



Securities Industry Association

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February 10, 2003

By Hand and Via Electronic Mail

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: File No. SR-NYSE-2002-66

Dear Mr. Katz:

The Securities Industry Association (“SIA”)¹ appreciates the opportunity to comment on the New York Stock Exchange’s (“NYSE”) above-referenced rule filing.² In SR-NYSE-2002-66, the NYSE proposes changes to its fee structure that would:

- increase the existing cap on transaction charges;
- establish a new transaction charge for principal transactions;
- increase existing fees for branch offices;
- establish separate new fees for NYSE technology services provided to brokers and specialists; and
- change the fees applicable to subscribers to the NYSE's Automated Bond System.

The NYSE filed the proposal with the Securities and Exchange Commission (“SEC” or “Commission”) pursuant to Section 19(b)(3)(A) of the Securities Exchange Act of 1934 (“Exchange Act”),³ which provides for immediate effectiveness.⁴ Because

¹ The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA member firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In the year 2001, the industry generated \$198 billion in U.S. revenue and \$358 billion in global revenues. Securities firms employ approximately 750,000 individuals in the United States. (More information about SIA is available on its home page: <http://www.sia.com>.)

² Securities Exchange Act Release No. 47174 (January 13, 2003), 68 FR 2606 (“Release No. 47174”).

³ 15 U.S.C. 78s(b)(3)(A).

the NYSE proposes significant changes in the NYSE fee structure, the SIA believes that the proposal should have been filed under Section 19(b)(2) of the Exchange Act, which provides for industry comment and SEC review of a rule proposal before it becomes effective.⁵

The SIA fully supports self-regulation and member firm funding of self-regulatory organization (“SRO”) activities, and appreciates the NYSE’s stated purpose for the fee changes – the need to increase revenue to fund its regulatory programs and the services that it provides. The SIA, however, believes that there should be an opportunity for industry comment and SEC review before significant changes, such as the instant proposal involving the new pricing structure, become effective in order to ensure that the proposed fees are fair and reasonable.⁶

I. Established Procedure for Filing Significant Fee Changes

The SIA previously has expressed concern about the process for filing significant SRO fee changes.⁷ The discussion and recommendations set forth in that comment letter apply to this rule proposal as well. In the SIA Letter, the SIA noted that Section 19(b) of the Exchange Act requires that every SRO file with the Commission copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO, accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission is required to publish notice of the filing of a proposed rule change and to give interested persons an opportunity to submit written data, views, and arguments. Section 19(b) provides that the Commission shall approve an SRO’s proposed rule change if it is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the SRO.

⁴ NYSE filed SR-NYSE-2002-66 with the Commission on December 23, 2002, proposing that the fee changes become effective on January 1, 2003. The NYSE submitted Amendment No. 1 on January 10, 2003, which replaced Form 19b-4 and Exhibit 1 of the original filing in their entirety. The SEC notes in Release No. 47174 that calculation of the abrogation period for the proposal begins on January 10, 2003, the date of filing of the amendment.

⁵ While there are aspects of the proposed fee structure that may not be significant, and therefore may be appropriately filed for immediate effectiveness, because these changes have been filed together, we believe they should have been filed for notice and comment.

⁶ The SIA understands that the NYSE notified some or all of its member firms of the proposed fee changes by letter in the Fall of 2002. Several firms indicated, however, that the letter was brief in nature and did not include the proposed rates for the fees, making it difficult to analyze at that time the full impact of the proposal.

⁷ See Letter to Jonathan G. Katz, Secretary, SEC, from Stuart J. Kaswell, Senior Vice President and General Counsel, SIA, dated December 9, 2002, commenting on the National Association of Securities Dealers Trading Activity Fee (“SIA Letter”).

A proposed rule change may take effect when approved by the Commission by order, unless the rule change is within the class of rule changes that are effective upon filing pursuant to Section 19(b)(3)(A). Under Section 19(b)(3)(A) of the Exchange Act and Rule 19b-4(e) thereunder, a proposed rule change may take effect upon filing, without the notice and approval procedures required by Section 19(b)(2), if the proposed rule change comes within the prescribed statutory categories, which include rule changes that (1) constitute a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO, (2) establish or change a due, fee, or other charge imposed by the SRO, (3) are concerned solely with the administration of the SRO, or (4) are matters which the Commission may, consistent with the public interest and the purposes of this subsection, specify by rule. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.

In 1994, in a release adopting amendments to Rule 19b-4, the Commission stated that significant new fees should be filed under Section 19(b)(2) rather than Section 19(b)(3)(A). Specifically, the release states: “[U]nder Section 19(b)(3)(A)(ii) of the [Exchange] Act, rule changes that establish or change a due, fee, or other charge imposed by the SRO may become effective upon filing. The Commission notes that the filing of a proposed fee applicable to members may nonetheless raise significant regulatory issues and thus be required, consistent with current Commission policy, to be submitted pursuant to Section 19(b)(2).”⁸

As we stated in the SIA Letter, the SIA believes that the Commission should narrowly construe the scope of rule changes that can be filed pursuant to Section 19(b)(3) of the Exchange Act to ensure that all rule proposals – including fee proposals – that raise substantive issues and propose far-reaching changes are filed under Section 19(b)(2), thus allowing for full notice and comment prior to effectiveness. In this regard, the SIA made certain recommendations in the SIA Letter for considering future SRO fee proposals, particularly those establishing structural or significant fee changes. We strongly urge the Commission to consider those recommendations in connection with the instant filing. Specifically, the recommendations are:

- (a) firms should be given an opportunity to express their views prior to the new fee becoming effective;

⁸ Securities Exchange Act Release No. 35123 (December 28, 1994), 59 FR 66692.

