

From: Gene Finn [glrfinn@worldnet.att.net]
Sent: Tuesday, May 18, 2004 3:39 PM
To: rule-comments@sec.gov
Cc: askdoj@usdoj.gov
Subject: S7-10-04

Gene Finn
1236 Battery Ave.
Baltimore, Md. 21230

May 17, 2004

Re: S7-10-04

Dear Mr Katz;

In my e-mail comment dated, May 16, 2004, I requested incorporation by reference of prior comments and letters to the Commission.

Attached are electronic copies of many of those submissions including a request to The Anti-trust Division of the Department of Justice for their assistance with the SEC.
Please include this copy of these communications in the S7-10-04 record.

Thank you

Gene Finn

cc. W. Lindsey Wilson (for H. Hewitt Pate) Anti-trust division DOJ

Gene L. Finn Ph.D.

1236 Battery Avenue
Baltimore, MD 21230
Tel. 410-659-0613
E-mail <gene.l.finn@att.net>
December 10, 2001

Harvey Pitt, Chairman
Securities and Exchange Commission
450 Fifth St. NW
Washington DC 20549

NASDAQ and CTA/CQS Non-professional Access Fees and the
Related Denial and/or Limitation of Access To Market Information

Dear Chairman Pitt;

This is a request that the Securities and Exchange Commission (The Commission) withdraw their approval of and/or review the Consolidated Tape Association (CTA), Consolidated Quotation Association (CQS) and National Association of Securities Dealers/ NASDAQ (NASDAQ), non-professional subscriber access fees (the subject fees) imposed upon online investors¹. The subject fees are not fair and reasonable; they are unreasonably discriminatory; and online investor access to current (un-delayed) market information is denied and/or limited by the subject fees.

The enforcing mechanism for the subject fees are restraints on competition in exclusive processor broker and marketmaker subscriber agreements that are intended to monopolize and that do not appear to be germane to the exclusive processors' self-regulatory responsibilities. They limit in various ways the ability of brokers and marketmakers to communicate bid and offer quotation prices to their clients and their clients' customers.²

Therefore, it is requested that The Commission also withdraw their implied approval of restrictions in exclusive processor subscriber contracts (agreements) with brokers and marketmakers that restrain directly or indirectly their ability to provide un-delayed quotation and last sale information to individual investor clients.

¹ In addition to being an online investor, I am an outside director of Ameritrade Holding Corporation; but the views expressed here are my own and should not be attributed to anyone else associated with Ameritrade. Online investor includes any investor that accesses information for purposes of transacting for his/her own accounts utilizing computer, Internet, and/or related technologies.

² See for example NASDAQ Workstation II Subscriber Agreements; Query only and Marketmaker versions. Sections 8-9.

I write this letter as an individual online investor who has declined to sign exclusive processor subscriber agreements and to pay non-professional fees required for access to un-delayed last sale and bid/offer quotation information generated by investors' orders and transactions. As a consequence, my access to un-delayed information has been denied and/or limited by SIAC (Securities Industry Automation Corporation) the exclusive processor for NYSE, and AMEX listed securities, and NASDAQ Inc., the exclusive information processor for NASDAQ listed securities.

This differential treatment of online investors and the related obstruction and/or interference with efficient communications between investors and their brokers is the subject of this letter petitioning elimination of the subject fees.³ This request seeks what numerous past letters have sought through the comment process⁴, a Commission review of the subject non-professional fees and a Commission decision to withdraw their approval of the subject fees, as presently applied, as not necessary in furtherance of the purposes of the Act.

Background

Online investors who decline to become non-professional subscribers to NASDAQ and /or NYSE and/or AMEX and who decline to pay the subject fees are denied access to current (un-delayed) market information for securities listed in the respective markets. Moreover access is also denied by NASDAQ to OTC (over-the-counter) securities that are quoted and reported through the NASDAQ system but that are not included in the NMS (National Market System) market data plan for NASDAQ.⁵ Access is limited and/or denied by a 15 to 20 minute delay that is selectively imposed by the exclusive processors (CTA/CQS and NASDAQ),⁶ upon non-subscriber online investors that manage their own accounts⁷

³ This letter is not submitted in response to any particular notice or filing. The Commission, if persuaded, certainly has the power to take up this issue on its own initiative. However delay in the review of this issue is extremely costly to investors in fees and in denial of access. The intent of this letter is to separate this issue from the broader more complicated market data issues and to end this costly delay.

⁴ See also letters to the SEC from Gene L. Finn dated: July 24, 1997, File No. S7-16-97; May 1, 1998 SR-NASD-98-17; June 17, 1998, File No. SR-CTA/CQ-97-3; March 30, 1999, Rel. No. 34-40869; September 21, 1999, File No. SR-CTA/CQ-99-02, March 5, 2000, File no. S-7-28-99 and Letter to Arthur Levitt, Chairman, dated Dec. 3, 1999, File no. SR-CTA-99-53.

⁵ The non-NMS securities are tied-in with the NMS in a single network bundle for pricing purposes.

⁶ For example, when a non-subscriber online investor accesses his account for stock prices, his screen likely will show prices that are purposefully delayed 15-20 minutes. No quotations prices will appear for NYSE and AMEX stocks because the denial of access for those quotations prices apparently is "ad infinitum".

⁷ Many investors are self-directed, choosing to access information electronically over their computers, without the inter-positioning of an account executive between them, their transactions and the information necessary to price their limit orders and execute trades. Such investors' brokerage commissions are lower; and their access to the market and information is more efficient, frequently without manual intervention. Restraints in subscriber agreements specifically permit telephone communication of information to clients by account executives but prohibit broker communication of equivalent information using computer or Internet related technologies, unless a special fee is applied.

Online investor access fees⁸ and non-professional access fees are interchangeable names for the same fees. The subject non-professional fees are only applicable to investors that utilize computer, Internet and related technologies to access market information. Whether the fees are paid directly by the subscriber investors or by the investors' brokers for the investors is irrelevant. Investors who access the identical information from account executives by telephone or from media distributors do not pay the subject fees. Moreover investors whose accounts are managed by their brokers on a discretionary basis do not pay the non-professional fees; and none of these groups are required to sign subscriber agreements.

Although competition has prompted online brokers to offer free access to their more valued accounts, signed subscriber agreements are required for freely provided online broker paid access for customers. This merely transfers the discriminatory impact to the online broker and causes higher commissions. Exclusive processors should not be permitted to accomplish indirectly what is inappropriate if attempted directly.

Non-professional Information Access Fees

The CTA/CTQ and NASDAQ networks receive hundreds of millions of dollars collecting subscriber fees from professionals who enter quotation and trade report information, from professionals who access but do not display quotation and trade report information, from other professionals that access for their clients only the national best bid/offer quotation (NBBO) and last sale reports, and from non-professionals who access the latter information for purposes of transacting and managing their own brokerage accounts. The subject market information includes the un-delayed last sale trade prices and size of trade and the NBBO or any of those individual items as a group or singly. Thus the pricing unit to non-professional investors is a last sale price or a last sale price with bid and offer quotations and sizes.⁹

Exclusive processor monthly fees for the subject information are charged to professional subscribers on a per-device basis and to nonprofessional subscribers on a per-customer, per account, or per login¹⁰ basis and to broadcast media on a per household basis. Monthly fees for professional subscribers range from \$18.00 to \$127.25 per network (NYSE listed, NASDAQ listed, AMEX/Regional listed). Non-professional subscribers

⁸ It is sometimes represented, incorrectly, that the non-professional fee is imposed on the broker. The subscriber agreement must be signed by the online investor; and the denial of access is imposed upon the online investor if no fee is paid for his/her access.

⁹ It appears that the information is bundled, arbitrarily, by type of information and by markets. An item is defined as any part or all of the data set including last sale, bid, offer, and size for the given security. Access must be purchased for each of three markets and access to all securities in that market must be purchased as a package. For example, online investors cannot purchase access to only information for the few stocks in their portfolios or only Dow stocks. They must pay for the right to access all stocks or none. Similarly, they cannot choose to access only bid prices or only last sale prices.

¹⁰ For example, NYSE controlled CTA/CQS fees apply, not to each customer, but to each customer login. If a customer has two accounts with different login numbers and/or has a simultaneous login from two personal computers, that form of access to his broker requires payment of multiple CTA/CQS non-professional fees, even though CTA/CQS costs are not affected by the multiple logins, multiple accounts, or the frequency of access.

receiving information via broker broadcasts over their computers and touch tone phones are charged a monthly fee of \$1.00 for unlimited access to a particular network; and per-query fees range from \$.0025 to \$.02. Charges paid by media broadcast are on a per household basis approximating \$.002 per household per month.¹¹

Exclusive processor contracts require the denial of access to be imposed by brokerage firms upon their customers as a condition of brokerage firm access to the subject information. This denial of access requires online brokers to maintain two information systems for customers accessing information utilizing their personal computers (online): 1) un-delayed information for non-professionals who become fee-paying subscribers and 2) delayed information for non-professionals who do not become subscribers. Moreover, online brokers are required to incur extensive costs for administration of the fees, for periodic internal and external audits of fee administration processes.¹²

This denial and/or limitation on access is the economic lever used by the exclusive processors (CTA/CQS and NASDAQ) to collect access fees selectively from online investors. For online investors who choose not to become subscribers, the limitation on access obstructs the efficient execution of transactions.

Per Se Discrimination

The subject non-professional fees are per se discriminatory. They are differentially applied to a selected group of non-professional investors; they are not cost-based; they are imposed without the application of any commonly accepted standards of fairness, reasonableness of costs or rate of return on capital; they may have an implied immunity from anti-trust statutes¹³; they are grossly excessive in relation to access charges for equivalent un-delayed information provided to other similarly situated groups; they are a limitation and/or denial of investor access to un-delayed market information; they limit, restrain and obstruct efficient communications between online brokers and their clients; they restrain, unnecessarily, the efficiency of the transactions process; they reduce, arbitrarily, the potential for public orders to meet without the participation of a dealer by artificially delaying small investor online access to subject information; and they competitively disadvantage online brokers and/or online transaction processes as compared to other brokers, other transaction processes and other information distribution channels.

