Securities Industry Association
1425 K Street, NW • Washington, DC 20005-3500 • (202) 216-2000, Fax (202) 216-2119 • www.sia.com, info@sia.com

June 30, 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 comment on these NYSE Arca rule filings. In our view, they would further fragment market data and impose additional costs on access and transparency for SIA member firms and investors. File No. SR-NYSEArca-2006-21 would establish new fees requiring "professionals" to pay $30 a month per device and "nonprofessionals" to pay $10 a month per device to continue to receive ArcaBook Data, which for years has been distributed for free. File No. SR-NYSEArca-2006-23 would create a new Arca Best-Bid-and-Offer (BBO) data product that undercuts the consolidated BBO required by regulation and is subject to a professional fee of $15 a month per device and a nonprofessional fee of $5 per month per device on a pilot basis. In these filings, NYSE Arca offers only a cursory justification for its fees and fails to demonstrate that the proposed fees for the product bear a reasonable relation to the cost of the product. Until this relationship is demonstrated, one cannot ascertain whether these fees are justified or indeed represent a possible windfall.

---

[1] The Securities Industry Association brings together the shared interests of approximately 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 2004, the industry generated $236.7 billion in domestic revenue and an estimated $340 billion in global revenues. (More information about SIA is available at: www.sia.com.)

We believe these rule proposals raise a number of significant policy issues and questions – not yet decided by the Securities and Exchange Commission ("Commission") – regarding consistency with the national market system requirements of the Securities Exchange Act of 1934 (the "Exchange Act"). SIA members believe these proposals are only the tip of the iceberg, as other exchanges also may follow suit to extract more market data revenues from their so-called "proprietary data," information which is merely a composite of member firms' quote and order activities reported to the exchanges in their role as SRO. This trend of potentially unjustified (and possible windfall) fees places an ever-increasing price on access and transparency that burdens and disadvantages investors.

As the SIA has emphasized in a series of comment letters, with increasing consolidation in the industry as a result of mergers and the emergence of for-profit exchanges, the potential is great for conflicts of interest relating to how these self-regulatory organizations fulfill their primary purpose in the national market system to assure fairness to investors and other market participants, while at the same time seeking to generate ever more revenue for their shareholders.[2] Given these dramatic changes in our markets, SIA believes strongly that the Commission must carefully scrutinize these two market data proposals to ensure that they further national market system goals – and not just profit motives – and require NYSE Arca to justify the level, impact, operation, and contractual restrictions of its proposed per device fees.[3]

This letter examines the issues raised by these filings in the following areas: for-profit exchanges and their control of market data; inconsistency with the fairness goals of Regulation NMS; the absence of any cost-of-production or other justification for the proposed fees; and failure to file the new contractual requirements for public comment and SEC review and to consider the attendant administrative burdens of the new fee structure.

---

[2] *E.g.*, Comment Letter from the Securities Industry Association dated April 28, 2006, File No. SR-NYSE-2005-32 (NYSE OpenBook proposal); Comment letter from the Securities Industry Association dated July 18, 2005, File No. SR-NASD-2005-05 (TotalView enterprise license fee).

[3] The SIA believes that the SRO rule filing process requiring prior notice and opportunity to comment before Commission decision whether to approve or deny should not result in a "rubberstamp" approval of the exchange's desire by the Commission. We are concerned that that may happen here. NYSE contacted member firms well before these filings were published for notice and comment and told them that ArcaBook Data would become "fee liable" as of July 3, 2006. Firms had to sign new contracts with pre-set terms and create new administrative controls to track users and count devices, and failure to comply would result in ArcaBook Data being turned off. This is an inappropriate process for instituting new market data requirements and fees. Although NYSE has since published notice that it "anticipates" that the fee structure will "become effective August 1, 2006," it is still urging firms to submit their signed contracts as soon as possible.

