NSX National Stock℠ Exchange

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Submitted Via Electronic Mail

Ms. Nancy M. Morris, Secretary
U.S. Securities and Exchange Commission
100 F St. N.E.
Washington, DC 20549-0609
Email: rule-comments@sec.gov

Re: Proposed Order Approving Proposal by NYSEArca, Inc. to Establish Fees for Market Data and Request for Comment, dated June 4, 2008 (SEC Release No. 34-57917) ("Proposed Order") – File No. SR-NYSEArca-2006-21

Dear Ms. Morris,

The National Stock Exchange ("NSX") appreciates this opportunity to respond to the Commission's invitation for comment on its Proposed Order that would approve a proposal by NYSEArca, Inc. ("NYSEArca") to establish fees for certain market data that NYSEArca previously made available without charge ("the Proposed Rule"). We do not believe that the Commission should issue the Proposed Order as a final order for at least two reasons. First, the Commission should take the opportunity to review the current system for dissemination of market data before allowing the imposition of additional fees for access to information that is vital to the orderly functioning of the national market system. Second, even if the Commission is not inclined to conduct a comprehensive review at this time, it should apply a standard of review that recognizes the absence of true competition in the market for distribution of market data, and deny the requested fee increase as unsupported by valid cost justifications.

In our original comments in connection with this issue[1], NSX urged the Commission to consider opening a comprehensive dialogue concerning market data distribution structures with the objective of optimizing and modernizing the dissemination of market data for the benefit of investors and the U.S. capital markets.

The petition presents an opportunity to recognize and address the inadequate and inefficient system that comprises our nation's market data collection, production, and delivery mechanisms. A positive consequence of Regulation NMS has been the harmonization of trading rules and market structure for all listed U.S. equities, which has eliminated the practical distinctions between issues listed on the NYSE, Nasdaq, AMEX, or any other national exchange.

[1] NSX Comment Letter, In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21

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The primary listing venue no longer determines where trading volume and liquidity aggregate. For example, during the month of August 2008, Nasdaq and NYSE transacted just 39.5% and 25.1%, respectively, in market share of their own listed issues[2]. At this point, none of the four primary listing exchanges (NYSE, NYSEArca, Nasdaq, and AMEX) execute a majority of the consolidated volume in their listed issues on their primary listing markets. This is reflective of the goals of the 1975 Amendments to the Securities Exchange Act of 1934, as amended (the "Exchange Act") which, *inter alia*, mandate that issues be freely tradable pursuant to unlisted trading privileges on secondary markets[3]. This success cannot be enhanced, or even maintained, without ready access to quality quotation and transaction data on a fair and equitable basis.

While the national market system has evolved at a rapid pace, the CTA and UTP plans continue to operate just as they have for years and years, in spite of the dramatic changes to market structure and technology. While NSX and others have called for fundamental reform of the *entire* system, perhaps a more transitional step would be to address some basic realities and respond accordingly. For example, there is no longer any practical reason for three data streams carrying real time top of book/last sale information (Tape A for NYSE listed, Tape B for AMEX and Regional Exchange listed, and Tape C for Nasdaq Listed). Cash equity trading is now harmonized and primary listing venues are not relevant (except to the listing exchanges that manage to continue to receive listing fees from corporate issuers). Furthermore, there are currently two SIPs (Securities Information Processors) that perform more or less identical functions for two sets of U.S. listed stocks for little reason other than legacy market structure that once recognized differences between listed (NYSE and AMEX) issues versus OTC (Nasdaq) issues. Consolidation of the three equity data streams into one and the two SIPs into one would eliminate significant waste from the system. All this inefficiency brings unnecessary costs that are inevitably passed on to the investing community.

Quality and Pricing of Top of Book Data

NSX has argued that the consolidated top of book quote and trade data has less value now than ever before, due to fragmentation, as well as smaller quote and trade sizes. As a result, quoted top of book liquidity may be significantly less what has been available in the past. As SIFMA pointed out in its recent letter[4], top of book quoted liquidity is insufficient even for many retail sized orders, and expecting investors to rely solely on such limited information is not realistic or productive. The Proposed Order states that depth of book is not required to meet best execution obligations. However, the need for this information on the part of the investing public which desires to trade with knowledge of the quality and depth of quotes can readily be demonstrated. We do not believe that "best execution" and "need" should be viewed as synonymous.

We support the notion that current consolidated market data is vastly overpriced, partially because fragmentation and decimalization have reduced the value of the "top of book" data on a

[2] Source -- Data as reported by UTDF/CTS
[3] See Section 11A and 12(f) of the Exchange Act
[4] SIFMA Comment Letter -- http://www.sec.gov/comments/34-57917/3457917-4.pdf

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relative basis. At the same time, the definition or scope of "core" data has remained static in a rapidly changing trading environment. In addition, technology advances have not translated into cost reductions to consumers for this basic data stream.

