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Jonathan Katz, Secretary
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

RE: File No. SR-NASD-2004-185

Dear Mr. Katz;

At sec. 7030 Special Options, the subject rule proposes to continue to apply a discriminatory access fee to nonprofessional online investors (investors who access quotations information from their broker computers through their own computer or other electronic device).

Since July of 1997, in numerous comment letters I have pointed out to the Commission that, absent a showing of differential costs, quotations access fees imposed solely upon a selected category of individual investors was discriminatory, a discriminatory practice not necessary for purposes of the Exchange ACT.

In my numerous comment letters I enumerated many reasons why the nonprofessional access fees imposed upon online investors should be eliminated:

1) They are discriminatory. There is no reasonable cost or other economic justification for fee differentiation that penalizes investors that choose a more efficient method of accessing information from their brokers.
2) Congress never intended that individual investor access to quotations information would be obstructed by fees, especially fees that were not cost-justified. Most investors whose access is obstructed by the nonprofessional access fee (now called “non-continuous access fee”) have less than $5000 in their brokerage account and engage in fewer than 10 trades per year
3) The nonprofessional fee did not exist before 1980 and the markets were able to function. The discriminatory fee is not necessary to make the Exchange Act work.
4) The access fees competitively disadvantage brokers who serve online investors. Even when some investors choose to become non-professional subscribers, competition forces the broker to pay the fees for the larger and more active investor.

5) Thus the fees paid are commonly incorporated in the commission and other charges of such brokers and paid indirectly by all small online investors. They also reduce the competitiveness of online brokers as compared to other brokers.
6) The fees have been chronically excessive because the SEC has had no commonly accepted standards of reasonableness for the review of these public fixed fees such as cost, rate of return, uniformity, absence of discrimination etc.
7) The market data access fees unnecessarily bundle quotations with last sale information. Small investors should be able to access quotations only, since last sale is essentially history and not really necessary to price a small investor order.
8) The proposed per query fee $.005 would be reduced to .0025.
9) The proposed amount of the non-professional access fee cannot be evaluated, because it has no basis in costs and it is unrelated to any real standard of reasonableness. Applied only to online investors it should be discarded as discriminatory; but even if it were applied to all investor accounts, a $.000005 per query fee might be fairer and more reasonable.
10) For example, the proposed $.005/query fee should be compared to the broadcast fee that NASDAQ charges CNBC. There is no per viewer fee for access over CNBC; but if that fee for broadcast rights is reduced to a per viewer basis we would find that by comparison, the proposed fee for broker distribution of quotations is exorbitant.
11) Past experience has made it clear that the non-professional access fees, even in small increments have the capability of generating huge economic surpluses. These surpluses have become incentives to exorbitant and obscene SRO compensation bonuses. They are also used to finance payment for order flow arrangements used by SRO market centers to encourage order flow to their facilities in competition with non-SRO market centers whose own cash payment for order flow is viewed as undermining best execution.
12) The power of access fees imposed upon millions of investors, essentially unregulated, has caused and continues to cause distortions in market structure competition. Indeed the proposed acquisitions of Archipelago by NYSE and Instinet by NASDAQ are undoubtedly motivated in part by the desire to reduce competition for market data value and to have monopoly control for the future for NYSE and NASDAQ as “for profit” market centers.
13) NMS market data systems are not user controlled and they soon will be under the exclusive control of the NYSE and NASDAQ for profit market centers. The Commission needs to decide to adopt cost and rate of return standards and other objective criterion to properly regulate fixed fees in the new environment.
14) The Commission has apparently again approved the sharing of surpluses from fee revenues by SRO participants with other participants. Hence the sharing goes through SROs and they use it to reward order flow providers to compete with non-SRO market centers, at least those that they have not bought out.
15) Thus the surpluses continue to be used in anti-competitive ways. To correct this problem the Commission needs to enable ECN’s and registered Marketmakers to be direct as well as indirect participants in the sharing of any surpluses distributed by the exclusive processors of level I market data information.

Thank you for your consideration of these comments.

Gene L. Finn