



Oscar N. Onyema
Senior Vice President and
Chief Administrative Officer
Office of the Chairman

American Stock Exchange
86 Trinity Place
New York, New York
T 212.306.1243
F 212.306.1152
oscar.onyema@amex.com

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Via Electronic Submission and Overnight Courier

Ms. Nancy Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

**Re: Statement in Support of Action Made by Delegated Authority
Release No. 34-54597, File No. SR-NYSEArca-2006-21**

Dear Ms. Morris:

The American Stock Exchange LLC (“Amex”) appreciates the opportunity to comment on the Commission’s order granting the petition of NetCoalition for review of the above-referenced approval order. The Amex supports the action taken by the Securities and Exchange Commission (“SEC” or the “Commission”) staff, pursuant to delegated authority, to approve NYSEArca’s fees that were the subject of the Approval Order (“Approval Order”). The Amex believes that the SEC staff acted in accordance with applicable law and SEC precedents in reviewing and approving the NYSEArca filing, and that the broader public policy questions raised by the NetCoalition petition should be addressed (if at all) in the context of Commission rulemaking, rather than in connection with the NYSEArca filing or other specific market data fee filings that are now pending at the SEC.

Incentives for Providing Greater Transparency

Unlike “core” data (*i.e.*, quotation and last sale information that exchanges are legally required to submit to processors under the NMS Plans), exchanges are not required to distribute depth of book or other proprietary data, as is some of the data that is the subject of NYSEArca’s fee proposal. These products are developed by exchanges and are distributed to the public purely on a voluntary basis. In the absence of a regulatory mandate to distribute the data, the Amex believes that exchanges should have a financial incentive to produce innovative new market data products. The users of this data buy the data if it provides them value and is priced reasonably. The determination of reasonable pricing of such data should be left to competitive forces, which are very much

alive in the exchange industry. As the Commission is aware, exchanges compete on several levels, including in the sale of proprietary data.

Exchanges spend large sums of money developing and maintaining trading technologies. The information produced by these systems can provide significant market transparency. In order to distribute the data to the public, exchanges incur significant expenses enhancing the data and building distribution channels. A meaningful financial incentive would encourage markets to invest the money necessary to develop these products. In the event that exchanges are not able to extract some return on their investment, and choose not to distribute non-core data, investors and the marketplace as a whole would be worse off.

In adopting Regulation NMS, the Commission liberalized the ability of exchanges to distribute market data outside of the National Market System Plans, and considered the legal standards that should apply to the terms on which that data was distributed.¹ Although some commentators had previously called for the Commission to mandate markets to disseminate more types of market data,² including depth of book information, the Commission determined to regulate neither the publication of such information nor the specific terms (including fees) under which a market would make such information available to the public, if at all. Rather, the Commission chose to require that the terms of data dissemination be subject to the general fairness and nondiscrimination standards in Rule 603 of Regulation NMS (and, in the case of exchange fees, Sections 6(b)(4) and (5) of the Exchange Act), and otherwise to leave to free market forces the determination of what information would be provided and at what price.³ This is consistent with established Commission precedents which generally apply the standards set forth in, and implied by, Section 11A of the Securities Exchange Act of 1934 (“Exchange Act”) (including wide availability of market regulation, neutrality of fees, quality of market information, fair competition and equal regulation), rather than a cost recovery “ratemaking” analysis to market data fee filings.⁴

The Commission staff’s action in approving NYSEArca’s fees under delegated authority was careful and deliberative. Moreover, the staff applied an appropriate legal standard in its handling of the filing, consistent with past Commission action.

Value vs. Cost Based Pricing for Proprietary Data

NetCoalition’s petition for review amounts to attempting to dictate the business model of exchanges. There are a number of exchanges that already charge for depth of

¹ See Adopting Release for Regulation NMS, Release No. 34-51808, 70 FR 37496 (June 29, 2005) (Regulation NMS Adopting Release), at 37566-7.

² See Report of the Advisory Committee on Market Information (September 14, 2001) at page 48, text accompanying footnote 231.

