THE FINANCIAL SERVICES ROUNDTABLE

Impacting Policy. Impacting People.

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January 17, 2007

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

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

Dear Ms. Morris:

The Financial Services Roundtable[1] (the "Roundtable") appreciates the opportunity to submit a statement in opposition to the action taken by the Division of Market Regulation ("Division" or "Staff") of the Securities and Exchange Commission ("Commission") in approving by delegated authority a rule change related to the market data fees charged by NYSEArca, Inc. The Roundtable applauds the Net Coalition for challenging the delegated approval of the market data fee increase. The Roundtable believes that the rapidly evolving structure of the securities markets requires the Commission to reconsider the current model for consolidation and dissemination of market data by the exchanges. The exchanges are no longer member-directed self regulatory organizations ("SROs") but for-profit businesses that operate under government-sponsored protection and without competition with regard to the sale of bids, offers and last sale prices generated by orders from Roundtable members and their customers. The Commission's proper role is to ensure that market data, the oxygen of our capital markets, is available to all investors on a fair basis. The Roundtable has often commented to the Commission when it believes the fairness and transparency of our markets are threatened.[2] Given the importance of market data to all investors, the Roundtable urges the Commission to impose a moratorium in new market data fee increases as it determines the appropriate structure for market data dissemination in today's market place.

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[1] The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Roundtable member companies provide fuel for America's economic engine accounting directly for $18.3 trillion in managed assets, $678 billion in revenue, and 2.1 million jobs.

[2] Definition of Eligible Portfolio Company File #S7-37-04
Internal Control Roundtable File #4-511
Executive Compensation and Related Party Disclosure File # S7-03-06

The Problem

Bids, offers, and last sale prices of securities traded on America's exchanges are a fundamental by-product of orders from the most diverse investor base in the world. Indeed, Congress, in creating the national market system in1975, made the consolidation, dissemination and availability of market data a key element in new Section 11A of the Securities Exchange Act of 1934.[3] Congress was concerned that prices and trades were not accessible to all investors and acted to assure "the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."[4] For approximately twenty-five years the rules adopted by the Commission under Section 11A provided a framework that promoted the reasonableness of the market data charges as well as its dissemination in a non-discriminatory manner.

The most important check on market data rates during this period, however, was the ownership structure of the exchanges. Exchanges, as self-regulatory organizations ("SROs"), were member owned and managed entities. While Congress charged the Commission with the oversight of market data rates, exchange members and their customers, being most directly impacted by the cost of market data worked with exchange management to establish fair pricing. Because of Commission rules, broker-dealers are required to provide data to the exchange and then buy it back in consolidated form. Given this regulatory obligation to buy the data and distribute it to clients, brokers ensured that exchange management kept market data prices at reasonable levels.

This self-restraint mechanism began to fail, however, with the advent of Internet-based access to brokers. With millions of Americans seeking access to the prices of securities in their portfolios or mutual funds, brokers and banks experienced rapidly rising market data costs. In addition, the introduction of decimal pricing caused a reduction of liquidity at the best prices (top-of-book) leading to a loss of informational value for the consolidated best bid or offer disseminated by the exchanges. In essence, brokers and ultimately their customers are paying more for less.

The most significant deterioration in market data price controls, however, has been the change in ownership structure at the exchanges. Rather than continuing as member-owned, not-for-profit enterprises, nearly all U.S. exchanges have migrated to shareholder-owned, for profit corporations. Exchange management owes its fiduciary duties to the shareholders of the corporation and those duties include maximizing the revenue generated by market data fees. Brokers and users of the exchanges, while often owning shares in the exchange corporations, are far less capable of constraining the fee levels. This is particularly true of market data fees because exchanges retain government-sponsored control over the sale of market data. Exchange transaction fees are subject to competitive pressures among the competing markets. However, market data is consolidated among the exchanges prior to sale and the exchanges share in the proceeds. No mechanism for competition exists for this product.

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[3] Securities Exchange Act Section 11A, 15 U.S.C. 78k-1.
[4] Securities Exchange Act Section 11A(a)(1)(C)(iii), 15 U.S.C. 78k-1(a)(1)(C)(iii)

Moreover, as exchanges retain self-regulatory authority, challenging the actions of management with regard to fee levels entails the risk of regulatory reprisal by the exchanges. It is difficult to conceive of a larger conflict of interest than a corporation with semi-governmental authority exercising its authority to regulate users of its market over products that the users are required to purchase. Market forces are irrelevant in this context. Although the SROs are exploring consolidated self-regulation, each exchange will retain oversight of trading on its market. Even if one ignores the lack of a competition for market data, the inherent conflict of interest of this structure requires review by the Commission.

