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October 2, 2014

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

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Kevin M. O'Neill, Deputy Secretary

COMMENT LETTER AND PETITION FOR DISAPPROVAL

Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending its Fees for Non-Display Use of NYSE Arca Integrated Fee, NYSE ArcaBook, NYSE Arca Trades, and NYSE Arca BBO, and to Establish a Fee for Managed Non-Services for NYSE Arca BBO; Release No. 34–73011; File No. SR–NYSEARCA-2014-93

Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending its Fees for Non-Display Use of NYSE Arca Options; Release No. 34-73010; File No. SR-NYSEARCA-2014-94

Dear Mr. O'Neill:

SIFMA[1] appreciates the opportunity to comment on the above-captioned notices (the "Notices"), under which NYSE Arca, Inc. (the "Exchange") proposes to amend and establish new market data fees.[2]

The U.S. Securities and Exchange Commission (the "Commission") shall by order approve or disapprove such proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved in accordance with Section 19(b)(2)(B) of the

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[1] The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending its Fees for Non-Display Use of NYSE Arca Integrated Fee, NYSE ArcaBook, NYSE Arca Trades, and NYSE Arca BBO, and to Establish a Fee for Managed Non-Services for NYSE Arca BBO, Release No. 34–73011; File No. SR–NYSEARCA-2014-93; 79 Fed. Reg. 54315 (September 11, 2014). Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending its Fees for Non-Display Use of NYSE Arca Options; Release No. 34-73010; File No. SR-NYSEARCA-2014-94; 79 Fed. Reg. 54307 (September 11, 2014).

Securities Exchange Act of 1934, as amended (the "Exchange Act").[3] For the reasons set forth below, and because the Exchange's actions are inconsistent with the decisions of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*,[4] we respectfully petition the Commission to disapprove the proposed rule change.[5]

This is not the first time the Exchange and other national securities exchanges have filed proposed rule changes for market data fee rules that do not comport with the standards the Court established in the *NetCoalition* cases. The Commission should immediately disapprove of this and other similar unlawful market data product and fee rule changes proposed by self-regulatory organizations. The Commission staff should not be approving such rule change filings if on their face they are unlawful. The rule change at issue here is unlawful because it is based on invalid grounds, omitted cost data, and otherwise failed to comport with the Exchange Act as interpreted by the Court in *NetCoalition I*, and reaffirmed in *NetCoalition II*. We therefore urge the Commission to act immediately to disapprove this and other similar rule changes.

A. Market Data Fees Must Be "Fair And Reasonable."

Under the Exchange Act, the Commission is required to ensure that the proposed fees are, among other things, "fair and reasonable."[6] SIFMA disagrees with any notion that the amendment to Section 19(b)(3)(A) of the Exchange Act in Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act")[7] reflects a presumption that these fees are constrained by competitive forces[8] and that the Commission is therefore relieved of its obligation to ensure that data fees are "fair and reasonable" within the meaning of Section 11A(c)(1)(C).[9] Neither the plain language of the amendment to Section 19(b)(3)(A), nor the available legislative history of that amendment, supports such a presumption.[10]

B. The Exchange Has Not Shown That These Market Data Fees Are Constrained By Competitive Forces.

The Exchange has not shown that it is subject to significant competitive forces that would limit it to charging reasonable fees in pricing this market data. *NetCoalition I* made clear that the costs incurred in providing market data are relevant in assessing the reasonableness of the fees

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3 See 15 U.S.C. § 78s(b)(2)(B).

4 *NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) ("*NetCoalition II*"); *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010) ("*NetCoalition I*").

5 15 U.S.C. § 78s(b)(2)(B).

6 Section 11A(c)(1)(C) of the Exchange Act provides that fees must be "fair and reasonable" and not "unreasonably discriminatory" while Section 6(b)(4) provides that an exchange must "provide for the equitable allocation of reasonable dues, fees, and other charges among . . . persons using its facilities."

