



December 18, 2006

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

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Attention: Nancy M. Morris, Secretary

Re: File No. SR-Amex-2006-89 (Amex Depth-of-Book Data)

Dear Ms. Morris

The Market Data Subcommittee of the Securities Industry and Financial Markets Association ("SIFMA")¹ Technology and Regulation Committee appreciates the opportunity to comment on Amex's market data rule filing referenced above. Although SIFMA generally supports wider distribution of valuable market data, we respectfully request that the Commission staff not approve the proposed rule by delegated authority at this time. Instead, we ask that the Commission first decide the significant public policy issues pending before it relating to: market data pricing and the appropriate criteria to judge reasonableness of fees; investor access to market data and the need to assure transparency; impacts on competition; and the conflicts of interest of for-profit SROs who seek to maximize shareholder value (or in the case of Amex, future shareholder value after its IPO) through the advantageous pricing of market data products based on exclusive control of factual information granted by government regulation. We believe that these complex and inter-related questions require a comprehensive review by the Commission before further rules are approved in response to one-off proposals such as this one.

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

I. Approval by delegated authority would be inappropriate until the Commission addresses significant pending issues that directly impact Amex's proposal.

Preliminarily we note that, in enacting Section 11A of the Securities Exchange Act of 1934, Congress stated its intention to “assure the prompt, accurate, reliable, and *fair collection, processing, distribution, and publication of information* with respect to quotations for and transactions in [covered] securities” and to “*increase the information available to brokers, dealers, and investors.*”² Congress’ use of the words “fair and reasonable” and “not unreasonably discriminatory” to describe the standard for judging market data fees indicates that Congress was not satisfied with relying solely on market forces, particularly where an SRO, as the “exclusive processor,” is the sole source of that information.³ To be consistent with these statutory objectives, the standard of fair and reasonable must be applied to further Congress’ goal of increased investor access to market information, rather than to further the exchange’s (or exclusive processor’s) goal of maximizing profits. In short, Congress wished to expand investor access to market information by ensuring that excessive fees were not charged.

There are significant public policy issues and investor protection interests at stake with Amex’s filing in terms of consistency with the Exchange Act’s mandate. In various meetings and phone calls with Commission staff over the last few months, SIFMA has discussed the many unresolved market data issues previously identified in our comment letters on market data over the last few years⁴ as well as in the Commission’s own statements.⁵ We have appreciated the Commission’s time and attention,

² Securities Exchange Act Sections 11A(c)(1)(B), and (a)(1)(D) (emphasis added).

³ *Id.* at Sections 11A(c)(1)(C) and (D).

⁴ Comment Letter from SIFMA re: SR-NYSE-2006-81 (NYSE proposal to bundle exchange best bid and offer data with OpenBook) (Nov. 9, 2006); Comment Letters from the Securities Industry Association (“SIA”) re: SR-NYSEArca-2006-21 and SR-NYSEArca-2006-23 (NYSE Arca market data fee proposal) (June 30, 2006 and Aug. 18, 2006); Comment Letter from SIA re: SR- SR-NASDAQ-2006-013 (TotalView fee proposal) (Aug. 18, 2006); Comment Letter from SIA and The Bond Market Association (Feb. 2, 2006), File No. SR-NYSE-2005-77, at 19-20 (NYSE combination with Archipelago); Comment Letter on Regulation NMS from Marc Lackritz, President SIA to Jonathan Katz, Secretary, SEC (Feb. 1, 2005), File No. S7-1-04, at 25-31; Comment Letter on SRO Governance and Transparency Concept Release from Marc Lackritz, President SIA to Jonathan Katz, Secretary, SEC (March 9, 2005), File No. S7-39-04, at 16-19; Comment Letter from the SIA (April 28, 2006), File No. SR-NYSE-2005-32 (NYSE OpenBook proposal); Comment letter from the SIA (July 18, 2005), File No. SR-NASD-2005-05 (TotalView enterprise license fee).

⁵ See, e.g., *Regulation of Market Information Fees and Revenues*, Release No. 34-42208 (Dec. 9, 1999) (“[T]he fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) 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.”); *Regulation NMS*, Release No. 34-51808 (June 9, 2005) 70 Fed. Reg. 37496, 37560 (June 29, 2005) (“Many commenters recommended that the level of market data fees should be reviewed and that, in particular, greater transparency concerning the costs of market data and the fee-setting process is needed. The Commission agrees. To respond to commenters’ concerns, it has sought comment on market data fees in its concept release relating to

and believe these discussions have been very productive. We anticipate that SIFMA will soon send a follow-up letter with a proposed comprehensive approach to these broader issues. Accordingly, we have asked that new market data proposals not be approved by delegated authority until the Commission has clearly stated the factors and criteria to assess whether an exchange market data proposal is in compliance with the Exchange Act standard that fees be fair, reasonable, and not unreasonably discriminatory, and represent an equitable allocation of fees.⁶

Moreover, the Commission is currently considering a petition for review on the NYSEArca depth-of-book market data rule filing submitted by another trade association.⁷ It is difficult to see how or why the SEC staff by delegated authority could approve a similar market data filing by another exchange until the issues raised in that petition are resolved. SIFMA asks that the resolution of that petition be conducted in a manner consistent with SEC practices for public rulemaking proceedings.

