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Corporate Secretary

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Via email to rule-comments@sec.gov

Florence E. Harmon, Esq.
Acting Secretary
United States Securities and Exchange Commission
Station Place, 100 F Street, NE
Washington, DC 20549-1090

Re: Draft Order Approving ArcaBook Fees--Release No. 34-57917, File No. SR-NYSEArca-2006-21 (the "ArcaBook Filing")

Dear Ms. Harmon:

We write on behalf of NYSE Arca, Inc. (the "Exchange") to respond to the Commission's June 4, 2008, "Notice of Proposed Order Approving Proposal by NYSE Arca, Inc. to Establish Fees for Certain Market Data and Request for Comment" (the "Request for Comment") and the Commission's draft "Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data" (the "Draft Approval Order"), which is attached to the Request for Comment.

A. The Standard for Non-Core Data. In the Request for Comment and the Draft Approval Order, the Commission establishes a framework for assessing fees relating to "non-core" market data products of national securities exchanges.[1] It relies on the existence of competitive forces to determine whether an exchange's non-core data proposal is equitable, fair and reasonable, and not unreasonably discriminatory.

Under this market-based approach, one asks, "Is the exchange subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees?" If yes, the Commission would approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act.

The Exchange applauds this approach. We believe that the following Commission language "hits the nail squarely on the head":

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[1] The Commission defines non-core market data to mean data other than the best-priced quotations and consolidated last sale prices that the markets make available under joint securities industry plans, such as the CTA Plan and the CQ Plan.

> [W]hen possible, reliance on competitive forces is the most appropriate and effective means to assess whether terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory. If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior. . . . [W]hen an exchange is subject to competitive forces in its distribution of non-core data, many market participants would be unlikely to purchase the exchange's data products if it sets fees that are inequitable, unfair, unreasonable, or unreasonably discriminatory. As a result, competitive forces generally will constrain an exchange in setting fees for non-core data because it should recognize that its own business will suffer if it acts unreasonably or unfairly.[2]

We further agree with the Commission that nothing in the Securities Exchange Act of 1934, Commission rules under that Act, the rulings in the NASD-Instinet dispute of the mid-1980's, nor anything else requires the markets to engage in cost-based pricing.

We believe that the Commission's new standard for assessing non-core data fees will spur innovation. It will allow markets to inject new market data products into the marketplace more quickly. It will help to assuage the markets' current perception that they have no margin for error when launching data products. And, it will promote the ability of exchanges to react quickly and appropriately to the changing ways in which their customers use data. This will facilitate the ability of data users to receive and use data in the manner most useful to them and will enhance the overall competitiveness of the United States securities markets in the global arena.

B. Application of the Standard to Proposed ArcaBook Fees. In applying this standard to the fees that NYSE Arca proposed in the ArcaBook Filing, the Commission finds that ArcaBook fees satisfies the standard because NYSE Arca is subject to significant competitive forces in both of the two relevant categories of competition:

(A) NYSE Arca's compelling need to attract order flow from market participants; and

(B) the availability to market participants of alternatives to purchasing ArcaBook data.

The Exchange is in wide agreement with the Commission's findings. We agree with the Commission that NYSE Arca has a compelling need to attract order flow and that it will have to reassess ArcaBook fees if it comes to believe that those fees are restricting NYSE

[2] Request for Comments, p. 4.

Arca's ability to attract order flow. We agree that market participants have access to a number of alternatives to purchasing ArcaBook data.

We agree that neither NYSE Arca nor any other market exercises monopoly power over its depth-of-book data. We agree that discriminating between professional subscribers and nonprofessional subscribers is a reasonable form of discrimination.

We agree that charging for ArcaBook data will not unduly reduce market transparency. Given the current trend towards dark pools of liquidity, we believe that the market transparency that ArcaBook and other markets offer should be rewarded, not penalized.

We agree that the differences in speed between data dissemination by NYSE Arca and dissemination under the joint industry plans are imperceptible for retail investors. And, we agree that best execution does not mandate the use of depth-of-book data.

About the only point of contention that the Exchange can raise with the Request for Comment and the Draft Approval Order is the Commission's affirmation that firms must use and display for trading-related purposes prices and quotes that SIAC and Nasdaq consolidate and make available under the CTA, CQ, OPRA and OTC/UTP Plans. We believe that those securities information processors should continue to perform the consolidation function to ensure that a consolidated stream of best quotes and last sale prices remains readily available and agree that those consolidated best quotes and last sale prices constitute "core data," as set forth in the Request for Comments and the Draft Approval Order. However, we believe that it is unnecessary for the Commission to mandate the consumption of consolidated data under the joint industry plans in today's market environment, an environment that is characterized by:

(1) frequently hidden interest, even at the national best bid and offer;

(2) the ability of vendors and broker-dealers to recreate the consolidated streams of information easily by means of access to proprietary feeds from participating exchanges, effectively obviating the need for much of the data that the markets make available under the joint industry plans; and

(3) the status of exchanges as the ultimate "safety nets," given their responsibility under Regulation NMS for routing orders to better-priced exchanges.

We believe that requiring the consumption of consolidated data under the joint industry plans simply adds unnecessary cost for those who do not require it. Of course, the issue of whether the mandatory display of consolidated data continues to serve the best interests of the industry is separate and apart from the issues relating to the proposed

ArcaBook fees. We suggest that that Commission address the mandatory display requirement separately.

C. <u>The Arca Book Fees</u>. The Exchange strongly supports the Commission's findings and conclusions in the Request for Comment and the Draft Approval Order and applauds the Commission for going to such unprecedented lengths to ensure that all interested parties received ample opportunity to comment on every aspect of the issues that the Draft Approval Order addresses. However, we feel compelled to note that we submitted the ArcaBook Filing more than two years ago, and have been unable to impose fees for the distribution of ArcaBook data during that entire period. We note that many of those who have opposed the fees most vocally are competitors that benefit directly from our inability to impose the fees. By succeeding in delaying approval of the fees, these firms have taken advantage of the regulatory system and used it as a competitive tool. We expect that these same firms will continue to seek delays because it remains in their competitive interests to do so. During our two-year wait, other exchanges have collected fees for their distribution of essentially similar data products. Furthermore, the Commission's request for additional comments delays our ability to start to charge for our depth-of-book data even longer. The revenues that we have lost as a result of the delays have placed us at a competitive disadvantage. We ask the Commission to rectify this inequity as quickly as possible.

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We thank you for this opportunity to comment and remain available to respond to any questions that you might have.

Sincerely,

Mary Yeager
Corporate Secretary
NYSE Arca, Inc.

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Kathleen L. Casey
Erik Sirri, Director, SEC Division of Trading and Markets
Robert L.D. Colby, Deputy Director, SEC Division of Trading and Markets