7 Pub. L. No. 111-203, H.R. 4173 (June 29, 2010).

8 79 Fed. Reg. at 54319, 54310.

9 15 U.S.C. § 78k-1(c)(1)(C).

10 For further discussion of these arguments, please *see* Comment Letter of SIFMA and NetCoalition re: Release No. 34-62887 and Release No. 34-62908 (Oct. 8, 2010).

because "in a competitive market, the price of a product is supposed to approach its marginal cost, *i.e.*, the seller's cost of producing one additional unit . . . [and] the costs of collecting and distributing market data can indicate whether an exchange is taking 'excessive profits' or subsidizing its service with another source of revenue."[11] Thus, the cost of producing market data would be direct evidence of whether competition constrains the ability to impose supracompetitive fees.[12] In *NetCoalition II*, the Court reiterated its holding, stating that *NetCoalition I* "remains a controlling statement of the law as to what sections 6 and 11A of the Exchange Act require of SRO fees," and that "there must be evidence that competition will in fact constrain pricing for market data before the Commission approves a fee charged for market data premised on a competitive pricing model."[13] The Notices, however, do not contain evidence of the Exchange's costs of collecting and distributing the market data. Nor do they provide the Commission with the type of substantial evidence the *NetCoalition* Courts found to be necessary to sustain an exchange rule seeking to impose a market data fee. Instead the Notices rely on the kind of unsupported theory and speculation that the *NetCoalition* Court rejected.

1. The "joint products" theory does not support the Exchange's contention that the proposed data prices are constrained by competition.

The Exchange's "joint products" theory[14] is inconsistent with the Exchange Act, contradicts economic reality, and is unsupported by substantial evidence.[15]

The "joint products" theory is inconsistent with the "fair and reasonable" requirement of Section 11A(c)(1)(C) of the Exchange Act because under the platform approach to pricing, the Exchange may set market data prices at supracompetitive levels as long as they charge less for other services, even though some users of the data may consume only data services, but not other services such as trade execution. This approach to pricing would therefore immunize data fees from review by wrapping them together with fees for other services and would thus nullify the "fair and reasonable" standard.

In addition, the "joint products" theory is flawed because market data is bought and sold separately from execution services, as evidenced by the fact that SIFMA member firms'

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11 615 F.3d at 537.

12 615 F.3d. at 537-38.

13 2013 WL 1798998 at *11.

14 79 Fed. Reg. at 54320, 54311.

15 *See generally Response to Ordover and Bamberger's Statement Regarding Nasdaq's Proposed Rule Change Concerning the Pricing of Depth-of-Book Market Data* ("*Response I*") 22-27 (Mar. 31, 2011) (attached hereto as Exhibit 1); *Response to Ordover and Bamberger's Statement Regarding the SEC's Proposed Order Concerning the Pricing of Depth-of-Book Market Data* ("*Response II"*) 13-16 (Oct. 10, 2008) (attached hereto as Exhibit 2).

customers often buy market data on its own.[16] The price of two products that are bought and sold separately is the result of the distinct competitive conditions confronting each product.[17]

In any event, there is no substantial evidence here to support the Exchange's "joint products" theory, only the same type of conclusory statements dismissed by the D.C. Circuit in *NetCoalition I*.[18]

2. The Exchange does not support its argument that order flow competition constrains market data fees.

The Exchange also concludes the fees here must be competitive because the market for order flow is subject to competitive forces.[19] The Court in *NetCoalition I* rejected this "order flow" argument because, as is the case here, there was no support for the assertion that order flow competition constrained an exchange's ability to charge supracompetitive prices for its data.[20] In rejecting the argument, the Court discounted the statements made by various exchanges to the effect that they consider the impact on order flow in setting data prices: "The self-serving views of the regulated entities . . . provide little support to establish that significant competitive forces affect their pricing decisions."[21]

