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SCHWAB

January 17, 2007

Via Electronic Submission

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street N.W.
Washington, D.C. 20549

RE: Release No. 55011 – Order Granting Petition for Review of SR-NYSEArca-2006-21

Dear Ms. Morris:

Charles Schwab & Co., Inc., and its affiliates ("Schwab") appreciate the opportunity to comment on the Securities and Exchange Commission's ("Commission" or "SEC") review of the staff's action in approving by delegated authority a rule change related to the fees charged by NYSEArca, Inc., for its Arca Book market data product.[1] Schwab believes strongly that the Commission's decision to review the staff's approval of a new pricing structure for Arca Book is entirely appropriate and consistent with the Commission's basic goal of protecting investors.

We share the view of the Petitioner, NetCoalition, that the staff's approval should be set aside and that the NYSEArca data fees proposal should be considered as part of a broad review of market data issues. We recommend a moratorium on new or increased fees for any market data product until the Commission has adopted a framework for equitable access to market data. The principal goal of this new framework should be ensuring that all investors – whether professional or non-professional, whether accessing information for institutional trading systems, through a broker-dealer, through an Internet portal, or directly from an exchange – have equal access to the same quality information, at a reasonable price, and at the same time.

Through its affiliates, Schwab engages in a range of financial activities, including retail brokerage, mutual funds, and services to investment advisers and retirement plans. Schwab represents millions of individual investors routing orders for execution in multiple markets. Some of our clients trade actively, routing orders directly to the market center of their choice. Others are engaged investors, who may place 10-20 equity or ETF orders a year. We believe that, whatever their investing style or goals, our clients should have access to real-time

[1] Release No. 34-54597; File No. SR-NYSEArca-2006-21, October 12, 2006.

quotations that cover the depth of their order (on average 1,000 or more shares), indicate where the market for their security is moving, and show which market center is likely to execute their order. Unfortunately, the current market data system, for most investors, makes this too expensive a goal to achieve.

Schwab has argued for a number of years in various submissions to the Commission[2] that the market data system as a whole is fundamentally flawed and needs to be overhauled. We believe that the urgency of doing so has increased dramatically since the decision by both the New York Stock Exchange and Nasdaq to become for-profit public companies and the resulting conflicts of interest in maximizing their profits for shareholders while retaining regulatory powers and monopoly control over market data that is reported to them under SEC rules.

Moreover, the Commission's adoption of Regulation NMS[3] has enhanced the need for depth-of-book data, which is priced beyond the reach of most retail investors. The promise of Regulation NMS is transparency to enable price discovery. Market data illuminates the fragmented pool of liquidity to enable buyers and sellers to find each other on fair and equal terms. The unequal treatment of market participants in terms of access to market data, however, threatens to undermine this promise by benefiting market professionals at the expense of the retail investor by granting the former a distinct information advantage.

The petition from NetCoalition offers an opportunity for the Commission to undertake a comprehensive review of the market data system, as promised in the Regulation NMS adopting release. We urge the Commission to propose a system that serves better the needs of all market participants by assuring equal access to today's faster, deeper market data coming directly from the exchanges at a fair and reasonable price, while addressing the exchanges' conflicts of interest in using their monopoly control over market data to increase their revenue at the expense of the individual investor.

The NetCoalition Petition for Review – A Call for a New Standard of "Fair and Reasonable"

NetCoalition brings an important new perspective to the debate over market data fees. NetCoalition members include some of the largest Internet portals, such as Google and Yahoo!, portals that are used by literally tens of millions of Americans every month. Google, Yahoo!, and other web sites now include comprehensive finance sections that complement the financial and investing information available on sites like schwab.com and those of other financial institutions. Millions of Internet users have been using the financial information on Google, Yahoo! and other web portals to access real-time stock quotes and other critical information. But

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[2] See, e.g., Comment Letter of Jeffrey T. Brown, SRO Concept Release (File S7-40-04), March 9, 2005; Comment Letters of W. Hardy Callcott, July 10, 2000, and David S. Pottruck, March 15, 2000, Concept Release on the Regulation of Market Information Fees and Revenues (Release No. 34-42208, File No. S7-28-99); Schwab Petition for Rulemaking, June 29, 1999.

