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**April 29, 2013**

**Via Electronic Mail (rule-comments@sec.gov)**

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

**COMMENT LETTER AND PETITION FOR DISAPPROVAL**

**Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Implementing Certain Fees for NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT BBO, Release No. 34–69285, File No. SR–NYSEMKT–2013–32.**

Dear Ms. Murphy:

SIFMA[1] appreciates the opportunity to comment on the above-captioned notice (the "Notice"), under which NYSE (the "Exchange") proposes to establish non-display usage fees for certain NYSE MKT market data products.[2]

The proposed rule change purports to have become effective upon filing with the U.S. Securities and Exchange Commission (the "Commission") under Section 19(b)(3)(A) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").[3] For the reasons set forth below, and because the Exchange's actions are inconsistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*,[4] we respectfully petition the Commission to temporarily suspend this rule change under Section

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1 The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

2 *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Implementing Certain Fees for NYSE MKT OpenBook, NYSE MKT Trades, and NYSE MKT BBO*, Release No. 34–69285, File No. SR–NYSEMKT–2013–32, 78 Fed. Reg. 21172 (April 9, 2013).

3 15 U.S.C. § 78s(b)(3)(A).

4 615 F.3d 525 (D.C. Cir. 2010).

19(b)(3)(C) of the Exchange Act[5] and institute proceedings to disapprove the rule changes under Section 19(b)(2)(B) of the Exchange Act.[6]

## A. Certain Of The Proposed Fees Are Subject To A Cost-Based Standard.

Under the Act, fees imposed by an exclusive processor of data must be "fair and reasonable."[7] The NYSE MKT Trades and NYSE MKT BBO fees at issue here concern last sale data and best bid/offer data, which is "core" data.[8] The Commission has previously recognized that the determination of whether core data fees are "fair and reasonable" should take into account the cost of collecting and producing the data. For example, in the 1999 SEC "Market Information Concept Release" (the "Concept Release") the Commission noted that:

> [T]he fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization fees are too low.[9]

The Concept Release, therefore, found that "the total amount of market information revenues should remain reasonably related to the cost of market information."[10]

This view was confirmed in *NetCoalition*, where the D.C. Circuit distinguished between "core" data and "non-core" data, such as depth-of-market data.[11] Referring to the legislative history of the Securities Acts Amendments of 1975, the Court found that the Commission has special oversight duties with respect to core data that require it to conduct a cost analysis typical of public utility ratemaking in determining whether data fees are "fair and reasonable" within the meaning of the Act:

> The petitioners rely on portions of the legislative history suggesting the Commission was supposed to "assume a special oversight and regulatory role" over exclusive processors by treating them as public utilities, a role inconsistent with allowing market forces to determine market data prices. S.Rep. No. 94-75, at 12 (1975), as reprinted in 1975 U.S.C.C.A.N. 179, 190 (Senate Report); *see id*. at 11, 1975 U.S.C.C.A.N. at 189 ("Any exclusive processor is, in effect, a public utility, and thus it must function in

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5 15 U.S.C. § 78s(b)(3)(C).

6 15 U.S.C. § 78s(b)(2)(B).

7 15 U.S.C. § 78k-1(c)(1)(C).

8 *See* NYSE MKT BBO, http://www.nyxdata.com/Data-Products/NYSE-MKT-BBO; NYSE MKT Trades, http://www.nyxdata.com/Data-Products/NYSE-MKT-Trades.

9 Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613, 70,627 (Dec. 17, 1999).

10 *Id.*

11 615 F.3d at 534-35.

> a manner which is absolutely neutral...."); Conference Report at 93, 1975 U.S.C.C.A.N. at 324 535*535 ("[W]here 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."). These statements, however, refer to an "exclusive central processor for the composite [i.e., consolidated core data] tape or any other element of the national market system," not to an exchange acting as the processor of its proprietary non-core data. Senate Report at 11, 1975 U.S.C.C.A.N. at 189 (emphases added); *see also* Conference Report at 93, 1975 U.S.C.C.A.N. at 324. In fact, the legislative history indicates that the Congress intended . . . that the SEC wield its regulatory power "in those situations where competition may not be sufficient," such as in the creation of a "consolidated transactional reporting system." Conference Report at 92, 1975 U.S.C.C.A.N. at 323; *see* Senate Report at 12, 1975 U.S.C.C.A.N. at 190 ("[I]n situations in which natural competitive forces cannot, for whatever reason, be relied upon, the SEC must assume a special oversight and regulatory role.").[12]

The Commission's responsibility with respect to the rule filings is thus clear. It must require the Exchange to provide detailed cost data to justify the fees proposed. However, the Notice does not, as it must, contain any information regarding the cost of collecting and producing the data at issue. The filing is, therefore, legally insufficient and the Commission should exercise its power to suspend the filing.

