

November 19, 2024

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

Re:

- Petition for Rulemaking to Amend Rule 40.6
- Petition for the Commission to Review and Disapprove CME Group 2025 Fee and License Changes<sup>1</sup>
- Petition for the Commission to Abrogate 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; and CME Group Data Licensing Policy Guidelines Non-Display Use<sup>2</sup>

Dear Chairman Behnam:

We<sup>3</sup> write to urge the Commission to perform its statutory obligation to ensure rules by designated contract markets (DCMs) comply with the Commodity Exchange Act and Commission rules.

Specifically, the Commission should:

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<sup>1</sup> On or about September 26, 2024, CME Group communicated to one or more customers a notice titled *2025 Fee & Policy Adjustments Futures and Options*. That document outlines several dramatic changes to data provision by CME and related costs. CME Group, *2025 Fee & Policy Adjustments Futures and Options* ("2025 Data and Fee Changes").

<sup>2</sup> *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>, (originally emailed from CME to Customers Sept. 30, 2020) (subsequently updated Dec. 2023) (last viewed Oct. 28, 2024). 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 Fees". (Collectively, 2021 CME Data and Fee Changes).

<sup>3</sup> To learn more about Healthy Markets or our members, please see our website at <http://healthymarkets.org>.

- Revise Rule 40.6 to ensure that the Commission is aware of the substance and impacts of DCM rules, and able to effectively ensure that such rules comply with the substantive requirements of the CEA and Commission rules;
- Stay, review, and disapprove the 2025 Data and Fee Changes; and
- Abrogate changes that CME implemented in 2021, as those changes were adopted despite clearly being inconsistent with the CEA and Commission rules, and remain inconsistent with the law.

**Background**

For decades, historical commodity futures market data had been freely available. Trading prices were (and are) published in newspapers and digital media. This isn't by accident. Designated Contract Market 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, Commission regulations explicitly declare that reporting markets "must make the information ... readily available to the news media and the general public without charge, in a format that readily enables the consideration of such data, no later than the business day following the day to which the information pertains."<sup>4</sup>

Nevertheless, beginning in 2021, the CME revised its rules and added new "guidance," to increase the rates for data, and impose new fees on entirely new categories of data.

For example, the CME (like other DCMs) previously provided historical market information on a delayed basis free of charge. Now, according to the 2021 CME Data and Fee Changes communications to their customers:

**2. Historical Subscriber Feed Distribution License Fees**

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.

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 added a whopping \$135,000 to subscribers of all of its venues – per year – for data that was previously provided for

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<sup>4</sup> 17 CFR § 16.01.

free. It was a crushing new cost for many data distributors, and disproportionately harms smaller market participants.

Separately, CME began requiring licensing for end-users, which essentially mandated third-party data distributors to provide CME with the identities of their customers. This permitted CME to directly market and sell its own historical data products (e.g., CME DataMine<sup>5</sup>) directly to its competitors' customers. This is clearly anti-competitive behavior, and an abuse of its privileged market position.

Since then, CME stopped timely publication of its Daily Bulletin.<sup>6</sup> While previously provided shortly after the close of the trading day,<sup>7</sup> this information is now made available the next day, and isn't finalized until 10am Central Time the next day.<sup>8</sup> This delay makes it difficult, if not impossible, for firms to reconcile their systems or use this information for risk monitoring (such as for opening margin calls) or other purposes.

However, the CME has resolved this problem of its own creation by now separately providing that information in a more timely manner pursuant to its own pay-for-data product, CME DataMine (End-of-Day Market Summary – Premium Plus), which it makes available for \$2,173 per month.<sup>9</sup>

Because the Commission has failed to intervene to protect investors and other market participants by blocking the CME Date and Fee Changes, despite pleas from market participants,<sup>10</sup> data providers have essentially been compelled to acquiesce to the terms imposed by CME or exit the business. The costs of the new fees is material for both data providers and their customers, including farmers and other commodity producers.

With respect to the 2021 CME Data and Fee Changes, there is nothing in the public record to reflect the Commission receiving timely notice of them, engaging in any public review, conducting any public notice or comment process, or taking any action. The CME didn't stop in 2021.