Consequently, the non-professional fees, as currently applied, are unfair and unreasonable; and they are unreasonably discriminatory. Also they are an inappropriate denial and/or limitation of investor access to market information. Indeed, they operate as

¹¹ See Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change, September 2001, Securities and Exchange Commission, Washington, DC p.30.

¹² If the fees were limited to properly assignable costs of the exclusive processors and/or the comparable media broadcast household fees, the administrative costs and other implicit costs in customer time, inconvenience and denial of access would undoubtedly exceed the fee revenues.

¹³ See Silver, *Doing Business As Municipal Securities Co., Et Al. V. New York Stock Exchange*, 373 U.S. 341, pp. 344-345,349,356-35, and 364.

a denial and/or limitation on reasonably efficient investor access to the securities transactions process.

Securities Exchange Act of 1934 Mandates

In Section 11A of the Exchange Act, Congress articulated general findings and objectives for achieving a national market system, and granted The Commission broad authority in overseeing its development. The recent report of the SEC market information advisory committee, chaired by Professor Joel Seligman, (The Seligman Report), emphasized that:

Section 11A(c)(1) of the Exchange Act prohibits SROs, SIPs, and broker-dealers from contravening rules prescribed by the SEC to: (1) prevent the use, distribution, or publication of fraudulent, deceptive, or manipulative market information; (2) assure the prompt, accurate, reliable, and fair collection and dissemination of market information, and that the form and content of the information is fair and useful; (3) assure that exclusive processors make their market information available to all SIPs on terms that are "fair and reasonable;" (4) assure that all persons have access to market information from SROs and SIPs on terms that are "not unreasonably discriminatory;" (5) assure that all broker-dealers transmit orders in a manner consistent with the establishment of a national market system; and (6) assure equal regulation of all markets and broker-dealers effecting transactions in national market system securities.

The objectives set forth in Section 11A(a) to guide the SEC in its oversight of the national market system were to assure: (1) economically efficient execution of securities transactions; (2) fair competition among broker-dealers, among exchange markets, and between exchange markets and markets other than exchange markets; (3) the availability to broker-dealers and investors of market information; (4) the practicability of broker-dealers executing investors' orders in the best market; and (5) an opportunity for investors' orders to be executed without the participation of a broker-dealer.¹⁴

The subject fees are discriminatory, excessive and anti-competitive. They are arguably inconsistent with each of the above objectives of Section 11A(a) of the Exchange Act.¹⁵

¹⁴ See Seligman Report p. 14

¹⁵ For example: 1) Transactions efficiency is reduced. Subject fees are not cost based; they appear to be excessive, retail broker costs of administration and application of subject fees are large; and the limitation and/or denial of access to individual investors to critical market information for purposes of managing their own account competitively disadvantages such investors as participants in the market process and increases investor side time required to manage his/her activities. 2) The fairness of competition is reduced. The key competitive mechanism that enables online brokers to un-bundle brokerage services and charge petitioner lower commissions is the application of computer, Internet and related technologies to the retail brokerage service processes. Provision of access to information, especially un-delayed market data is a major component of that competition. Because subject fees selectively restrict, arbitrarily and unnecessarily, the manner in which online customers are permitted to access information from their online brokers, the fees and the related denial of access competitively disadvantages online brokerage processes that petitioner utilizes. 3) In addition, because the subject fees are not cost-based, the selective use of revenue surpluses to finance other activities of SROs and selected members and facilities used by members competitively disadvantages non-exchange markets relative to exchange markets. The rush of market centers to become

The Seligman Report points out that Congress viewed exclusive processors as public utilities that must function in a manner that is "...absolutely neutral with respect to all market participants."¹⁶ Conversely, the Report recommends that The Commission not use a cost-based utility type approach in their review of exclusive processor fees.¹⁷

The Commission needs to consider whether Congress actually intended that only the final consolidation (from market participants) where a single processor might emerge was considered to be regulated potentially as a utility, with competition determining both the collection and the distribution stages of the information process.

Clearly, the applications of the non-professional fees of the network exclusive processors are not "neutral" probably because the on both the collection and distribution sides of their activities the exclusive processors are insulated from competition. With the possible exception of the narrow role of exclusive consolidator, there is no reason to believe that this non-competitive structure is necessary for the information processes to work. With respect to the subject fees, there is no evidence that competition would unfairly discriminate against particular groups of participants, given the availability of anti-trust relief to limit monopoly abuses.

Pricing of Information: Arbitrary and Capricious Differentiation of Fee Basis

The non-professional fee bases are discriminatory in comparison to fee bases used for other non-professionals and professionals receiving access to the identical class of information.

Non-professional access fees, including last sale and the best bid/offer quotations, while described as per customer fees are often calculated as per account and per login fees. For example, a client and spouse cannot be simultaneously logged on to a joint account to access NYSE information. Similarly, an IRA (Individual Retirement Account) and a

exchanges is clear evidence of that disadvantage. 4) The availability to investors of market information is reduced, by fiat. Access to information is being limited and/or denied to petitioner and other non-subscriber online investors on reasonably non-discriminatory terms by exclusive processors. Furthermore, online investor brokers' ability to compete in the efficient provision of market information to their online customers is being arbitrarily restrained. 5) Execution of customer orders in the best market is arbitrarily and unreasonably impeded. Market prices frequently change within the few seconds that self-directed non-subscriber investors must check back and forth between web pages to check undelayed bid/offer quotations, provided free by online brokers, before acceptance of trades for execution in order to meet their best execution obligations. The forced time delays associated with denial of un-restricted access to un-delayed information, when coincident with quotation changes sometimes prevents a self-directed investor from executing at the "best market". 6) Opportunities for execution of online investors' orders without the intervention of a dealer are reduced. When restrictions on online investor access to quotation and last sale prices information delay their triggering of the execute key for a market order, it is reasonable to assume that quotation changes that sometimes occur reflect the execution of ECN limit orders that were narrowing market bid/offer spreads. Quotation prices reflecting small ECN orders change more quickly than do dealer quotation prices because the former are being executed against very quickly and the limit order is being cleared from the market, changing the quotation price. As a result, anything that delays investors' ability to monitor quotation prices would reduce the opportunity for their trades to execute without the intervention of a dealer.

¹⁶ See Seligman Report p. 43.

¹⁷ See Seligman Report p. 50.

regular account at the same broker are separately charged a fee if they have separate login numbers. Each customer with such access must sign exclusive processor subscriber agreements and non-professional fees must be paid either directly or indirectly by the broker for that customer as required to reconcile exclusive processor denial of access with broker's best execution obligations and/or to overcome competitive disadvantages caused by the selective denial of access.

Some distributors of market information to general public groups, such as media distributors, are charged on the basis of the number of households served¹⁸ with no subscriber agreement required of viewer households and no separate fee charged. Similarly, customers that receive information over the telephone from their brokerage firms' account executives are not required to become non-professional subscribers or pay fees. Likewise, customers whose accounts are managed on a discretionary basis by a broker are not required to become non-professional subscribers.

Non-professional Fees are Excessive

Non-professional fees Charged for individual investors' access to market data information over a personal computer range from \$.0025 to \$.02 per item capped at \$ 1 per month per customer account or per computer login number for each market NYSE, NASDAQ and AMEX. In contrast, for distribution of such information on television, distributors are billed by the exclusive processor for one market's access at \$1.60 per 1,000 households or approximately \$.0016 per household per month with the distributor charges capped at \$125,000 annually. NASDAQ currently has a four year old pilot program involving distribution of real-time data on television with monthly fees that are \$.002 per household for the first 10,000,000 households, \$.001 per household for the next 10,000,000 households, and \$.0005 per household for additional households.¹⁹

The implicit per item access fees of households to broadcast information are infinitesimal. The per customer non-professional access fee rates applied to online customers of brokers are literally hundreds of times the per household rates charged for media broadcast of the same information.

Fees levied upon professionals, manually providing information to customers over telephones or over monitors in branch offices and through discretionary account management are per device fees, levied upon devices without adjustment for the number of customer devices used to call the broker, the number of separate customer access queries made etc. For example, if account executives sharing or using a device singly are serving 500 client accounts, the professional per device fee, reported by The Seligman Report as ranging from \$0.85 to \$6.00 daily,²⁰ translates into a per client monthly fee ranging from \$0.06 to \$0.25. Again no subscriber agreement must be signed by such customers for access and no non-professional access fee is required of such customers.

¹⁸ See Seligman Report pp.29-31.

¹⁹ See Seligman Report pp.29-31.

²⁰ See Seligman Report pp.30.

The differential bases for charges used by exclusive processors illustrate how exorbitant fees are being extracted from online brokerage customers. The basis for the subject fee is not households as in the broadcast of data over CNBC or per account executive device serving 300 or 500 or 1000 accounts but rather each computer login number/password of each online investor. This, of course, is unreasonably and unnecessarily discriminatory.

Non-Professional Fees are not Cost-based

There is no evidence that the provision of access to un-delayed market information by online brokers to their individual investor clients increases the costs²¹ of either the exclusive processors or the SRO owned market centers that share the subject non-professional fee revenues. Costs of the exclusive processor are essentially unaffected by the variety of ways and frequency of access that a broker's customers employ in managing their accounts.

However there is clear evidence that the selective imposition of non-professional fees on online investors increases the costs of the investor and the broker who must administer the fee. The Seligman Report described the many complaints respecting the onerous administrative requirements imposed upon investor clients and online brokers that were made in comment letters to the SEC.²²

Yet, in year 2000, SIAC (Securities Industry Automation Corporation) as the exclusive processor for NYSE, AMEX, and Regional securities, had total consolidator costs of \$7.7 million and NASDAQ the exclusive processor for NASDAQ securities had consolidator costs totaling \$29.2 million while revenues obtained by the two exclusive processors from non-professional fees alone were \$115 million in 2000. Subscriber revenues from professionals were another \$469 million.²³ Clearly, the subject fees are not cost-based.