(b) fee proposals that require programming changes should not be made effective until the industry has had sufficient time to program and test the necessary changes; and

(c) where fees are presented to the industry as “revenue neutral” or “fair and reasonable,” the rule filing should contain data that demonstrates that this is true, *e.g.*, volume assumptions and/or rates on which the conclusion is based, and also should contain a representation that volume-based rates will be adjusted periodically to take into account changes in market volume.

II. NYSE Fee Proposal and Related Concerns

The NYSE stated in its filing that “these fee increases are necessary to ensure that revenue is adequate to satisfy increasing costs for operations, technology, regulation and infrastructure.” According to the NYSE, relying on funding of these efforts from its general revenues as has been done in the past is no longer possible. The NYSE notes that many of its constituencies will be impacted by fee increases. For example, the instant proposal impacts members and member organizations, while a separate rule filing (which is not the subject of this comment letter) proposes increased fees for listed companies.

In the proposal, the NYSE establishes new fees in two areas: for principal transactions and for use of NYSE technology services. With regard to principal transactions by members and member organizations (other than those acting as specialists), the NYSE is proposing to apply the same schedule of transaction fees that it presently applies to agency transactions (with some exceptions). These new transaction charges will be included within the proposed overall transaction fee cap per member organization, which is being increased as noted below. The NYSE also is proposing new fees for the use of trading floor technology, which are user (subscriber) based, and are specific to certain broker-related services, specialist activity, or Automated Bond System services.

The NYSE proposes increased fees in two areas. First, the NYSE proposes to raise the overall cap on transaction charges of \$500,000 per month per member organization to \$600,000 per month per member organization. Second, the NYSE is increasing both the branch office initial fee (charged when a new branch office opens) and the annual maintenance fee for the branch office.

As discussed below, SIA member firms have concerns with the rule proposal.

A. Significant fee proposals should be filed pursuant to Section 19(b)(2) of the Exchange Act.

Although the fees may ultimately prove to be fair and reasonable and therefore consistent with Section 6(b)(4) of the Exchange Act,⁹ the SIA believes the industry should have been given an opportunity to participate in the process before the changes became effective. For example, several firms note that the new fee on principal transactions is a novel one and should have been subjected to industry review before becoming effective. Even though the overall impact of this new charge may be negligible for many firms because of the overall transaction fee cap, the precedential effect of the fee warrants further analysis and input from the industry.¹⁰

B. SRO rule filings should provide information that would assist the industry in determining whether the new and increased fees are fair and reasonable, as required by the Exchange Act.

SIA member firms recognize that the NYSE must ensure that it has sufficient funding to provide efficient, well-regulated trading systems and for carrying out its self-regulatory responsibilities. The SIA believes, however, that the NYSE has not provided the industry (and the SEC) with sufficient information for determining whether the new and increased fees are fair and reasonable. As stated in the SIA Letter, the SIA believes that, for major revisions to an SRO's pricing structure, the filing should be accompanied by data showing that the SRO has conducted a financial analysis, which includes the volume assumptions, costs, and/or the rates on which the conclusion is based.¹¹ Although the NYSE offers some reasons for the fee changes in its filing, the SIA believes that more information should have been provided, particularly in regard to whether the new fees are justified and the increased fees, such as those for branch offices, are supported by increased costs.¹²

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ In this regard, a few firms noted the lack of information in the filing on the question of whether the imposition of this new fee constitutes a burden on competition not justified by the purposes of the Exchange Act.

¹¹ As also stated in the SIA Letter, the SIA believes that any volume-based rates should be adjusted periodically, and that the SRO should include information on this point in its filing as well.

¹² The SIA notes that the NYSE proposed in the Fall of 2002 a new definition of branch office that the SEC is presently considering. The SIA voiced its strong concern with this proposal, which could significantly expand the scope of locations that brokerage firms would have to treat as branch offices. See Letter to Secretary, SEC, from Kimberly H. Chamberlain, Vice President and Counsel, SIA, dated December 23, 2002, commenting on the NYSE's proposed amendments to NYSE Rule 342. The fact that this proposal is outstanding and that it could have a major impact on a firm's and the SEC's review of the instant proposal is all the more reason why the instant proposal should have been subject to industry review and comment before becoming effective.

C. Implementation period is necessary before fee changes become effective.

Whenever an SRO imposes changes in its fee structure, it undoubtedly involves reprogramming of systems on the part of member firms. Even the most insignificant programming changes require the attention and funds of the member firm to execute the changes. It is important for the SRO to ensure that there is adequate time for member firms to implement and test these operational changes before the fee changes become effective. The SIA notes that the instant rule filing did not provide for such an implementation period.

III. Conclusion

The SIA appreciates the opportunity to provide comments on this significant NYSE fee proposal. Although SIA member firms may vary in their views on the specific fee proposals, all member firms agree that the process should provide an opportunity to evaluate the impact of the proposed changes, to challenge the appropriateness of the changes, and to program and test the changes well in advance of the effective date. Our concerns, therefore, revolve primarily around process rather than substance at this time.

If we can provide further information or clarification of the points in this letter, please contact me or Ann Vlcek, Associate General Counsel, at 202.296.9410.

Sincerely,

Stuart J. Kaswell
Senior Vice President and
General Counsel

cc: Annette L. Nazareth, Director, Division of Market Regulation, SEC
Robert L.D. Colby, Deputy Director, Division of Market Regulation, SEC
Alden Adkins, Associate Director, Division of Market Regulation, SEC
