



August 18, 2006

Ms. Nancy Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.W.
Washington, DC 20549-9303

Re: File Nos. SR-NYSEArca-2006-21 and SR-NYSEArca 2006-23

Dear Ms. Morris:

The Market Data Subcommittee of the Technology and Regulation Committee of the Securities Industry Association ("SIA")¹ appreciates the opportunity to supplement our comments of June 30, 2006 on these NYSE Arca filings by briefly responding to some of the issues raised by NYSE Arca in its letter of July 25, 2006.

Fairness and Reasonableness of Fees

NYSE Arca states: "The Commission has set standards for that distribution [i.e., the distribution of "core" market data outside the Plans]: it must be fair, reasonable and not unreasonably discriminatory. The Exchange's data distribution and proposed fees are consistent with these standards and reflect an equitable allocation of the Exchange's overall costs to users of its facilities."

NYSE Arca offers no public data in support of its contention that its allocation is "equitable". NYSE Arca offers no public data to document the "overall costs" it claims justify its market data fees. Based on the public record, there is no possible way to substantiate NYSE Arca's assertions. What is the standard? Neither NYSE Arca nor the

¹ The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2005, the industry generated an estimated \$322.4 billion in domestic revenue and an estimated \$474 billion in global revenues. (More information about SIA is available at: www.sia.com.)

Commission have said. The SROs exercise an effective monopoly over market data that comes into their systems by regulation. In the absence of market forces, documentation of the costs of production and distribution of the specific SRO facility is critical.

NYSE Arca asserts that: "In addition to being non-discriminatory, the fees proposed by the Exchange also are fair and reasonable." NYSE Arca provides no data for the public record that would allow anyone to assess whether the fees are "fair and reasonable." In the absence of supporting data, the filing instead offers a circular argument that should be rejected by the Commission. The only justification offered in File No. SR-NYSEArca-2006-21 is that the NYSE Arca Market Data fee "compares favorably" with Nasdaq's and NYSE's own depth of book products. Fees for Nasdaq's depth of book product, TotalView, were approved without supporting information. Fees for NYSE's depth of book product, OpenBook, were approved with the NYSE referencing Nasdaq's unsubstantiated TotalView fees. Now, NYSE Arca cites the NYSE's unsubstantiated fees that in turn cite Nasdaq's unsubstantiated fees to justify their own unsubstantiated fees. If any of these fees had been set by market forces, there would be some justification for citing them as part of the documentation in support of a fee filing. That is not the case before us. As a matter of law, economics or real-world business, one monopoly rent is not "fair and reasonable" because it is comparable to another monopoly rent.

We have recently been told that NYSE Arca submitted cost data to the Commission which was not discussed in the filing for public comment. If so, the SIA and other members of the public would appreciate an opportunity to review and comment on that cost data.

"Diversify the Revenue Stream" and Competitive Analysis

NYSE Arca asserts "fees will enable the Exchange to further diversify its revenue stream to compete with its rivals." This is certainly true, and it underscores that these fees – contrary to the past assertions of the exchanges – have nothing to do with sustaining regulatory functions or ensuring an equitable distribution of the Exchange's overall costs to users of its facilities. But the analysis relating to impact on competition is supposed to consider the effects on other market participants. NYSE Arca's filing is silent on any competitive impacts except the one it hopes will help its own bottom line. If keeping up with revenue growth of other exchanges is the driver – un-tethered by connection to cost – there is no real basis for capping market data fees. If, for example, an exchange begins losing money in another area such as trading or listings, market data fees become the logical revenue stream to keep up with rivals no matter the impact on transparency or other market participants' and investors' ability to access and fairly compete in the market.

Broad Policy Issues

NYSE Arca argues that broader policy issues should be resolved in the context of, for example, the Commission's Concept Release on SRO Governance but that these

policy issues "should not stand in the way of Commission action on the two captioned filings." SIA agrees that these issues should be addressed in the context of the SRO release. SIA adamantly disagrees, however, with the notion that the Commission staff, through delegated authority, should approve these filings first, and only then – after these issues are moot – ask the Commission to establish a proper policy and standards-based approach to market data access and fees. The issues the Commission hoped to address during consideration of the SRO release are not abstract or hypothetical. They are concrete and immediate, and presented by the range of SRO market data fee filings submitted to the Commission over the past year. These filings should not be approved piecemeal but addressed comprehensively.

Failure to Include the Contracts Governing Distribution and Access to the Arca Data

NYSE Arca asserts that it has closely consulted with vendors and end-users about their needs and preferences in determining the data fees and that there is no need for contracts governing distribution and access to Arca Data to be submitted to the SEC.

Regulation NMS established that each broker-dealer owns its own bid, offer, and order information and has a right to distribute it subject to the condition that it does so on terms that are fair and reasonable and not unreasonably discriminatory.² Nasdaq recognized this development when it revised its Services Agreement, working with SIA to create a reciprocal data license that recognizes that each individual firm retains "all ownership and other rights associated with [the firm's] data."³ In contrast, NYSE has not recognized the rights reflected in Regulation NMS or otherwise attempted to negotiate a reciprocal licensing contract with the industry. Instead, taking advantage of the fact that member firms are required to submit their bids and offers and order information to the exchange, it is attempting to impose unilaterally substantial fees where there were none before and use a vendor distribution agreement and various exhibits that NYSE Arca has not negotiated with, nor sought comments from, industry representatives. Nor has NYSE filed the agreement, which restricts access and sets material terms, with the Commission for public notice and comment and Commission approval.