The fact that the revenues generated solely by non-professional fees for access to consolidated information are three times the consolidator's total costs of consolidation by itself should persuade The Commission that denial of reasonably non-discriminatory access to online investors is resulting from the selectively applied non-professional fees.

Subject Fees are imposed Through Exclusive Arrangements that are Anti-Competitive and Discriminatory

The subject fees are imposed by exclusive SIPs under NMS plans jointly administered by SRO's that are permitted to join the plans as voting participants. The plans are also exclusive, permitting only SROs to be revenue sharing and voting participants in the plans. Thus, unlike the National Stock Clearing Corporation (NSCC), the plans are not user –controlled but rather they are essentially economically independent SRO cartels for

²¹ There may have been some cost impact when the fees were originally imposed because, at that time, each customer inquiry accessed the processor's computer system. That is no longer the case. Access is now from data stored in brokers' and vendors' computers.

²² See Seligman Report, pp.20-21

²³ See Seligman Report pp.30.

managing the consolidation and distribution of market data and market data fee revenues including the subject non-professional fee revenues. Even large non-SRO originators of the information are excluded from participation in existing SRO controlled NMS market data plans.

Exclusive processors are the agents of the SRO groups forming the cartel for purposes of consolidating market data input by members and other input subscribers. In that capacity exclusive processors act as billing agents for the cartel, not just for exclusive processor consolidation services included in the non-professional fees but also for undefined SRO non-processor services included in the subject fees. This loading on of unrelated costs results in the fees being grossly excessive as well as discriminatory.

These arrangements that prevent, limit, and/or distort competition enable the imposition of the subject fees that deny and/or limit the access of online investors to the subject market information.

Contractual restraints on Competition That Limit Investor Access

In order to successfully participate in the market transactions service business, brokers and their agents serving as agents for online individual self-directed investors, the largest originators and producers of component streams of market information, are required to sign exclusive processor contracts that transfer to the exclusive processors of the subject information, without remuneration, all proprietary rights in the investor information input into exclusive processor systems. Additionally, such input subscribers are required to agree to do nothing that will reduce (i.e. compete with) the subsequent value of that information to the exclusive processors.²⁴

As a result, both the collection and distribution processes for the subject information are purged of competition; and online investors' access to competitively generated alternative sources of equivalent information is denied and or limited. These arbitrary and capricious restraints on competition not only reduce transactions efficiency but they also infringe on the inherent right of information producers to publish quotation and last sale information and the inherent right of online investors to receive that information without the limitation of the subject fees and the related administrative burdens and invasion of privacy.

Sharing of Exclusive Processor Surpluses is Discriminatory

After deduction of operating expenses, each Network's revenues generally are distributed to its SRO participants in accordance with their proportional share of the total transaction volume for the Network. Fee surpluses can be used to pay for orderflow, expand into new domestic and foreign markets, promote SRO facilities in competition with non-SRO facilities etc.

²⁴ For example, see Workstation II Subscriber agreements Marketmaker and Order Entry firm versions, Section 8.

There is no requirement that surpluses be shared with non-SRO market participants that bring orderflow to the SROs' market centers. Consequently, the competitive process of sharing orderflow byproduct value with investors' retail brokers and their clients, through payment for orderflow and service enhancements, arbitrarily excludes the market information revenue value that non-exclusive and reasonably non-discriminatory sharing of exclusive processor surpluses would permit.

As a result the denial and/or limitation of access to online investors is exacerbated by fees that exceed exclusive processor costs (including cost of capital) and by sharing arrangements that distort competition among broker-dealers, among exchange markets, and between exchange markets and markets other than exchange markets.

Impact on competition among Brokers

Non-professional fees, because they are selectively applied to online customers of brokerage firms, competitively disadvantage brokers who serve those customers; and they discourage the adoption of more efficient methodologies for communications between such brokers and their customers.

Securities markets are information systems. Everything that happens in securities trading has an information side. Indeed brokers are in the information business almost as much as they are in the asset and transaction business. Online investors seek a highly efficient time-saving and time-utilizing process for receiving information, placing orders, and transacting.

Non-professional fees are being used by SRO market centers to extract the benefit of technological efficiencies from online brokers and their customers for the benefit of other participants, particularly the SRO's that are sharing the non-professional fee surpluses. As a result some online investors pay unnecessary and excessive fees. Others, who remain non-subscribers and who are subjected to a denial or limitation on access, must spend more time, visit more computer pages, and be satisfied with less than current information when routinely viewing portfolio information. Also, online investors must pay higher commissions or other charges than would otherwise be necessary because online broker costs are increased unnecessarily by the need to administer the non-professional fee process.

Summary

The subject non-professional fees, are excessive and discriminatory. They are not cost-based; they are not neutral in their application to investors; and they are enforced by a limitation and/or denial of access of millions of online investors to un-delayed quotation and last sale information, essential to the efficient execution of their transactions and efficient management of their brokerage accounts.

Consequently, online investors are being discriminated against unfairly. More important, the limitation and/or denial of investor access to market information through their brokers is not necessary in furtherance of the purposes of the Exchange Act.

The Commission needs to separate out the non-professional fees from the other broader market data structure questions and deal with the most egregious unfairness in the process, the non-professional access fees.

A review is needed of the reasonableness of the anti-competitive mandatory clauses in exclusive processor agreements with brokers that restrict the mode of transmission of the subject market information from brokers to clients and that arbitrarily require the mandatory transfer of proprietary rights to market information input to exclusive processor systems. .

The Commission needs to withdraw their approval of the non-professional fees and the anti-competitive clauses of exclusive processor subscriber agreements that support them; that would allow individual investors and the markets to benefit from the competition for their business.

Respectfully submitted,

Gene L. Finn

Cc: J. Joe Ricketts, Chairman of the Board, Ameritrade Holding Corporation
Honorable Paul S. Sarbanes, Chairman, Committee on Banking, Housing, and Urban
Affairs, US Senate

Finn Associates Inc.
1236 Battery Ave.
Baltimore, MD 21230
Tel. 410-659-0613
Fax 410-659-5166

Jonathan Katz, Secretary
Securities and Exchange Commission
September 21, 1999
450 Fifth St. NW
Washington D.C. 20549

RE: Rel. No. 34-41767 File No. SR-CTA/CQ-99-02

Dear Mr. Katz;

In the subject release (The Release), the SEC solicits comment²⁵ respecting the proposed reduction of per se discriminatory Tape B quotation access fees charged online investors (nonprofessional investors), who access quotation and last sale report information electronically through their PC'S (personal computers). Investors who access the same information through human voice (telephonic) communication from their broker are not charged the subject "non-professional" access fees.

I am an individual online investor, a member of the class discriminated against by the existing and proposed fees. My background as Chief Economist and Senior Economic Advisor for the SEC (1969-1982) and Chief Economist for NASD (1973-1995) qualify me to comment on the issues raised in this release. Although I am currently an outside director on the Boards of Knight/Trimark Group Inc. and Ameritrade Holding Corporation, these views are my own and should not be attributed to others affiliated with those companies.

²⁵ In addition to being an online investor, I am an Outside Director of Knight/Trimark Group Inc., the largest NASDAQ and Third Market dealer and of Ameritrade Holding Corporation, a large retail Internet brokerage firm. However, the views expressed herein are mine and they should not be attributed to either of these organizations. I served as SEC Chief Economist 1969-1976, SEC Senior Economic Advisor 1977-1982 and as NASD Chief Economist from 1983-1995. Hence, I am qualified to comment on this issue.

Fee Discrimination

The “nonprofessional” Tape B fees that are the subject of the release apply to only a selected group of investors. Therefore they are “per se” discriminatory. This discrimination should be eliminated, justified on substantive regulatory grounds or the subject nonprofessional fees should be eliminated. The comparable CTA Tape “A” and NASDAQ “nonprofessional” fees also are unnecessarily discriminatory. That discrimination should be corrected also, if necessary by elimination of those fees.

This rate discrimination, a blatant exercise of SRO monopoly power, cannot be demonstrated to be “necessary in furtherance of the purposes of the” Exchange Act of 1934, as required by the Act. Unless that need can be demonstrated, the nonprofessional fees appear to violate anti-trust laws.

The need to discriminate against online investors, investing for their own account must be supported by something more than an undocumented proclamation by the SRO and /or the SEC that such fees are found to be “in furtherance of the purposes of the Act”. A report containing differential cost and revenue data, rates of return, the Commission’s reasoning and other related information used in finding such rate discrimination reasonable must be in the public record as intended by Congress in the 1975 Amendments to the Exchange Act of 1934.²⁶

Non-professional quotation access fees, if necessary at all, should be applied to all investors. How the information is accessed from intermediaries (vendors, brokers, media etc.) appears to be unrelated to the costs of SRO activities. Consequently such fees are an unnecessary restraint on communications between brokers and their customers and on competition among brokers and vendors.

Unless found necessary for purposes of the Act, such discrimination appears to violate the basic principles of the anti-trust laws. “What cost or other basis is there that makes it necessary for a differential per investor fee applied to investors, such as myself, that use an electronic means to access quotation information from their brokers’ computers?” Without a reasonable answer to this question, the current Commission approval of selective SRO nonprofessional quotation access fees has no credible foundation. It is this acute lack of a reasonable regulatory foundation that has undoubtedly motivated the subject NASD proposal to dramatically reduce the existing Tape B fees.

Given the Exchange Act’s presumption against discriminatory fixed fees and in favor of competition and fairness, the acknowledged excesses of existing fees and the inadequacy

²⁶ See Legislative History of Securities Acts Amendments of 1975, House Committee on Interstate and Foreign Commerce, May 1975, p.93. See also House Conference Report No. 94-229, May 19, 1975, p.93 and Securities Acts Amendments of 1975, Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, Senate Report 94-75, P. 11.

of the basis for the discrimination warrant Commission action to abrogate completely the non-professional quotation access fees imposed by NASD and the exchanges.

