

Darla C. Stuckey  
Corporate Secretary

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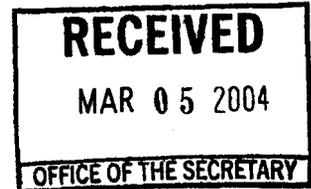
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7

March 4, 2004

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



Re: NYSE Withdraws Petition to Remove from the CTA and CQ Plans  
the Participants' Exemption from Paying Certain Market Data Fees  
Release No. 34-47571 (March 26, 2003); File No. S7-07-03

Dear Mr. Katz:

On February 16, 2001, the New York Stock Exchange filed a Petition (the "NYSE Petition") with the Commission requesting the Commission to act pursuant to section 11A of the Securities Exchange Act of 1934 and Rule 11Aa3-2(b)(2) under that Act to amend the CTA and CQ Plans by removing from them the provisions that provide the Participants in those Plans with certain exemptions from the obligation to pay Plan-imposed fees. (The Commission published the NYSE Petition in the Federal Register on April 1, 2003, and solicited comments on it. See Release No. 34-47571 (March 26, 2003); 68 FR 15688; File No. S7-07-03.)

Subsequently, the Participants in the Plans unanimously approved, and submitted to the Commission, amendments to the Plans that proposed to remove from the Plans the exemptions that were the subject of the NYSE Petition.

The Commission's recent approval of those Plan amendments mooted the need for the Commission to act on the NYSE Petition. Therefore, the New York Stock Exchange hereby withdraws the NYSE Petition.

If you have any questions, please call Richard Bernard at 212-656-2222.

Sincerely yours,

A handwritten signature in cursive script that reads "Darla C. Stuckey".



February 14, 2001

Mr. Jonathan G. Katz, Secretary  
United States Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

Re: Petition for Amending the CTA Plan and the CQ Plan  
so as to Delete the Participants' Fee Exemptions

Dear Sir:

The New York Stock Exchange, Inc. ("NYSE" or the "Exchange") submits this petition to urge the Securities and Exchange Commission (the "SEC") to remove from the CTA Plan and the CQ Plan (collectively, the "Plans")<sup>1</sup> the provisions that exempt the Plans' Participants from certain charges that generally apply for the receipt and use of market data (the "Participant Fee Exemptions").

In particular, we request that the SEC act pursuant to Rule 11Aa3-2(b)(2) under section 11A of the Securities Exchange Act of 1934 (the "1934 Act")<sup>2</sup> to amend the CTA Plan and the

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<sup>1</sup> The CTA Plan, pursuant to which U.S. securities markets collect and disseminate last sale price information for securities listed on national securities exchanges, is a "transaction reporting plan" under SEC Rule 11Aa3-1 and a "national market system plan" under SEC Rule 11Aa3-2. The CQ Plan, pursuant to which U.S. securities markets collect and disseminate bid/asked quotation information for securities listed on national securities exchanges, is also a "national market system plan" under SEC Rule 11Aa3-2.

<sup>2</sup> Rule 11Aa3-2(b)(2) provides as follows:

The Commission may propose amendments to any effective national market system plan by publishing the text thereof, together with a statement of the purpose of such amendment, in accordance with the provisions of paragraph (c) of this section.

CQ Plan by deleting section XII(b)(iv) of the CTA Plan, and section IX(b)(iv) of the CQ Plan, in their entirety.<sup>3</sup>

## I. Background

The Participant Fee Exemptions are found in the sections of the Plans that regulate Plan expenses and revenues, including the imposition of market data charges on data recipients.<sup>4</sup> They specify that each of the Plans' Participants<sup>5</sup> is exempt from those market data charges (other than access fees) if it is in compliance with the requisite market data contract. According to the exemptions, the market data contract must require the Participant (1) to receive market data solely at premises that it occupies solely or on its "trading floor or trading floors (as that term is generally understood)", and (2) to use the data solely for certain approved purposes.

One of the charges that the Participant Fee Exemptions exempt is the per-display-device fee that the markets impose for market professionals' receipt of market data by means of display devices. Since 1996, CSE has protested CTA's application of the exemptions (in accordance with their plain meaning) to devices that are located on the physical trading floors of the Plans' Participants and not to devices located at the remote offices of specialists and market makers that make markets over an electronic network. CSE's position ignores the plain language of the Plans. CSE appealed the markets' affirmation of the plain language of the CTA Plan's

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<sup>3</sup> This petition specifically addresses our concerns under the CTA Plan and the CQ Plan. Analogous issues, which the NYSE does not specifically address in this petition, arise under the OPRA Plan (in which NYSE currently participates). For the view of the OPRA Plan participants on participant fee exemptions, see File No. SR-OPRA-00-06, Release No. 34-43109 (August 2, 2000; the "OPRA Release").

