

Finn Associates Inc.
1236 Battery Ave.
Baltimore, MD 21230
Tel. 410-659-0613
Fax 410-659-5166

Chairman Arthur Levitt
Securities and Exchange Commission
450 Fifth St. NW
Washington D.C. 20549

December 3, 1999

File No. SR-CTA/CQ-99-53

Dear Chairman Levitt;

This letter is in reference to the Commission's consideration of a market data concept release at the December 8, 1999 open meeting.¹

My July 24, 1997 comment letter to the Commission recommended that: " SEC should withdraw its approval of SRO market data subscriber fees applied to individual investors investing directly for their own account and accessing data electronically. These charges discriminate against those who would access such data electronically (as compared to access over the telephone); and such fees unnecessarily restrain competition."

My May 1, 1998 comment letter to the Commission recommended that: " The Commission is obligated by the Exchange Act to take the initiative and institute a review of the discriminatory NYSE and Nasdaq real-time quotation access fees. Moreover, given the abhorrent character of the discrimination, the Commission should require NYSE and Nasdaq to begin immediate escrow of the proceeds from such charges until its review is completed."

¹ I am an individual online investor, a member of the class discriminated against by NYSE and NASD/Nasdaq non-professional fees. My background as a former Chief Economist and Senior Economic Advisor for the SEC (1969-1982) and Chief Economist for NASD (1973-1995) qualifies me to comment on the "nonprofessional fee" issue. Although I am currently an outside director on the Boards of Knight/Trimark Group Inc. and Ameritrade Holding Corporation, these views are my own and should not be attributed to others affiliated with those companies.

My June 17,1998 comment letter to the Commission recommended that: the Commission "...summarily require the removal of discriminatory fees that arbitrarily and capriciously limit small investor access to essential market bid/offer quotation information. " and require the "...immediate escrow of the proceeds from such charges...."

The Commission's decision to review market data fees is to be cheered and applauded. However, the costs to online investors roll on. The recently released Unger Report shows that these discriminatory fees cost online investors \$ 31 million out-of-pocket in 1998 alone. These "nonprofessional" fees probably cost them twice that amount in administrative costs and lost investment pricing efficiency resulting from restricted access to real-time quotations information.

The obvious unfairness of these fees has already caused NYSE and Nasdaq to drastically lower their levels; but the per se discrimination against online investors inherent in these fees argues strongly for Commission injunctive relief from what appear to be simply unnecessary, unfair charges.

Further regulatory delay appears to be inevitable. Consequently, given the economic incentive of NYSE and Nasdaq to delay SEC action, I request, for myself and other online investors, that the Commission consider the establishment of escrow funds of such fees to protect online investors from further discrimination.

Sincerely yours,

Gene Finn

In the subject release (The Release), the SEC solicits comment respecting a proposed NASD/Nasdaq order display and execution system that would establish NASD dominance over order display and trading in Nasdaq stocks. Because Nasdaq is the NASD's exclusive processor for quotation and trade report information in Nasdaq stocks, the proposed system would substantially expand the NASD's dominance and control over quotation and trade report information in Nasdaq stocks.

The NASD proposal is deficient in that it would expand the scope of discriminatory quotation access fees and illegal restraints on investor access to quotations information that are currently imposed upon online individual investors by NASD/Nasdaq. As a matter of policy, the Commission should not approve any proposal that would expand the scope of an unnecessary discriminatory practice.

I am an individual online investor, a member of the class discriminated against by NYSE and NASD/Nasdaq non-professional fees. My background as a former Chief Economist and Senior Economic Advisor for the SEC (1969-1982) and Chief Economist for NASD (1973-1995) qualifies me to comment on the issues raised in this release. Although I am currently an outside director on the Boards of Knight/Trimark Group Inc. and Ameritrade Holding Corporation, these views are my own and should not be attributed to others affiliated with those companies.

SEC's Unger Report Documents Fee Discrimination

The Commission's recently published report on online trading, under the direction of SEC Commissioner Laura Unger (the "Unger Report"), documents quotations access discrimination confronted by online investors. The Report states: "Contrary to their practice off-line, the CTA and NASD do impose fees for on-line firms' delivery of real-time market data to customers via the Internet."²

² On-Line Brokerage: Keeping Apace of Cyberspace, Securities and Exchange Commission, p.47.

Investors who access real-time quotation and last sale report information electronically through their PC'S (personal computers) are charged fees; investors who access the same information through human voice (telephonic) communication from their broker are not charged access fees.

Whether the NASD royalty fees, applied to online customer accounts and usage of information, are charged directly to the customer, or charged indirectly through broker commissions, this price discrimination and the related restraint of investor access to quotation information is inconsistent with fundamental Exchange Act and Anti-Trust law principles. Also, whether the fee is \$3 per account month or 1 cent per quote, it is discriminatory.

Discriminatory Fee should be eliminated

Non-professional quotation access fees, if necessary at all, should be applied to all investors. How the information is accessed from intermediaries (vendors, brokers, media etc.) appears to be unrelated to the costs of SRO activities and highly related to competition. Consequently such fees are an unnecessary restraint on communications between brokers and their customers and on competition among brokers and vendors.

By the Commission's own calculation, the scope of this discrimination was 14 times more in 1998 than in 1994 for access to NASD/Nasdaq quotations and 10 times more for access to CTA (NYSE) quotations. In 1998, the discriminatory fees were \$31 million.³ If we include the broker administrative cost of monitoring investor access to quotations and the economic cost of lack of access of investors, unwilling to pay NASD/ NYSE access fees, the total 1998 estimated cost easily approaches \$50 million.