Prior Petitions

A number of past petitions²⁷ to the Securities and Exchange Commission (SEC) sought relief from these highly discriminatory fees. Please include those submissions by reference in this record. In addition, The Commission should consider combining the files of all “nonprofessional fee” proposals. In March 1999 the NASD announced a plan to cut such fees for NASDAQ stocks by 50% and the NYSE announced a planned cut of 25% for NYSE stocks.

These public announcements reflect those SROs’ internal judgment respecting the excessive nature of those charges. They also indicate the use of proposals for large cuts in fees to finesse efforts to have these lucrative, but discriminatory, fees eliminated altogether. Thus prior petitions to the SEC are relevant and still valid requests for relief.

Background

As the release notes, nonprofessional fees were introduced in 1985. When such fees were implemented, non-professional electronic access to information apparently impacted exclusive processor computers each time inquiry was made for current information. Such impact of each retail customer inquiry on SRO exclusive processor costs has not been the case for nearly a decade.

As The Commission is aware, responsible decisions respecting the pricing and entry of investor orders cannot be made without access to the real-time best bid and ask prices in the particular security at the time a transaction is contemplated. Indeed, the SEC would consider a broker as failing in his fiduciary obligation, if the broker does not provide such information to his client at the time of receipt of an order. This makes the selective imposition of NASDAQ and NYSE subscriber access fees on online investors not only a horrendous abuse of monopoly power but also a practice that undermines a pre-eminent National Market System (NMS) goal of Congress.

Copyright Rights

SRO’s are agents of the government. In that capacity, they require marketmakers and other regulatees, that provide quotation and last sale information, to relinquish all proprietary rights to the information input into SRO systems. The SRO’s in turn copyright the combined database, re-selling it to subscribers, including those market participants whose activities generate the raw information in the first place. Use of

²⁷ Letters from Gene L. Finn to the SEC dated July 24,1987, File No. S7-16-97; May 1 1998, RE: SR-NASD-98-17; June 17,1998, File No. SR-CTA/CQ-97-3; and March 30, 1999, Re: Rel. No. 34-40869.

copyrights to shore-up the monopoly power created by NMS rules to enhance SRO promotional and other competitive activities was never intended by Congress.

Nonprofessional Fee Is Inherently Defective

The nonprofessional fee was not a “reduced rate” as characterized in the Release (page 3). It was a new fee being applied to nonprofessional subscribers. Also, by omission, the Release implies that the fee is applied uniformly to all individual investors based upon the general standard that the investor “...receive the information solely for his personal, non-business use.[and] The subscriber shall not furnish the information to any other person.” (See Release footnote 6). Essentially, all individual investors would appear to be covered by such a broad standard and discrimination would appear to be absent.

The discrimination against online investors, being ignored in The Release, is in the fine print of SRO subscriber applications and agreements that qualify online investors for the “Privilege of Receiving Last Sale Information & Bond Last Sale Information as a Nonprofessional Subscriber.” The limiting clause, almost identical in Tape A (NYSE), Tape B (Amex, Regional exchange) and NASDAQ customer access agreements, prohibits brokers from communicating quotation and last sale information to customers through any electronic means (i.e. without payment of fees and a signed customer agreement).

Anti-Competitive Economic Impacts

The revenue side economic impact of this discrimination can be illustrated by a simple example. Assume that the revenues of the subject Tape B proposal merely cover incremental costs of data collection and re-transmission, that there are 4 million online investors that pay the fee and that there are 70 million individual investors in total that would meet the apparent Commission standard in the Release regarding personal, non-commercial use and non-transfer of the information to others. To raise revenues equivalent to the proposed \$1 per month per investor, a fee applied to all investors would be reduced to about 5.7 cents per month per investor for minimum Tape B access. If NYSE Tape A and NASDAQ were revised accordingly, the combined maximum monthly charge per customer would be 15-20 cents per month instead of \$3.

While the amounts seem small, \$3 per month for 4 million investors is \$142 million per year.

The value of service side (non-access to information) impact is undoubtedly much larger. For example, investors that do not submit directly to the imposition of SRO access fees receive the minimum real-time quotation information on a forced basis and pay indirectly for the cost of that information in higher commissions. Instead of being disclosed up front, the discriminatory monopoly fees are hidden (bundled) in brokerage commissions.

In the current technological environment, SEC regulation and best execution competition force brokers to provide real-time quotation information before trades are submitted for

execution. In addition to the fees, investors also pay higher commissions to cover the costs of more complicated trading systems' designs that are required to administer the discriminatory fee program.

Other Inequities of Non-professional Fees

Moreover, investors suffer from irrational access differences reflecting a "what the market will bear" philosophy for setting rates and access parameters. Here are some specifics to illustrate these points.

Delayed bid/offer quotations require a fee for access to quotations in NYSE stocks but are available for NASDAQ stocks without a nonprofessional subscriber agreement (fee).

Real-time last sale reports in all stocks are available to investors over CNBC without fee, but cannot be provided over broker-dealer systems without a nonprofessional agreement or per item charge. No information is available on per item CNBC viewer rates for comparison with SRO non-professional per item fee rates.

Quotation and last sale information is bundled, when the bundling is advantageous to the SRO (sellers) and unbundled when unbundling is favorable to the seller. For example, NASD keeps Amex and NASDAQ stocks unbundled, with a minimum charge for each NASD category. Conversely, last sale, bid, offer, volume and each item of information is kept bundled for the stocks in a "quote packet".

Similarly, the more complex clearing and depository functions of NYSE and NASD are combined but the information collection and distribution systems are kept separate to accommodate SRO promotional goals. Should it be necessary for purposes of the Act for investors to pay 3 separate minimum royalty fees of \$1 per month, especially if 15-20 cents should cover the pro-rata incremental costs? Of course not.

Revenues are shared among SRO's on a transaction basis, but SRO non-professional royalty fees are charged on a per-investor or rate-of-access basis. This means that SRO royalty revenues unnecessarily are front-end loaded against small investors that typically average 1 transaction per month. SRO data storage computer systems being accessed for updates by broker and vendor systems are unaffected by whether the broker retail customer inquiry stream consists of a few active or many inactive investors. SRO exclusive processor costs are unaffected by the rate of customer access from broker and vendor systems. Therefore, customer access fees should be set competitively by brokers, not by SRO's.

Only pro-rata incremental costs of non-professional information distribution should be used for fee evaluations. Market information has been required for market surveillance and other regulatory purposes; markets and brokers have required such information merely to operate; such information has been desired by issuers to advance issuer and market promotional goals; and the information has been used by portfolio managers and media organizations for various purposes unrelated to immediate execution of stock trades. Indeed the SEC had to be persuaded by NASD (and issuers) to permit expansion

of the NASDAQ market data system from the few hundred stocks originally included in NASDAQ NMS to virtually all NASDAQ stocks.

Given these various needs for the level 1 (best bid/best offer, last sale etc.) data stream, the incremental costs of distribution to online investors would seem to be far less than the revenues that are being proposed in the subject Release. Without audited incremental cost information, the reasonableness of specific fees cannot be determined. Four million dollars per month for 3 tape feeds (NYSE, NASDAQ, and AMEX) is still \$142 million per year.

Discrimination against Small Investors

The benefits of productivity of the new computer technologies that lower the costs of small investor information processes are being retained by SRO's for general budgetary uses. Regulation is insulating this SRO anti-competitive process from both competition and anti-trust enforcement by sheltering anti-competitive provisions of SRO subscriber agreements. Specifically, as noted above SRO vendor contracts include restrictive clauses that prohibit the efficient, electronic transmission of quotation and last sale information to non-professionals.

Equally important, SRO contracts with information producers, including marketmakers and others, require such producers to transfer all proprietary rights in the information to the SRO. This protects SROs from competition in the information collection and distribution processes. Restraints on competition have the greatest impact upon small investors who individually do not have sufficient business to avoid these adverse anti-competitive impacts. The competitive incentive, to attract small investor business, is the only process through which small investors can obtain the benefits of such productivity and the aggregation of small order flow.

Recommendations

SRO nonprofessional market data access fees should be eliminated.

Non-professional quotation access fees selectively imposed upon online investors seem to have no redeeming values. They reduce the efficiency of the market process and they undermine the perception of fairness that the Commission works very hard to preserve. Moreover, the proposed volume discounts for active traders silence the squeaky wheels; but they ignore the technological changes that make such economic distinctions meaningless.

Currently, the problem of elimination of the non-professional fee is manageable, because the online investor population is still relatively small. Conversely, the shift to online activity is rapid and the revenue from non-professional fees is rising rapidly. This indicates that, if such fees are retained, close regulatory monitoring will be required to prevent excessive and discriminatory fees, such as those that have been allowed to develop in the past.

Therefore, if the Commission approves SRO non-professional royalty fees, they should be approved for only one year at a time to assure frequent review and opportunity for investor comment..

Thank you for your consideration of this comment.

Respectfully yours,

Gene L. Finn

Gene L. Finn Ph.D.
1236 Battery Avenue
Baltimore, MD 21230
Tel. 410-659-0613
E-mail <gene.l.finn@att.net>
January 15, 2002

Harvey Pitt, Chairman
Securities and Exchange Commission
450 Fifth St. NW
Washington DC 20549

NASDAQ and CTA/CQS Non-professional Access Fees and the
Related Denial and/or Limitation of Access To Market Information

Dear Chairman Pitt;

Thank you and Assistant Director Katherine England for the SEC's kind, courteous and prompt response to my letter of December 10, 2001 seeking relief from the denial/limitation of access associated with the subject NASDAQ and CTA/CQS non-professional fees.

That letter, (copy attached) states that "The Division of Market Regulation is currently working with the various exchanges and the NASD that are participants of the CTA/CQ Plans. The concerns raised in your letter will be addressed in this process."

With all due respect, the problem is in the process.

It is like the proverbial farmer, who when he discovers that the chicken fence (investor protection) has a hole in it and his dogs (competition) are securely penned-up, decides to solve the problem by attempting, with the cooperation of the foxes, to find ways to change the foxes' dietary habits. Meanwhile, the farmer leaves the hole in the fence and the dogs penned up until the foxes are so persuaded, because of course the foxes need to eat. Meanwhile, the chickens (online investors) continue to be the main course.

