (and auction data is essentially double counted in the proposed fee framework).

- The proprietary DOB data product fees used in determining the ratio include order-by-order depth information, instead of, or in addition to, aggregated depth information. The DOB data required to be added to the SIP data feeds under the MDI Rule includes only aggregated depth information. Since order-by-order information is typically considered more valuable than aggregated depth information, the result is a higher ratio and an overstatement of the value of the new DOB data to subscribers under the Amendments.

- The proprietary DOB product fees used in determining the ratio include full depth information, *i.e.*, all price levels, rather than just the top five price levels required to be added to the SIP data feeds under the MDI Rule. Full depth information is typically considered more valuable than only the first five levels, resulting in a higher ratio and fees that are not aligned with the value of the new DOB data to subscribers.

As a result, the method employed by the Submitting Participants does not align the proposed fees for the new DOB data to the value of the data to subscribers. Further, FINRA agrees with the Commission that a cost-based approach to establishing fees under the MDI Rule would provide a solid basis for arriving at fees that are fair and reasonable. The Submitting Participants justify their departure from using a cost-based approach by stating that the Operating Committees do not have access to information regarding the costs expected to be incurred by the Participants in providing the underlying consolidated market data to competing consolidators and self-aggregators. However, such information could have been considered by the Operating Committees because the parties providing the underlying consolidated market

data and incurring the relevant costs are the same parties that participate on the Operating Committees. While a cost-based approach is not mandated and it is possible to achieve fees that meet the statutory standard using other means, the alternative approach ultimately used by the Submitting Participants did not result in fees that are fair and reasonable

For these reasons, FINRA believes that the proposed DOB data fees are set at a level that is unfair and unreasonable and that is unlikely to allow competing consolidators to offer DOB data products at prices that are competitive with exchange proprietary data products, which frustrates the Commission's market infrastructure goals. As a result, FINRA believes that the proposed DOB data fees are not consistent with the Exchange Act and the MDI Rule.

B. Redistribution Fees Should Not Be Charged to Competing Consolidators

Under the existing fee schedules for the SIP Plans, vendors that redistribute SIP data are subject to specified redistribution fees.[27] The Amendments would maintain these existing redistribution fees at current levels and clarify that the same flat redistribution fees apply regardless of whether an entity redistributes all core data or any subset thereof. In addition, the Amendments specifically add language to the SIP Plan fee schedules stating that the redistribution fees apply to competing consolidators.[28]

As noted above, in the MDI Rule, the Commission specifically stated that redistribution fees should not be applied to competing consolidators:

> In addition, 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. The Commission believes imposing redistribution fees on data content underlying consolidated market data that will be disseminated by competing consolidators would be difficult to reconcile with statutory standards of being fair and reasonable and not unreasonably discriminatory in the new decentralized model. Under the new decentralized consolidation model, self-aggregators also will directly receive the data content necessary for generating consolidated market data from the SROs and, because by definition they are limited to using the data for internal purposes, would not be subject to fees for redistributing such consolidated market data. If the plan(s) proposed to impose redistribution fees on the data content underlying consolidated market data, the Commission would be concerned that competing consolidators could be subject to unreasonable discrimination as they

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27 Specifically, under the UTP Plan, the charge for redistributing real-time UTP Level 1 Service is $1,000 per month and the charge for redistributing delayed UTP Level 1 Service is $250 per month. *See* Exhibit 2, Section (h) of the UTP Plan. Under the CTA and CQ Plans, the redistribution charge (per month) is $1,000 for Network A and $1,000 for Network B. *See* Exhibit E, Section E of the CTA Plan.

28 *See* UTP Amendment at 67567; CTA/CQ Amendment at 67523.

would be required to pay higher fees for such data than self-aggregators would pay for the same data.[29]

In the Transmittal Letters, the Submitting Participants stated their disagreement with the Commission's view, suggesting that, rather than comparing competing consolidators to self-aggregators, 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."[30]

The proposed application of redistribution fees to competing consolidators is flatly inconsistent with the Commission's express direction in the MDI Rule. Moreover, FINRA disagrees with the Submitting Participants' statement regarding the most appropriate comparison to competing consolidators. The Commission made quite clear in the MDI Rule that competing consolidators are intended to take the place of the existing exclusive SIPs, which are not charged redistribution fees today. Indeed, competing consolidators are required to perform many of the same functions currently performed by the SIPs, including collecting data from SROs, consolidating data (including calculating the national best bid and offer), and disseminating consolidated data to subscribers. "Downstream vendors" exist today and would continue to exist under the new decentralized model, but they differ in key respects from the existing SIPs and competing consolidators in that they solely redistribute consolidated data. FINRA therefore agrees with the Commission that imposing redistribution fees on competing consolidators would frustrate the Commissions objectives in creating the decentralized, competing consolidator framework, and any such fees would not be "fair and reasonable and not unfairly discriminatory," as required under the Exchange Act and the MDI Rule.

III. Conclusion

FINRA thanks the Commission for its attention to these matters. Should you have any questions or wish to further discuss FINRA's views, please contact Stephanie Dumont, Executive Vice President, Market Regulation and Transparency Services, FINRA, at (202) 728-8176 (stephanie.dumont@finra.org) or Racquel Russell, Senior Vice President and Director of Capital Markets Policy, FINRA, at (202) 728-8363 (racquel.russell@finra.org).

Sincerely,

Marcia E. Asquith

Marcia E. Asquith
Executive Vice President,
Board and External Relations

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29 *See* MDI Rule at 18685.

30 *See* UTP Amendment at 67563-64; CTA/CQ Amendment at 67518-19.