Given the pending petition for review and SIFMA's ongoing discussion with the Commission, at a minimum the Commission should impose a limited-duration moratorium on considering any further market data rule changes and continue the automatic stay of the NYSE Arca market data fee until it has had an opportunity to reach a decision on the underlying policy issues involving the sale of market data by for-profit exchanges. Facing an analogous situation, the Federal Deposit Insurance Corporation ("FDIC") recently declared a six month moratorium on accepting new applications for deposit insurance from any proposed or existing industrial loan company, even if the application involves a change in bank control, until it had the chance to further evaluate industry developments and relevant policy issues. Any exceptions would be acted upon only by the FDIC's Board of Directors.⁸

SRO structure [still pending]. . . in particular, whether market data fees are reasonable, whether the Commission should reconsider a flexible cost-based approach . . . and whether market data fees should be used to fund SRO operational or regulatory costs."); *Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS* at 42 ("By continuing to fail to address the reasonableness of the rates charged by the markets, the majority sidesteps serious questions about whether government-sponsored monopolies should be allowed to charge excessive rents to cross-subsidize other functional costs, and if so, how they should be held accountable.") (available on SEC website).

⁶ In Amex's filing, it agrees that this is the standard that applies. See also *Regulation NMS*, *supra* note 5, 70 Fed. Reg. at 37567 ("the more stringent 'fair and reasonable' requirement is applicable to an 'exclusive processor' [which includes] an SRO or other entity that distributes the market information of an SRO on an exclusive basis").

⁷ See, e.g., "Internet Firms Seek SEC Review of Stock Exchanges' Data Fees," Dow Jones Newswire, Nov. 14, 2006 (describing NetCoalition's petition for review of staff delegated authority approval of NYSEArca depth-of-book market data rule filing).

⁸ Federal Deposit Insurance Corporation Press Release, *Moratorium on Certain Industrial Loan Company Applications and Notices* (July 28, 2006). In defending the moratorium, the FDIC said: "The FDIC recognizes that the moratorium may appear inconsistent with specific timetables for agency action on certain applications or notices. However, adherence to a strict statutory timeline without an opportunity to re-evaluate the FDIC's

A moratorium would give the Commission time to address the significant public policy issues SIFMA has identified for the Commission, but which have not yet been addressed. These include:

1. Given the limited liquidity reflected in the consolidated quote and its comparatively slow speed, is depth of book data or other data distributed by individual exchanges essential in today's decimalized environment to make securities pricing transparent and fair to all investors?
2. What is the impact of the availability of depth-of-book data on the best execution obligation of broker-dealers, and how should that be factored into review of market data pricing?
3. Each exchange has a government-sponsored monopoly over the distribution of market data generated by participants in its market. Is this appropriate in a world of for-profit exchanges and, if so, how does it further investor protection and investor interests?
4. Do market data fees today fund for-profit competitive endeavors, and not just self-regulation or the cost of collecting and distributing the data? If so, how should this be factored into review of market data pricing?
5. What information about costs and revenues should the exchanges be required to disclose to meet the Exchange Act's statutory standard of fair, reasonable, and equitable allocation of costs to assure the investing public that the Commission is overseeing an open and transparent process?
6. Market data is simply facts about stock (and options) prices that broker-dealers are required to submit to an exchange for free to assure a fair and orderly market. Although there is a service an exchange like Amex provides by compiling and distributing that data (such as a company compiling phone number listings), there is no additional value creation (e.g., analytics) at the exchange level.⁹ How should this factor into whether the fees exchanges

standards for determining the public interest may frustrate the substantive policies the agency is charged with promoting.” (Emphasis added.)

⁹ SIFMA members welcome exchange competition in value-added data analytics, if the raw materials (data stream) to create those analytics are available on equal and non-discriminatory terms. SIFMA has grave concerns regarding pending Nasdaq proposals that utilize regulatory data to produce commercial products. Those proposals would simply leverage the regulatory monopoly downstream into the value-added data markets.

want to charge are reasonable?