It is for this reason that, beginning with my letter dated May 1, 1998, I have argued a number of times that the Commission should require that the revenues from the non-professional fees be held in escrow until the Commission could complete a review of the subject fees.²⁸

²⁸ See the attached letters to the SEC dated May 1, 1998, March 30, 1999, September 21, 1999, December 1, 1999, December 3, 1999 (to Arthur Levitt), and March 5, 2000.

This issue of non-professional fees is simply another reminder that the cooperative self-regulatory process does not work when the problem is the resolution of competitive issues (supply, demand and price of market services) that affect the revenues of SRO's and their dominant members. Indeed reliance on the self-regulatory process has already unnecessarily delayed the regulatory review process at enormous costs to the affected online investors.

Rather, The Commission should announce, without further regulatory delay, their decisions respecting the facts pertaining to the subject issue and let market participants, including SRO's, initiate the necessary changes to comply. It is unfair to online investors to make them wait for relief until all of the tremendously complex issues of market data information systems structures can be resolved. It is also unnecessary to allow the per se discrimination and denial/limitation of online investor access to continue another day.

Respectfully yours,

Gene Finn

Finn Associates Inc.
1236 Battery Ave.
Baltimore, MD 21230
Tel. 410-659-0613
Fax 410-659-5166

Chairman Arthur Levitt
Securities and Exchange Commission
450 Fifth St. NW
Washington D.C. 20549

December 3, 1999

File No. SR-CTA/CQ-99-53

Dear Chairman Levitt;

This letter is in reference to the Commission's consideration of a market data concept release at the December 8, 1999 open meeting.²⁹

My July 24, 1997 comment letter to the Commission recommended that: " SEC should withdraw its approval of SRO market data subscriber fees applied to individual investors investing directly for their own account and accessing data electronically. These charges discriminate against those who would access such data electronically (as compared to access over the telephone); and such fees unnecessarily restrain competition."

My May 1, 1998 comment letter to the Commission recommended that: " The Commission is obligated by the Exchange Act to take the initiative and institute a review of the discriminatory NYSE and Nasdaq real-time quotation access fees. Moreover, given the abhorrent character of the discrimination, the Commission should require NYSE and Nasdaq to begin immediate escrow of the proceeds from such charges until its review is completed."

²⁹ I am an individual online investor, a member of the class discriminated against by NYSE and NASD/Nasdaq non-professional fees. My background as a former Chief Economist and Senior Economic Advisor for the SEC (1969-1982) and Chief Economist for NASD (1973-1995) qualifies me to comment on the "nonprofessional fee" issue. Although I am currently an outside director on the Boards of Knight/Trimark Group Inc. and Ameritrade Holding Corporation, these views are my own and should not be attributed to others affiliated with those companies.

My June 17,1998 comment letter to the Commission recommended that: the Commission "...summarily require the removal of discriminatory fees that arbitrarily and capriciously limit small investor access to essential market bid/offer quotation information. " and require the "...immediate escrow of the proceeds from such charges...."

The Commission's decision to review market data fees is to be cheered and applauded. However, the costs to online investors roll on. The recently released Unger Report shows that these discriminatory fees cost online investors \$ 31 million out-of-pocket in 1998 alone. These "nonprofessional" fees probably cost them twice that amount in administrative costs and lost investment pricing efficiency resulting from restricted access to real-time quotations information.

The obvious unfairness of these fees has already caused NYSE and Nasdaq to drastically lower their levels; but the per se discrimination against online investors inherent in these fees argues strongly for Commission injunctive relief from what appear to be simply unnecessary, unfair charges.

Further regulatory delay appears to be inevitable. Consequently, given the economic incentive of NYSE and Nasdaq to delay SEC action, I request, for myself and other online investors, that the Commission consider the establishment of escrow funds of such fees to protect online investors from further discrimination.

Sincerely yours,

Gene Finn

In the subject release (The Release), the SEC solicits comment respecting a proposed NASD/Nasdaq order display and execution system that would establish NASD dominance over order display and trading in Nasdaq stocks. Because Nasdaq is the NASD's exclusive processor for quotation and trade report information in Nasdaq stocks, the proposed system would substantially expand the NASD's dominance and control over quotation and trade report information in Nasdaq stocks.

The NASD proposal is deficient in that it would expand the scope of discriminatory quotation access fees and illegal restraints on investor access to quotations information that are currently imposed upon online individual investors by NASD/Nasdaq. As a matter of policy, the Commission should not approve any proposal that would expand the scope of an unnecessary discriminatory practice.

I am an individual online investor, a member of the class discriminated against by NYSE and NASD/Nasdaq non-professional fees. My background as a former Chief Economist and Senior Economic Advisor for the SEC (1969-1982) and Chief Economist for NASD (1973-1995) qualifies me to comment on the issues raised in this release. Although I am currently an outside director on the Boards of Knight/Trimark Group Inc. and Ameritrade Holding Corporation, these views are my own and should not be attributed to others affiliated with those companies.

SEC's Unger Report Documents Fee Discrimination

The Commission's recently published report on online trading, under the direction of SEC Commissioner Laura Unger (the "Unger Report"), documents quotations access discrimination confronted by online investors. The Report states: "Contrary to their practice off-line, the CTA and NASD do impose fees for on-line firms' delivery of real-time market data to customers via the Internet."³⁰

³⁰ On-Line Brokerage: Keeping Apace of Cyberspace, Securities and Exchange Commission, p.47.

Investors who access real-time quotation and last sale report information electronically through their PC'S (personal computers) are charged fees; investors who access the same information through human voice (telephonic) communication from their broker are not charged access fees.

Whether the NASD royalty fees, applied to online customer accounts and usage of information, are charged directly to the customer, or charged indirectly through broker commissions, this price discrimination and the related restraint of investor access to quotation information is inconsistent with fundamental Exchange Act and Anti-Trust law principles. Also, whether the fee is \$3 per account month or 1 cent per quote, it is discriminatory.

Discriminatory Fee should be eliminated

Non-professional quotation access fees, if necessary at all, should be applied to all investors. How the information is accessed from intermediaries (vendors, brokers, media etc.) appears to be unrelated to the costs of SRO activities and highly related to competition. Consequently such fees are an unnecessary restraint on communications between brokers and their customers and on competition among brokers and vendors.

By the Commission's own calculation, the scope of this discrimination was 14 times more in 1998 than in 1994 for access to NASD/Nasdaq quotations and 10 times more for access to CTA (NYSE) quotations. In 1998, the discriminatory fees were \$31 million.³¹ If we include the broker administrative cost of monitoring investor access to quotations and the economic cost of lack of access of investors, unwilling to pay NASD/ NYSE access fees, the total 1998 estimated cost easily approaches \$50 million.

The Unger Report, while documenting this differential treatment of online investors vis-a-vis other investors, focuses upon discrimination between non-professional and professional investors. While non-professional fees may be exorbitant when compared to professional fees, this comment is focused upon the unnecessary, discriminatory, anti-competitive impact of imposing access fees on a sub-set of investors because of the way they access information rather than because of differences in the cost of providing that access.

Congressional Intent

The Unger Report indicates a Commission concern that immediate elimination of online investor fees as a source of funding for SRO activities "...may impede the Commission's goal of enhancing SRO regulation."³² A review of the intent of Congress, when amending the Exchange Act in 1975, would show that Congress never intended that the SEC,

³¹ See the Unger Report, p. 54.

³² Unger Report, p.50.

through SRO's (self-regulatory organizations) would be able to finance a variety of regulatory goals with surplus SRO market data revenues.

Rather, as the Commission has said elsewhere: "...Congress directed the Commission to remove present and future competitive restrictions on access to market information and order systems...." and "...Congress granted the Commission broad authority to make rules, including those to....assure the prompt, accurate, and reliable distribution of quotation and transaction information; (3) enable non-discriminatory access to such information;...."³³Etc.

Moreover, Congress expressed a clear intent, in the legislative history to the 1975 amendments to the Exchange Act of 1934, that the monopoly power of SRO exclusive information processors that might result from the formation of the National Market System (NMS) should be subjected to "utility" type review. Congress said: "...where 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."³⁴

Utility type regulation means recovery of reasonable costs (including cost of capital) that are incurred in providing the service. It would require equivalent treatment of members of the same class and it would prohibit discriminatory restrictions on online investor and broker access to quotation information. Such discrimination was precisely the type of monopolistic practice that Congress was attempting to prevent when it made the statement quoted above.

Anti-Competitive Impact on Small Investors

The discrimination against online investors, being sheltered by the regulatory process, is in the fine print of SRO subscriber applications and agreements that qualify online investors for the "Privilege of Receiving Last Sale Information & Bond Last Sale Information as a Nonprofessional **Subscriber.**"(emphasis added) The limiting clause, almost identical in Tape A (NYSE), Tape B (Amex, Regional exchange) and NASDAQ customer access agreements, prohibits brokers from communicating quotation and last sale information to customers through any electronic means (i.e. without payment of fees and a signed customer agreement).

On the production side, SRO contracts with information producers, including marketmakers and others, require such producers to transfer all proprietary rights in the information to the SRO. This protects SROs from competition in the information collection and distribution processes. Regulation is sheltering these anti-competitive

³³ See SEC Release No. 34-40760; File No. S7-12-98, FR Vol 63 No. 245, p 70858

³⁴ See Legislative History of Securities Acts Amendments of 1975, House Committee on Interstate and Foreign Commerce, May 1975P. 93. See also House Conference Report No. 94-229, May 19, 1975, p.93.

provisions of SRO subscriber agreements from both competition and anti-trust enforcement.

What is most regrettable, these restraints on competition have the greatest impact upon small investors who individually do not have sufficient business to avoid these adverse anti-competitive impacts. The economic benefits of productivity of the new computer technologies that lower the costs of small investor information processes are being captured and retained by SRO's through their exclusive information processors; and used to finance a variety of SRO activities. The competitive incentive to attract small investor business-- the only process through which small investors can obtain the benefits of productivity associated with the aggregation of small order flow-- is thwarted.