For-Profit Motive of the New Exchange Raises Fundamental Policy Questions Regarding Market Data Control and Costs Not Addressed by the Filings

In a February 2, 2006 joint SIA/BMA comment letter to the Commission on the then proposed rule change relating to the NYSE's merger with Archipelago Holdings, Inc., the SIA noted that the merger proposal was deficient in that it ignored how the ownership, management, administration, and fee-setting for the new exchange's market data would be handled.[4] The letter pointed out that the SRO status of the proposed exchange would convey monopoly status over the data on orders and quotes reported to the exchange which, coupled with demutualization, would result in an unjustifiable government-mandated subsidy to a profit-making entity. The SIA/BMA letter urged that the market data utility function be housed inside one of the regulatory affiliates independent of the NYSE Group, and that the resulting market data fees be justified by the cost of producing the data and not be used to cross-subsidize other exchange activities.

Now, post-merger, the two NYSE Arca market data rule proposals at issue here squarely raise these issues. The question is still the same for the SEC: how is "the public interest in market transparency and equal access . . . well-served by this arrangement"?[5] We believe it is not, and the exchange has failed to meet its burden of showing how these proposed rules are consistent with the Exchange Act.

The ArcaBook information is used for many purposes today, including by trading desks, brokers, trade routing systems, and retail investors seeking direct access to the market, and as a primary source for after-hours quotes. Prior to the NYSE-Arca merger, Arca distributed the data in the ArcaBook for free, recognizing that the purpose of market data is to make your market transparent to professionals and investors in order to assure fairness and attract more orders. Broker-dealers who submitted their order and quote data to Arca for free received free data under Arca's then-existing policy, to the mutual benefit of broker-dealers, Arca and investors. In the aftermath of a merger promising the new owners of the exchange new revenue opportunities, the exchange has fundamentally altered the role and distribution of, and changed the rules regarding access to, Arca's market data.

There is no acknowledgment or analysis of this dramatic change in the filing sections on "statutory basis" and "burden on competition." File No. SR-NYSEArca-2006-21 summarily states that "by making the NYSE Arca Data available, ArcaBook enhances market transparency and fosters competition among orders and markets." To the contrary, imposing a fee where there was none and restricting access by contract diminish market transparency and impede competition. This is not consistent with Section 6(b)(5) of the Exchange Act.

---

[4] Comment Letter from Securities Industry Association and The Bond Market Association dated Feb. 2, 2006, File No. SR-NYSE-2005-77 at 19-20.

[5] *Id.* at 19.

With these rule proposals, NYSE is continuing a trend of market data fragmentation, enabling it to charge multiple fees for the most basic of information to run fair and orderly markets – the bids and offers and orders pending on its exchange markets. Rather than integrate ArcaBook data into OpenBook (and charge a reasonable fee based on costs), or rather than working to enhance the regulatory required consolidated quote stream in terms of depth and speed, NYSE Arca is using its SRO status for commercial gain.[6]

The Proposed Rules are Inconsistent with Fairness Goals of Regulation NMS

The "ArcaBook – Fee Transition Fact Sheet" distributed by NYSE states:

> The ArcaBook data feed provides real time, depth of book limit order information for NYSE Arca and ArcaEdge (OTCBB). By receiving the information directly from the source, ArcaBook clients are able to receive order information approximately 60 times faster than they can through the securities information processor (SIP) and see 6 times the liquidity within five cents of the inside quote that is offered by the market inside.

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.[7]

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.[8]

---

[6] This is in contrast to Nasdaq, which integrated the former Brut ECN data book into its existing TotalView product. Under NYSE's approach, member firms and others will be required to buy both NYSE OpenBook and ArcaBook data in order to receive depth of book information in the NYSE markets.

[7] Regulation NMS, Release No. 34-51808, June 9, 2005 at 11.

[8] For example, consider a retail investor who uses an online trading firm to trade stocks but, due to

NYSE Arca's ability to "sell against" the slower NBBO is troubling. Subscribers will be able to obtain this BBO data faster than they can secure the consolidated BBO data from the CTA and Nasdaq UTP plans. Firms, who must buy the consolidated data under SEC rules, may feel the need to also buy the faster BBO data. This dilemma may be multiplied many times over with other exchanges, each 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 carefully as part of this fee proposal.