[3] Final Rule Release No. 34-51808, June 9, 2005.

the imposition of new or increased fees for Arca Book data and other market data products,[4] has led many web sites – including AOL, Yahoo! Finance, and Google Finance – to cease providing real-time market information to investors because the cost has become prohibitive. As a result, investors today have fewer choices for obtaining real-time stock quotes. We believe that reducing the choices available to investors for getting detailed market information is antithetical to the goal of a free and open capital markets system. The staff decision to approve Arca Book's pricing scheme has, unfortunately, already had that effect.[5]

The Petition for Review submitted by NetCoalition[6] argues that the staff's action should be set aside primarily because NYSEArca did not provide a sufficient basis for increasing its fees. No data was provided by NYSEArca to demonstrate that the proposed fee increase was "fair and reasonable," as required by the Securities Exchange Act of 1934.[7] We have argued for many years that no demonstration has ever been made that the fees for market data have any relationship to the cost of producing the data. The Commission itself, in its 1999 Concept Release on Regulation of Market Information Fees and Revenues, stated that "the fees charged by a monopolistic provider…need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization if fees are too low. The Commission therefore believes that the total amount of market information revenues should remain reasonably related to the cost of market information."[8]

In its approval of the NYSEArca filing, the staff notes that the fees for the Arca Book product "are reasonable when compared to the fees charged by other markets for similar products."[9] The approval order goes on to compare the Arca Book fees to those charged for the NYSE's OpenBook data feed and the Nasdaq's TotalView product. Yet during the approval process for the pricing of these comparative products, no information that justifies their fee level was offered or considered. Commission staff is basing approval of the Arca Book fees, which are devoid of justification or any demonstration that they are fair and reasonable, on the fact that it had previously approved similar fee structures for other products, which are themselves devoid of any demonstration that they are fair and reasonable. We do not believe that this method of

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[4] Examples include the staff approval, by delegated authority, of fee structure changes for NYSE's Open Book (Release No. 34-53585; File Nos. SR-NYSE-2004-43 and SR-NYSE-2005-32; March 31, 2006).

[5] Last week the Wall Street Journal reported that NYSE will be submitting a proposal to the Commission to offer real-time last sale data to financial portal websites. Aaron Lucchetti, *NYSE Test May Give Investors Real-Time Quotes Via the Web*, Wall St. J. (Jan. 12, 2007) at C3. Post-sale data, however, is no substitute for pre-sale order book information (bids, offers, and orders) that investors need to make informed investment decisions and does not address the informational disadvantage individual investors endure today due to the high price of exchange book data.

[6] Petition for Commission Review of Staff Action by Delegated Authority, SR-NYSEArca-2006-21 (November 14, 2006).

[7] 15 U.S.C. § 78s(b)(1)

[8] SEC Concept Release, "Regulation of Market Information Fees and Revenues," Release No. 34-44208, File No. S7-28-99.

[9] Release No. 34-54597; File No. SR-NYSEArca-2006-21, October 12, 2006.

decision-making meets the Congressional requirement that the Commission ensure that the fees are "fair and reasonable," particularly since the Commission itself has concluded that a "cost-based standard" should be used to determine whether the proposed pricing structure meets the "fair and reasonable" test.

We continue to believe that the exchanges have the right to charge fair and reasonable fees for aggregating and distributing the data submitted to them by broker-dealers pursuant to SEC rules. Yet the exchanges have consistently refused to share with the Commission, Congress or the public their methodology for determining the rate structure. The Commission's willingness to allow the staff to approve by delegated authority market data products, fees, and fee increases without requiring the exchanges to provide adequate justification and without considering the impacts on retail investors is inconsistent with investor protection and the Exchange Act.