Empowered by government charters, SRO exclusive processors in effect are expropriating order flow value from small investors.

Regulatory Record is Inadequate

The need to discriminate against online investors, investing for their own account must be supported by something more than an undocumented proclamation by an SRO market manager and /or the SEC that such fees are found to be "in furtherance of the purposes of the Act". A report containing differential cost and revenue data, rates of return, the Commission's reasoning and other related information used in finding such rate discrimination reasonable must be entered in the public record as intended by Congress in the 1975 Amendments to the Exchange Act of 1934.³⁵

Urgent need for Commission Action

The Commission should put an end to this costly regulatory charade. The Unger Report reveals that online investors have been ripped-off for at least \$31 million in 1998 alone. The Commission should refuse to approve any systems that incorporate conditions of information access that discriminate against a particular group of small individual investors.³⁶

Currently, the problem of elimination of the non-professional fee is manageable, because the online investor population is still relatively small. Conversely, the Unger Report demonstrates that the shift to online activity is rapid and the revenue from non-

³⁵ See Legislative History of Securities Acts Amendments of 1975, House Committee on Interstate and Foreign Commerce, May 1975, p.93. See also House Conference Report No. 94-229, May 19, 1975, p.93 and Securities Acts Amendments of 1975, Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, Senate Report 94-75, P. 11.

³⁶ See Unger Report p 50 and footnote 124. Small inactive investors are effectively shut off by cost; and the economic efficiency of market processes is obstructed by these demonstrably discriminatory fees.

professional fees is rising rapidly. This indicates that the revenue loss from elimination of such fees will have much less impact if their elimination is accomplished sooner rather than later.

Thank you for your consideration of this comment.

Respectfully yours,

Gene L. Finn

Gene L. Finn Ph.D.
1236 Battery Ave.
Baltimore, Md. 21230
Tel. 410-659-0613

R. Hewitt Pate
Acting Assistant Attorney General
Department Of Justice
601 D Street NW
Washington D.C. 20530
April 7, 2003

Dear Sir;

This is an appeal for Anti-trust Division (The Division) action to compel NASD (NASDAQ) and NYSE (Consolidated Tape Association/ Consolidated Quotation System) to eliminate unnecessary discrimination and restraints on competition in the collection and distribution of securities market information to online investors (investors who access such information electronically). In particular, the Securities and Exchange Commission (SEC or The Commission) has failed to protect small online investors from excessive and discriminatory NASDAQ and CTA/CQS (NASD and NYSE) “nonprofessional” market data access fees and the related anti-competitive practices through which those fees are imposed.

In particular, the SEC announced in Release No. 2002-99, dated July 3, 2002 that it was ordering SRO’S (self-regulatory organizations), including NASDAQ, NYSE and other exchanges, to discontinue an emerging, competitively motivated practice of rebating market data fee revenue surpluses to non-SRO market participants that are originators of the underlying market data. This emerging competition using revenue sharing to attract the orderflow of small online investors was squashed by this arbitrary SEC action.

Such orderflow rebates are competition’s way of returning, through lower transactions’ costs, orderflow values to small investor clients of service providers that are not vertically integrated. In the subject matter, the SEC appears to be insensitive to the impact of the agency’s own regulatory actions on competition. Consequently, anti-competitive practices are being exacerbated and indeed protected unnecessarily.

Background

In the mid-1980’s, as investors began to access last sale and bid/offer quotation information from their brokers using automated telephone and computer technologies, NASD and NYSE introduced separate “nonprofessional” access fees for any investors utilizing electronic devices to access information from their brokers. Approval of the SEC was obtained for the first and succeeding changes, without public hearings and/or evaluations of the cost, capital return and fairness standards employed in arriving at the fees, which appear per se discriminatory.

The exclusive processor fees do not apply to all investors; rather they apply only to investors utilizing electronic processes to access information from their brokers' computers.

It is important to emphasize that electronic access is not from NASDAQ and NYSE exclusive processor computers but from broker computers. Indeed the broker/client electronic access process is probably less costly to the NYSE and NASDAQ exclusive processors than are the non-electronic processes employed by other brokers.

Hence, the objective of the selective "non-professional" online fee was not to recover differential costs but rather to capture increased revenue from brokers and investors who are captives of cartelized processes.

Since the implementation of these "nonprofessional" fees in the mid-1980's, online investors have paid directly or indirectly hundreds of millions of dollars in discriminatory fees without reasonable regulatory review of the cost basis for the discrimination or of the underlying anti-competitive practices. The issue of the unfairness of these fees was raised letters to the Commission as long ago as 1997 without relief.³⁷

The Commission on occasion has suggested that a review of access fees was underway; but the only changes that have occurred have been made by the cartels following complaints and the associated threat of formal review. For example, such threats caused the cartel operators to reduce monthly fees from \$3.50 per month per market to a cap of \$1 per month per market 3 or 4 years ago. NYSE and Amex have also adopted monthly enterprise caps for the two or three largest online brokers, essentially to satisfy complaints of such brokers. In contrast, NASDAQ has declined to adopt such enterprise caps for large firms.

Failure of Regulation to address Anti-trust problems

The long absence of corrective action by the SEC suggests a complete lack of comprehension of the anti-competitive effects of these discriminatory and excessive fees. When the SEC finally took action, in July, 2002, they simply squashed emerging competition that was enabling disadvantaged online market participants to get out from under the boot of the market data cartel.

Because online investor market data fees are patently excessive, normal competitive economic processes were working through the routing of orderflow to cause rebates of economic surpluses to market participants that originate the underlying market data. The SEC action, prohibiting rebates, obliterated any possibility for broker/dealer originators

³⁷ See the attached letter to Chairman Harvey Pitt dated December 10, 2001 and in particular footnote 5 that cites my earlier submissions to the SEC on this subject. There are of course many more prominent submissions in the now voluminous record.

of last sale and quotation price information from participating in the normal competitive sharing of the revenues from this cartelized information production and resale business.

The SEC rationale in The Release was: “The Commission is concerned that the availability of large market data revenue rebates in certain markets may be creating incentives for traders to engage in transactions with no economic purpose other than to receive market data fees. The Commission believes that such trades may be distorting the actual volume of trading in these securities. Moreover, the Commission is concerned that the structure and size of market data revenue rebates may be distorting the reporting of trades, and that these rebate programs may reduce the regulatory resources of the markets and reallocate the funding of regulation among participants.”³⁸

This one paragraph illustrates a complete lack of understanding of the competitive ramifications of online investor market data access fees that are both excessive and per se discriminatory. SEC approved restraints on competition protect these fees that are not cost based. The fees result in the very surpluses that are found to encourage trading, purely for the re-capture of the economic surpluses being generated. Most important, these surpluses result from access fees that are selectively imposed upon online investors.

The fees are per se discriminatory; they discriminate against online investors and among online investors; and the surpluses would not exist if the excessive, discriminatory fees did not exist. Parenthetically, The SEC has at least a dozen ways to penalize wash and/or fictitious transactions.

While the putative purpose of the “non-professional” fees is to recover distribution costs of the central processors and to prevent unauthorized re-dissemination of the information, the fees have not been cost based and the fees are not inherently necessary to prevent re-distribution of market data by investor users. Rather they are exploitation fees, even greater than the “what the market will bear fees” commonly discussed in anti-trust literature.

Failure to reconcile anti-trust and regulatory goals

The SEC regulatory review process has been unable reasonably to reconcile the Securities Acts’ goal of investor protection and the DOJ anti-trust goal to prevent illegal anti-competitive practices. As a result, competition, the only means that small investors have to protect themselves from excessive costs, is being restrained unnecessarily under the “cloak” of investor protection.

Intervention of the anti-trust division is needed to protect the public from these unnecessary discriminatory and anti-competitive practices. While, because of SEC oversight, these practices are assumed to be exempt from anti-trust review, the desire of the SEC to finance regulatory activities has apparently led to a complete failure to

³⁸ SEC Release NO. 2002-99, July 3, 2002.

reconcile properly the goals of the anti-trust laws and the goals of market data regulation. It is time for the Department of Justice to assume its responsibility.

The recent SEC action runs contrary to the judicially established requirement that securities regulation must reconcile the conflicting goals of the antitrust statutes and the securities laws. Presumably, the exemption from anti-trust is not automatic.

Absent the implied protection of SEC oversight regulatory powers, the subject non-professional fees and the mandatory contractual market data fee restraints would have been attacked under anti-trust laws many years ago.

From the standpoint of the small investor, his/her only real friend in this regulatory situation is competition. Unless The Division intervenes in this matter, competition will continue to be trashed by the inherent conflicts and biases that result as market participants compete to influence regulatory and self-regulatory processes. In this case the SEC concern that surpluses are needed to finance regulatory activities is used to justify surpluses from discriminatory fees applied to small online investor activities. SEC relief is long overdue and highly unlikely.

Market participants, especially small investors, have a right to securities market economic policies that are rigorous enough to withstand independent anti-trust review. If anti-competitive restraints are permitted that do not adequately reconcile anti-trust and securities laws goals, then both consumer and investor protection are deficient.

NASDAQ and NYSE market data access fees being charged online investors are maintained by a process that is absent any of the pervasive review and reasonableness tests for fixed fee type regulations that might justify discriminatory restraints on competition. The SEC has failed reasonably to reconcile the goals of the anti-trust acts and securities acts in their consideration of this issue.

Therefore, as an individual online investor without the resources to challenge these fees, I request that The Division review the “nonprofessional “ market data access fees being imposed selectively on online investors and enjoin the continued application of these discriminatory fees.

