

July 3, 2007

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

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Attention: Nancy M. Morris, Secretary

Re: File No. SR-Amex-2007-49

Dear Ms. Morris

The Market Data Subcommittee of the Securities Industry and Financial Markets Association (“SIFMA”)¹ Technology and Regulation Committee welcomes the opportunity to comment on SR-Amex-2007-49. Amex, similar to the New York Stock Exchange and Nasdaq before it, proposes to create a new market data feed for last sale prices for trades taking place on its exchange (“Amex Trade Prices”), and to distribute the new feed through a one-year pilot.² The fee for Amex Trade Prices would be a flat monthly fee of \$25,000 a month.

Like the NYSE and Nasdaq proposals, which SIFMA has commented on,³ Amex’s proposal is an attempt to distribute simple factual data – the price at which stock changes hands – for a fee unrelated to any disclosed cost the exchange incurs. Amex would be acting as an exclusive processor, yet there is no attempt to show how or why

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

² As SIFMA has stated in the past, it is appropriate and necessary for this – and any other – pilot relating to market data to be filed and noticed for public comment before Commission approval. We appreciate that the instant pilot proposal was not made effective upon filing.

³ See SIFMA Comment Letter dated March 7, 2006 on Nasdaq’s Last Sale Data Proposal, File No. SR-NASDAQ-2006-060; SIFMA Comment Letter dated March 26, 2006 on NYSE’s Last Sale Data Proposal, File No. SR-NYSE-2007-04.

the fee is fair and reasonable, as required under Section 11A of the Securities Exchange Act of 1934 (“Exchange Act”). Amex provides only a summary statement – without any evidentiary basis – that the fee would be an equitable allocation of reasonable fees and charges within the meaning of Section 6(b)(4). It also is not clear whether Amex would attempt to exclude broker-dealers and their website customers from receiving the new data feed. If so, that would be a violation of Section 11A’s equal access and non-discrimination requirements. In short, the exchange has provided the Commission with insufficient basis to approve this filing in compliance with the Exchange Act.

The Commission Must Review First the Market Data Issues Raised by the NetCoalition Petition, and the Pending Depth-of-Book Data Proposals from NYSE Arca and Nasdaq.

At the outset we note that the new Amex Trade Prices data feed is for post-sale trade data, which is very different from pre-sale quote data that investors and professionals need to make informed trading decisions. Accordingly, this proposal does not diminish the imperative for the Commission to determine the outstanding issues at stake in the petition challenging the depth-of-book quotation proposal pending from NYSE Arca relating to assessing a new fee for distribution of the Arca Book,⁴ and the pending proposal from Nasdaq relating to integration of the former INET book with assessment of the TotalView fee.⁵

As previously requested, we again ask that the Commission Staff not approve this or any other market data rule filings on delegated authority until the Commission itself establishes clear standards for evaluating market data proposals and determines the related issues presented *In the Matter of NetCoalition*.⁶

Amex Trade Prices Must be Made Available to Broker-Dealers on the Same Terms as ISPs and Other Vendors to Avoid Unreasonable Discrimination.

From language in the release, it appears that Amex intends to distribute its new feed to “internet service providers” and “traditional market data vendors.” It is not clear whether broker-dealers are included in those categories, but there is no basis to exclude them. Broker-dealers operate websites for investors and serve investors just like ISPs or other market data vendors. Indeed, under the market data distribution agreements that Amex uses, broker-dealers are treated as “vendors.” This is the inclusive approach

⁴ Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (March 7, 2007); Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (Jan. 17, 2007); Comment Letter from SIFMA re: File Nos. SR-NYSEArca-2006-21 and SR-NYSEArca 2006-23 (Aug. 18, 2006); Comment Letter from SIFMA re: File Nos. SR-NYSEArca-2006-21 and SR-NYSEArca 2006-23 (June 30, 2006).