3. The Exchange does not support its contention that there are reasonable substitutes for the market data.

The Exchange also asserts that several alternatives to the data product at issue here are available, but it does not provide any evidence that the alternatives are reasonable substitutes such that price is constrained by competitive forces.[22] Here again, the Exchange relies on arguments that were soundly rejected by the *NetCoalition* Court.[23] Under the Court's holding in *NetCoalition I*, a market data provider must provide "evidence of trader behavior"—such as the number of potential users of its data and how those users might react to changes in the price of that data—to support its conclusion that competition constrains its ability to charge supracompetitive fees for market data.[24] Yet the Exchange provides no evidence, only theories, as to how users might react to changes in the price of its data product.

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16 *See Response I* at 26-27; *Response II* at 14-15.

17 *See Gartenberg v. Merrill Lynch Asset Mgmt., Inc*., 694 F.2d 923, 929 (2d Cir. 1982).

18 *See* 615 F.3d at 541 (noting the "lack of support in the record" and characterizing proffered support as "conclusion[s], not evidence").

19 79 Fed. Reg. at 54320, 54311.

20 615 F.3d at 539-42; *see also Response I* at 13-22; *Response II* at 8-13; *An Economic Assessment of Whether "Significant Competitive Forces" Constrain an Exchange's Pricing of its Depth-of-Book Market Data* ("*Assessment*") 16-18 (July 10, 2008) (attached hereto as Exhibit 3).

21 615 F.3d at 541.

22 79 Fed. Reg. at 54321, 54313. *See also Response* at 12-13.

23 615 F.3d at 542-44; *see also Response I* at 12-13; *Response II* at 4-7; *Assessment* at 5-12.

24 615 F.3d at 542-44.

In the Notices, the Exchange claims that data recipients purchase Exchange market data on an entirely voluntary basis and the products are optional.[25] SIFMA disagrees with any contention that purchasing the market data is optional because data recipients must use this information for their businesses. The Exchange is the exclusive distributor of these products and there are no reasonable substitutes.

C. The Exchange Expands the Definition of Non-Display Use to Increase Fees.

The Notices state the following, "The Exchange is proposing to expand the types of uses considered Non-Display Use to also include non-trading uses. In addition, the proposal would specify that Non-Display Use would include any trading use, rather than only certain types of trading, such as high frequency or algorithmic trading, as under the current fee structure."[26] Additionally, "The Exchange proposes to amend the fee structure applicable to Non-Display Use of NYSE Arca Integrated Feed, NYSE ArcaBook, NYSE Arca BBO, and NYSE Arca Trades and to establish a fee for managed non-display services for NYSE Arca BBO. Specifically, the Exchange proposes certain changes to the three categories of, and fees applicable to, data recipients." SIFMA would like to point out that for many firms there will be issues with how non-display use is defined and in determining which category a firm fits under for the purposes of paying the applicable fee. The Notices do not provide enough guidance in this regard and SIFMA is concerned about the unexpected imposition of new fees on data recipients.

As part of this expansion of fees, the Exchange states that this "would address the difficulties of monitoring and auditing trading versus non-trading uses of the data and the burden of counting devices used for the purposes of applying the per-device fees." The Exchange claims administrative burdens are reduced with this new fee structure, which is an ideal situation in which to reduce fees, but yet the Exchange instead attempts to use this as an argument to increase fees and apply such fees to more categories. This theme is present throughout the Notices: "Finally, the Exchange notes that eliminating the trading versus non-trading distinction would substantially simplify fee calculations and ease administrative burdens for the Exchange." The Exchange exploits the lack of competition and reasonable substitutes for the data to extract higher fees while reducing its own costs. This is contrary to a market constrained by competitive forces.

In addition, with the Exchange's expansion of Non-Display Use fees, the Exchange states that the other exchanges do not make any fee distinctions in their non-display use fees. However, evidence that other exchanges have non-display use fees that are not fair or reasonable is not a persuasive argument to allow the Exchange to do the same.