<sup>4</sup> See Subsection (b)(iv) of Section XII (Financial Matters) of the CTA Plan and of Section IX (Financial Matters) of the CQ Plan.

<sup>5</sup> The Plans' Participants include the American Stock Exchange LLC ("AMEX"), the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc. ("CBOE"), the Chicago Stock Exchange, Inc., the Cincinnati Stock Exchange, Inc. ("CSE"), the National Association of Securities Dealers, Inc. ("NASD"), NYSE, the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

Participant Fee Exemption to the SEC and the matter is currently before Administrative Law Judge Lillian McEwen, who was appointed pursuant to the SEC's order dated September 26, 2000.<sup>6</sup>

During the course of the dispute, the Exchange has acknowledged the perception of some persons that the trading floor-only language of the Participant Fee Exemptions is inequitable to those markets that do not have a physical trading floor. To remedy the perceived problem, NYSE has proposed to have the Plans' Participants amend the Plans by deleting the Participant Fee Exemptions from the Plans.

However, both Plans require the Participants' unanimous agreement to any amendment. When the NYSE canvassed the Participants to determine whether they would support the proposed deletion of the Participant Fee Exemptions, eight of the nine Participants indicated that they would. One market, CBOE, opposed the deletion, effectively vetoing the proposal.

In 2000, CBOE, which is primarily an options exchange, accounted for 0.000002 percent of the shares of NYSE-listed securities that were traded through CTA. (It accounted for an even smaller percentage of trades in those securities.) The eight markets supporting the proposed amendments accounted for the remaining 99.999998 percent. However, because amendment of the Plans requires unanimity, CBOE was able to block the equities markets' collaborative resolution of the issue.

NYSE made several attempts to persuade CBOE to change its position, but CBOE declined, stating that the loss of the Participant Fee Exemptions would cost CBOE too much.

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<sup>6</sup> See Administrative Proceeding File No. 3-9967. The dispute is described in greater detail in the January 12, 2001, prehearing brief that NYSE filed with Judge McEwen and the Commission in anticipation of a hearing that is currently scheduled to occur on March 1, 2001 (the "ALJ Hearing"). Copies of that brief have been filed with the office of the Secretary of the Commission. We have attached an additional copy to facilitate your review.

Thus, preservation of its CTA subsidy apparently motivated CBOE to use its veto.<sup>7</sup> As a result, the other Participants and the SEC are being forced to expend time and money on a proceeding before an administrative law judge.<sup>8</sup> NYSE respectfully submits that such a proceeding is not the most appropriate way to resolve the issues presented by the continued application of the Participant Fee Exemptions. It is undisputed that deletion of the Participant Fee Exemptions would render the hearing before Judge McEwen unnecessary.

## II. The Better Alternative

When introduced into the CTA Plan in 1979, the Participant Fee Exemption simply applied to CTA the practices that previously had been used by NYSE and AMEX in the very different technological and market structure environment that existed at that time. However, the Participants (other than CBOE) have agreed that the Participant Fee Exemptions are no longer desirable in today's environment. In addition, a dispute over the plain meaning of Plan terms constitutes a fruitless and wasteful exercise, especially when it avoids needed resolution of the underlying policy issue. In contrast, removal of the Participant Fee Exemptions from the Plans addresses the policy concerns that underlie the pending CSE dispute and best satisfies the 1934 Act standards of fairness and the avoidance of unreasonable discrimination.<sup>9</sup>

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<sup>7</sup> CBOE's CTA subsidy derives from the fact that CBOE's participation in CTA, nominal though it might be, maintains CBOE's Participant status and therefore makes it eligible for the Participant Fee Exemptions. CBOE has said that the Participant Fee Exemptions save CBOE \$600,000 or more per year in display-device fees that it would otherwise have to pay.

<sup>8</sup> It is interesting to note that, to date, CBOE, the Participant that effectively vetoed the other Participants' collaborative resolution of the issue presented by CSE's appeal, has elected not to participate actively in the proceeding before Judge McEwen. It has not filed a prehearing brief, and NYSE is unaware of its having submitted witness or exhibit lists in connection with the proceeding.