⁵ Comment Letter from SIFMA re: File Nos. SR-NASDAQ-2006-053, and SR-NASDAQ-2006-013 (Feb. 12, 2007); Comment Letter from SIFMA re: File No. SR-NASDAQ-2006-013 (Aug. 18, 2007).

⁶ File No. SR-NYSEArca-2006-21; *see* Letters cited in notes 3 and 4 above.

Nasdaq is taking with its new last sale data proposal and there is no rational basis for Amex to differ.

SIFMA members are well aware of the Regulation NMS Rule 603(c)(1) requirement to provide a consolidated quote at the time a trade may be placed. Broker-dealers have the ability to interpret and apply this SEC requirement appropriately and may choose to use single exchange last sale data in non-trading areas of their websites. It is no reason to discriminate against broker-dealers and deny them and their customers access to this data.

In order to comply with the Exchange Act requirement that market data proposals not be “unreasonably discriminatory,” Amex is required to make its new data feed available to broker-dealers under the same terms as those offered to ISPs and other vendors. In any order of approval, this must be made clear.

Amex’s Proposal Simply Takes Advantage of the CTA’s Failure to Have a Separate, Reasonable Last Sale Data Feed and is Further Indication of a Lack of Competition.

In adopting Regulation NMS, the Commission hoped to “produce market forces and innovation that would benefit the investing public.” Amex Trade Prices however, is the same data available today from the consolidated tape which simply documents the sale of a security. There is no innovation and no competition that led to this new data feed. When it comes to real-time quotation data, for years our members have asked for simplified pricing, reduction of administrative burdens, and a data product that can provide an investor with a full quote on a typical retail size, such as 1,000 or 2,000 shares. To date, Amex, NYSE, Nasdaq, and the CTA have failed to respond.

The proposed fees provide an alternative to existing Network B fees under the CTA Plan. Amex Trade Prices therefore would compete with the CTA Network B feed – the portion that includes last sale information. But this type of competition is artificial, based on advantage stemming from regulatory status as an exchange. A logical competitive response with normal market forces operating would be for the CTA to segregate last sale data from quotation data, and price last sale data lower and more competitively. But this is not a regular market, and Amex, NYSE, and Nasdaq each have a veto in the Plans to exercise in self-interest. Further evidence that there is no competition at work in the field of exchange market data is that Amex’s last sale data proposal is virtually identical (except for the size of the fee) to NYSE’s.

SIFMA members will review the potential benefit of Amex Trade Data compared to continuing to receive the last sale data through the CTA consolidated feed. This is primarily a cost analysis, both in terms of comparing fee schedules as well as additional technological implementation costs and administrative burdens. A real-time last sale price, for example, could replace balance and position information on a client’s online account page. It could not be used for trading quote purposes.

It is not clear, however, whether Amex Trade Prices will capture sufficient volume and percentage of the market to be a viable alternative to the CTA in the absence of also purchasing the newly proposed last sale data feeds from the other exchanges. These new last sale “products” may require SIFMA members and other vendors to purchase last sale feeds from the other exchanges and then attempt to integrate them, multiplying costs and complexity. All this because the CTA’s consolidated feed is priced so high that each individual exchange can undercut the CTA’s price when it comes to last sale data.

Amex’s branding requirement that the text “Amex Data” be placed in “close proximity to the display of each Amex Trade Price or series of Amex Trade Prices” unnecessarily complicates the distribution. There is nothing in the Exchange Act that suggests branding of this sort is a permissible regulatory objective for an exchange’s rules. Exchange Act Section 6(b)(5) prohibits an exchange from using its regulatory power to “regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.” The “Amex Data” labeling requirement is unreasonable – if not impossible – in cases where vendors or broker-dealers will aggregate Amex, NYSE, and Nasdaq last sale data. Nasdaq does not require such branding, and it is not necessary for a viewer to understand the data. It only serves to complicate and make more expensive distribution to end-users.

Amex Fails to Show How Its Proposed Fee is Fair and Reasonable and an Equitable Allocation of Costs.