How the exchanges exploit this conflict of interest has become evident following the adoption of Regulation National Market System ("Regulation NMS") in 2005.[5] Regulation NMS permits exchanges to independently sell their exchange specific data products along side the consolidated market data product that brokers are required to purchase. These proprietary data feeds often are depth-of-book montages of all bids and offers below the top-of-book. While largely a tool of institutional trading in the past, depth-of-book feeds have become far more important since the introduction of decimal pricing. Recognizing this importance, exchanges now offer expensive proprietary depth-of-book feeds that only institutions may practically afford. With liquidity evaporating at the consolidated best bid or offer following decimals, retail investor orders often exceed the available liquidity in the consolidated display. Without paying extremely high rates, retail customers are unable to determine the total execution price of their orders because they only see the illiquid top-of-book. The Roundtable believes that this two-tiered structure with institutions having access to prices not reasonably available to small investors creates a fundamentally unfair market structure that unreasonably discriminates against small investors.

The exchanges have compounded this inequitable access to market data by offering their proprietary market data feeds at speeds advertised as sixty times faster than the top-of-book data feeds provided by consolidated top-of-book feeds. So not only does the data in the consolidated feed have significantly less informational value, but also it is delivered much slower than the data delivered to institutions and automated trading systems through proprietary data feeds. Regardless, brokers are required by rule to purchase this less valuable and slower information, information that by the time a customer seeks to act upon it, traders with the proprietary, faster feeds will have traded ahead of the customer. This appears to the Roundtable to recreate the informational advantage that once existed on the physical floors of the open outcry markets. The exchanges are leveraging the regulatory requirements to maximize market data revenues for the benefit of their shareholders not for the benefit of the investing public. The Roundtable believes this structure is flawed and fails to promote the transparency and fairness that Congress mandated in amending the Securities Exchange Act in 1975.

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[5] Exchange Act Release No. 51,808 (June 9, 2005).

The Solution

The Roundtable believes that the Net Coalition's petition is a timely opportunity for the Commission to rectify the growing inequity in the market data context. The Coalition rightfully challenged the approval by the Division of the NYSEArca increase in market data fees. Now the Commission must take up that challenge and determine a path that enhances the availability of data for all investors. This is entirely consistent with other initiatives promoted by the Commission. The Roundtable applauded the Commission for pressing forward with "interactive data" so that all investors, large and small, could have more meaningful use of corporate reports. Corporate transparency is a fundamental element of our capital markets but it makes little sense to enhance access to corporate information if at the end of the analysis, investors cannot reasonably access the prices establishing the current market for a security.

The Roundtable urges the Commission to abrogate the approval of the NYSEArca filing, issue a moratorium on new market data fee filings, and initiate a broad based review of the market data structure culminating in rulemaking that establishes a more fair, competitive and transparent structure. In adopting Regulation NMS, the Commission pushed the market structure review off to the Concept Release on Self-Regulation. While the Commission sought and received comment on market data in the Concept Release, it has yet to announce any recommendations or rulemaking on market data as a result of its consideration of the issue. Unfortunately, as the Commission delays acting in this space, the exchanges are establishing facts on the ground that will become harder and harder to reverse. Just as the Commission responded to concerns about the consequences of the implementation of Sarbanes-Oxley, it should now formulate a new openness for market data. The Roundtable urges the Commission to act with all expediency in resolving this important market structure problem.

CONCLUSION

The Roundtable looks forward to working with the Commission on this important matter. If you would like to discuss this issue further, please contact me at Rich@fsround.org or 202-589-2413, or Irving Daniels at Irving@fsround.org or 202-589-2417.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel

cc: Christopher Cox, Chairman, U.S. Securities and Exchange Commission
Paul S. Atkins, Commissioner, U.S. Securities and Exchange Commission
Roel C. Campos, Commissioner, U.S. Securities and Exchange Commission
Kathleen L. Casey, Commissioner, U.S. Securities and Exchange Commission
Annette L. Nazareth, Commissioner, U.S. Securities and Exchange Commission