

March 8, 2005

**VIA ELECTRONIC MAIL**

Mr. Jonathan G. Katz  
Secretary  
United States Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609

Re: *File S7-40-04, SEA Rel. No. 50,700 (November 18, 2004), 69 FR 71256  
(December 8, 2004) (“SRO Concept Release” or “Release”)*

Dear Mr. Katz:

Ameritrade, Inc.<sup>1</sup> (“Ameritrade”) appreciates the opportunity to provide comments on the Commission’s SRO Concept Release. We have limited our comments to the market data aspect of the Release.

On behalf of our retail investor client base, we encourage the Commission to design a competitive market data system that provides reliable and widely available market data for the use and protection of investors. In the absence of a competitive system, we encourage the Commission to ensure that market data fees are directly related to the costs of collecting and disseminating market data. Further, we encourage the Commission to ensure that quality market data is available to retail investors. By modifying the existing system to decrease costs and improve quality, the Commission would be promoting greater market efficiency for the benefit of the investing public.

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<sup>1</sup> Ameritrade Holding Corporation (“Ameritrade Holding”) has a 29-year history of providing financial services to self-directed investors. Ameritrade Holding’s wholly owned subsidiary, Ameritrade, Inc., acts as a self-directed broker serving an investor base comprised of over 3.6 million client accounts. Ameritrade does not solicit orders, make discretionary investments on behalf of our clients, or provide proprietary research or advice regarding securities. Rather, Ameritrade empowers the individual investor by providing them with the tools they need to make their own investment decisions. In exchange for a low commission, we accept and deliver orders to buy or sell securities to the appropriate exchange, market maker, electronic communications network or other alternative market for execution. Ameritrade does not trade for its own account or make a market in any security.

I. Executive Summary

A. Commission review of SRO and Network fees should be intensified

- Review should be ongoing
- Administrative burden for market data operations should be reduced
- Market data fee proposals should not be made effective upon filing
- Review should be intensified for compliance with Exchange Act standards

B. Market data fees are too high due to lack of competition

- A comprehensive market data solution is necessary
- Competition would lower market data costs and improve market information quality
- Market data fees should be imposed strictly on a cost basis until competition is established
- Enhanced transparency is a prerequisite to determining the appropriate level of market data fees
  - (i) Governance proposals should be extended to the Market Data Distribution Networks (referred to herein as “Networks”)
  - (ii) SRO Transparency proposals should provide for improved market data transparency
  - (iii) Enhanced transparency proposals should be extended to the Networks
- Market data fees should not be used to pay for SRO expenses unless they directly contribute to market data quality
- Quality market data information, including depth-of-book information, should be available to the investing public at a reasonable cost

C. Existing market data system discriminates against online investors

## II. SRO Concept Release

### A. *Commission Review Of SRO And Network Fees Should Be Intensified*

Ameritrade believes the current procedure for Commission review of SRO and Network fees, especially market data fees, is flawed and should be revised to provide more thorough and meaningful review earlier in the process. The Commission typically reviews SRO and Network fees in the context of proposed fee filings thereby making it very difficult to re-visit the appropriateness of SRO and Network fees after they are in place. Previous fee filings give the appearance that the Commission places too much reliance on SRO fee standards with insufficient analysis of the impact such fee changes may have on market participants.

We recommend that the Commission consider revising the fee review process to include ongoing review of existing fees. General reviews such as those that occurred with the Market Data Concept Release and the Advisory Committee on Market Information appear to translate into little immediate action--even when significant problems are uncovered.

This problem points to the more general concern of how market data fees are administrated as well as the overly burdensome administration of such fees. Uniform Network contracts should be imposed on all SROs with standardized fee, access, and billing definitions to reduce the inconsistencies across SROs.<sup>2</sup> We respectfully encourage the Commission to take the necessary steps to make such uniformity a reality. Any reduction in the significant hidden costs of administering market data systems presently imposed on broker-dealers would improve market data operations and ultimately benefit the investing public.

