

Gene L. Finn  
Finn Associates  
1236 Battery Ave.  
Baltimore, Md. 21230  
Tel. 410-659-0613  
glrfinn@att.net

Jonathan Katz, Secretary  
Securities and Exchange Commission  
450 Fifth St. S.W.  
Washington, D.C.

February 20, 2005

Re:File No. S7-40-04

Dear Mr. Katz;

This comment is in response to the recent SEC Release No. 34-50700, question 24 ( Fed. Reg. Vol 69, No. 235 page 71275). The question asks whether current market data fees significantly limit access of investors or other participants.

Non-professional NYSE, Nasdaq, and Amex market data access fees and related restrictions do unfairly, unreasonably and unnecessarily restrict access of small online investors to real-time data. They also force online brokers to maintain dual (real-time and delayed data systems) that raise the commission costs of small investors unnecessarily.

### **Selective Non-professional Access Fees Are Discriminatory**

In particular, The SEC (The Commission) has never addressed the issue of the discriminatory non-professional market data access fees and the related restrictions on access to realtime market data that are imposed upon online individual investors, i.e. those investors who access, or would access such information through their own personal computers from their brokers' computers. In contrast to other individual investors, online investors must become NYSE, Nasdaq, and Amex subscribers and pay NASDAQ, NYSE and AMEX subscriber fees, or their access is restricted. Non-professional access fees are applied, not to all investors but only to online investors.

Many such investors have small portfolios and transact once or twice a month as they manage their portfolios. They are not professionals and access information solely for the purpose of managing their own accounts. If their total commissions per year approximate \$125 per year, a \$1 per month per market charge for access is more than one-third their commission costs. However, at any level, unnecessary discrimination should not be tolerated.

Selective, discriminatory pricing and access restrictions, applied to the smallest investors, are simply not " necessary for purposes of the Act". If The Commission believes otherwise, they should state their rationale. Instead, we find The Commission purposefully ignoring pleas for relief from this discriminatory pricing for several years, with no explanation.

### **Past Pleas Have Been Ignored**

I have argued repeatedly, in SEC comments, that this per se discrimination does not meet the "fair and reasonable" and "not unreasonably discriminatory" standards of the 1975 Amendments to the Exchange act. My background, as former Chief Economist and Senior Advisor to The Commission (1969-1982) and former Chief Economist of the NASD (1993-1995) and former Board member of Ameritrade Holding Corporation and Knight Trading Group, qualifies me to comment on this issue.

Release No.34-50870, File No. S7-10-04, at footnote 35, states that all comments have been reviewed. This implies that the Commission has determined that the selective pricing is not discriminatory and is "fair and reasonable" and "not unreasonably discriminatory" and not worthy of explanation.

Fixed prices of a cartel that are selectively imposed upon the weakest investor group, are just the kind of anti-competitive practice that Anti-trust laws were designed to prevent and that the protection of investors clause of the securities acts was designed to protect investors against.

The Commission has the power to approve and disapprove NMS plans. In doing so The Commission must reconcile the statutory goals of both the Securities Acts and the Anti-trust Acts. Indeed under self-regulation, the SRO's (self-regulatory organizations) would appear to have those same responsibilities.

Strangely in this case, the goals of the two Acts are in complete correlation. Both would argue that access fees applied solely to online investors are discriminatory, anti-competitive, and unjustified; and they should be eliminated to comply with both statutes.

### **Need for Regulatory Funds Does Not Justify Price Gouging of the Small Investor**

The Commission and the SRO's are failing to protect the weakest investor group from market data access price discrimination, even though they have a dual responsibility to protect small investors from such anti-competitive practices.

By the way, the Commission's release states that in 1999 the Commission undertook a complete review of the NMS market data system and rates were reduced by about 75 percent; but the releases make no mention of the above discriminatory pricing complaints that were made to the SEC and Congress at least as early as February, 1999.

Although, I have not reviewed the public record from 1999, I do not recall that the SEC published any findings of such a review prior to the SRO's defensive and dramatic reductions in non-professional fee levels.

### **Recommendation**

My recommendation to the Commission is to abrogate the discriminatory SRO NMS non-professional market data access fees that are imposed solely upon online investors. Save The Commission further embarrassment. Until this is done the terms "fair and reasonable" and "not unreasonably discriminatory" will have no meaning.

Sincerely yours,

Gene L. Finn

