



**SIFMA**<sup>TM</sup>

Securities Industry and  
Financial Markets Association

March 26, 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-NYSE-2007-04**

Dear Ms. Morris

The Market Data Subcommittee of the Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> Technology and Regulation Committee appreciates the opportunity to comment on SR-NYSE-2007-04. The NYSE proposes to create a new market data feed for last sale prices for trades taking place through the exchange “(NYSE Trade Prices”)), and to distribute the new feed through a one-year pilot.<sup>2</sup> The fee for NYSE Trade Prices would be a flat monthly fee of \$100,000 a month.

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<sup>1</sup> 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.

<sup>2</sup> As SIMFA 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.

**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 NYSE 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,<sup>3</sup> and the pending proposal from Nasdaq relating to integration of the former INET book with assessment of the TotalView fee.<sup>4</sup>

As SIFMA has requested in numerous other market data filings in recent months, we 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.<sup>5</sup>

**NYSE 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 the NYSE intends to distribute its new feed to “internet service providers” and “traditional market data vendors.” There is no basis to exclude broker-dealers who operate websites for investors and who serve investors just like ISPs or other market data vendors. Indeed, under the market data distribution agreements that the NYSE uses, broker-dealers are treated as “vendors.” This is the inclusive approach Nasdaq is taking with its new last sale data proposal and there is no rational basis for the NYSE to differ.

The NYSE indicates “it will not permit NYSE-Only Vendors to provide NYSE Trade Prices in context in which a trading or order-routing decision can be implemented unless the NYSE-Only Vendor also provides consolidated displays of [CTA] Network A last sale prices in an equivalent manner, as Rule 603(c)(1) of Regulation NMS requires.” Broker-dealers have the ability to interpret and apply this SEC requirement appropriately. It is no reason to deny broker-dealers access to the new data feed.

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<sup>3</sup> Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (March 5, 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 (August 18, 2006); Comment Letter from SIFMA re: File Nos. SR-NYSEArca-2006-21 and SR-NYSEArca 2006-23 (June 30, 2006).

<sup>4</sup> 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).

<sup>5</sup> File No. SR-NYSEArca-2006-21; *see* Letters cited in notes 3 and 4 above.

To avoid violating the requirement in the Securities Exchange Act of 1934 (the “Exchange Act”) that market data proposals not be “unreasonably discriminatory,” the NYSE must make its new data feed available to broker-dealers on the same terms as those offered to ISPs and other vendors. In any order of approval, this must be made clear.

**The NYSE’s Proposal Simply Takes Advantage of the CTA’s Failure to Have a Separate, Reasonable Last Sale Data Fee.**

The NYSE’s filing observes that, in adopting Regulation NMS, the Commission hoped to “produce market forces and innovation that would benefit the investing public.” The NYSE Trade Prices however, is the same data available today from the consolidated tape: simple facts documenting the sale of a security; i.e., facts created by broker-dealers and their customers. No innovation and no real competition led to this new data feed. The NYSE claims that its new data feed is “to respond to the desires of its constituents.” The NYSE did not consult our members, who create the data the NYSE is selling. 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, the NYSE has failed to respond.

As the NYSE admits in its filing, “the proposed fees provide an alternative to existing Network A fees under the CTA Plan.” The NYSE Trade Prices therefore would compete with the CTA Network A feed — the portion that includes last sale information — as well as with the Nasdaq’s newly proposed last sale feed when it comes to NYSE listings sales data.<sup>6</sup> SIFMA’s general view is that any competition in the exchange market data field can be constructive. But the competition must be real. It must be based on a normal functioning market, not an artificial one based on advantage stemming from regulatory status as an exchange. If normal market forces were operating, a logical competitive response would be for the CTA to segregate last sale data from quotation data, and to price last sale data lower and more competitively. But this is not a regular market, and the NYSE has a veto in the Plans to exercise in self-interest.