Many proposed fee filings are deemed to be effective upon filing. The "effective upon filing" process bestows excessive power on self-interested parties and creates strong momentum in favor of the proposed fees. Such a circumstance makes it very difficult to mount an effective challenge when the proposed fees fail to meet the standards required by the Exchange Act. This process places the burden on the challenger to establish that the proposed fee changes fail to meet the standards required by the Exchange Act, and the burden should more appropriately be imposed on the moving party. Ameritrade questions whether the existing notice and comment process for effecting fee changes facilitates informed and meaningful public/industry participation when the proposed fee changes are deemed to be effective upon filing.

After proposed fee changes are filed, the Commission determines whether the fees are fair and reasonable, not unreasonably discriminatory and otherwise consistent with the requirements of the Exchange Act. Historically, the Commission has relied upon the ability of the SROs and the Networks to negotiate fees acceptable to SRO and/or Network members. It is unclear where the Exchange Act provides for such authority without reasonably taking into consideration the impact such changes impose on data users. In our view, any assumption that

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<sup>2</sup> See Letter from Marc E. Lackritz, President, Securities Industry Association, to Jonathan G. Katz, Secretary, Commission, dated February 1, 2005, on repropoed Regulation NMS, at 29-30 ("SIA Reg. NMS Letter").

an acceptable negotiation process occurs between SROs, Networks and other interested parties is misplaced. Ameritrade respectfully suggests that the Commission review all proposed SRO and Network fee filings with more vigor and provide for further analysis of whether fee changes are “fair and reasonable” or “unreasonably discriminatory.”<sup>3</sup>

*B. Market Data Fees Are Too High Due To Lack Of Competition*

At the outset of our market data discussion, it is our general view that the Commission should adopt a comprehensive solution, as suggested by the SRO Concept Release, to the unresolved market data issues that have lingered for many years without adopting the interim solution advocated in the Commission’s reproposal of Regulation NMS.<sup>4</sup> An interim solution that merely rearranges the revenue pie for those already at the table is terribly discriminatory and fails to pursue a path that truly benefits the individual investor.<sup>5</sup>

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<sup>3</sup> In this regard, we want to reiterate our prior concerns with the NYSE’s pricing proposal for OpenBook. The NYSE does not provide any basis for its proposed charges -- \$5000 per month for the right to receive and redistribute the feed, and \$50 per month for each terminal to be used by an end user. Given that Nasdaq offers Level II quotes for \$9 per month, the NYSE’s proposed charges appear on their face to be unreasonable and without justification. We believe that the Commission owes an obligation to investors to assure that new fees, which appear to be inappropriate and excessive, are not approved during the short term. *See* Notice of filing of a Proposed Rule Change Establishing Fees for Receiving NYSE OpenBook on a Real-Time Basis, SEA Rel. No. 50,275, SR-NYSE-2004-43 (Aug. 26, 2004) (“OpenBook”). *See also* Letter from Ellen L. S. Koplow, Executive Vice President and General Counsel, Ameritrade, to Jonathan G. Katz, Secretary, Commission, dated September 23, 2004, on OpenBook.

<sup>4</sup> *See* Letter from Phylis M. Esposito, Executive Vice President and Chief Strategy Officer, Ameritrade, to Jonathan G. Katz, Secretary, Commission, dated January 26, 2005, on repropoed Regulation NMS, at 11.

<sup>5</sup> Robert Greifeld, the President and Chief Executive Officer of The Nasdaq Stock Market, has previously indicated that he thought that market data fees could be reduced by about an astonishing 75%. At the Commission’s hearing on proposed Regulation NMS in New York on April 21, 2004, Mr. Greifeld stated:

*But we believe the government should only be involved where the government must be involved. So we must limit the monopoly to the data that is part of the public good, and provide it at a low cost. Currently that cost for professional investors is around \$20. That cost in a Nasdaq market was established by Nasdaq over 20 years ago. It was about \$17 twenty years ago. There was no great wisdom in that number, and we look at the number today, that number is too high.*

*We agree with that concept. The number probably should be somewhere around five to seven dollars. And that’s after some thoughtful analysis on our side, and trying to imply a rough cost-plus basis to the analysis.*

*With the current structure, then, data is not provided at a low enough cost and it does create . . . unintended results and distortions in our market. The market centers today are the beneficiaries of that excessive rent and are utilizing this money to buy prints independent of market value.*

*If the utility rate was five to seven dollars, then the market centers would have a very difficult time buying prints. And I think that is the problem we’re trying to solve. . . .*

In 2003, we understand that the Networks spent approximately \$40 million on market data collection and dissemination but received about \$424 million in revenue. Ameritrade pays SRO fees of approximately \$13 million per year for the ability to provide real-time pricing data to our clients. Investors and Ameritrade consider real-time streaming market data to be a basic necessity in a modern marketplace.<sup>6</sup> We also believe the current market data fee and rebate structure undermine the ability of firms to provide this basic service.

