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September 11, 2008

Via Electronic Mail (rule-comments@sec.gov)

Ms. Florence E. Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-NYSEArca-2006.21,
SEC Release No 34-57917

Dear Ms. Harmon:

The Security Traders Association¹ (“STA”) has historically had a sustained and productive dialogue with the Commission on behalf of our members, and we are respectfully submitting this letter to offer our perspective on the recent Proposed Order Approving Proposal by NYSE Arca, Inc. To Establish Fees for Certain Market Data (the “Proposed Order”).

The STA recognizes the critical role the Commission plays in protecting the integrity and confidence that investors rightfully place in the U.S. markets. We believe (and have consistently maintained) that an appropriate balance between regulation and competition is critical to the development of market structure. We further agree with the Congressional findings underpinning the national market system provisions in the Securities Exchange Act of 1934, as amended by the Securities Acts Amendments of 1975 (Section 11A(a)(1), 15 U.S.C. § 78k-1 (a)(1)), where “The Congress finds that...(C) It is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure...(ii) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets...(iii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities.....”

¹ The STA is a worldwide professional trade organization that works to improve the ethics, business standards and working environment for our members. There are approximately 5,200 members, all engaged in the buying, selling, and trading of securities. Members participate in STA through 28 national and international affiliate organizations and represent the interests of the trading community and institutional investors. The STA provides a forum for our traders, representing institutions, broker-dealers, ECNs, and floor brokers to share their unique perspectives on issues facing the securities markets. They work together to promote their shared interest in efficient, liquid markets as well as in investor protection.

AFFILIATES

Alabama Security Dealers Association
Boston Security Traders Association
Canadian Security Traders Association
Carolina Security Traders Association
Security Traders Association of Chicago
Cleveland Security Traders Association
Security Traders Association of Connecticut
Dallas Security Traders Association
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London Security Traders Association
Security Traders Association of Los Angeles
Mid-Atlantic Security Traders Association
Mid-South Security Dealers Association
Minnesota Security Dealers Association

Montreal Institutional Equity Traders Assoc.
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Seattle Security Traders Association

Security Traders Association of St. Louis
Institutional Equity Traders Association of
Toronto
Vancouver Security Traders Association
Security Traders Association of Wisconsin

Dictum Meum Pactum

Market Data is the oxygen of the National Market System. It is not a coincidence that wide distribution of quote and trade data via the internet coincided with an explosion in trading volumes on the nations various exchanges. Prompt, accurate, economically priced and reasonably accessible market data is of vital importance to the competitiveness and fairness of our markets, and is a critical need of investors and market professionals alike. The Congress recognized this in the Securities Acts Amendments of 1975 and charged the Commission with the legal obligation to ensure that exchange fees are fair, reasonable and not unreasonably discriminatory.

There are two primary issues: 1.who owns the market data broker-dealers are required to provide exchanges; and, 2. what is a reasonable monetary charge to access that data? These have caused great concern for market participants for many years. Progress toward resolution of these issues has moved at a glacial speed. The Concept Release on the Regulation of Market Information Fees and Revenues issued by the commission in 1999 drew sharply divided responses from market participants. In response, the Commission formed the Advisory Committee on Market Information to wrestle with these issues. Two years later, in 2001, the Committee issued its report which included a recommendation that:

If the Commission retains a single consolidator model . . . there should be a number of improvements, including: (1) mandatory competitive bidding for the exclusive consolidator function; (2) broader participation in the Plan governance process through a non-voting advisory committee; and (3) industry efforts to streamline Plan administration, with goals such as (a) the full transparency of fees, contractual terms and conditions, business requirements and administrative procedures related to the provision and use of market data, (b) clear and consistent interpretations of market data policies and contractual requirements, (c) simplification and rationalization of market data business practices . . .).

Now, seven years after the final report and nine years into the process, very little progress toward implementation of the recommendations offered as resolutions has been achieved; the issues still exist and the concerns continue to grow.

Although we are encouraged that the Commission has published a proposed resolution concerning the market data proposal advanced by NYSE Arca, we are less than pleased with the scope and content of that proposal.

The STA has previously encouraged the Commission to take a holistic approach to market data, believing that the best chance to resolve many of the complicated issues involved would be concerted action that would require interested parties to compromise. The Commission instead chose to consider only some of the market data issues, thus removing bargaining chips that could have been used to gain consensus on other more difficult and important issues. Ownership and pricing of “core” data, a central concern in this debate, remains unresolved, with little likelihood of resolution after the proposed action is taken.

The Proposed Order states that:

...an exchange's attempt to impose unreasonably or unfairly discriminatory fees on a certain category of customers would likely be counter-productive for the exchange because, in a competitive environment, such customers generally would be able respond by using alternatives to the exchange's data.