7. When an exchange acts as the exclusive processor of securities pricing data on its market, only it can aggregate that information to show the true depth and quality of the market for the securities that trade on that exchange. Investors and other market participants are not entitled to view that information unless they are first willing to pay what the exchange charges. There are no alternatives. Does this information and access asymmetry between the exchange and investors and other market participants produce what economists call a market failure? Because each exchange sets the fees for the data which it controls, how meaningful is it to use one exchange's fees as a benchmark to measure the fairness and reasonableness of another exchange's fees? In such circumstances, how can pricing based on a subjective notion of "value," or based on what the market will bear, result in a fair and reasonable price?
8. Given the economic distortions inherent in the exchanges' control over securities pricing information, is a structural solution necessary to introduce competition (as a substitute for rate reviews) into the market data system? For example, should market data exclusive processing functions be moved into a separate affiliate, or should the exchange's exclusive processor be required to provide the raw data stream on equal terms to third parties who could also process that data?
9. Can procedural reforms in the data licensing (contract) and fee filing process promote a more level playing field without placing the SEC staff in the role of rate maker?

These open questions apply to Amex's pending proposal, as well as to the existing and future market data products of Nasdaq, NYSE, NYSEArca, and other exchanges.

II. Amex has not shown that its proposed fees meet the statutory standards of fair, reasonable, not unreasonably discriminatory, an equitable allocation of costs, and that its proposal will protect investors, enhance market transparency and foster competition among orders and markets.

To meet the statutory standards, Amex simply points to the higher fees of NYSE for OpenBook data, Nasdaq for TotalView, and NYSEArca for Arca book data (pending). There is no information relating to the cost of producing and distributing the Amex data, nor is there any comparison of the scope and extent of its market data compared to the scope and extent of those other market data products. In short, there is insufficient information to make that comparison and determination.

Moreover, Amex has bundled together all of the order information that will be visible in its "Auction and Electronic Market Integration" platform (or AEMI) into one product it will call "AEMI Depth of Book." There may be many securities that trade on Amex of little concern to most investors, but trading in certain ETFs through Amex is highly popular and important to institutional and retail investors alike. Regrettably, there will be no opportunity to purchase depth-of-book data for that category of securities alone, in light of Amex's bundling all of its data together in a take-it-all or leave it approach.

Amex's position is that because it will make this data available to those willing and able to pay, it will enhance market transparency. Amex ignores, however, the impact on investors and other market participants who are unable to pay "subscriber" fees for "professionals" (\$20 a month per device) and "non-professionals" (\$10 a month per device). Those market participants will be disadvantaged and will be required to rely on the slower, less informative consolidated quote. Creating an un-level playing field does not foster competition. Approving the Amex filing will result in two-tiers of market transparency.¹⁰

III. Amex failed to file and justify the key terms of the agreements under which the Amex data would be distributed.

Amex would apply the same definitions of "professional" and "non-professional" and require members to sign the same vendor agreements and their customers to sign the same subscriber agreements that the CTA and CQ Plans require. SIFMA objects to the definitions and, in particular, how the

¹⁰ Entities that do not need to display the quote data to employees or customers will only be required to pay \$2,000 a month for "direct access." The entities which would use the data to feed internal algorithmic systems may realize enormous gains from using the data and have the greatest means to pay. But because they do not "display" the quote data to others seeking to access the markets through securities pricing information, their fees in the aggregate would be significantly lower (per quote used, for example). There is a question whether this constitutes pricing that is "not unreasonably discriminatory" and is an "equitable allocation of costs."

exchanges (including Amex as administrator of CTA/CQ Tape B) have inconsistently and expansively applied the "professional" market data definition and user category in order to generate additional revenues. In fact, SIFMA filed a petition for rulemaking to review the SROs' definitions on April 8, 2005, which the Commission has not yet acted on.¹¹

The definitions and the contractual terms that apply to the National Market System Plans were approved by the SEC long ago under very different market and competitive conditions. SROs were membership driven, not-for-profit entities, and it was pre-decimalization and pre-internet distribution of market data. It is insupportable to approve use of those terms and those agreements for use by Amex in its profit-making commercial market data enterprise without a full review, analysis and opportunity for public comment.

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SIFMA requests that the Commission refrain from approving Amex's proposed rule changes at this time for the reasons stated above. In the alternative, the Commission has sufficient justification to defer approval or disapproval proceedings on Amex's filing for 90 days under Exchange Act Section 19(b)(2), to give the Commission time to consider in a comprehensive and deliberate the major statutory and policy issues highlighted in this letter.

If you have any questions, please contact Melissa MacGregor at 202-216-2034.

Respectfully submitted,

Christopher Gilkerson, Chair
SIFMA Technology and Regulation Committee

Gregory Babyak, Chair
Market Data Subcommittee of SIFMA
Technology and Regulation Committee

cc: The Hon. Christopher Cox, Chairman, SEC
The Hon. Paul S. Atkins, Commissioner, SEC
The Hon. Roel C. Campos, Commissioner, SEC
The Hon. Annette L. Nazareth, Commissioner, SEC
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¹¹ Letter from SIA re: SR-NASD-2005-026 (April 8, 2005) (supporting the NASD's proposal to define "professional" for purposes of TRACE market data distribution different from how other SROs have defined it so that the definition is consistent with the intended use of the data, and petitioning the Commission to review the antiquated "pro" and "non-pro" definitions and how they are applied).