<sup>9</sup> In addition, repealing the Participant Fee Exemptions would place the Plans on an even footing with the national market system plan governing market data related to over-the-counter securities (in which NYSE does not participate). That plan does not provide a participant fee exemption. It requires the participating markets and their remotely located market makers to pay the plan's fees.

A. Preserve the Sanctity of the Written Word

Failing to respect the plain language of the Participant Fee Exemptions, as CSE would have Judge McEwen do, would free each CTA market to challenge the plain meaning of other provisions of the Plans by appealing to the SEC. That would allow the market to circumvent the Division of Market Regulation and the prescribed procedure for amending the CTA Plan, including Federal Register notice and the opportunity for comment. For instance, a CTA market whose percentage of share volume exceeds its percentage of trades might argue that changed circumstances since 1974 justify a new interpretation of the Plans' revenue sharing formula. It might claim that the formula's reference to "the number of last sale prices of transactions" really means "the number of shares traded in transactions."

B. Remove Perceptions of Inequities

An alternative to deleting the Participant Fee Exemptions to remove perceived inequities would be to expand them. However, expanding the exemptions in the name of leveling the playing field among market makers (as OPRA has done on a two-year pilot basis<sup>10</sup>) is not the optimal way to eliminate that perception. In fact, it leaves the Participants vulnerable to criticism that the expanded exemptions create inequities against data recipients that are not Participant market makers. It merely re-draws the boundaries for further dispute over what constitutes a fee-exempt device and postpones the battle until the next complainant attacks those new boundaries.

On the other hand, eliminating the Participant Fee Exemptions removes any perception of inequity.

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<sup>10</sup> See the OPRA Release.

### C. Avoid Administration Burdens

Expanding the exemptions can only complicate market data administration and increase policing burdens. First, as a definitional matter, for a firm that performs retail, clearing and other functions in addition to its market-making functions, it will be difficult to determine which off-Floor devices are used solely for market-making purposes. As new trading structures and technologies change the nature of our markets, they will further obfuscate job functions and make judgments as to who qualifies as *bona fide* market makers even more difficult. Second, as an auditing matter, detecting mixed-use devices (that is, devices used for legitimate market-making purposes and for other, non-exempt purposes) will be difficult.

Finally, the pending transformation of two existing floor-based markets into geographically-dispersed markets, the expected registration of NASDAQ and one or more ECNs as national securities exchanges, and their entry into the Plans as Participants will only exacerbate the line-drawing problems and multiply the administrative burden attendant to expanding the exemptions.

### D. Eliminate Revenue Skewing

Eliminating the Participant Fee Exemptions eliminates the deviation of revenue sharing among the Participants away from the Plans' revenue sharing formulae. The "in one pocket and out the other" construct that underlies the exemptions<sup>11</sup> turned the exemptions into a joke when CBOE joined the Plans: the value of the exemptions to CBOE -- which has several hundred devices on its floor, but has virtually no equities trading -- dwarfs its CTA/CQ revenue share.

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<sup>11</sup> That is, given that the Participants share market data revenues, including those that they themselves pay, each Participant would presumably receive a distributive share that roughly correlates with its market data payments.

#### E. Cost Mutualization

Similarly, the Participant Fee Exemptions effectively prevent each Participant from deciding whether to pass the costs of fees for exempted devices through to the members that use them -- in effect, forcing all markets to mutualize the costs. The exemptions makes this a collective decision. If the Participant Fee Exemptions are repealed, each market will be free to decide that issue for itself.

#### IV. Conclusion

Rule 11Aa3-2(b)(2) provides that the Commission may propose amendments to national market system plans of its own volition. Rule 11Aa3-2(b)(2) is designed as a safeguard, in the event that the Participants cannot achieve consensus on changes to national market system plans. The Exchange recognizes that the Commission has acted with appropriate restraint in proposing amendments to national market system plans.

However, in this instance, eight of the nine Participants support deletion of the Participant Fee Exemptions. A single market, which represents an infinitesimal percentage of equities trading activity should not have the ability to thwart the determination of all of the other Participants, especially where those others account for 99.999998 percent of the trading in NYSE-listed securities. In addition, deleting the Participant Fee Exemptions would end the windfall to the CBOE that results from their continuance and would provide a superior resolution to the alternative of extending the Participant Fee Exemption to exchanges without floors.

The Exchange urges the Commission to exercise its authority to amend the Plans by deleting the Participant Fee Exemptions.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "R.L.D. Colby", with a stylized flourish at the end.

Cc: Annette Nazareth (SEC)  
Robert L.D. Colby (SEC)  
CTA Plan Participants