Every investor who buys and sells securities has a legitimate claim to the ownership of market data, yet SROs act as the exclusive beneficiary of the same market data provided by investors. The benefits of market data revenue should be conferred upon the investing public.<sup>7</sup>

One of the Commission's most important market structure responsibilities is to assure the integrity of market data and ensure that market data fees are fair and reasonable. The most important change the Commission could introduce is enhanced competition to the compilation and dissemination of market data. In a competitive environment, we believe market data services would be improved in two ways -- the cost of market data would be dramatically reduced and competing Networks would compete to provide more sophisticated market data.

Until a more competitive market data environment exists, we continue to believe that market data fees should be limited to the costs of collecting and disseminating market data. More importantly, we do not believe market data revenues should be used to fund the regulatory costs of SROs. We do not support diminished SRO funding for regulatory operations but believe that such funding should come from more transparent sources. Until SRO transparency is achieved, it is likely that market data revenue funds rebates, marketing, and/or excessive

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Transcript of Hearing Re: Proposed Regulation NMS, before the Commission, in New York, New York, on April 21, 2004, at 212-3.

<sup>6</sup> Another basic service that our clients expect to receive is automated executions. Thus, we are disturbed to note that the NYSE's revised Hybrid Proposal continues to provide that, under less than clear circumstances, the Direct+ system will switch from an automated to a manual response. If the NYSE purports to provide an automated execution facility, then the access should be electronic 100% of the time, not just 98%. Our client complaints often occur due to our inability to access a market's quote after important news is disseminated during times of imbalance or during fast trading markets. Simply put, the need for certainty of execution may be most important during the 2% of the time in which the NYSE will not be automated. This lack of certainty resulting from the absence of an automated response is troubling and renders the revised Hybrid Model unquestionably flawed. *See* Notice of Filing of Amendments Nos. 2 and 3 to a Proposed Rule Change Relating to Enhancements to the Exchange's Existing Automatic Execution Facility Pilot (NYSE Direct+ ), SEA Rel. No. 50,667, SR-NYSE-2004-05) (Nov. 15, 2004) ("Hybrid Proposal"). *See also* Letter from Ellen L. S. Koplou, Executive Vice President and General Counsel, Ameritrade, to Jonathan G. Katz, Secretary, Securities Exchange Commission, dated September 22, 2004, on the Hybrid Proposal.

<sup>7</sup> *See* Testimony of Kim Bang, President and Chief Executive Officer, Bloomberg Tradebook, LLC, at a hearing on "The SEC's Market Structure Proposal: Will It Enhance Competition?" before the Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises of the Committee on Financial Services, U.S. House of Representatives (Feb. 15, 2005), at 21-23.

executive compensation--all of which are unrelated to the SRO regulatory function.<sup>8</sup> Market data fees are ultimately paid by the investing public and should not be used to fund esoteric SRO wealth distribution schemes.

As we stated earlier, data costs and market center revenues have increased exponentially without sufficient Commission review. We believe additional Commission review is not only desirable but also required by the Exchange Act. In the absence of competition, Ameritrade would like to see the Commission gain an understanding of the costs associated with providing market data. Only upon gaining such an understanding can the Commission determine the appropriate competitive structure that would allow for either a return of excess revenues to investors or the creation of a model in which market data revenues equal the cost of providing market data to the investing public. Market participants should be able to determine whether the costs they are forced to pay are reasonable.

The SRO Governance and Transparency Proposals,<sup>9</sup> once implemented for the SROs and extended to the Networks,<sup>10</sup> should help provide the transparency necessary for Ameritrade to engage in a more fulsome market data fee discussion.<sup>11</sup> It would also be helpful if these transparency proposals are revised to include a requirement that both SROs and Networks explain the use of and need for market data fees.<sup>12</sup> Ameritrade believes market data fees should be accounted for separate and apart from more generalized information technology costs.