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<sup>5</sup> 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.”

<sup>6</sup> CME, Daily Bulletin, *available at* <https://www.cmegroup.com/market-data/daily-bulletin.html> (last viewed Oct. 25, 2024).

<sup>7</sup> Data was typically provided around 4pm CST through a Preliminary Bulletin and around 6:30pm CST for the Final Bulletin.

<sup>8</sup> CME, Daily Bulletin, *available at* <https://www.cmegroup.com/market-data/daily-bulletin.html> (last viewed Oct. 25, 2024)(“Below is the previous trade date Daily Bulletin. Preliminary Daily Bulletin updates at approximately 12:00 a.m. CT the following business day and the Final Daily Bulletin updates at 10:00 a.m. CT next business day.”).

<sup>9</sup> CME Group, End-of-Day Market Summary – Premium Plus from CME DataMine, *available at* <https://datamine.cmegroup.com/#/datasets/STLPREMPLS> (“These files are delivered intraday at the same time they are delivered on FTP. The CBOT and CME early files come through around 3:05 PM and the NYMEX and COMEX around 5 PM.”)(last viewed Nov. 8, 2024).

<sup>10</sup> See, e.g., Letter from Tyler Gellasch, HMA, to Hon. Heath Tarbert, CFTC, Dec. 11, 2020, *available at* <https://healthymarkets.org/wp-content/uploads/2020/12/CME-Historical-Data-12-11-2020-4.pdf> (“HMA Letter”).

In September 2024, the CME Group notified customers that it would:

- terminate End-of-Day data licenses, effective April 1, 2025.<sup>11</sup>
- stop offering “Quote Information packages ... to new customers” effective January 1, 2025;<sup>12</sup>
- revise its definition of “Non-Display Use”;<sup>13</sup>
- terminate “all Delayed licenses for Non-Display Use of Information”;<sup>14</sup>
- terminate its “Delayed No Charge Website” product;<sup>15</sup> and
- materially revise its fees.

The consequences of each of these changes will be profound. For example, by terminating the “End-of-Day” licenses, this information then becomes subject to delayed data fees.

To take this out of the abstract, if a data customer wants end-of-day data via a data feed for accounting, margins, risk management, analysis, etc., it would need to now be subject to the Delayed Data Feed Fee (\$293.90 per month) for each of the four CME Group DCMs. Further, it would also have to pay the Non-Display Fees, which apply to anything but simply “display only” of the data. These fees range from \$351 to \$589 per month. And that would need to be paid for each of CME Group’s four DCMs.

Totaling these new fees, a customer may suddenly see the data costs for what is now essentially free end-of-day data jump to approximately \$42,000 per year! These new fees will negatively impact thousands of market participants, and act as a significant inhibitor to competition.<sup>16</sup> Rising data costs have already pushed smaller firms out of the markets.<sup>17</sup>

There is nothing in the public record to reflect the Commission receiving timely notice of them, engaging in any public review, conducting any public notice or comment process, or taking any action. To the contrary, the entire notice to customers from CME is less than two pages long, and the details offer no substantive analysis or explanations.

### *Commission’s Procedures for Reviewing DCM Filings are Inconsistent With Its Statutory Obligations*

The CEA makes it clear that the Commission is tasked with enforcing DCMs’ compliance with its requirements.

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<sup>11</sup> 2025 Data and Fee Changes.

<sup>12</sup> 2025 Data and Fee Changes.

<sup>13</sup> 2025 Data and Fee Changes.

<sup>14</sup> 2025 Data and Fee Changes.

<sup>15</sup> 2025 Data and Fee Changes.

<sup>16</sup> The Commission is well aware of the value of numerous, diverse speculators in its markets. See, e.g., Celso Brunetti and Bahattin Buyuksahin, *Is Speculation Destabilizing?*, CFTC, Apr. 22, 2009, available at [https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/plstudy\\_03\\_cftc.pdf](https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/plstudy_03_cftc.pdf).

However, the imposition of significant new costs for essential market information will disproportionately negatively impact smaller and newer firms looking to compete in the marketplace.

