August 8, 2022

The Honorable Gary Gensler
Chairman
U. S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Gensler:

As organizations focused on investor protection and investor rights, we write to express our collective concern about the Securities and Exchange Commission's continuing failure to meaningfully review or analyze self-regulatory organization (SRO) fee filings to assure their conformity with the requirements of the Securities Exchange Act of 1934 (Exchange Act). We urge the Commission to revise its SRO rule change filing processes to ensure that fee filings comply with the Exchange Act and Commission rules and better protect investors and other market participants.

As you know, because of their central roles in our capital markets, national securities exchanges (NSEs) are required by law to file changes to their rules and fees with the SEC. The SEC, in turn, is obligated to review exchange filings and determine that those filings are consistent with the law.[1]

As SROs, exchanges have an overarching responsibility to put in place standards to promote "just and equitable principles of trade." Under the SEC's rules, exchanges also have the "burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder."[2] The law also requires the SEC to ensure that SRO fees reflect "an equitable allocation of reasonable dues, fees, and other charges"; are "not ... designed to permit unfair discrimination between customers, issuers, brokers, or dealers"; and do "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.[3]

In recent years, exchanges have increasingly flouted and even abused "effective on filing" privileges to inflate fees for market data and connectivity, often without any basis or justification.[4] In the absence of clear SEC rules or evaluation procedures put in place by the SEC, and in the absence of competition, exchanges fees have increased at rates that bear little relationship to reality.[5]

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[1] Specifically, under Section 3(a)(26) of the Exchange Act, each National Securities Exchange registered with the SEC is granted self-regulatory organization (SRO) status, subject to the SEC's oversight.
[2] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).
[3] 15 U.S.C.§ 78f(b).
[4] For just one example, in 2022 alone MEMX has filed the same exact rule changes increasing connectivity fees four times, has been able to continue to collect hundreds of thousands of dollars from market participants for connectivity fees, despite the fact that the fees have subsequently been suspended and withdrawn, and despite clear evidence that such fees are likely inconsistent with the Exchange Act's requirements. https://healthymarkets.org/wp-content/uploads/2022/06/6-28-22-MEMX-Connectivity-and-Data-FINAL1.pdf
[5] A 2018 analysis by SIFMA found that fees to receive market data from certain exchanges have increased by 1100% in recent years. (See Letter from Melissa MacGregor and Theodore R. Lazo, SIFMA to Brent J. Fields, SEC, (Oct. 24, 2018), (https://www.sifma.org/wp-content/uploads/2018/10/File-No.-4-729-SIFMA-Comments-on-Roundtable-on-Market-Data-and-Market-Access-October-24-2018-002.pdf).

Exchange fees matter to investors because they directly affect order routing decisions and the ability of broker-dealers to achieve best execution for their customers.[6] Market participants shouldn't have to continue to endure existing exchange rules that violate the law.[7] The investing public should be given a voice in how and when these changes go into effect.[8]

To address the inordinate growth and complexity of rule modifications by NSEs,[9] we specifically urge the Commission to take a number of steps. First, the SEC should more vigorously exercise its authority to suspend SRO rules that are subject to the "effective upon filing" provisions in the Exchange Act and to institute proceedings to determine whether such rules should be approved or disapproved.[10]

Second, to the extent possible under the provisions of the Exchange Act, we urge the SEC to revise its rules and procedures for NSE rule change filings to include an opportunity for market participants and members of the public to review and potentially contest filings prior to effectiveness, and to provide market participants with adequate time to analyze, implement, and test any necessary changes to their systems as a result of exchange rule changes. We also urge the SEC to consider limiting the frequency of exchange changes that may be "effective upon filing" and prohibiting the retroactive application of exchange fee changes.

Further, to better assist the Commission and its staff in reviewing the NSEs' compliance with the Exchange Act and Commission rules, we urge the SEC to require NSEs to disclose the number of market participants who qualify for a particular pricing tier on a monthly basis, and to disclose all communications (not just written) with any market participants about their SRO fee filings, both before the filings are made and thereafter. Such enhanced disclosures, including with respect to order routing incentives and practices, stand to dramatically improve market participants' and the Commission's ability to ensure brokers are fulfilling their best execution obligations.

Finally, we believe that it is plainly in the interest of market participants and above all the investing public to provide a reasonable time for review of these filings, *before* they become effective, so that all stakeholders can understand their potential impact on products, pricing, investors, and technology. Accordingly, the SEC should work to rescind the "effective upon filing" status for SRO fee filings, and to assure SRO rule changes do not become effective until after the SEC has affirmatively determined that such fees are reasonable, equitably allocated, not unduly burdensome on competition, and not discriminatory.

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[6] In 2021 alone, there were approximately 572 immediately effective filings of which approximately 201 were market data related.. Many of these filings appear to implement rules that facially discriminate against some market participants, unduly burden competition between market participants (e.g., brokers of different sizes), impose unreasonable or inequitably allocated fees, or otherwise violate the requirements of the Exchange Act.

[7] For a detailed discussion of how such changes can be disruptive, see comment letter from Quantitative Investment Management, LLC. December 21, 2018. Accessible at https://www.sec.gov/comments/sr-cboeedga-2018-017/srcboeedga2018017-4827803-177046.pdf

[8] For "effective upon filing" rules changes, the public is typically not provided a formal notice or the opportunity to review and potentially challenge a rule or fee in advance of implementation.

[9] Incredibly, in 2021, there were over 1300 SRO filings. By contrast, in 2003, there were under 70 filings, total. (https://financialservices.house.gov/uploadedfiles/hhrg-117-ba16-20220330-sd002.pdf).

[10] *See* 15 U.S.C.§ 78s(b)(3)(C) (authority to suspend); 15 U.S.C. Sec. 78s(b)(3)(A) (effective upon filing for certain SRO rules, including those involving fees).

Thank you for your consideration.

Sincerely,

Americans for Financial Reform Education Fund

Better Markets

Consumer Federation of America

Healthy Markets Association

Public Citizen

20/20 Vision

CC: The Honorable Hester M. Peirce

The Honorable Carolyn Crenshaw

The Honorable Mark Uyeda

The Honorable Jaime Lizárraga