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<sup>8</sup> The American Shareholders Association pointed out in a press release issued on February 2, 2005, and captioned "Grasso Compensation Report Ignores the Real Problem: Market Data Cartel" that the NYSE was able to pay exorbitant compensation to its former Chairman Richard Grasso "because of the exorbitant mark up of their monopoly generated market data fees."

<sup>9</sup> See File S7-39-04, SEA Rel. No. 50,699 (November 18, 2004), 69 FR 71126 (December 8, 2004) ("SRO Governance and Transparency Proposals").

<sup>10</sup> We believe that the Commission should extend whatever governance provisions are ultimately imposed on the SROs as a result of the SRO Governance and Transparency Proposals to the networks that disseminate consolidated market information. There should be public participation in the administration of the Networks similar to that of the SROs.

<sup>11</sup> See SIA Reg. NMS Letter, *supra* note 2, at 28-29.

<sup>12</sup> The disclosure requirements for market data fees for both the SROs and the Networks should be enhanced to include a complete description of all market data fees and to include audited financial statements setting forth revenues, expenses and revenue distributions across all functions. More specifically, the audited financial statements should set forth financial data itemizing the market data fee revenue separated into: (i) fees charged to professional and non-professional subscribers, and (ii) into the direct and indirect expenses associated with the collection and dissemination of market data. In this manner, the Commission, securities firms, and the investing public will be able to determine if the market data fees imposed comply with the standards of the Exchange Act.

We have attempted to respond to the market data questions presented by the Commission's SRO Concept Release as appended hereto in Attachment A. However, Ameritrade does not believe market data fees are transparent enough to permit a proper assessment of the appropriateness of fees charged because SRO operating costs and uses of revenue are not revealed. We would appreciate the opportunity to submit additional comments on the appropriateness of market data fees when such transparency exists.

Once full transparency is achieved, we respectfully suggest that the Commission move quickly to implement the cost-based approach laid out above. The first step in fashioning this approach should be to identify the categories of SRO costs required to generate and disseminate market data, including direct market data costs such as market data recordation, communication, consolidation and dissemination. SRO costs that do not directly contribute to the quality of market data should be excluded from the calculation. This would include member regulation costs and those costs directly associated with other SRO services such as advertising and marketing expenditures.

Market data quality is also a concern, particularly with the decrease in transparency that is a natural result of decimalization. Real-time market data is essential to price discovery and acts as the very lifeblood of our securities markets. Unfortunately, the basic market data available to many investors today is insufficient. Investors should have the ability to see last sale and national best bid/offer ("NBBO") as well as price and volume away from the inside quote in a manner consistent with the Voluntary Depth Alternative set forth in the Commission's Regulation NMS reproposal. The Commission could enhance the interests of the investing public by reviewing not only market data fees but also the quality of market data provided. Liquidity at each price point has been reduced as a result of decimalization thereby reducing the value of the basic data currently provided (*i.e.*, last sale and national best/bid offer only). To make matters worse, securities firms are paying the same prices charged before decimalization. Investors need additional data to maintain a comparable level of visibility into the marketplace. Core market data should include full depth-of-book information and should not be limited to last sale and NBBO information. If investors were provided access to reasonably priced, real-time depth-of-market data, all investors and market participants would benefit.

### *C. Existing Market Data System Discriminates Against Online Investors*

Market data fees are presently imposed in an entirely discriminatory fashion. Investors accessing real-time quotes through an account executive by telephone, from devices in branch offices, and from media distributors do not incur direct market data fees. Conversely, the same investors who access real-time quotes through an online brokerage account incur charges based on each instance a real-time quote is accessed.<sup>13</sup> The Commission should rectify this situation.

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<sup>13</sup> *Non-professional NYSE, Nasdaq, and Amex market data 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.*

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In addition, market data fees are currently assessed at disparate rates and based on whether the subscriber is a professional or non-professional. The definition of non-professional subscriber, which is inconsistent among the various SROs, is not rooted in the reality of today's marketplace. Under the current definitional approach, subscribers are treated as professional subscribers unless they fall within one of the narrow exclusions. This means that many subscribers are unnecessarily swept into the more costly professional category.