<sup>17</sup> Lynne Marek, *Another big Chicago trading name exits*, Crains Chicago Business, Dec. 12, 2018, available at <https://www.chicagobusiness.com/finance-banking/another-big-chicago-trading-name-exits>.

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.”<sup>18</sup> 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.<sup>19</sup>

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.”<sup>20</sup>

We do not see how the processes set forth in Rule 40.6 are consistent with the CEA or the Administrative Procedures Act. As HMA wrote to the Commission approximately four years ago,

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.<sup>21</sup>

The Commission’s lack of procedural review and consideration is far more egregious than practices that have already been rejected as insufficient by the Court of Appeals for the District of Columbia Circuit. For example, like the Commission, the Securities and Exchange Commission is required to ensure that its exchanges’ rules comply with the law and that Commission’s rules. A number of years ago, when the Options Clearing Corporation adopted a rule with limited review and analysis by the Commission, the Court struck it down. In rejecting the SEC’s approval of that rule change, the Court explained:

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<sup>18</sup> 17 C.F.R. § 40.6(d)(1).

<sup>19</sup> 17 C.F.R. § 40.6(d)(3)(E).

<sup>20</sup> *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”).

<sup>21</sup> HMA Letter.

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.”<sup>22</sup>

The Court held that an agency must make its own independent review and “may [not] ... delegate its responsibility to the regulated party.”<sup>23</sup> 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.<sup>24</sup>

### *The 2021 and 2025 CME Changes Are Inconsistent with the Law*

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.”<sup>25</sup> The purpose of these rules is to ensure that the public has access to essential information about the markets under the Commission’s jurisdiction.

The 2021 Data and Fee Changes and, now, the 2025 Data and Fee Changes preclude that.

Lastly, DCM Core Principle 2 requires DCMs to provide “impartial access” to the markets. However, by placing data that used to be freely available behind enormous, and rapidly evolving pay walls, that access is now limited to those firms that are able to absorb the significant new costs, undermining market liquidity and inhibiting competition. Prohibitive paywalls provide for discriminatory access, not impartial.

### **Conclusion**

The Commission’s failure to engage in any meaningful collection of information or analysis of the 2021 Data and Fee Changes and 2025 Data and Fee Changes is

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<sup>22</sup> *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))).

<sup>23</sup> *Id.* at 446 (quoting *Gerber v. Norton*, 294 F.3d 173, 185-86 (D.C. Cir. 2002)).

<sup>24</sup> 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.

<sup>25</sup> 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.”).

arbitrary and capricious, and its passive support of the implementation of these changes is unsupported by the essentially non-existent administrative record. Lastly, the 2021 CME Data and Fee Changes and the 2025 CME Data and Fee Changes appear to be facially inconsistent with the law and Commission rules.

For each of these reasons, the Commission should promptly vacate the 2021 CME Data and Fee Changes and block the 2025 Data and Fee Changes.

Further, because the process used by CME to implement both sets of changes does not adequately ensure the Commission is accurately fulfilling its responsibilities under the CEA and the Administrative Procedure Act, we urge you to promptly review and revise Rule 40.6.

As part of that review, we recommend that the Commission implement the recommendations of Project 2025 to require all SROs to “conduct meaningful cost-benefit analysis as part of the rulemaking process with respect to major rules” and “publish rules in proposed format and seek public comment before they are submitted” to regulators.<sup>26</sup>

Should you have any questions or would like to discuss these matters further, please contact Tyler Gellasch at (202) 909-6138.

Sincerely,



Tyler Gellasch  
President and CEO  
HMA

Cc: Hon. Kristin Johnson  
Hon. Christy Goldsmith Romero  
Hon. Summer Mersinger  
Hon. Caroline Pham

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<sup>26</sup> The Heritage Foundation, Project 2025: Mandate for Leadership, *Financial Regulatory Agencies*, Chapter 27, available at [https://static.project2025.org/2025\\_MandateForLeadership\\_CHAPTER-27.pdf](https://static.project2025.org/2025_MandateForLeadership_CHAPTER-27.pdf) (last viewed Nov. 12, 2024).