HMA | HEALTHY MARKETS ASSOCIATION
A MEMBER ORGANIZATION

March 6, 2025

Via Electronic Mail (rule-comments@sec.gov)

Hon. Mark Uyeda, Acting Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Petition to Revise Publication Process for Self-Regulatory Organization Filings

Dear Acting Chairman Uyeda:

The Healthy Markets Association[1] writes to petition the Securities and Exchange Commission to reverse the recent elimination from the Federal Register of nearly any discussion of rule changes by national securities exchanges related to fees or accessing the market data that market participants are required to provide the exchanges for exchange consolidation.

The new publication process deprives market participants of the opportunity to timely consider in order to provide informed comment, is contrary to the law, and should be reversed.

Background

As you know, because of their central roles in our capital markets, national securities exchanges 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.[2]

For decades, the SEC staff reviewed and summarized these exchange filings, including their purported justifications and compliance with the law, and released that document for solicitation of public comment and published it in the Federal Register. Market participants, advocacy groups, experts, and the press have all come to use those documents to identify filings to which they need to pay attention, and evaluate potential comments.

Process Change

Effective January 1, 2025, without any prior notice to the public (much less, solicitation of any comments), the Commission staff changed its process in a way that materially increases the burdens on market participants to identify, review, assess, and comment on exchanges' filings.

---

[1] The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at http://healthymarkets.org.

[2] Specifically, under Section 3(a)(26) of the Exchange Act, each National Securities Exchange registered with the agency is granted self-regulatory organization (SRO) status, subject to the Commission's oversight.[2] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

Specifically, the Commission's notification to the public and submission to the Federal Register began to omit essentially all substantive information. Instead, the Commission staff has simply drafted for each change a curt, typically two-page document saying essentially that a rule change was submitted, and then purportedly linking to the proposed rule change. For example, consider the contrast between the older format (12 pages),[3] and the newer one (3 pages),[4] for essentially the same type of filing from Nasdaq BX.

Discussion and Analysis

The New Process is Inconsistent with the Administrative Procedure Act.

The Federal Register serves an important role in ensuring that the public has adequate notice of the substance of the government's rulemaking.[5] But the SEC's new filing system fails to do that.

The Administrative Procedure Act requires agencies to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content. Section 553 of the APA stipulates the substance that an agency must include in a proposed rule to provide adequate notice to the public. The Federal Register notice must include, for example:

1. the time, place, and nature of public rule making proceedings;
2. the legal authority under which the rule is proposed;
3. either the terms or substance of the proposed rule or a description of the subjects and issues involved; and
4. the Internet address of a summary of not more than 100 words in length of the proposed rule, in plain language, that shall be posted on the Internet website under section 206(d) of the E-Government Act of 2002 (commonly known as Regulations.gov).

While the SEC staff had historically published a fairly robust description of the rule and its purported justification and compliance with the law, the SEC has now eliminated from the Federal Register nearly any discussion of the proposed rule and instead merely identifies the high-level subject of the rulemaking.

There is no longer any description of the rule, the issues involved, or how it would impact or apply to market participants. Therefore, participants using the Federal Register have no ability to participate in the rulemaking process and certainly would not be put on notice of the issues raised, much less be able to comment upon them.

---

[3] *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend BX Options 7, Section 3,* SEC, Exch. Act Rel. No. 101942, (Dec. 17, 2024), *available at* https://www.sec.gov/files/rules/sro/phlx/2024/34-101942.pdf.

[4] *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Increase the Exchange's Port Fees in BX Options 7, Section 3,* SEC, Exch. Act Rel. No. 102087 (Jan. 3, 2025), *available at* https://www.sec.gov/files/rules/sro/bx/2025/34-102087.pdf.

[5] See generally, Neil Gorsuch and Janie Nitze, *Over Ruled: The Human Toll of Too Much Law,* (2024).

In order to find out virtually anything about the proposal, interested parties would need to look beyond the Federal Register to either the SEC or the exchange's website (which the SEC does not control). This is clearly not how the Federal Register was intended to function. The whole point of the Federal Register was for the agency to provide notice in one place of the substantive proposal at stake and how that proposal would impact the firms and the markets. That isn't what's happening now.

A link to the exchange's website does not in fact provide constructive notice and is an insufficient remedy. Among other reasons, the links to the exchanges' websites are frequently broken or do not direct an interested individual to the actual filings. Moreover, publishing a link is inconsistent with the E-Government Act of 2002,[6] and SEC's initial Office of Management and Budget E-Government Act annual (compliance) report.[7][2] The Commission noted in that report that "Self-Regulatory Organization Rulemaking" is "Information frequently requested by the public" and was therefore assigned priority level 3 – where the SRO documents are "typically is posted the same day it is received."[8]

Market participants and experts are often unable to identify the correct filings, based upon the links provided to date. Further, market participants cannot even be sure that the filing they are reviewing is in fact the correct filing, since filings are frequently withdrawn and resubmitted, and it is difficult to differentiate between very similar submissions. Additionally, we are not aware of any requirement for SROs to retain public access to documents and links for historical lineage and to preserve a record. Not only is this a valuable service that the Commission's website currently provides, the E-Government Act of 2002 requires that the Commission use its website to organize, preserve and make these specific SRO documents accessible to the public.[9] Linking to a website outside of the Commission's control that may change doesn't do that.