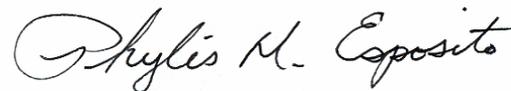
The current definition of professional does not accurately reflect professional subscriber behavior, is too broad, is too complex, and results in discriminatory pricing against many subscribers--particularly online subscribers. This definition should be standardized and updated to reflect the marketplace changes that occurred over the past decade.

In conclusion, Ameritrade believes the best way to ensure that investors receive fairly priced and quality market data on a reasonable and non-discriminatory basis is to promote competition with ongoing and vigorous Commission oversight.

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Ameritrade thanks the Commission for considering our comments. Please contact me at 201/761-5570 if you would like to discuss our comments further.

Sincerely,



Phylis M. Esposito  
Executive Vice President and Chief Strategy  
Officer

Enclosure: Attachment A

CC: Chairman William H. Donaldson  
Commissioner Paul S. Atkins  
Commissioner Roel C. Campos  
Commissioner Cynthia A. Glassman  
Commissioner Harvey J. Goldschmid

Annette L. Nazareth  
Robert L. D. Colby

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Letter from Gene L. Finn, Finn Associates, to Jonathan G. Katz, Secretary, Commission, dated February 20, 2005, on the SRO Concept Release, at 1.

SECURITIES AND EXCHANGE COMMISSION  
17 CFR PART 240  
Release No. 34-50700; File No. S7-40-04  
RIN 3235-AJ36  
CONCEPT RELEASE CONCERNING SELF-REGULATION

Question 23: Should market data revenue be used to cross subsidize SRO regulatory operations?

Without transparency into the SRO's complete budget, it is difficult to speculate on what funding sources are appropriate for regulatory operations. In general however, market data revenue should be used for market data distribution operations.

Question 24: Are current market data fees significantly limiting access of market participants, investors, or other users to data? Why are certain market data fees more problematic than others, such as those associated with SRO data products that are not part of the consolidated quote stream? If so, which fees and why?

While the true cost of market data distribution operations is not known, and while greater transparency into the SROs' budgets would help alleviate concerns, existing testimony from Robert Greifeld, the President and CEO of Nasdaq, has indicated that at least for his SRO, costs could be as much as 75% too high. In order to provide access to financial markets, Ameritrade assumes the direct cost of market data fees for many of its clients. These costs are reflected in the total cost of Ameritrade brokerage operations and in fees charged to our clients in the form of commissions.

In the area of professional data fees and depth-of-book data fees, Ameritrade feels strongly that the disparities in price, features and access between various SROs has created a confusing and overly discriminatory landscape. Based on the ruling that accounts held by non-real persons are professionals, SROs unfairly discriminate against small business owners who choose to invest part of their company's assets in a brokerage account. These same individuals who choose to open a personal account are then told that they can be classified as non-professional.

Lastly, only limited pricing competition exists between depth-of-book products. Aggregate depth-of-book data is available from only one source for a specific security and that data is priced wildly different between distributors.

Question 25: Should the Commission reconsider the flexible, cost-based approach?

The Commission should be applauded for being open to the concept of significant change in the market data fee structure. We urge the Commission to review all ideas on the table, both old and those that are presented during this comment period.

Question 26: Should the Commission consider a narrow cost-based approach that takes into account only limited costs, such as consolidation costs?

We feel that the costs associated with the receipt, consolidation and retransmission of market data are significant, more so in the face of burgeoning data rates from derivatives markets. Further, we feel that some markets are justified in attaching certain functions to the cost of market data as they provide complete access to all data available. Only when markets attempt to provide a limited set of data, and try to attach ancillary operations to the cost of market data, do we feel there is cause for concern. Ameritrade believes strongly that any consideration of new revenue plans for market data must include a complete view into the budget of SRO operations, not simply the cost of market data but all revenue and expenses.

Question 27: On a conceptual basis, what should be included in the cost of generating market data?

As stated previously, it is difficult to speculate on what costs should be included when the composition of those costs is not known. Only complete transparency into the SROs' budgets will produce sufficient evidence to comment on what should and should not be included. That being said, costs of wholly unrelated activities, such as regulatory operations, conceptually should not be funded with market data revenue.