Due to the conflicts of interest in having an exchange set its own market data fees, the public interest in transparency, and the need to protect investors, the 1934 Securities Exchange Act requires that market data fees be “fair and reasonable,” “not unreasonably discriminatory,” and based on an “equitable allocation” of costs. Amex fails to show how its proposal meets those requirements. There is no cost information to assess fairness or reasonableness. Is it a 10 percent mark-up? Is it a 50 percent mark-up? Is it a 200 percent mark-up? We are unable to tell. If the price for the data was based on cost, then there would not be an opportunity for Amex to undercut the consolidated quote and create its own revenue-generating feed.

Failure to provide cost information as a baseline precludes a reasonable opportunity for SIFMA and other members of the public to comment. There is nothing in the Act that allows a for-profit exchange that acts as an exclusive processor of its own data to set fees unilaterally for that data simply as it believes appropriate in terms of its own revenue generation. This would allow cross-subsidization of competitive activities. Instead, the exchange is required to demonstrate how it meets the standards under the Act. As SIFMA has made clear before, the users of a trading platform should pay fees that support that trading platform. Investors and firms accessing stock quotes and prices in furtherance of market transparency should not.

The exchange proposes to set a flat fee at \$25,000 a month. Although this enterprise license approach has its benefits for large broker-dealers and vendors,

especially when considering the elimination of end-user agreements and other reporting burdens, it effectively precludes small broker-dealers and vendors from accessing Amex Trade Prices at all. The Amex and NYSE last sale data proposals are the first time exchanges have proposed distribution of such basic market data in an exclusive manner due to the extremely high hurdle of a substantial enterprise monthly fee with no per query alternative. The Commission should carefully weigh this fact, and should consider the impact on investors and other market participants before approving.

It is Improper for Amex to Use the CTA Network B Vendor Contract and Other Terms Contained in an Un-filed “Exhibit C.”

The Commission approved the CTA Vendor Contract long ago in the context of a National Market System Plan functioning much like an industry utility. Amex today is a for-profit exchange attempting to compete with the CTA. It should not be permitted to evade Commission and public scrutiny of the restrictions and contractual terms under which it will disseminate Amex Trade Prices by boot-strapping a decades-old prior approval. That is inconsistent with Sections 19(b) and 11A of the Exchange Act.

Amex also failed to file “Exhibit C” for Commission review and approval and deprived the public of an opportunity to review its actual text and comment on it. There is no opportunity to “negotiate” the terms of these agreements, so the Section 19(b) process is critical. As noted above, the “Amex Data” labeling requirement required under Exhibit C is anti-competitive, and the language of the particular proposed restrictions must be reviewed and analyzed. We appreciate that Amex would not require end-users to execute a “subscriber” agreement, thus freeing investors from the burden they endure today when accessing CTA and other exchange data. However, the proposed substitute “warning notice about the end-user’s receipt and use of market data” must be published for notice and comment, as it is a material term of Amex’s proposal. Amex failed to do so.⁷

* * *

⁷ We note that, instead of adding burdensome requirements such as this, Nasdaq has allowed broker-dealers and others to execute an indemnity addendum to the vendor agreement. Amex should consider the same approach.

There is insufficient basis for the Commission – and its staff under delegated authority – to approve this proposal. It would violate the Exchange Act, just as approving the pending NYSE and Nasdaq proposals would. If you have any questions regarding this letter, please contact Melissa MacGregor, Vice President and Assistant General Counsel at SIFMA, at 202-434-8447.

Respectfully submitted,

Christopher Gilkerson and Gregory Babyak

Co-Chairs, Market Data Subcommittee of the
SIFMA Technology and Regulation Committee

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
Dr. Erik R. Sirri, Director Division of Market Regulation
Robert L.D. Colby, Deputy Director Division of Market Regulation
Dr. Chester Spatt, Chief Economist
Brian G. Cartwright, Esq., General Counsel