Finally, this backdoor approach of changing and expanding definitions to increase fees should be closely scrutinized by the Commission.

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[25] 79 Fed. Reg. at 54317, 54318, 54309, 54310.

[26] 79 Fed. Reg. at 54315, 54308.

D. The Exchange Seeks to Codify its Proprietary Agreements into Law.

The Exchange claims that it "believes that requiring Redistributors to provide monthly reports of data recipients that are receiving the managed non-display service is reasonable because as a matter of practice, the Exchange already has been requiring such reporting pursuant to its right under the vendor and subscriber agreements to request such information, and there is no indication that this has been burdensome for Redistributors."

The Commission should not permit the Exchange to make its one-sided vendor and subscriber agreements the law. Like the end-user, vendors are "negotiating" with a monopoly provider.

E. The Exchange Inappropriately Seeks to Transfer Price Discipline to Vendors.

The Exchange states, "In addition, in the case of products that are distributed through market data vendors, such as Bloomberg and Thompson Reuters, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models." The Exchange's argument is flawed because the market reality is that when end users need the market data, the vendors will provide it. Vendors are merely a conduit to take market data, and do not play a role in pricing of the data. Vendors cannot refuse to offer these proprietary products to end users because there is no reasonable alternative product to supply to them. This is why end users are requesting these specific market data feeds.

F. The Exchange Uses Hidden Policies to Avoid Filing Necessary Rule Changes and Commission Review.

On September 29th, 2014, the New York Stock Exchange (NYSE) e-mailed vendors to notify them that vendor fees for proprietary data products, including certain ones at issue here,[27] were going to substantially increase. The background here is of some interest. In 2009, SIFMA received the following assurance from NYSE:

> "As currently drafted, the filing provides that all internal entitlement to data by external vendors is billable, even if that use is for feed monitoring, operations, support, and other similar functions related to making the external service available. We were originally going to address this particular situation as part of a larger, separate filing, but we have changed our mind. We intend to articulate a policy that limits the liability of these entitlements to $1,500 per month, or 25 devices. If we need to file this we will, but because it will limit the amount customers need to pay, we are comfortable that we can implement this through the policy until such time as it may be formally filed and approved."[28]

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[27] For example, NYSE's Policy for Internal Entitlements – Proprietary Data Products states: "The products currently covered by this policy are: OpenBook, ArcaBook, Arca Trades, NYSE Trades and NYSE Global Index Datafeed."

[28] Email from Mr. Ron Jordon, EVP Market Data Services, NYSE Euronext to Christopher Gilkerson, Co-Chair of Market Data Subcommittee (January 22, 2009).

Needless to say, SIFMA believes NYSE needs to file this fee increase as a rule change as a matter of law. Indeed, as reflected in the above, NYSE believed in 2009 that they needed to file such an increase as a rule change -- and made a commitment to the industry to that effect. NYSE was right in 2009 and dead wrong today -- these fee increases will impact hundreds of internal users and NYSE cannot, in its sole discretion, unilaterally decide to preclude Commission review. The Commission should not allow its authority to review rule changes to be so blatantly circumvented.

Along with that fatal procedural flaw, the proposal suffers from the same legal infirmities as described at length above. The fees have not been demonstrated to be "fair and reasonable"; the fees have not been shown to be constrained by market forces; there are no reasonable substitutes for this data.

Conclusion

For the foregoing reasons, the Commission should disapprove this unenforceable rule change under Section 19(b)(2)(B) because it is inconsistent with the Exchange Act and the D.C. Circuit's decisions in the *NetCoalition* cases. Fees such as those described in the Notices demand Commission attention.

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If you have any questions or you would like to discuss these matters further, please call Melissa MacGregor, Managing Director and Associate General Counsel at SIFMA, at 202-962-7385.

Respectfully submitted,

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Senior Managing Director & General Counsel
SIFMA