Question 28: Are there other, better cost-based approaches? What are their potential benefits and drawbacks?

There are many potential approaches that can be developed and reviewed. None of those approaches can be debated without transparency into the entire budget of the SROs. Once this information is available, Ameritrade will be in a position to actively participate in the dialogue and analysis of alternative cost-based approaches.

Question 29: Should the Commission require a more detailed explanation of how SROs spend the revenue generated from market data fees? Would the requirements proposed in the SRO Governance and Transparency Proposal that SROs detail their sources and uses of revenues add sufficient transparency in this area, or should more detailed reporting be mandated?

The requirements proposed to date have set the stage for increased transparency and stronger participation by the investment community. Only through a discovery of all aspects of the SROs' budgets, both revenues and expenses, will sufficient transparency be achieved.

Question 30: If the Commission were to implement a revised approach to market data fees that substantially reduced this element of SRO funding, would SROs be able to raise the level of other revenue sources to remain adequately funded to comply with their statutory obligations?

Adequate funding for both oversight and market data distribution is both required and appreciated. With the proper transparency, SROs should have the right to levy fees appropriate to meet the financial needs of both endeavors.

Question 31: What SRO fees or other charges presently are under priced? What SRO fees or charges are over priced? On balance, are SROs over funded or under funded? What would be the impact on smaller SRO members of funding regulatory costs exclusively through regulatory fees?

It is difficult to speculate what fees are over or under priced as there is currently no transparency into the financials of the SROs.

Question 32: If market data fees were substantially reduced and SROs were unable to replace these revenues from other sources, would SROs be able to adequately fund their regulatory operations? If an SRO's funding were to become insufficient because of such a decline in revenue, should that SRO lose its status as a registered SRO?

Market data fees represent a fraction of the total revenue of the SROs. Without transparency into what other revenues and expenses the SROs have, comment on the outcome of changes to one line item in the SROs budget is speculation at best.

Question 33: If market data fees were substantially reduced, would this exacerbate the conflicts inherent in the SRO system – in particular, the incentive to fund business functions at the expense of regulation?

In any regulated industry, there are inherent conflicts between business functions and regulation/compliance. Reduced revenue will provide the potential for an outcome such as this. It will also create a climate where unjustifiable and exorbitant spending will be reduced or ended all together. Which outcome will only be determined through the combined vigilance of the investment community and the desire of the SROs to provide high quality services for fair and reasonable prices.

Question 34: To what extent would the enhancements proposed in the SRO Governance and Transparency Proposal mitigate these concerns about inherent conflicts? Are there other measures that could mitigate these conflicts?

We believe that the Commission should extend whatever governance provisions are ultimately imposed on the SROs as a result of the SRO Governance and Transparency Proposals to the networks that disseminate consolidated market information ("Networks"). In our view, there should be public participation in the administration of the Networks similar to that of the SROs. The SRO Governance and Transparency Proposals, once implemented for the SROs and extended to the Networks, should help provide transparency necessary for Ameritrade to engage in a more fulsome market data fee discussion. It would also be helpful if these transparency proposals were revised to include a requirement that both SROs and Networks explain the use of and need for market data fees. Therefore, we recommend that the disclosure requirements for market data fees for both the SROs and the Networks be enhanced to include a complete description of all market data fees and to include audited financial statements setting forth revenues, expenses and revenue distributions across all functions. More specifically, the audited financial statements should set forth financial data itemizing the market data fee revenue separated into: (i) fees charged to professional and non-professional subscribers, and (ii) into the

direct and indirect expenses associated with the collection and dissemination of market data. In this manner, the Commission, securities firms, and the investing public will be able to determine if the market data fees imposed comply with the standards of the Exchange Act.

Question 35: Should the Commission require that all SRO fees and charges be closely related to the cost of the SRO providing the service in question? What would be the benefits and risks of doing so?

Fees and charges should be closely linked to the cost of providing some services but not all. For example, since data is a required element, then that pair should be closely linked. In addition, if regulation is also required, this is another example of a linked revenue/expense pair. Listing fees, seats on an auction floor and other non-required services should be free to compete in an open marketplace.