NYSE Arca's argument that "the terms and conditions of the existing Network A CTA/CQ contracts have been in effect for many years and enjoy widespread use and acceptance" underscores SIA's concerns – namely that contracts imposed on the industry in the era before for-profit exchanges and Regulation NMS don't provide a framework that reflects the world we live in. Moreover, the CTA/CQ contracts reflect national market system plan approaches to regulatorily-required consolidated data, not data to be packaged and sold for proprietary and competitive revenue-generating purposes. If

² Regulation NMS Rule 603(a).

³ Nasdaq Services Agreement, Section 2E. See Head Trader Alert No. 2006-059, "Nasdaq Announces Additional Revisions to Nasdaq Services Agreement," May 5, 2006.

NYSE Arca wants to adopt them as their own, they must be submitted again for public comment in that context.⁴

The Proposed Rules are Inconsistent with Fairness Goals of Regulation NMS

The “ArcaBook – Fee Transition Fact Sheet” distributed by NYSE underscores that ArcaBook clients will receive order information 60 times faster than they can through the securities information processor (SIP). We believe that such selling of its advantage over the mandated consolidated quote is troubling. It capitalizes on a two-tier market for market data – a fast lane and a slow lane – that seems to presume winners and losers.

In adopting the new Reg NMS Order Protection Rule, the Commission stated two fundamental rationales:

First, strengthened assurance that orders will be filled at the best prices will give investors, particularly retail investors, greater confidence that they will be treated fairly when they participate in the equity markets. Second, protection of the best displayed and accessible prices will promote deep and stable markets that minimize investor transaction costs.⁵

With the new fee structure for ArcaBook, it will be prohibitively expensive for the vast majority of retail investors – either directly or through their broker-dealer – to access the ArcaBook. A two-tier market for transparency is inconsistent with the two rationales above. This is contrary to the fairness goals of the Order Protection Rule and will result in increased transaction costs for retail investors and with investors having less confidence in the equity markets.

This dilemma may be multiplied many times over with other exchanges, some of which may try to operate as an exclusive processor for its own data outside of the consolidation process. The implications of this multiplier effect and ongoing data fragmentation should be considered by the Commission globally and not by the staff through delegated authority intended for routine SRO rule filings.

Assuring the Integrity of the Public Notice and Comment Process

NYSE Arca disagrees with SIA's comments on the need for administrative lead-

⁴ Even if the CTA/CQ contracts are appropriate, NYSE Arca did not submit its contractual changes through the CTA’s processes, which are subject to industry input through the new Advisory Committee mandated by Regulation NMS. Moreover, Arca was a member of the Nasdaq UTP Plan, but after the NYSE acquisition it appears to be part of the CTA Plan. We are unaware of the formal approvals and public notices that reflect these changes.

⁵ Regulation NMS, Release No. 34-51808 (June 9, 2005) at 11.

time, asserting that "to date, customers have already been aware of the changes for over *seventeen* (17) weeks." (NYSE Arca italics.) While NYSE Arca customers have been aware of the proposed changes, the presumption that the NYSE Arca proposal will be approved without any modification requires believing that no public comment will have any impact in informing the SEC's decision making process and the final rule adopted. In the world of for-profit exchanges, we are finding too often that an exchange makes a proposal and other market participants are obligated to devote sometimes significant resources to comply with the proposal, well in advance of the proposal actually being considered and approved by the Commission through the process enacted by Congress in the Securities Exchange Act of 1934.⁶

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For the reasons stated in our June 30 letter and elaborated above, we believe that the Commission should not approve the two rule proposals as they now stand. Moreover, to fulfill the responsibility entrusted to it by Congress, we believe that the Commission must examine and evaluate the costs incurred in collecting and disseminating market data and determine whether the fees are reasonably related to those costs, are fairly allocated, and further national market system goals of transparency and competition.⁷

⁶ In this case NYSE Arca has already told some member firms that they must submit their contractual documentation now or risk having their data turned off.

⁷ See also Comment Letter from Securities Industry Association and The Bond Market Association (Feb. 2, 2006), File No. SR-NYSE-2005-77, at 19-20 (NYSE combination with Archipelago); Comment Letter on Regulation NMS from Marc Lackritz, President SIA to Jonathan Katz, Secretary, SEC (Feb. 1, 2005), File No. S7-1-04, at 25-31; Comment Letter on SRO Governance and Transparency Concept Release from Marc Lackritz, President SIA to Jonathan Katz, Secretary, SEC (March 9, 2005), File No. S7-39-04, at 16-19; Comment Letter from the Securities Industry Association (April 28, 2006), File No. SR-NYSE-2005-32 (NYSE OpenBook proposal); Comment letter from the Securities Industry Association (July 18, 2005), File No. SR-NASD-2005-05 (TotalView enterprise license fee).

Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Melissa MacGregor, SIA, at 202-216-2000.

Respectfully submitted,

Gregory Babyak, Chairman
Market Data Subcommittee of the
SIA Technology and Regulation Committee

Christopher Gilkerson, Chairman
SIA Technology and Regulation Committee

cc: The Hon. Christopher Cox, Chairman
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