The Rule Filings are Deficient because there is No Justification for the Proposed Fees, which are Unreasonable

NYSE's ArcaBook operates as an exclusive processor of market information on the NYSE Arca exchange. There is no competitor. Congress recognized the dangers of exclusive processors. It warned the Commission to regulate them as public utilities and to guard aggressively against all manner of abuse, pointing to the risk of antitrust problems if such regulation were not effectively applied:

> [S]erious antitrust questions would be posed if access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in the trade *or if its charges were not reasonable*. Therefore, in order to foster efficient market development and operation and to provide a first line of defense against anti-competitive practices, Sections 11A(b) and (c)(1) would grant the SEC broad powers over any exclusive processor and impose on that agency a responsibility to assure the processor's neutrality and the reasonableness of its charges in practice as well as in concept.[9]

Congress envisioned that the Commission would regulate exclusive processors similar to the way public utilities are regulated so as to avoid abuse and undue expense and to assure price transparency. Monopolies obviously were not the Congress's preferred course and it was careful to insist that they be controlled and their charges be reasonable.

The filings under review provide the Commission with no such assurances. File No. SR-NYSEArca-2006-21 states that ArcaBook data enhances market transparency and

---

the high cost of ArcaBook Data, the firm cannot provide access to it. If this retail investor and an institutional trader both decide to place a trade for 2,000 shares of XYZ stock while NYSE Arca is at the inside quote, the institutional trader who can access ArcaBook will see the best quote (perhaps at full depth) 60 times faster than the retail investor who is relying on the consolidated quote for the first few hundred shares. The institutional trader will be able to place his order faster, and will have his order filled first, hitting the quote. In contrast, the retail investor's order will fill later and he won't get the execution at the quote he saw.

[9] *Securities Acts Amendments of 1975*, Report of the Senate Comm. on Banking, Housing and Urban Affairs to Accompany S.249, S. Rep. No. 94-75, 94th Cong., 1st Sess. 11-12 (1975).

fosters competition, yet the filing provides no guidance as to how charging professional users $30 per month and non-professional users $10 per month for data that was previously free "enhances market transparency and fosters competition."[10]

Moreover, NYSE provides no data to support the summary conclusion that the fees are "an equitable allocation of overall costs" and are "fair and reasonable." There is no information provided to help guide the Commission in determining whether the fees bear any relationship to costs, or whether the fees represent an equitable allocation of the costs associated with using exchange facilities. No data is provided as to what formula – if any – is relied upon in the computation of these fees. The Exchange Act requires that fees be subject to a rigorous cost-based analysis. Without this information, the Commission lacks a legally sufficient foundation to approve the proposed fee.

This absence of supporting data is particularly striking in this instance. As an independent entity, Arca thrived while *giving away* its market data, suggesting that the costs of consolidation and dissemination are modest enough to actually be offset by additional trading volume generated in the absence of fees.

In the absence of supporting data, the filing 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, but that is not the case before us.

It should provide the Commission and investors with little comfort when one entity, which we believe can be considered a monopoly here, seeks to bolster a pricing regime by pointing to the fees of another entity that we believe can also be considered a monopoly. To judge the reasonableness of the proposed fees of one exchange (which enjoys a possible government-sanctioned monopoly as an exclusive processor in terms of sourcing market data from its members) with the fees of another exchange (that could also be considered a monopoly) is not what we believe the Congress had in mind in requiring the Commission to judge the reasonableness of fees.

---

[10] NYSE has also proposed an enterprise fee, which would cap monthly fees at $20,000 provided that at least 90% of the subscribers or device users are “nonprofessional” and no more than 10% are classified as “professionals.” In-house professionals, however, would be excluded from the capped fee and firms would have to pay the extra professional device fee for each of them. Except for the exclusion of in-house professionals, we are generally supportive of this enterprise fee concept. However, just as with the per device access fees, there is no cost information in the rule filing to justify the $20,000 a month cap as fair and reasonable.

