



December 12, 2018

Via Electronic Mail

Brett Redfearn, Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20002

Peter Driscoll, Director
Office of Compliance Inspections and Examinations
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20002

Re: Concerns Regarding Certain Exchange Market Data Practices

Dear Directors Redfearn and Driscoll,

We write to express our concern with certain exchange practices related to market data sales and oversight. In particular, we are concerned that exchanges and their affiliates may be engaging in anti-competitive behavior and other unfair practices related to their audits of market data and sales of historical data.

These practices suggest that exchanges and their affiliates are essentially utilizing their business units and regulatory powers in a coordinated manner as to maximize their profits, but which may be inconsistent with existing rules and public policy. We urge you to explore these issues and to take appropriate action as may be necessary to protect investors, reduce undue burdens on competition, and promote fair and efficient markets.

Market Data Audits

Parties who have licensed exchange market data products must agree to subject themselves to “audits” by the exchange.¹ Market participants (and particularly data vendors) need access to exchange market data products². Accordingly, exchanges or

¹ See, e.g., Vendor/computer input user agreements required for the CTA and CQ Plans.

² Notably, in 1990, the CTA and CQ Plans changed the inspection provision to only such subscriber premises as receive the market data. *Filing and Immediate Effectiveness of Amendments to the Consolidated Tape Association Plan and to the Consolidated Quotation Plan*, Sec. and Exch. Comm'n, 55

their designees who act as auditors have tremendous leverage over market participants in the audit process.

The contours of the rights and obligations of the parties are not clearly laid out anywhere other than the contracts. There do not appear to be any clear standards, codes of conduct, or other relevant expectations for the parties. Unfortunately, we have reason to believe that exchanges have weaponized this process to deter competition.

Several examples include:

- **Give Up Your Customers:** It is a common exchange practice for the “audit” team to request, and be provided with, specific identities of customers of a data vendor. Worse, we understand executives from one exchange affiliate contacted customers whose names had been recently provided pursuant to an audit. Perhaps coincidentally, executives of an exchange affiliate also thereafter solicited some of those customers for its own sales of similar data products.
- **We’ll Be More Permissive:** Exchanges and their affiliates offer data products that frequently compete with similar products by third-party vendors. We understand that one exchange has suggested that it would be more permissive in the application of its usage policies to direct customers than it would be for other vendors.
- **We’ll Define It How We Want To:** We understand neither an exchange nor its designated auditor have been willing to provide vendors with clarifications or definitions on how to properly qualify customers under the policies, and have sometimes relied on using “LinkedIn” profiles and other information to make determinations. Because there is no clearly acceptable “know-your-customer” process that is deemed sufficient under the shifting policies, vendors may be subjected to significant changes and resulting charges.

Of course, if a vendor disagrees with the findings of an audit and refuses to pay the bill (for whatever reason, substantiated or not), the exchange has the ability to simply stop providing future market data, which may be essential to the vendor’s business. Vendors -- particularly smaller ones -- simply have no leverage, and so will ultimately be forced to pay.

These examples and more raise a number of significant questions, including:

- What policies, procedures, and practices determine when and under what circumstances an exchange may initiate an audit?
- What policies, procedures, and practices govern the audit process, including any are the standards for conducting such audits?
- What conflicts of interest policies of the exchanges, if any, govern exchange audits?



- To whom may audit details be shared by the auditing exchange? Is exchange audit information ever shared with individuals, business units, or affiliates who are engaged in marketing, sales, or other similar functions? If so, under what circumstances?
- Are exchange audits applied fairly and consistently?
 - For example, does an exchange affiliate have its consolidated feed provision get audited at the same rate and in the same manner as competitors' products?
 - In selling its data services, does an exchange provide any information regarding audit rates?
 - What is the frequency of exchange audits to various types of firms?
- To whom may audit findings be reviewed and appealed?
- How many audits are conducted each year and what are the basic contours of the findings, including by customer type?

We believe the Commission and its staff would be well-served to know the answers to these important questions.

Historical Data

As we highlighted in our October 23, 2018 letter to the Commission,³ the exchanges have taken different views on how historical market data should be treated.

In particular, NYSE requires all recipients of historical data to enter independent license agreements for use of that information, even if the data is obtained through a third-party that already has all of the data. And NYSE has taken the position that it may charge whatever it deems appropriate for that potential customer to license that data through the third-party. Further, NYSE and its affiliates may independently reach out to those customers to separately negotiate the provision of the same data without the intermediation of the third-party.

As we wrote in October,

NYSE has argued that it can ... discriminate between customers. We understand that NYSE does, in fact, provide this data to customers of its affiliate for free, while separately charging third parties significant fees for the historical data. Even worse, NYSE requires that any third-party vendors identify their customers to NYSE--effectively using its oversight authority to obtain information that could be used by NYSE to identify the vendor's customers so that it may underbid them. These potential practices place direct

³ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Oct. 23, 2018, available at <https://www.sec.gov/comments/4-729/4729-4554022-176182.pdf> ("HMA Market Data Roundtable Letter").

burdens on competition for the distribution and use of historical market data.

While NYSE's provision of the data in real-time is plainly subject to the contours of the governing filings with the Commission, the exchange has apparently taken the controversial position that it is not bound by any of the Exchange Act requirements regarding competition, discrimination, reasonable fees, or equitable allocations of fees, and the like for the provision of the same data one day later.⁴

These practices and more raise a number of significant questions, including:

- Is the provision of historical data governed by the Exchange Act and relevant exchange filings, as we believe?
- What policies, procedures, and practices are used by exchanges to determine prices for historical data?
- What conflicts of interest policies, if any, govern the provision of historical data?
- Are all customers of historical data treated the same? (For example, is ICE Data Services provided data on different terms than third parties?)
- Are clients who buy historical data from the exchanges or any affiliates (including ICE Data Services) subjected to the same prices and terms as customers who acquire the data through third-party vendors?
 - What communications do exchanges and their affiliates have with their historical data customers and third-party vendors related to pricing of historical data products?
 - Has NYSE or any affiliate (including ICE Data Services) ever communicated with redistributors of their data with recommendations as to what these third parties should charge for the data?
- Have exchanges or their affiliates (including ICE Data Services) used customer lists or contact information provided by third-party data vendors during the licensing process for their own sales purposes to offer competing products? If so, under what circumstances?

We believe the Commission and its staff would be well-served to know the answers to these important questions.

⁴ HMA Market Data Roundtable Letter (citing *Historical Use of Real-Time NYSE Proprietary Data Products Policy*, NYSE, Sept. 2014, available at https://www.nyse.com/publicdocs/nyse/data/Policy-HistoricalUseofReal-TimeNYSEProprietary%20Data%20Products_PDP.pdf and noting that “[i]f a vendor of real-time proprietary NYSE Market Information would like to redistribute this data externally at a later time, the vendor must contract with NYSE directly for such use and pay the relevant fee.”)). The “relevant fee” is not defined in this document or elsewhere, and appears to be entirely subject to NYSE’s discretion. We are aware of market participants receiving the rights to the data at no additional charge from another NYSE affiliate.



Conclusion

We urge you to examine these concerns and take appropriate action to better protect investors, reduce undue burdens on competition, and promote fair and efficient markets without delay.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch
Executive Director