HEALTHY MARKETS
TRANSPARENCY & TRUST

December 11, 2020

Hon. Heath Tarbert, Chairman
Commodity Futures Trading Commission
1155 21st Street, NW
Washington, DC 20581

Re: CME Group Market Data Fee List--Effective Jan. 2021;
CME Group Market Data Fee List--Effective Apr. 2021;
CME Group Data Licensing Policy Guidelines Historical Information Distribution;
CME Group Data Licensing Policy Guidelines Non-Display Use[1]

Dear Chairman Tarbert:

The Healthy Markets Association[2] is writing to voice our objections to the above-referenced CME Fee Changes. Together, these fee changes would increase the complexity and costs of market data, while impermissibly restricting access to essential data and burdening competition. We urge the Commission to review the fee changes for compliance with the Commodity Exchange Act and Commission regulations, and disapprove them.

Further, the Commission's application of Rule 40.6, which permits even significant fees to be implemented without Commission notice, public review or comment, or

[1] *CME Group Market Data Fee List--Effective Jan. 2021*, CME Group, *available at* https://www.cmegroup.com/files/download/cme-market-data-fee-list-jan-2021.pdf (last viewed Dec. 3, 2020); *CME Group Market Data Fee List--Effective Apr. 2021*, CME Group, *available at* https://www.cmegroup.com/files/download/cme-market-data-fee-list-apr-2021.pdf (last viewed Dec. 3, 2020); *CME Group Data Licensing Policy Guidelines Historical Information Distribution*, CME Group, *available at* https://www.cmegroup.com/market-data/distributor/files/cme-group-data-licensing-policy-guidelines-historical-information-distribution.pdf, (last viewed Dec. 3, 2020); *CME Group Data Licensing Policy Guidelines Non-Display Use*, CME Group, *available at* https://www.cmegroup.com/market-data/distributor/files/cme-group-data-licensing-policy-guidelines-and-non-display-licensing-faq.pdf, (last viewed Dec. 3, 2020); Email from CME Group to Customers, Sept. 30, 2020. Collectively, the modifications to the terms, conditions, and fees for use and distribution of market data reflected by these materials are hereinafter referred to as "CME Fee Changes".

[2] The Healthy Markets Association is an investor-focused not-for-profit coalition that is dedicated to the proposition that informed and empowered investors are essential for healthy capital markets. To learn more about Healthy Markets or our members, please see our website at http://healthymarkets.org.

consideration is not only outdated, but also arbitrary and capricious. Accordingly, we ask the Commission to revise it immediately.

Background

Over the past several years, exchange operators across several different asset classes have morphed into public, for-profit enterprises, and have come to rely upon data products as key sources for additional revenues. This global trend has included developing and acquiring new businesses focused on data offerings, as well as exchanges increasingly exploiting their positions as aggregators and keepers of essential market data. Many exchanges, including CME, are establishing new fees, raising fees, and adding rules related to the use and distribution of market data that are inconsistent with their legal obligations and the public interest.

Excessive fees and onerous conditions for monopoly products undermines the capacity of particularly smaller market participants to remain in the market, negatively impacting transparency and the markets overall. This problem is being confronted in different asset classes, under varying statutory schemes, both here and abroad. In the securities markets in the US, exchanges are required to file with the Securities and Exchange Commission all fee filings, and the SEC is obligated to review these filings to determine if they are consistent with the securities laws,[3] including, inter alia, that they:

- are an equitable allocation of reasonable dues, fees, and other charges;[4]
- "not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers";[5] and
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.[6]

The Commission has historically not taken an active role reviewing and passing judgement on Designated Contract Market (DCM) fee filings. Generally, when a DCM wants to change a rule or fee, it provides notice to its customers, self-certifies that it is compliant with the Commodity Exchange Act and the Commission's regulations,[7] and begins with the implementation of the change.[8]

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[3] 15 U.S.C. § 78a et seq, See generally, *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017) (related to the review of a rule change from the Options Clearing Corporation). However, this obligation applies to all self-regulatory organizations, including exchanges.
[4] 15 U.S.C. § 78f(b)(4).
[5] 15 U.S.C.§ 78f(b)(5).
[6] 15 U.S.C.§ 78f(b)(8).
[7] See, e.g., https://sirt.cftc.gov/sirt/sirt.aspx?Topic=TradingOrganizationRules.
[8] We also note DCMs often seek confidential treatment under the Freedom of Information Act (FOIA) regarding relevant information from the public regarding the changes, further frustrating the goals of promoting transparency and public interest. How can we know if a filing complies with the CEA if the justification is kept secret?