When it comes to the Arca BBO Service proposed in File No. SR-NYSEArca-2006-23, it is important to note that the proposed $5 nonprofessional fee is five times greater than the nonprofessional fee the CTA and Nasdaq UTP Plan each charge for the consolidated NBBO. The only justification is that NYSE is able to exploit current market structure and provide its BBO "60 times faster" than the antiquated consolidated NBBO processors – one of which it owns and controls (SIAC).

Compounding what we believe to be unjustified and excessive proposed prices, NYSE Arca under its pricing model may charge a single user for each device he or she uses to obtain access to the same data. For example, if a trader has four computers under her desk with applications displaying NYSE Arca data from the proposed products, then NYSE Arca may attempt to charge four times the fee for that trader to effectively access the data. NYSE Arca has proposed a pricing model under which it may charge users prices that are many multiples of those quoted in the rule filings.

SIA is not arguing that NYSE's proposed products should have no fee. Rather, in view of what we believe to be NYSE's quasi-monopoly position, SIA contends that there needs to be a check on NYSE's ability to charge whatever it wishes, and that NYSE Arca must demonstrate that the data fees bear a reasonable relation to its costs of production.

The Filings Are Deficient Because They Fail to Include the Contracts Governing Distribution and Access to the Arca Data

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.[11] Nasdaq recognized this development when it revised its Services Agreement, working with the 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."[12] In contrast, NYSE has not recognized the rights reflected in Regulation NMS or otherwise attempted to negotiate with the industry a reciprocal licensing contract. 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 by using a vendor distribution agreement and various exhibits that NYSE Arca has not negotiated with nor sought comments on from industry representatives.[13] Nor has NYSE filed the agreement, which restricts access and sets

---

[11] Regulation NMS Rule 603(a).

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

[13] A routine 21-day comment period is an insufficient amount of time to consider the significant issues raised by the rule proposals. Members of the SIA Market Data Subcommittee did appreciate an opportunity to discuss the rules on June 29, 2006 with representatives from NYSE Arca. Although the discussion was helpful, unresolved issues remain and particularly those that the Subcommittee members believe the Commission needs to address (including the fairness and reasonableness of the fees, whether

material terms, with the Commission for public notice and comment and Commission approval. As a procedural matter, NYSE Arca is amending and adding to the CTA vendor agreement without first submitting its contractual changes through the CTA's processes, which are subject to industry input through the new Advisory Committee mandated by Regulation NMS.

Finally, NYSE Arca has also failed to consider the administrative burdens imposed by its proposed rules. For the first time, firms will be required to track ArcaBook access and usage through system controls, which may take weeks to develop and will impose significant development costs.

* * * *

For the reasons stated 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 the 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. With the Commission's recent market structure initiatives such as Regulation NMS, as well as with the mergers and the emergence of for-profit exchanges, there is an even greater imperative for the Commission to move past the concept release stage and SRO rule-by-rule evaluation process to reappraise how market data is controlled and how fee proposals are reviewed and approved in light of national market system goals of transparency and fair access. We believe that the investing public would be well served by this reappraisal.

Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Ann Vlcek, Vice President and Associate General Counsel, 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
The Hon. Paul S. Atkins, Commissioner

---

the fees are consistent with the Exchange Act, and whether to require the contractual terms to be part of the rule filing – and particularly if in fact the exchange's main focus is to maximize revenues).

The Hon. Cynthia A. Glassman, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette L. Nazareth, Commissioner
Robert L.D. Colby, Acting Director, Division of Market Regulation
David Shillman, Associate Director, Division of Market Regulation
Elizabeth King, Associate Director, Division of Market Regulation
Daniel Gray, Market Structure Counsel, Division of Market Regulation
Kelly Riley, Assistant Director, Division of Market Regulation
Ron Jordan, NYSE
Jenny Drake, NYSE