### B. The Exchange Has Not Otherwise Shown That These Market Data Fees Are Constrained By Competitive Forces.

Putting aside the absence of cost data, the Exchange has not otherwise shown that it is subject to significant competitive forces that would limit it to charging reasonable fees for the data at issue.

#### 1. The "platform competition" approach does not support the Exchange's contention that the proposed data prices are constrained by competition.

The Exchange's "platform competition" approach to pricing data products[13] is inconsistent with the Exchange Act, contradicts economic reality, and is unsupported by substantial evidence.[14]

The "platform competition" approach is inconsistent with the "fair and reasonable" requirement of Section 11A(c)(1)(C) of the Exchange Act because under the platform approach to pricing,

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12 *Id.*

13 78 Fed. Reg. at 21177.

14 *See generally Response to Ordover and Bamberger's Statement Regarding Nasdaq's Proposed Rule Change Concerning The Pricing of Depth-Of-Book Market Data* ("*Response*") (March 31, 2011) (attached hereto as Exhibit 1).

the Exchange may set market data prices at supracompetitive levels as long as they charge less for other services, even though some users of the data may consume only data services, but not other services such as trade execution. This approach to pricing would therefore immunize data fees from review by wrapping them together with fees for other services and would thus nullify the "fair and reasonable" standard.

In addition, the "platform competition" theory is flawed because market data is bought and sold separately from execution services, as evidenced by the fact that SIFMA member firms' customers often buy market data on its own.[15] The price of two products that are bought and sold separately is the result of the distinct competitive conditions confronting each product.[16]

In any event, there is no substantial evidence here to support the Exchange's "platform competition" theory, only the same type of conclusory statements dismissed by the D.C. Circuit in *NetCoalition*.[17]

**2. The Exchange does not support its argument that order flow competition constrains market data fees.**

The Exchange also concludes the fees here must be competitive because the market for order flow is subject to competitive forces.[18] The Court in *NetCoalition* rejected this "order flow" argument because, as is the case here, there was no support for the assertion that order flow competition constrained an exchange's ability to charge supracompetitive prices for its data.[19] In rejecting the argument, the Court discounted the statements made by various exchanges to the effect that they consider the impact on order flow in setting data prices: "The self-serving views of the regulated entities . . . provide little support to establish that significant competitive forces affect their pricing decisions."[20]

**3. The Exchange does not support its contention that there are reasonable substitutes for the market data.**

The Exchange also asserts that several alternatives to the data products at issue here are available, but it does not provide any evidence that the alternatives are reasonable substitutes such that price is constrained by competitive forces.[21] Under the Court's holding in *NetCoalition*, a market data provider must provide "evidence of trader behavior"—such as the number of potential users of its data and how those users might react to changes in the price of that data—to support its conclusion that competition constrains its ability to charge

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15 *See Response* at 26-27.

16 *See Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 929 (2d Cir. 1982).

17 *See* 615 F.3d at 541 (noting the "lack of support in the record" and characterizing proffered support as "conclusion[s], not evidence").

18 78 Fed. Reg. at 21177.

19 615 F.3d at 539-42.

20 615 F.3d at 541.

21 78 Fed. Reg. at 21177. *See also Response* at 12-13.

supracompetitive fees for market data.[22] Yet the Exchange provides no evidence, only theories, as to how users might react to changes in the price of its data products.

## Conclusion

For the foregoing reasons, the Commission should suspend this unenforceable rule change[23] under Section 19(b)(3)(C) because suspension is necessary or appropriate in the public interest, for the protection of investors, and in furtherance of the purposes of the Exchange Act.[24]

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If you have any questions or you would like to discuss these matters further, please call Melissa MacGregor, Managing Director and Associate General Counsel of SIFMA, at 202-962-7385.

Respectfully submitted,

Ira D. Hammerman
Senior Managing Director & General Counsel
SIFMA

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[22] 615 F.3d at 542-43.

[23] As noted above, Section 19(b)(3)(C) provides: "Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this subparagraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable federal and state law."

[24] 15 U.S.C. § 78s(b)(3)(C).