However, under Rule 40.6, the Commission has determined that self-certification is unnecessary for some fee changes. For some fee changes, a DCM need only to provide notice to the Commission in a "Weekly Notification of Rule Amendments."[9] Further, a DCM need not make a self-certification nor provide the weekly notice to the Commission for fees or fee changes that are not associated with market making or trading incentive programs, and:

1. Are less than $1.00; or

2. Relate to matters such as dues, badges, telecommunication services, booth space, real time quotations, historical information, publications, software licenses or other matters that are administrative in nature.[10]

In 2011, the Commission explicitly determined to "retain[] the existing language in § 40.6(d) that permits certain non-substantive rules to take effect without certification to the Commission."[11]

DCM Core Principle 8 provides that a DCM "shall make public daily information on settlement prices, volume, open interest, and opening and closing ranges for actively traded contracts on the contract market." Further, Rule 16.01 outlines the types of data that must be made "readily available to the news media and the general public without charge."[12] The purpose of these rules is to ensure that the public has access to essential information about the markets under the Commission's jurisdiction.

Discussion

The CME is exploiting the Commission's inadequate procedures to add new "guidance," increase the rates for data, and impose new fees on entirely new categories of data. In particular, on September 30th, the CME notified its customers of upcoming changes to its fee tables, including the imposition of new fees for historical data, which are scheduled to become effective January 1, 2021. The CME subsequently communicated that it will further modify its fees on April 1, 2021. It has also published revised guidance regarding its licensing and fees.

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[9] 17 C.F.R. § 40.6(d)(1).
[10] 17 C.F.R. § 40.6(d)(3)(E).
[11] *Provisions Common to Registered Entities*, CFTC, 76 Fed. Reg. 44776, 44783 (July 27, 2011), *available at* https://www.govinfo.gov/content/pkg/FR-2011-07-27/pdf/FR-2011-07-27.pdf ("2011 CFTC Process Changes").
[12] 17 C.F.R. § 16.01. See also, *Core Principles and Other Requirements for Designated Contract Markets*, CFTC, 77 Fed. Reg. 36612, 36642 (June 19, 2012), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2012-12746a.pdf (explaining that "in making information available to the general public, as required in 16.01(e), DCMs should ensure that such information can be accessed by visitors to the Web site without the need to register, log in, provide a user name or obtain a password.").

These fees are material to customers who consume and distribute this data. For example, the CME and other exchanges have previously provided historical market information on a delayed basis free of charge. Now, according to the CME Fee Filing,

> **2. Historical Subscriber Feed Distribution License Fees**
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> An annual fee will be introduced for Historical Subscriber Feed Distribution. The Historical Subscriber Feed Distribution fee will apply to all Licensees externally distributing Historical Information via Data Feed Services. Fees will not be assessed where Historical Information is provided as an integral part of a real-time or delayed data Service to Subscribers (for example, through the provision of charts). Historical Information Distribution Licensees will be required to report Subscriber Feed Distribution – Historical Information, on a monthly basis.
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> Historical Subscriber Feed Distribution annual fees will be adjusted to the following:

License	CBOT	CME	COMEX	NYMEX	DME
Historical Subscriber Feed Distribution	$30,000	$30,000	$30,000	$30,000	$15,000

This new Historical Subscriber Feed Distribution fee would total a whopping $135,000 per year for data that is being provided for free today. This is a crushing new cost for many data distributors, and disproportionately harms smaller market participants.

Further, the CME is also seeking to require licensing for end-users, which essentially mandates third-party data distributors to provide CME with the identities of their customers. Once the customers' identities are obtained from the distributors, there are no restrictions to stop CME from seeking to market and sell their own historical data products directly to those customers.

The new fees and licensing requirements appear to be little more than an effort by CME to exploit its position as a DCM to drive customers away from other data distributors, and into its own "historical" market data product, CME DataMine.[13] This is clearly anti-competitive behavior, and an abuse of its privileged market position.

Unfortunately, despite the fact that the fee is significant, and is being imposed by a market regulator for access to essential market data, the Commission appears to have received no notice of it, engaged in no review, conducted no public notice or comment process, or taken any action. We suspect that this may be because the Commission is

[13] CME DataMine, Access Historical Data on CME Group Markets, *available at* https://www.cmegroup.com/market-data/datamine-historical-data.html (last accessed Dec. 2, 2020). CME claims DataMine provides "access [to] more than 450 terabytes of historical data almost instantaneously, using some of the most flexible data delivery methods available. Extensively back-test strategies using real benchmark markets that date back as far as the 1970s, to help you gauge profitability and risk."

relying upon its Rule 40.6, which covers the Commission's role with respect to DCM rule changes.