One approach would be to modernize the feed to include additional (e.g. three) price levels in the new consolidated book quote, which would restore some of the utility lost to decimalization and dramatically and immediately increase the value of this "core" data. This would also begin to justify the costs imposed on the investing community for this basic information. While certain exchange operators may object to this notion on the grounds that it would diminish the perceived value of their respective proprietary depth of book data feeds that are offered in competition with the consolidated data, the integrity of the national market system would be greatly enhanced.

Transparency

Regulation NMS mandated a new calculation methodology that would form the basis for the distribution of consolidated market data revenues to the SROs. This new methodology, effective in April 2007, introduced an allocation of 50% of the data revenues on the basis of trading market share and 50% on the basis of quoting market share (previously, 100% of the data revenue was allocated to the SROs based on trading market share). In addition, each symbol in the "network" receives a proportion of the revenue pool based on its relative volume in that network.

The SIPs calculate the data revenues that are attributable to each symbol[5], then assign a portion of that revenue to each SRO based on the respective market share (quoting and trading). The rationale behind using this kind of formula was predicated on the observation that price discovery is not limited to trade executions, and that quality of an exchange's quotes should also be a factor when allocating market data revenues. The SIPs' calculation of "quote credits" takes into account the length of time at the NBBO as well as the size quoted on a symbol by symbol basis for each exchange. If we accept the premise that this calculation in some form measures quoting quality, then it would follow that the investing community should find this information very useful when it comes to making order routing decisions, or when evaluating liquidity at the exchanges.

However, this information is nowhere to be found publicly, since it remains in the exclusive purview of the exchanges under the cloak of the CTA and UTP Plans, which govern

[5] Regulation NMS, Release No. 34-51808; File No. S7-10-04: "The first step of the adopted formula is to allocate a Network's total distributable revenues among the many different securities that are included in a Network (the "Security Income Allocation"). Paragraph (b) of the adopted Allocation Amendment bases this allocation primarily on the square root of dollar volume of trading in each security. Use of the square root function will more appropriately allocate revenues among stocks with widely differing trading volume. A small number of Network stocks are much more heavily traded than the great majority of Network stocks. By proportionally shifting revenues away from the very top tier of active stocks and increasing the allocation across other stocks, the Security Income Allocation is intended to reflect more adequately the importance of price discovery for all Network stocks."

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the dissemination, sale, and redistribution of market data. There should be nothing proprietary about this data, particularly since it could provide helpful indications of liquidity on a symbol by symbol basis.

We support transparency and disclosure wherever possible, and the lack of it in connection with market data administration hinders competition in U.S. capital markets.

The fact that broad market data issues have been raised frequently during the past decade or so, with no resolution or consequential change suggests that there continues to be a real disconnect between the users and administrators of this product, and we are nowhere near an appropriate equilibrium. The situation is analogous to a major toll road that has broken down over the years and is in need of overhaul and repair; yet, rather than seeing construction to modernize and upgrade the highway, drivers are instead instructed to permanently slow down, while the toll revenues continue to pile up for use elsewhere.

As cited by a 2002 study on market data[6]:

"Market participants indicate that the equities market cost structure is complicated, and many firms including vendors, broker-dealers, and their clients require consultants to review billing and to ensure they have not paid more than once for the same data. Innovation is also hindered, as market centers have less incentives to enhance the quality of their data since the shared revenue model inhibits their ability to profit fully from their investment. Firms and vendors of equity market data are also deterred from innovation, since the process of attaining approval from the central administrators is tightly controlled, lacking transparency, and subject to delay. These outcomes result from the shared governance and revenue sharing model required of the pooled resource model."

We believe that the current system for market data distribution should be subjected to a rigorous review and analysis. Even if the Commission is not inclined to use this occasion to prompt such a review, there are more specific reasons related to the current competitive landscape which dictate that the Proposed Order should not be issued as final.

Competition

The Proposed Order cites to evidence of competition between market centers for order flow. It also relies upon competition between market centers relating to their alternative non-core market data products. Based on this evidence of competition, the Proposed Order concludes that careful review of the proposed price increases is not necessary. We believe that the Commission should not be at all complacent about the current state of relevant competition for several reasons.

It must be noted that the current competitive environment, such as it is, has evolved, in part as a result of the current market data landscape, including the historic availability of meaningful core and non-core market data. While we believe that the current system is anything

[6] *Competing Models for Market Data Dissemination: A Comparison of Stock and Futures Markets*, by Sharon Brown-Hruska, Ph.D.; June 20, 2002

but perfect, final approval of the Proposed Order will materially and negatively impact that environment by undermining the ability of smaller and more innovative markets to compete with the larger market centers. As a result, reliance on current competitive data which arises under the current structure for distribution of market data (with current pricing levels) to support the proposition that such competition can be taken for granted in the future is analytically misplaced.