³ Regulation NMS Adopting Release at page 37567.

⁴ Concept Release on Regulation of Market Information Fees and Revenues, Release No. 34-42208 (December 9, 1999) at page 33.

book products. It is our understanding that these products are quite successful and their subscriber rates have increased steadily since their introduction. If there is public demand for the products and a willingness to pay for the data as evidenced by the success of existing market data products, exchanges should be allowed to charge competitive rates for such products.⁵ Indeed, Amex believes that the growth rate in subscription of proprietary data is higher than that of core data, and that subscribers obtain value from the data. NetCoalition members have benefited directly from this growth by obtaining depth of book data to attract web traffic and then selling advertisements. Insisting that exchange fees for depth of book data should be based on cost, rather than value, is not logical. It is equivalent to NetCoalition members being required to provide free space or a cost based fee to advertisers on their web pages because they obtained the depth of book data for free or at cost.

Uneven Competitive Environment

The Amex believes that the Commission will create an uneven playing field if it denies exchanges with pending rule filings the right to charge for depth of book data, when there are other exchanges that currently charge for the same data pursuant to SEC approval. To allow some competitors the opportunity to make a profit through the generation or use of market information, and deny others the same, is not consistent with the SEC's mandate to create a national market system that fosters competition between markets and within the marketplace. This would create an unintended burden on competition that is inconsistent with the principles of the Exchange Act⁶ and the specific requirement of "equal regulation" that applies in the context of market data.⁷

Procedure

Although Amex does not dispute the significance of the policy issues surrounding market data, Amex believes that if the Commission determines to modify existing standards for SRO market data fees, or establish new standards, it should do so pursuant to rulemaking. In that way, it will permit all interested persons notice and the opportunity to comment on any changes. Also, such a process will carry with it all of the procedural safeguards (including a cost-benefit analysis, a review of impacts on efficiency, competition and capital formation and regulatory Flexibility Act analysis) that attend formal rulemaking by the Commission. Such a process, rather than a substantive action in the context of reviewing the NYSEArca fee proposal, is more likely to result in informed and balanced policymaking.

⁵ Indeed, we believe that the Commission's approach to market data fees has been, in general, to rely largely on the ability of the NMS Plans or other data providers "to negotiate fees that are acceptable to SRO members, information vendors, investors and other interested parties" in establishing appropriate fee levels. *See* Concept Release Concerning Self-Regulation, Release No. 34-50700 (November 18, 2004) at page 51.

⁶ *C.f.*, Sections 3(f), 6(b)(5) and 23(a)(2) of the Securities Exchange Act.

⁷ Section 11A(c)(1)(F) of the Exchange Act.

Moreover, given the rapid pace of change in the equities market, with the introduction of many new trading platforms and the phase-in of Regulation NMS, the Commission needs to be nimble in its processing of exchange rule filings, and particularly those that pertain to the dissemination of data products on these new and evolving markets. Amex respectfully urges the Commission to allow its staff to continue to use delegated authority in reviewing proprietary data fee filings as the Commission considers what action, if any, is appropriate with respect to market data fees generally.

Conclusion and Recommendation

It is our understanding that the SEC plans to revisit the market data debate regarding ownership of data and fees that exchanges charge for market data.⁸ The Amex believes that the most prudent solution would be for the SEC to reaffirm the staff's approval, under delegated authority, of the NYSEArca fees and then to consider whether any action is appropriate as part of a rulemaking process.

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The Exchange appreciates the opportunity to submit its views in the above referenced matter. If the Commission or members of its staff have questions concerning any matters raised in this letter, please contact me at (212) 306-1243.

Sincerely yours,



Oscar N. Onyema
Senior Vice President and Chief Administrative Officer

Cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette L. Nazareth, Commissioner
The Hon. Kathleen L. Casey, Commissioner
Erik Sirri, Director, SEC Division of Market Regulation
Robert Colby, Deputy Director, SEC Division of Market Regulation

⁸ Regulation NMS Adopting Release at page 37560-1, text accompanying footnotes 579-589.