We do not believe that the depth-of-book feeds from the various exchanges are fungible. Depth-of-book feeds are not substitutes for one another: NASDAQ's depth-of-book data for IBM will be different from the NYSE depth-of-book data for IBM. On the contrary, each depth-of-book data feed reflects the market conditions for a particular security on that particular venue. For a full appreciation of the liquidity available in the entire marketplace (regardless of whether any legal duty of best execution would allow a less diligent approach²), as a commercial and competitive matter, a broker-dealer needs the depth-of-book feeds from each significant venue on which the security trades.

The STA believes that, in general, there is a good deal of competition amongst exchanges for order flow, but we do not believe that this competition imposes any pricing discipline on market data fees. In fact the only direct connection that is apparent is that many venues use the market data fees they receive to pay rebates to order-sending firms for their orders. As noted in STA's Special Report (May 2008):

The pool of market data fees is significant and exchanges have employed a practice of rebating a portion of these revenues to market participants. These rebates have formed an important economic tool used to encourage order flow and thus greater market share.³

The Proposed Order states that it is in the exchange's own interest to keep fees low in order to attract more order flow. The Commission fails to acknowledge here that market data fees enable the exchanges to pay the rebates that attract their order flow. Therefore, raising the market data fees would enable them to pay higher rebates and thus, attract more order flow.

Today, the exchanges have enough money from market data sales to cover not only their costs of collecting and distributing the data — costs we expect are rather trivial in amount — but also to fund rebates to order-entry firms. At a minimum, that suggests that the pricing of market data is neither competitive nor efficient. As SEC Chairman Pitt observed during the 2001 Market Structure Hearings:

² We note the Commission has not addressed potentially relevant federal and state statutes other than the Exchange Act.

³ Security Traders Association, *Special Report: The STA's Perspective on U.S. Market Structure*, pg 17, May 2008.

MR. PITT: I guess one model of [market data] pricing tends to be what's your cost for the production of either the product or the service, and then what's a reasonable return.(?) Presumptively, if the costs were being set that way, it would be highly unusual if it came out to be 17 percent of total self-regulatory costs over 70 years, which suggest that the costs are being set some other way, which then leads to the question that I think some of the people who pay the fees are asking, which is how are the costs set, it's not just a question of what they're funding, but how are they set and why is it appropriate to pay that amount of money⁴

Throughout this proceeding, SIFMA, NetCoalition and several other commenters on this issue have presented well-reasoned data, views and arguments supporting why the Commission should not approve the NYSE Arca filing. These commenters have also determined that the commission can not conclude that it may rely on competitive forces to ensure that the prices for exchange market data sold by the NYSE and NASDAQ are fair and reasonable. The Congress anticipated disputes such as this in the Securities Acts Amendments of 1975 and charged the Commission with the legal obligation to ensure that exchange fees are fair, reasonable and not unreasonably discriminatory. Thus, the number of times that the Proposed Order would agree with the NYSE Arca and the exchange coalition gives us pause. The Commission's approach in the Proposed Order appears to be a departure from the mandatory review standards the Congress embedded in the statute.

Non-discriminatory access to reasonably priced data is critical for the markets. We urge the Commission to reconsider the Proposed Order and determine that it cannot rely on competitive forces to ensure the fairness and reasonableness of market data fees charged by NYSE and NYSE Arca and by NASDAQ. We recommend the Commission, pursuant to the standards in the Exchange Act, require exchanges to provide data on the costs of collecting and distributing the data. By doing so, the Commission can measure whether the rates and fees the exchanges propose to charge bear some rational relation to those costs. As the Commission wisely stated in the 1999 Concept Release:

The Commission . . . believes that the total amount of market information revenues should remain reasonably related to the cost of market information. . . . [T]he Commission believes that it will be possible to develop a flexible, cost-based approach to market information fees and revenues that both furthers the Exchange Acts national market system objectives and can be implemented in a reasonably efficient manner.

⁴ Statement of SEC Chairman Harvey L. Pitt in transcript of *SEC Meeting of the Market Structure Hearings*, New York University, Tisch Hall (Nov. 12, 2002), available at: <http://www.sec.gov/spotlight/marketstructure/mkts111202-hrg.txt>.

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We appreciate your consideration of our perspective on this important matter.

Respectfully submitted,



Bart M. Green
Chairman



John Giese
President & CEO

cc:

Hon. Christopher Cox, Chairman
Hon. Luis A. Aguilar
Hon. Kathleen L. Casey
Hon. Troy A. Paredes
Hon. Elisse B. Walter
Dr. Eric Sirri, Director of Trading and Markets

Attachment:

STA Special Report on U.S. Market Structure, Market Data Section