Moreover, we believe that the Commission has also failed in its statutory requirement to ensure that market data fees are an "equitable allocation" of costs among exchange users, and not unreasonably discriminatory.[10] The reality of today's market for stock quotes is that all market data users are not treated equally. Indeed, the entire premise of the NetCoalition petition is that its "clients" – users of Google, Yahoo! and other web sites that provide financial information but are not traditional financial services institutions – are being shut out of accessing real-time depth of market quotations. The NYSEArca fees, like those of all exchange-controlled market data products, are based on a theory that requires a company to pay for every set of eyeballs that looks at the data. With over four million customers, our market data costs are significant. Contrast that, however, with the market data costs of the exchanges' preferred customers, institutions and algorithmic traders. These market participants only pay for the data link to their computer systems. As a result, firms that generate millions of trades per day pay far less in market data fees than broker-dealers that provide service to investors each of whom may make on average only a handful of trades per year. This is not an equitable allocation of market data fees. Rather, it is a subsidization program whereby exchanges rebate revenue to their favored traders based on market data fees imposed on retail investors. This practice must end.

In addition, Schwab clients do not have the access to the kind of depth-of-book information that institutional investors on Wall Street have. An individual investor who seeks to access the same quality information as a professional investor would need to pay $97 per month[11], or more than $1,100 a year, just *to see basic pricing facts – bids, offers, quotes, and other orders - that are important tools for making a sound investment decision.* For an investor who makes a dozen trades per year, that cost is not reasonable. And if an investor decides not to pay this usurious amount, he or she is relegated to receiving only top-of-book data from a feed 60 times slower than the more expensive feeds that come directly from the exchanges. Some say that retail

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[10] Section 6(b)(4) of the Securities Exchange Act of 1934 calls for "equitable allocation of reasonable dues, fees, and other charges among [an exchange's] members and issuers and other persons using its facilities." 15 U.S.C. § 78f(b)(4).

[11] The $97 comprises the following: $60/month for NYSE OpenBook; $14/month for Nasdaq's TotalView; $10 a month for ArcaBook (pending resolution of the NetCoalition Petition); $10/month for AMEX data (pending); $1/month for Consolidated Tape A data; $1/month for Consolidated Tape B data; and $1/month for Nasdaq's UTP data.

investors do not need fast, in-depth data. We strongly disagree. The Commission, in adopting Regulation NMS, has imposed a system that requires access to depth-of-book information. As a result of the newly-created Intermarket Sweep Orders, Regulation NMS promotes simultaneous trading at multiple price levels. This will be a boon to algorithmic traders, yet retail investors will not even be able to see the multiple levels, let alone know whether their orders may interact with such prices. Retail investors should not be restricted from accessing necessary data because of the cost. This is like saying retail investors should be restricted from accessing corporate earnings reports, which the Commission makes available for free and which the Chairman has been striving to improve through interactive data reports. If the Commission believes that improving access to corporate information for investors is a top priority, surely the Commission should also support equitable access to depth-of-book trading data, without which retail investors are at a significant disadvantage in the marketplace.

The Commission Should Undertake Comprehensive Reform of the Market Data System to Enable Competition and Provide for Equal Access to Market Data

Schwab continues to believe that it would be in the best interest of all investors if the Commission would undertake a comprehensive review of the market data system, particularly in light of the fact that the exchanges are now for-profit public companies. The Commission itself has recognized that the new for-profit exchanges have significant conflicts of interest in meeting their obligations to shareholders and their obligations to investors. This fact creates a very different dynamic than existed in 1999, when the Commission issued a Concept Release on Market Information Fees and Revenues; in 2000, when the Commission convened the Advisory Committee on Market Information; or in 2004, when the Commission asked for comment on a number of market data issues in its SRO Concept Release. Today, the exchanges are beholden to their shareholders to increase revenue, and market data is the revenue stream that holds the greatest potential for doing so. There is perhaps no clearer illustration of this situation than that of the instant case, in which NYSEArca has decided to charge for market data that Arca was making available for free prior to its merger with NYSE and the subsequent creation of a for-profit, public company. It is incumbent upon the Commission, therefore, to ensure that individual investors have equal access to the same quality information, at a reasonable price, and with the same timeliness as other market participants.