The New Process is Inconsistent with the Securities Exchange Act of 1934.

Section 19(b)(1) of the Exchange Act, stipulates that in order for an exchange to establish or amend a rule, it must file copies of any proposed rule accompanied by a concise general statement of the basis and purpose of such proposed rule change. After the exchange filing has been received by the SEC, under Section 19(b)(1), the SEC must *"as soon as practicable after the date of the filing...publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved.*" (emphasis added).

Further, under Section (19)(b)(2)(E), after the Commission publishes the notice on its website, "the Commission shall thereafter send the notice to the Federal Register for publication thereof under paragraph (1) within 15 days of the date on which such website publication is made..."

---

[6] Public Law 107-347, *available at* https://www.govinfo.gov/app/details/PLAW-107publ347.
[7] See email from Lewis Walker, Chief Information Officer (Acting), Office of Information Technology, SEC, to Sarah Siddiqui and Karen Evans, E-Government and Information Technology, Office of Mgmt and Budget, at 6, *available at* https://www.sec.gov/files/secegov2008.pdf.
[8] Id., at 6.
[9] See Public Law 107-347, 116 STAT. 2916, SEC. 207(a), Accessibility, Usability, And Preservation of Government Information – Purpose.

So under the Exchange Act, the Commission is independently statutorily required to publish a notice of the proposed rule "together with the terms of substance of the proposed rule change or a description of the subject and issues involved," and send that notice to the Federal Register for publication there. The agency is clearly not doing this as the substantive description of the rule is being separated from the Commission's notice and is not being submitted "together" to the Federal Register.

The New Process is Inconsistent with Effective Exchange Oversight.

Under the Commission'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.[10]

The Commission's decision to no longer apply basic Administrative Procedures Act requirements to these rule changes by SROs stands to make it almost impossible for market participants to challenge such rule changes or even to understand them. In order to find out virtually anything about the proposals, interested parties need to look beyond the Federal Register, to either the Commission's or the exchange's website (which the Commission does not control).

HMA reviews every single SRO filing each week, summarizes them, and flags what we interpret as the most likely to be impactful to several dozen leading organizations each week, including banks, brokers, exchanges, data providers, investment advisers, pensions, and non-profit organizations. The new process has dramatically increased the time required by us to identify, review, and summarize each filing. That is because instead of going to a single place and seeing all of the relevant information, we must now go to several links (some of which may or may not be direct or erroneous), and seek to piece together information from multiple sources. Further, whereas the Commission staff would readily connect related filings in their summaries, the new process may leave that up to the discretion of the SRO making the filing.

As a result, with effectively no notice, the Commission's decision imposed upon HMA thousands of dollars in technology costs and dozens of extra hours each week to track and review filings. Worse, information that used to be at our disposal – because it was flagged by Commission staff – is now often lost. We may not be aware of some of the issues considered or raised by the agency's expert staff. In fact, under the new process, there is no longer any evidence that the staff has even reviewed the filings to understand them – as it ultimately must.

This new process – again, for which we were provided no warning or opportunity to comment upon – has had very concrete negative impacts upon not just HMA, but the dozens of firms and hundreds of people who rely upon us to review and identify filings of interest to them.

[10] 15 U.S.C.§ 78f(b).

There is No Conceivable Scenario Where the "Benefits" to the Commission from this New Process Outweigh the Aggregate Cost to the Public.

FWe are not aware of the Commission or its staff undertaking any reasonable cost-benefit analysis of its dramatic process change, as it solicited no public comment and provided no public analysis. However, were it to have engaged in an analysis, it would have performed an analysis of the change, it would have been clear that the change is unwise. The new process does not obviate the need for the staff to prepare a summary of an SRO proposal, including a discussion of salient issues. This will still need to be completed as part of the staff's internal SRO rule proposal review process and work product so as to ensure the filings' compliance with the law and Commission rules. Moreover, if we assume that there are nevertheless some Commission cost savings, those savings are more than swamped by the transfer of new, direct costs to the public. Consider the multiplier effect - rather than rely upon the expert Commission staff's summaries and consolidation of information, each interested party will now need to review an entire SRO proposal (rather than review a staff summary) to determine if the SRO's proposal is material to them and if it adversely impacts them. If we assume that this change in staff process creates some cost savings, there is no scenario where any co-called benefits outweigh the costs to the public in the aggregate.

*The Process *Before* the Recent Changes Was Inadequate*

For several years, HMA and others have been raising concerns with agency's failure to satisfy its obligations under Section 3(a)(26) of the Exchange Act, including its obligation 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.