Rule 40.6 appears to break down DCM rules changes into three buckets, (1) rules for which self-certification, notice and comments, and other processes apply, (2) rules for which simply a "notice" to the Commission, but for which no other processes apply, and (3) rules for which the Commission declines to require receipt of timely notice of the change. Oddly, it is unclear how the Commission is able to comply with its obligations to oversee DCMs' rules when it is unaware of what those rules are, or how they comply with the Commodity Exchange Act and Commission regulations.

The Commission cannot simply adopt a rule in which it says that it will not perform its administrative duties. The Commission cannot categorically decline to review and consider broad swaths of rules changes that it deems are insufficiently consequential, when it is clear that those rules directly relate to the statutory obligations and purposes of the CEA. It must review, consider, and pass judgment on rule changes by DCMs. And that judgment must be based upon the Commission's obligations under both its own rules and the Administrative Procedures Act.

When faced with the Securities and Exchange Commission's rubber stamping of a self-regulatory organization's proposed imposition of new fees, the District of Columbia Circuit Court explained:

> To satisfy the "arbitrary and capricious" standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."[14]

In that case, the court held that an agency must make its own independent review and "'may [not] . . . delegate its responsibility to the regulated party.'"[15] So too here, the Commission seems to be simply permitting the CME's determination to stand, without any review or scrutiny for compliance with the CEA or Commission rules. That cannot withstand judicial scrutiny. The Commission must remedy its error,[16] and revise Rule 40.6 to ensure that it both reviews DCM rule changes and ensures compliance with the law and its own rules.

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[14] *Susquehanna Int'l Group LLP, et al, v. SEC*, 866 F.3d 442, 445 (D.C. Cir. 2017) (quoting *Motor Vehicle Manufacturers Ass'n, v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983)(quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962))).

[15] *Id*. at 446 (quoting *Gerber v. Norton*, 294 F.3d 173, 185-86 (D.C. Cir. 2002)).

[16] In 2011, the Commission preserved this deeply flawed, inadequate process that does not provide for public notice, comment, or CFTC consideration of rules changes. In so doing, the Commission simply noted that it was doing so in response to comments from the OCC. 2011 CFTC Process Changes.

Notably, when the Commission reaffirmed the Rule 40.6 process in 2011, it explicitly stated that Rule 40.6(d) was for "non-substantive" filings.[17] No reasonable party could conclude that this new fee increase for historical market data from zero dollars to $135,000 per year is "non-substantive."

Still further, while rules that are adopted through the self-certification process of Rule 40.6(a) are subject to subsequent Commission action, including a stay or disapproval, Rule 40.6 does not appear to even provide remedy for DCM rules adopted through reliance upon Rule 40.6(d). For example, the provisions outlining the Commission's authority to stay the implementation of DCM rules do not appear to cover rules for which self-certification is deemed unnecessary.[18] So, in this instance, what is the remedy for a rule that is made effective without self-certification pursuant to Rule 40.6(d)?

Could the CME revise its historical data prices to $1 million per year? What would prevent that from happening? What would be the recourse for market participants to challenge such a fee to the Commission? What is the standard against which this facially exorbitant fee would be measured? What would the impact be on market participants and the markets overall? What process could the Commission exercise to identify, assess, and address that impact?

It appears that the Commission has created a policy that permits DCM rules to be approved by the Commission without notice, comment, review, or recourse. The Commission simply cannot do that.

The Commission should promptly revise Rule 40.6 to ensure that all rules changes by Designated Contract Markets are reviewed and considered by the Commission for compliance with the Commodity Exchange Act and Commission regulations (whether adopted pursuant to self-certification or not).

Lastly, we note that CME is both a market participant and a regulator. It establishes rules for its members and for trading on its venues. As a government-sanctioned regulator itself, the CME cannot simply ignore the impacts of its rules and fee changes on market participants, competition, and the integrity of the marketplace overall. CME must consider the impacts of its fees; It hasn't.

Conclusion

We urge the Commission to promptly undertake action to stop the implementation of the CME Fee Changes. Further, the Commission's reliance on Rule 40.6 in this context is arbitrary and capricious, and is unsupported by the record.

[17] 76 Fed. Reg. at 44783.

[18] 17 C.F.R. § 40.6(c) ("The Commission may stay the certification of a new rule or rule amendment submitted pursuant to paragraph (a) of this section by issuing a notification informing the registered entity that the Commission is staying the certification of the rule or rule amendment…").

We accordingly urge the Commission to revise Rule 40.6 and take such other actions as may be necessary to provide for the review and consideration of DCM rule filings, so as to ensure compliance with the Commodity Exchange Act and Commission regulations.

Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact me at (402) 312-7918.

Sincerely,

Chris Nagy
Research Director

Cc: Hon. Brian Quintenz
Hon. Rostin Behnam
Hon. Dawn Stump
Hon. Dan Berkovitz