Sincerely Yours,

Gene L. Finn

Finn Associates Inc.
1236 Battery Ave.
Baltimore, MD 21230
Tel. 410-659-0613
Fax 410-659-5166

Jonathan Katz, Secretary
Securities and Exchange Commission
450 Fifth St. NW
Washington D.C. 20549
March 5, 2000

Release No. 34-42208; File No. S-7-28-99

Dear Mr. Katz;

I am an individual online investor and a member of the class discriminated against by NYSE and NASD/Nasdaq nonprofessional information access royalty fees that are applied exclusively to online investors. My background as a former Chief Economist and Senior Economic Advisor for the SEC (1969-1982) and Chief Economist for NASD (1973-1995) qualifies me to comment on the issues raised in this release. Although I am currently an outside director on the Boards of Knight/Trimark Group Inc. and Ameritrade Holding Corporation, these views are my own and should not be attributed to others affiliated with those companies.

Background

In the subject release (The Release), the SEC solicits comment respecting changes in regulatory processes for National Market System (NMS) market information systems. The release describes the SEC's perception of market data system regulatory problems and proposes numerous questions for the focus of comments.

In prior comments to the Commission³⁹, I have petitioned the Commission to correct discriminatory and anti-competitive fees and practices of National Market System (NMS) plans that regulate SRO (self-regulatory organization) exclusive processors. I request that those petitions and comments be incorporated by reference in this letter of comment. In those comments I made the following requests for relief.

(1) The Commission should eliminate the Nasdaq/Amex and NYSE market data nonprofessional access fees that are applied only to online investors. They are anti-competitive, they discriminate unfairly against such investors and their brokers; they are

³⁹ See Letters to the SEC from Gene L. Finn dated: July 24, 1997, File No. S7-16-97; May 1, 1998 SR-NASD-98-17; June 17, 1998, File No. SR-CTA/CQ-97-3; March 30, 1999, Rel. No. 34-40869; September 21, 1999, File No. SR-CTA/CQ-99-02

not necessary to accomplish the purposes of the Exchange Act; and they are contrary to the intent of Congress as expressed in the 1975 amendments to the Exchange Act.

(2) The Commission should require NASD/Nasdaq, NYSE, and Amex to escrow the receipts from the discriminatory nonprofessional investor fees to prevent further injury to online investors and the brokers that serve them.

(3) The Commission should require the NASD and NYSE to include in market data revenue sharing arrangements those non-SRO market participants whose efforts produce trade report and quotation data. Exclusion of such non-SRO market participants, is arbitrary and anti-competitive. It discriminates unfairly against non-exchange intermediaries and non-SRO direct investment facilities that primarily serve individual investors and in favor of SRO facilities and facilities that regulation insulates from both anti-trust laws and competitive pressures.

(4) The Commission should consider requiring that market data system plans be user (as opposed to SRO) controlled as has been the case for NSCC (National Stock Clearing Corporation). In contrast to the price discrimination, excessive charges, anti-competitive revenue sharing problems and constant bickering that afflicts SRO controlled systems, the user-controlled NMS clearing and depository systems have functioned as Congress intended all NMS systems to function. They should be the model applied by the SEC to the NMS market data system.

(5) The Commission should not permit SRO exclusive processors to include in information producer (marketmaker) subscriber contracts anti-competitive restrictions on marketmakers and other information producers that force them to transfer **to the SRO exclusive processor** all proprietary rights to the trade report and quotation information input into NMS systems. This prevents unnecessarily any and all competition in the collection and/or distribution of securities market data.

I request that these comments respecting market data system issues, included in earlier submissions, be considered by the Commission and incorporated here by reference. The following comments expand on the above views.

SEC's Unger Report Documents Fee Discrimination against Online Investors

The Commission's recently published report on online trading, the "Unger Report"⁴⁰, documents quotations access discrimination confronted by online investors. The Report states: "Contrary to their practice off-line, the CTA and NASD do impose fees for on-line firms' delivery of real-time market data to customers via the Internet."⁴¹

⁴⁰ On-Line Brokerage: Keeping Apace of Cyberspace, Securities and Exchange Commission, p.47.

⁴¹ On-Line Brokerage: Keeping Apace of Cyberspace, Securities and Exchange Commission, p.47.

Investors who access real-time quotation and last sale report information electronically through their PC'S (personal computers) are charged fees; investors who access the same information through human voice (telephonic) communication from their broker are not charged access fees.

Moreover, online customers with more than one account are charged for each account. Imagine that! Because of SEC regulation that protects SRO's from anti-trust, an investor with a regular account, IRA account and a 401k account with the same broker pays three Nasdaq, Amex and NYSE royalty fees for access to realtime quotation information.

Whether the NASD royalty fees, applied to online customer accounts and usage of information, are charged directly to the customer, or charged indirectly through broker commissions, this price discrimination and the related restraint of investor access to quotation information is inconsistent with fundamental Exchange Act and Anti-Trust law principles. Also, whether the fees are \$3 per account per month or 1 cent per quote, they are discriminatory.

Discriminatory Fees should be eliminated

Non-professional quotation access fees, if necessary at all, should be applied to all investors. How the information is accessed from intermediaries (vendors, brokers, media etc.) appears to be unrelated to the costs of SRO activities and highly related to competition. Consequently such fees are an unnecessary restraint on communications between brokers and their customers and on competition among brokers and vendors.

By the Commission's own calculation, the scope of this discrimination was 14 times more in 1998 than in 1994 for access to NASD/Nasdaq quotations and 10 times more for access to CTA (NYSE) quotations. In 1998, the discriminatory fees were \$31 million.⁴² If we include the broker administrative cost of monitoring investor access to quotations and the economic cost of lack of access of investors, unwilling to pay NASD/ NYSE access fees, the total 1998 estimated cost easily approaches \$50 million.

The Unger Report, while documenting this differential treatment of online investors vis-a-vis other investors, focuses upon discrimination between non-professional and professional investors. While non-professional fees may be exorbitant when compared to professional fees, this comment is focused upon the unnecessary, discriminatory, anti-competitive impact of imposing access fees on a sub-set of investors because of the way they access information rather than because of differences in the cost of providing that access.

The discrimination against online investors, being sheltered by the regulatory process, is in the fine print of SRO subscriber applications and agreements that qualify online investors for the "Privilege of Receiving Last Sale Information & Bond Last Sale Information as a Nonprofessional **Subscriber.**"(Emphasis added) The limiting clause,

⁴² See the Unger Report, p. 54.

almost identical in Tape A (NYSE), Tape B (Amex, Regional exchange) and NASDAQ customer access agreements, prohibits brokers from communicating quotation and last sale information to customers through any electronic means (i.e. without payment of fees and a signed customer agreement).

On the production side, SRO contracts with information producers, including marketmakers and others, require such producers to transfer all proprietary rights in the information to the SRO. This protects SROs from competition in the information collection and distribution processes. Regulation is sheltering these anti-competitive provisions of SRO subscriber agreements from both competition and anti-trust enforcement.

Market participants, including retail brokers, marketmakers and ECN,s, whose activities produce the market information being sold, incur costs of production. However, they are arbitrarily excluded from revenue sharing arrangements. Because competition is restrained artificially, individual investors, who are served by these intermediaries are further disadvantaged by the anti-competitive impact of these other anti-competitive practices of the SRO exclusive processors.

What is most regrettable, these restraints on competition have the greatest impact upon small investors who individually do not have sufficient business to avoid these adverse anti-competitive impacts. The economic benefits of productivity of the new computer technologies that lower the costs of small investor information processes are being captured and retained by SRO's through their exclusive information processors; and used to finance a variety of SRO activities. The competitive incentive to attract small investor business-- the only process through which small investors can obtain the benefits of productivity associated with the aggregation of small order flow-- is thwarted.

Empowered by government charters, SRO exclusive processors in effect are expropriating order flow value from small investors.

Restraints on Competition Disadvantage Individual Investors

Competition is the most efficient process through which small investors can protect themselves from unfair charges and practices. Unlike institutional investors, small investors individually do not possess the economic power to achieve the efficiencies available in the trade execution processes. Nor do they possess the resources to lobby for their interests. Unfortunately, while the Commission frequently pays lip service to competition, the Commission's economic policy actions suggest that it does not believe this proposition.

In the subject matter, SEC regulation has created SRO market data **monopsonies and monopolies** that are provided safe harbors from anti-trust and fair trade laws and from competition in the collection and distribution of trade and quotation information and in the operation of trade execution facilities.

SRO's have **monopsony** power to force participants to supply to the SRO's market information and to force those participants to give up all proprietary rights to the information provided. SRO's also have the **monopoly** power to dictate royalty or access fees to retail and intermediary users of the information. Because SEC regulation, by default, creates central information processors, competition in the collection and aggregation of information is pre-empted by the resulting monopsonistic and monopolistic structure.

SRO's, with diverse memberships, proprietary organizational goals and monopolistic tendencies, have been operated like for profit companies, using monopoly surpluses to expand their range of market activities. How can investors and market participants expect SRO exclusive processors to continually review and reasonably regulate the SRO's own market data fees and contractual arrangements imposed upon the users (market intermediaries and investors) of market data information?

The answer is that they cannot. SRO's have been able to utilize the monopoly and monopsonistic power that has resulted to further their own organizational goals. Essentially they operate like for profit companies with market data profit centers. They distribute surpluses as rebates and discounts to members and use them to subsidize questionable competitive initiatives against other SRO's or other, non-SRO market participants.

User Control of NMS Systems is needed

Entities with this massive power must be user-controlled and not-for-profit like NSCC (National Stock Clearing Corporation) and subject to direct SEC review as securities information processors. The self-regulatory model has failed; and regulation has failed to apply the public utility type regulation intended by Congress. Clearly, the success of the NSCC user controlled experience stands in stark contrast to the SRO controlled NMS market data system problems detailed in the Release.

Regulatory Record is Inadequate

The need to discriminate against online investors, investing for their own account, or to employ anti-competitive practices must be supported by something more than an undocumented proclamation by an SRO or the SEC that such fees and practices are found to be “in furtherance of the purposes of the Act”. At a minimum, public hearings with a hearing report containing differential cost and revenue data, rates of return, the Commission’s reasoning and other related information used in finding such rate discrimination reasonable must be entered in the public record as intended by Congress in the 1975 Amendments to the Exchange Act of 1934.⁴³

⁴³ See Legislative History of Securities Acts Amendments of 1975, House Committee on Interstate and Foreign Commerce, May 1975, p.93. See also House Conference Report No. 94-229, May 19, 1975, p.93 and Securities Acts Amendments of 1975, Report of the

Urgent action is needed to correct this abhorrent fee discrimination against online investors and the restraints of competition that prevent competition from establishing a competitive market data revenue sharing process among market participants. Regulatory delay has already cost online investors tens of millions of dollars in patently unfair charges. The cost to investors of the distortions created by SRO anti-competitive practices cannot be measured.