The Unger Report, while documenting this differential treatment of online investors vis-a-vis other investors, focuses upon discrimination between non-professional and professional investors. While non-professional fees may be exorbitant when compared to professional fees, this comment is focused upon the unnecessary, discriminatory, anti-competitive impact of imposing access fees on a sub-set of investors because of the way they access information rather than because of differences in the cost of providing that access.

Congressional Intent

The Unger Report indicates a Commission concern that immediate elimination of online investor fees as a source of funding for SRO activities "...may impede the Commission's goal of enhancing SRO regulation."⁴ A review of the intent of Congress, when amending the Exchange Act in 1975, would show that Congress never intended that the SEC,

³ See the Unger Report, p. 54.

⁴ Unger Report, p.50.

through SRO's (self-regulatory organizations) would be able to finance a variety of regulatory goals with surplus SRO market data revenues.

Rather, as the Commission has said elsewhere: "...Congress directed the Commission to remove present and future competitive restrictions on access to market information and order systems...." and "...Congress granted the Commission broad authority to make rules, including those to....assure the prompt, accurate, and reliable distribution of quotation and transaction information; (3) enable non-discriminatory access to such information;...."⁵Etc.

Moreover, Congress expressed a clear intent, in the legislative history to the 1975 amendments to the Exchange Act of 1934, that the monopoly power of SRO exclusive information processors that might result from the formation of the National Market System (NMS) should be subjected to "utility" type review. Congress said: "...where a self-regulatory organization or organizations utilize an exclusive processor, that processor takes on certain of the characteristics of a public utility and should be regulated accordingly."⁶

Utility type regulation means recovery of reasonable costs (including cost of capital) that are incurred in providing the service. It would require equivalent treatment of members of the same class and it would prohibit discriminatory restrictions on online investor and broker access to quotation information. Such discrimination was precisely the type of monopolistic practice that Congress was attempting to prevent when it made the statement quoted above.

Anti-Competitive Impact on Small Investors

The discrimination against online investors, being sheltered by the regulatory process, is in the fine print of SRO subscriber applications and agreements that qualify online investors for the "Privilege of Receiving Last Sale Information & Bond Last Sale Information as a Nonprofessional **Subscriber.**"(emphasis added) The limiting clause, almost identical in Tape A (NYSE), Tape B (Amex, Regional exchange) and NASDAQ customer access agreements, prohibits brokers from communicating quotation and last sale information to customers through any electronic means (i.e. without payment of fees and a signed customer agreement).

On the production side, SRO contracts with information producers, including marketmakers and others, require such producers to transfer all proprietary rights in the information to the SRO. This protects SROs from competition in the information collection and distribution processes. Regulation is sheltering these anti-competitive

⁵ See SEC Release No. 34-40760; File No. S7-12-98, FR Vol 63 No. 245, p 70858

⁶ See Legislative History of Securities Acts Amendments of 1975, House Committee on Interstate and Foreign Commerce, May 1975P. 93. See also House Conference Report No. 94-229, May 19, 1975, p.93.

provisions of SRO subscriber agreements from both competition and anti-trust enforcement.

What is most regrettable, these restraints on competition have the greatest impact upon small investors who individually do not have sufficient business to avoid these adverse anti-competitive impacts. The economic benefits of productivity of the new computer technologies that lower the costs of small investor information processes are being captured and retained by SRO's through their exclusive information processors; and used to finance a variety of SRO activities. The competitive incentive to attract small investor business-- the only process through which small investors can obtain the benefits of productivity associated with the aggregation of small order flow-- is thwarted.

Empowered by government charters, SRO exclusive processors in effect are expropriating order flow value from small investors.

Regulatory Record is Inadequate

The need to discriminate against online investors, investing for their own account must be supported by something more than an undocumented proclamation by an SRO market manager and /or the SEC that such fees are found to be "in furtherance of the purposes of the Act". A report containing differential cost and revenue data, rates of return, the Commission's reasoning and other related information used in finding such rate discrimination reasonable must be entered in the public record as intended by Congress in the 1975 Amendments to the Exchange Act of 1934.⁷

Urgent need for Commission Action

The Commission should put an end to this costly regulatory charade. The Unger Report reveals that online investors have been ripped-off for at least \$31 million in 1998 alone. The Commission should refuse to approve any systems that incorporate conditions of information access that discriminate against a particular group of small individual investors.⁸

Currently, the problem of elimination of the non-professional fee is manageable, because the online investor population is still relatively small. Conversely, the Unger Report demonstrates that the shift to online activity is rapid and the revenue from non-

⁷ See Legislative History of Securities Acts Amendments of 1975, House Committee on Interstate and Foreign Commerce, May 1975, p.93. See also House Conference Report No. 94-229, May 19, 1975, p.93 and Securities Acts Amendments of 1975, Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, Senate Report 94-75, P. 11.

⁸ See Unger Report p 50 and footnote 124. Small inactive investors are effectively shut off by cost; and the economic efficiency of market processes is obstructed by these demonstrably discriminatory fees.

professional fees is rising rapidly. This indicates that the revenue loss from elimination of such fees will have much less impact if their elimination is accomplished sooner rather than later.

Thank you for your consideration of this comment.

Respectfully yours,

Gene L. Finn