SIFMA members will review the potential benefit of NYSE 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 NYSE Trade Prices will always capture sufficient volume and percentage of the market to be a viable alternative to the CTA in

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<sup>6</sup> Notably, not even this type of limited competition is occurs today with the more important pre-sale quotation data.

the absence of also purchasing the newly proposed Nasdaq last sale data feed for NYSE-listed securities.<sup>7</sup> 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.<sup>8</sup>

The NYSE’s branding requirement that the text “NYSE Data” be placed in “close proximity to the display of each NYSE Trade Price or series of NYSE Trade Prices” also raises serious questions. Past efforts by the NYSE to redundantly place its brand on data have at least nominally, though unconvincingly, claimed to be in furtherance of the Act — either promoting investor protection by reducing alleged confusion or advancing the National Market System by identifying liquidity for order routing. Neither of those rationales exist in the case of last sale data. The NYSE is dictating branding for branding’s sake. There is nothing in the Act, however, that suggests that 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 NYSE’s efforts to use its regulatory powers to promote its commercial branding objectives is clearly an abuse, one that Section 6(b)(5) prohibits. The “NYSE Data” labeling requirement is unreasonable — if not impossible — in cases where vendors or broker-dealers will aggregate NYSE last sale data with Nasdaq last sale data on NYSE-listed stocks. 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.

### **The NYSE Fails to Show How Its Proposed Fee is Fair and Reasonable and an Equitable Allocation of Costs.**

The exchange proposes to set a flat fee at \$100,000 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 NYSE Trade Prices at all. This appears to be the first time an exchange has 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

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<sup>7</sup> See SIFMA Comment Letter dated March 7, 2006 on Nasdaq’s Last Sale Data Proposal, File No. SR-NASDAQ-2006-060.

<sup>8</sup> In its filing NYSE states that “[t]he Commission and the industry have long recognized CTA’s success in making market data available on an affordable and widespread basis to a large number of investors.” This is not accurate. SIFMA – the industry’s trade association – and others have filed numerous comment letters over the years pointing out the continued failure of the CTA, other Plans, and the exchanges to justify their market data fees as fair and reasonable, and the huge administrative burdens they impose due to arcane fee methodologies, reporting, and audit requirements. Together these act as a huge tax on market transparency.

Commission should carefully weigh this fact, and should consider the impact on investors and other market participants before approving.

In view of 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 Exchange Act requires that market data fees be “fair and reasonable,” “not unreasonably discriminatory,” and based on an “equitable allocation” of costs. The NYSE 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 the NYSE to undercut the consolidated quote and create its own revenue-generating feed.

The NYSE does provide the following reasons for the \$100,000 monthly fee:

- “The flat fee enables internet service providers and traditional vendors that have large numbers of casual investors as subscribers and customers to contribute to the Exchange’s operating costs.”
- “The contribution of market data revenues that the Exchange’s independent Board of Directors believes is appropriate.”
- “The contribution that revenues accruing from the proposed fees will make to meeting the overall costs of the Exchange’s operations.”
- “Projected losses to the Exchange’s other sources of market data revenues [from CTA] which are likely to result.”

None of these rationales meets the Exchange Act’s standards because they require cost information as a baseline, which is wholly lacking. Failure to provide that information 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 for that data as it “believes is appropriate.” 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 data to make the markets transparent should not. Finally, the NYSE’s attempt to set fees to insure itself against “projected losses” from a reduction in CTA revenue points out the distortions in this non-competitive market for data.<sup>9</sup>

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<sup>9</sup> One other justification is “the savings in administrative and reporting costs that the NYSE Real-Time Trade Prices service will provide to NYSE-Only Vendors.” This implies that the costly administrative and reporting obligations NYSE currently burdens broker-dealers with when they receive NYSE or CTA Tape A data is good reason to charge ISPs and “NYSE-Only Vendors” higher fees. This is irrational at best.

**It is Improper for the NYSE to Use the CTA Network A 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. The NYSE 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 NYSE Trade Prices by boot-strapping a decades-old prior approval. That is inconsistent with Exchange Act Sections 19(b) and 11A.<sup>10</sup>

The NYSE also failed to file its new “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 Exchange Act Section 19(b) process is critical.<sup>11</sup> As noted above, the “NYSE 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 the NYSE 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 the NYSE proposal. NYSE failed to do so.<sup>12</sup>

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Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Melissa MacGregor, SIFMA, 202-434-8447.

Respectfully submitted,

Christopher Gilkerson and Gregory Babyak

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

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<sup>10</sup> Matter of Bloomberg, Securities Exchange Act Release No. 49076 (January 14, 2004).

<sup>11</sup> *Id.*

<sup>12</sup> 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. NYSE should consider the same approach.

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  
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