A regulatory quagmire should not further delay correction of such discrimination in fees and practices.

Thank you for your consideration of this comment.

Respectfully yours,

Gene L. Finn

Finn Associates
1236 Battery Avenue
Baltimore, MD 21230
Tel. 410-659-0613
Fax 410-659-5166

Jonathan Katz
Secretary
Securities and Exchange Commission
450 Fifth St. N.W.
Washington D.C. 20549

May 1, 1998

RE: SR-NASD-98-17

Dear Mr. Katz;

The purpose of this comment ⁴⁴ is to call SEC attention to certain Nasdaq⁴⁵ realtime bid/offer price quotation access fees⁴⁶ that discriminate against "online investors" i.e. those investing by personal computers (PC's) over the Internet. Unlike customers that obtain realtime bid/offer quotations from a broker over the telephone, those who use a PC to access such quotations are charged a combined \$ 12.50 monthly fee⁴⁷ for Nasdaq/NYSE market data. The subject NASD proposal would extend the scope of quotation information covered by such fees by creating a book of limit orders, which

⁴⁴ This comment is that of an individual online investor. Although the author is also an Outside Director on the Advisory Board of Roundtable Partners LLC, a large market maker and on the Board of Ameritrade Holding Corporation, a large online retail brokerage firm, the views expressed herein are those of the author, and should not be attributed to either of those organizations. The author served as SEC Chief Economist 1969-1976 and Senior Economic Advisor 1977-1982 and as NASD Chief Economist from 1983-1995.

³³⁴⁵ NASD/Nasdaq is meant in this comment to be inclusive of Amex.

⁴⁶ Quotation information is bundled with last sale report information in level 1 subscriber fees; and market data revenues include both level 1 and level 3 (all marketmakers) quotation information. Nonetheless it is important to recognize that market data revenues are large. In 1997, NASD reported \$268 million in market data and transaction service fees. NYSE market data fees alone were \$72 million in 1995. It is reasonable to assume that level 1 market data fees (NBBO market quotation and last sale data) will aggregate in excess of \$250 million for all listed stocks in 1998.

⁴⁷ The fee may be modified by broker choice to a 1 cent per quotation fee which could be more or less than the monthly fee; but requires special accounting software etc.

would have its limit bid/offer prices included in the NBBO (National Best Bid Offer), an expansion of the market data royalty fee discrimination to additional information.

Yes, it is astonishing to think that the market that owes its prominence to companies like Microsoft, Intel, Yahoo, Excite, Dell Computer, Sun Microsystems, Apple Computer etc. would discriminate against users of personal computers; but it does. Nasdaq's only remaining competitor for company listings, the NYSE, also discriminates against PC users.

Exclusion of Fee Charges is Fundamental Deficiency of NASD Proposal

This comment is limited to a topic on which the NASD proposal is silent: fee charges for system services. The Proposal contains no fee information upon which its costs and benefits can be evaluated. For example, " Will the discriminatory bid/offer quotation royalty fees (described herein), that Nasdaq charges online investors for access to real-time quotation information, continue to apply in the new system? Will the quotations generated in the new limit order system increase the degree of discrimination?"

The answer appears to be yes to both questions. Clearly, the proposed system should not be approved, if the associated quotations information subscriber fees continue to discriminate against a particular class of individual investor, merely because they use a personal computer (PC) rather than a telephone to receive information from their broker.

Background

As the Commission is aware, intelligent decisions respecting the pricing and entry of investor orders cannot be made without access to the real-time best bid and ask prices in the particular security at the time a transaction is contemplated. Under the new NASD Order Audit Trail System regulations a broker would be failing in his fiduciary obligation if the broker did not make available market quotation information to his client at the time of the entry of a limit priced order. For each order received, the broker must electronically record every detailed event affecting the order and must transmit that information to the NASD. Thus regulation mandates provision of the quotation information subject to the fees.

The SRO's (self-regulators), NASD and NYSE, dominate and control the National Best Bid Offer (NBBO) information process. Bids and offers originate with investors and marketmakers. Regulations require the reporting and centralization of such quotations in Nasdaq and NYSE exclusive processor information systems; and Nasdaq and NYSE charge tariffs or access fees to vendors, marketmakers, brokers and other subscribers. These tariffs or fixed rates do not appear to be cost based, or otherwise subject to public utility type regulatory review processes, as Congress expressly intended in the 1975 Amendments to the Exchange Act of 1934.⁴⁸

⁴⁸ See Legislative History of Securities Acts Amendments of 1975, House Committee on interstate and Foreign Commerce, May 1975, "...where a self-regulatory organization or

The regulatory process, having created two information monopolies, is not protecting small investors from discriminatory charges.⁴⁹ The subject NASD proposal, SR-NASD-98-17 would expand the information covered by the discriminatory fees. It would establish a "virtual book" of limit orders in Nasdaq stocks that would be part of the NBBO. The "book" would include the bids and offers of the very online investors that cannot obtain fair and reasonable access to the real-time NBBO quotations needed to price their orders included in the "virtual book". This is probably the most unfair, discriminatory, arbitrary, and counter-productive aspect of Nasdaq and NYSE market data royalty fees.

Discriminatory Fees Inhibit Price Discovery and Service Quality

Like other investors, online investors need the real-time quotation in a stock when pricing or entering an order. When this need is coupled with the fact that the typical individual investor executes about 1 trade per month, the combined \$12.50 monthly Nasdaq/NYSE royalty fee imposed on online investors becomes a classic example of the callous exercise of monopoly power.

One result is that the investor access to the market is delayed and contorted because of the fees. When entering an order, the investor receives a flash quote paid for by the broker to provide a better execution environment or uses the telephone to receive the free quotation before entering an order. When the broker provides a free flash quote before order submission to the market, the terms of the order need to be changed if the investor's guess regarding price and bid/offer price spread is incorrect. Similarly, when investors resort to the telephone to avoid payment of exorbitant fees, the royalty fees serve to increase telephone congestion in fast markets, discriminating against the use of commonly available technology; and the charges are per se anti-competitive in that they force a payment on brokers that serve online investors that is not required of brokers that provide manual services by telephone.

For example, if an investor calls a broker on the telephone and requests a quotation for a security, there is no Nasdaq/NYSE access fee charged. If another investor, using a personal computer, makes inquiry through a broker's online system, A Nasdaq/NYSE fee applies. This outrageous and unnecessary charge restricts investor use of real-time quotations in pricing their orders; and it negatively affects the market price discovery process. Thus, these fees not only discriminate against investors who use the computer

organizations utilize an exclusive processor, that processor takes on certain of the characteristics of a public utility and should be regulated accordingly." P. 93 See also House Conference Report No 94-229, May 19, 1975, p.93.

⁴⁹ It also may not be protecting non-SRO market service competitors from anti-competitive use of the monopoly surpluses from market data (and listing) activities to create expanded SRO information systems such as OATS and the subject proposal. However this comment is limited to the discriminatory effect on online investors.

over those who use the telephone, the fees also reduce the transparency, competitiveness and economic efficiency of the market process. Indeed they are contrary to the fairness and economic efficiency principles underlying the new SEC order handling rules.

Anti-competitive Impacts

Competition in the provision of investor execution services is extremely intense, with commissions for executions routinely below \$20 for online transactions. The effect of the discrimination described above is to force a bundling of the royalty fees into commissions for personal computer online transactions because there is no fee on competing telephone brokered transactions. This forces firms that provide online services to pay charges not levied against telephone service brokers, giving such brokers a per se unfair competitive advantage. Likewise, the discrimination against use of computer communication processes unfairly and unnecessarily restricts Internet commerce and the evolution of alternative market exchange mechanisms that would compete with SRO exclusive processors and trade execution systems.

If for no other reason, Nasdaq and NYSE fees applied to small online investors, investing for their own account, should be eliminated as anti-competitive charges and restraints on competition that are "...not necessary or appropriate in furtherance of the purposes..." of the Exchange Act.⁵⁰

Fee Setting Process Ignores Congressional Mandate

Congress did not intend that Nasdaq and NYSE would reap monopoly profits, from royalty charges imposed upon small investors. Both houses of Congress expressed a clear intent, in the legislative history to the 1975 Amendments to the Exchange Act of 1934, that the monopoly power of SRO (self-regulatory organization) exclusive information processors that might result from the formation of the National Market System (NMS) should be subjected to exhaustive "utility" type review.⁵¹ The authors of the amendments would be shocked to see fee discrimination against small investors who use their PC's for access to quotation information. They would be angry if they saw that the smallest investors could not benefit from personal computer online efficiencies of Internet commerce because of exorbitant SRO royalty access fees tacked on top of the normal vendor distribution costs for real-time market bid/offer quotations.

Recommendation

The Commission should begin by withholding its approval of the proposed Nasdaq system unless and until the discriminatory Nasdaq royalty fees, applied to online

⁵⁰ See Conference Report p.94.

⁵¹ Ibid. Conference Report. See also Senate Report No 94-75, Report of the Committee on Banking, Housing and Urban Affairs, United States Senate, Securities Acts Amendments of 1975, pp 11-12 for a detailed discussion of Senate intent "receded to by the House in conference".

investors, are eliminated. However it is not enough for the Commission to withhold approval of a proposal. The Commission is obligated by the Exchange Act to take the initiative and institute a review of the discriminatory NYSE and Nasdaq real-time quotation access fees. Moreover, given the abhorrent character of the discrimination, the Commission should require the NYSE and Nasdaq to begin the immediate escrow of the proceeds from such charges until its review is completed.

Thank you for your consideration of this comment.

Respectfully yours,

Gene Finn