We believe that a comprehensive review of the market data system should be focused on achieving three goals:

- A reasonable fee structure for exchange-direct data (as well as NBBO consolidated data) that is based on the costs of consolidating, storing, transmitting and processing the data;
- Ensuring that retail investors have access to the same market data with the same timeliness as professional investors; and
- Allowing for competition in the provision of market data, so that investors have access to a variety of products and ultimately so that market data fees may be determined by market forces.

With regard to the fee structure, we have long been concerned that market data fees have been used to support other exchange functions, including the regulatory function. That concern has been exacerbated by the emergence of for-profit exchanges, whose fiduciary obligation to maximize shareholder value is paramount. Market data fees represent a lucrative way for these exchanges to increase revenue, and the government-protected monopoly that the exchanges enjoy as exclusive processors of market information creates a serious potential for abusive pricing practices. We believe that the Commission should create standards that allow producers of market data to recover their costs and make a reasonable profit (e.g., 10% return), but not an excessive profit.

At the heart of the debate over market data, we believe, are the evolving needs of today's investors. A series of innovations in the last decade, including the advent of online trading, decimalization, and electronic trading networks, have brought millions of individual investors into the marketplace. Today's investors are demanding better quality information, such as real-time "depth-of-book" information. What once was necessary only for professional investors should now be considered basic information for retail investors. Like the demise of floor-based trading, the time for a multi-tiered system, in which professional and institutional investors get the very best information, individual investors willing to pay significant fees have access to the next-best information, and the vast majority of the investing public gets the least-useful information, is long gone. Yet each exchange request for an increase in fees, approved by Commission staff without review of costs and the impact on investors, worsens that disparity. The exchanges are using rapidly increasing market data fees as a way to recreate in cyberspace, in effect, the information advantage held by floor specialists over individual investors, an advantage that most market observers, including the Commission, have concluded is inappropriate in a modern capital markets system.

The Commission should focus in a review of market data on leveling the playing field so that retail investors have access to fast and at-depth information. This disparity has been highlighted in the current situation, in which high-profile web sites like Google and Yahoo! that had been providing an important service for millions of investors, found themselves shut out from being able to offer that service. Every investor, no matter how large or small, whether professional or retail, whether he or she gets information from Schwab, from Google, or from the NYSE itself, should have access to the same information. Depth-of-book information should be priced such that anyone can purchase it.

In the alternative, the Commission should consider increasing the quality and speed of the consolidated quotation information. Individual investors who place orders up to several thousand shares should have the right to see a quote for the full extent of their order so that they know what price they will receive. Increased depth in the consolidated quote would also level the information playing field by allowing all investors to observe and understand pricing movements in the market, which is not possible with today's typical NBBO of a few hundred shares or less. Moreover, the Commission should not allow each individual exchange, like NYSEArca, to exploit the regulatory disadvantage of the consolidated quote by distributing their own data in front of it. This creates artificial value for the single-exchange market data products and exacerbates the informational disadvantage of retail investors.

Finally, we believe that the time has come for the Commission to end each exchange's exclusive processor monopoly over distribution of the factual bid, offer, and order data broker-dealers submit to them. The exchanges have become for-profit institutions. They should be forced to compete with other vendors to provide the best product at the best price. Opening the marketplace to competition would spur innovation, inspire creativity, result in new products, and provide a mechanism for keeping prices under control that is absent from today's system. This may be accomplished by requiring each exchange to establish a separate market data affiliate that would be required to compete with other vendors. The exchange would be required to offer other vendors the raw data feeds on the same terms as it makes them available to its affiliate. In this way the Commission could address the exchanges' market data monopoly while creating a mechanism for free market pricing.[12]

For all these reasons, we urge the Commission to set aside the staff approval of the Arca Book fee structure, issue a moratorium on new or increased market data fees, and begin a comprehensive review process that will benefit all investors and results in a better market data system.

Sincerely,

Jeffrey T. Brown

Jeffrey T. Brown
Senior Vice President
Office of Legislative and Regulatory Affairs

[12] This is different from the failed "competing consolidators" model considered by the Seligman Advisory Committee. Here, vendors would be able to accept the raw data feeds on the same terms as the exchanges' own affiliates, and could produce their own depth or analytical products that could vary from the exchanges' depending on their customers' needs.