In October 2021, HMA sent a letter to then-Chairman Gensler urging him to moderinze the fee filing and review processes to better ensure compliance with the law and protect investors.[11]

In August, 2022, several organizations sent a letter to then-Chairman Gensler urging him to modernize the agency's SRO rule change filing processes to ensure that fee filings comply with the Exchange Act and to better protect investors and other market participants.

Senate appropriators raised concerns with the Commission's oversight of SRO rulemaking processes. as part of the Fiscal Year 2023 committee report.[12]

And more recently, Project 2025 recommended that the Commission require all SROs to "conduct meaningful cost-benefit analysis as part of the rulemaking process with respect to

[11] Letter from Tyler Gellasch, HMA, to Hon. Gary Gensler, SEC, Oct. 29, 2021, *available at* https://www.sec.gov/files/rules/petitions/2021/petn4-778.pdf.

[12] The Senate Report that accompanied the FY 2023 Financial Services and General Government Appropriations Act noted that "The Committee is concerned that the SEC's current review process of proposed rule changes may allow registered securities exchanges to circumvent regulatory controls,' and 'encourage[d] the SEC to consider revising its review process to ensure compliance with the Securities Exchange Act of 1934."

major rules" and "publish rules in proposed format and seek public comment before they are submitted" to regulators.[13]

Regrettably, the Commission taken no tangible actions to address the concerns raised, and has now made the situation even worse.

We ask you to correct course.

The Commission should immediately resume full publication of proposed SRO rule changes in the Federal Register, including summaries, justifications, and reviews of key issues. Links alone are insufficient.

More broadly, we reiterate our request that the Commission take proactive steps to address the inordinate growth and complexity of rule modifications by national securities exchanges, which went from several dozen per year, to well over a thousand.[14] Action is long overdue.

First, the Commission should direct the staff to more thoroughly review SRO filings to ensure compliance with the law and Commission rules, and readily exercise its authority to suspend and initiate proceedings to consider disapproval of exchanges' rules that might otherwise be "effective upon filing."[15]

Second, the Commission should revise its rules to ensure that market participants and members of the public have sufficient time and information they need to review, comment upon, test, and implement any necessary changes resulting from an exchange rule change. For example, the agency should require exchanges to post all filings on their websites at least 30 days prior to filing and potential effectiveness. Further, the Commission should enhance the information required in SRO filings so as to ensure the Commission staff, market participants, and the public have all of the relevant information with which to make informed decisions about the change and its impacts. For example, the Commission should require exchanges to disclose the number of market participants who qualify for a particular pricing tier on a monthly basis, and disclose all communications (not just written) with any market participants about their SRO fee filings, both before the filings are made and thereafter, and furnish enhanced disclosures with respect to order routing incentives and practices. Further, the Commission should seek to codify its May 2019 SRO Fee Filing Guidance,[16] which appears to be largely ignored by some SROs, while followed by others.

Third, the Commission should expressly prohibit some well-known abuses. For example, it should prohibit retroactive fee changes and clarify that a filing isn't "new" or "initial" if it

---

[13] The Heritage Foundation, *Project 2025: Mandate for Leadership, Financial Regulatory Agencies*, Chapter 27, *available at* https://static.project2025.org/2025_MandateForLeadership_CHAPTER-27.pdf (last viewed Mar. 5, 2025).

[14] For example, from 2003 to 2021, SRO filings grew in number from under 70 to over 1300. See https://financialservices.house.gov/uploadedfiles/hhrg-117-ba16-20220330-sd002.pdf.

[15] *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).

[16] *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, *available at* https://www.sec.gov/about/staff-guidance-sro-rule-filings-fees.

substantively similar to and replaces a filing that has been withdrawn or suspended within the recent past, such as past six months. As we have written about repeatedly, several exchanges have made filings, received non-public pushback from Commission staff or had those filings publicly suspended, only to withdraw those filings and refile a substantively identical filing as a "new" filing later that day or within the next few days. In this way, the SROs have been able to continue to collect fees for – at times – more than a year – even though a substantively identical filing was withdrawn or suspended as potentially non-compliant with the law and Commission rules.

Lastly, the Commission should ensure that everyone has a amount of reasonable time for review of these filings, before they become effective, so that all stakeholders (and the Commission staff) can understand their potential impact on products, pricing, investors, and technology. Accordingly, the SEC should work with Congress to rescind the "effective upon filing" status for SRO fee filings or take other steps 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.

Conclusion

We urge you to promptly reverse the Commission's unannounced, unwarranted, and facially foolish decision to dispense with fulsome notice and comment requirements for exchange rule changes.

Longer term, we urge you to consider more significant reforms to improve the ability of market participants, the public, and the Commission staff to identify and fully consider issues raised by SRO filings, including their compliance with the law and Commission rules.

If you have any questions, please contact me at (202) 909-6138 or ty@healthymarkets.org. Thank you for your consideration.

Sincerely,

President and CEO
Healthy Markets Association

Cc: Hon. Hester Peirce, Commissioner
Hon. Caroline Crenshaw, Commissioner