Moreover, the data offered in the Proposed Order as evidence of healthy competition glosses over important trends that should be apparent even to the casual observer. During the last few years, the number of independent exchange competitors has fallen precipitously by attrition. The two dominant exchanges have now purchased multiple smaller exchanges which could no longer offer viable competition at the exchange level. The only new sources of meaningful competition for the largest exchanges have come from new market entrants who developed their market share not as exchanges, but rather as alternative trading platforms -- without the regulatory and other constraints associated with exchange status. Viewed in the appropriate context, the proposed fee increase itself is evidence of the increasing ability of the few dominant exchanges to take advantage of their strengthening pricing power.[7] The state of competition at the exchange level is anything but robust. The market share data referenced in the Proposed Order as evidence of competition does not address this undeniable trend, which we believe should not be dismissed without careful review.[8]

We also believe that the Commission has not addressed a different, but very important form of competition which should be carefully considered before issuing the Proposed Order. It is clear that core market data products compete directly with non-core market data being marketed on an unconsolidated basis. Notwithstanding this fact, the Proposed Order does not analyze the quality or vitality of competition between these two product categories. Current market data plans are governed by exchange representatives. Given recent consolidations among existing exchanges, effective control of these governing boards has become concentrated in the hands of the larger acquiring markets. As a result, there is little incentive for these exchanges to either enhance the quality of the consolidated data feeds as outlined above, or to reduce pricing for the consolidated core data product. To the contrary, since these same exchanges compete with their own non-core data products, they have every incentive to slow the rate of enhancement of the quality of the consolidated data feeds, and significant incentive to maintain high prices for the core data products. This allows their non-core data products, offered on an individual basis, to compete more successfully with the consolidated data feed. We believe that this is inconsistent with the fundamental purposes of a "composite quotation system" as specifically recognized by the Commission and Congress[9].

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[7] The fact that this proposed price increase comes at a time when technology is driving the cost of information downward throughout our economy, provides further evidence of the increasing pricing power of the dominant markets.

[8] Competition at the exchange level seems highly relevant as it is the exchanges who share in the revenue generated by the sale of consolidated market data after contributing their own data to the plans. This is an important source of revenue that helps the exchanges fund the regulatory, governance and other structural costs associated with exchange status.

[9] See, for example, pages 36 and 42 of the Proposed Order, as well as H.R. Rep. No. 94-229, 94th Cong., 1st Sess. 92 (1975)

In essence, the current structure has left the core data product in a moribund state locked in a time warp, while industry needs and technology continue to evolve at a dramatic rate. At the same time, pricing for the core data feed has remained higher than market forces or costs can justify. The Commission should not allow individual exchanges (who exert control over core data pricing and quality) to take advantage of this situation by raising prices on their own individual market data products that are directly competitive to the consolidated feed. Investors are increasingly required to subscribe separately and at additional cost to higher quality feeds, just to see the same liquidity as would have been available at top of book quotes in the past. This continues to erode the original purpose and intent of the consolidated feed. Competition between the core and non-core market data products should be more carefully assessed. The economic data presented in support of the Proposed Order does not, in our view, address this critical issue.

Congress specifically noted the importance of ensuring that any central processor is not under the control of one or a small number of market centers[10]:

"The Committee believes that if economics and sound regulation dictate the establishment of an exclusive central processor for the composite tape or any other element of the national market system, provision must be made to insure that this central processor is not under the control or domination of any particular market center. Any exclusive processor is, in effect, a public utility, and thus it must function in a manner which is absolutely neutral with respect to all market centers, all market makers, and all private firms. Although the existence of a monopolistic processing facility does not necessarily raise antitrust problems, serious antitrust questions would be posed in access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in the trade or if its charges were not reasonable."

The very danger warned against in the Senate Report has evolved by virtue of consolidation in the exchange industry. At this time, two major market centers control six exchange registrations and as a result, a disproportionate number of seats on the plan boards. Under these circumstances, these individual market centers should not be given approval to raise prices for products that compete with the consolidated market data feeds.

Thank you for the opportunity to express these views. We hope that the Commission will not hesitate to call upon us if we may provide you additional information or assistance concerning these issues.

Respectfully submitted,

National Stock Exchange, Inc.

[10] Securities Acts Amendments of 1975, Report of the Senate Comm. on Banking, Housing, and Urban Affairs to Accompany S.249, S.Rep. No. 94-75, 9th Cong., 1st Sess. 12 (1975)

cc: Chairman Christopher Cox
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