Janet Angstadt
Acting General Counsel
Legal

NYSE Arca, Inc. | 100 S. Wacker Drive | Suite 1800
Chicago, Illinois 60606
t 312.960.1696 | f 312.960.1369
janet@nyse.com

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Via email to www.rule-comments@sec.gov

Ms. Nancy J. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: NYSE Arca Data Filings
File Nos. SR-NYSEArca-2006-21 and SR-NYSEArca-2006-23

Dear Ms. Morris:

NYSE Arca, Inc. (the "Exchange") welcomes the opportunity to respond to comments that Steven Spencer[1] and the Securities Industry Association ("SIA")[2] have submitted to the Commission in respect of the Exchange's two captioned market data filings.[3] In one filing, the Exchange proposes to establish market data fees for (1) ArcaBook^{SM} and (2) real-time information relating to transactions and limit orders in debt securities that are traded through the Exchange's facilities. In the other filing, the Exchange proposes to establish a six-month pilot fee for vendors that choose to cull best bids and offers from ArcaBook to create an NYSE Arca Best-Bid-and-Offer service for distribution.

Fairness of Fees. Both letters protest that the filings would establish charges for services that the Exchange has previously provided without charge. While it is true that the Exchange has not previously charged for ArcaBook, recently enacted Regulation NMS clearly

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1 See letter from Steven C. Spencer, Esquire, dated June 18, 2006.

2 See letter to Ms. Morris from Gregory Babyak, Chairman, Market Data Subcommittee of the SIA Technology and Regulation Committee, and Christopher Gilkerson, Chairman, SIA Technology & Regulation Committee, dated June 30, 2006.

3 We note that the comments raise several broad policy issues that go far beyond whether NYSE Arca can join NYSE LLC ("NYSE") and the Nasdaq Stock Market, Inc. ("Nasdaq") in charging for depth-of-book data. This response addresses the comments that are more specific to ArcaBook fees. The Exchange's view is that the broader policy issues are better left to such forums as the deliberations of the Seligman Committee, the Commission's Concept Release on Market Data, The Commission's Concept Release on and SRO Governance, and Regulation NMS. Accordingly, these policy issues should not stand in the way of Commission action on the two captioned filings.

grants to each national securities exchange the right to distribute "core" market data outside of the national market system plans, and to impose fees for that market data.[4] In addition, Regulation NMS explicitly "rescinds the prohibition on SROs and their members from disseminating their trade reports independently." The Commission has set standards for that distribution: it must be fair, reasonable and not unreasonably discriminatory. The Exchange's data distribution and proposed fees are consistent with these standards[5] and reflect an equitable allocation of the Exchange's overall costs to users of its facilities.

The Exchange has established a framework for distributing data in which all vendors and end-users are permitted to receive and use the Exchange's market data on equal, non-discriminatory terms. Specifically, the contractual structure enables any individual or firm that wishes to receive Exchange data to obtain access based on standard industry terms and conditions. The fee structure is simple and applies equally to all users.[6] Access to the Exchange's network is also equally available to all. Indeed, the Exchange supports numerous telecommunications providers so as to offer any market participant several options in determining the best means to connect to the Exchange's market data network.

In addition to being non-discriminatory, the fees proposed by the Exchange are also fair and reasonable. In fact, the proposed fees are *far* lower than those already established—and approved by the Commission—for similar products offered by other U.S. equity exchanges and stock markets.[7] In approving a $60 per month device fee for NYSE's OpenBook, the Commission concluded as follows:

> The Commission finds that the Real-Time Fee Proposal is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. Specifically, the Commission believes that NYSE's proposed monthly per-terminal fee of $60 for real-time OpenBook data is reasonable when compared to the fees for Nasdaq's TotalView Service.[8]

NYSE's OpenBook provides bids and offers for CTA Plan securities for $60. ArcaBook provides bids and offers for those same CTA Plan securities, as well as exchange-traded funds that trade outside of the CTA Plan, for a combined fee of $15 per month. And, unlike NYSE, the Exchange proposes a nonprofessional subscriber discount for ArcaBook data (i.e., a nonprofessional subscriber device fee of $5 per month for CTA Plan securities).

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4 See Section V(B)(3)(a) of Regulation NMS (Release Nos. 34-50870 and 34-51808; File No. S7-10-04; File No. S&-10-04).

5 See Regulation NMS Rules 603(a)(1) and 603(a)(2).

6 Note that the Exchange is seeking to adopt a reduced fee for nonprofessional subscribers, following common industry practice.

7 The Commission has approved professional subscriber charges for NYSE's depth-of-book service (OpenBook) that are four times the level of the Exchange's fees for a similar set of securities and has approved charges for Nasdaq's comparable services (TotalView and OpenView) that are almost *five times* the level of the Exchange's fees for a similar set of securities. NYSE does not provide a discounted rate for nonprofessional subscribers; Nasdaq's nonprofessional subscriber rate is $14 per month, 40 percent more than the Exchange's proposed fees for nonprofessional subscribers.

8 See Release No. 34-53585; File Nos. SR-NYSE-2004-43 and SR-NYSE-2005-32 (March 31, 2006).

Nasdaq's TotalView provides bids and offers for OTC/UTP Plan securities for $70 per professional subscriber device. In addition to the CTA Plan securities and exchange-traded fund subscription, ArcaBook provides bids and offers for OTC/UTP Plan securities, for a monthly fee of $15 per professional subscriber device. The Exchange is also proposing a discount that enables nonprofessional subscribers to receive the data at lower cost than nonprofessional subscribers to Nasdaq's comparable service ($10 for NYSE Arca; $14 for Nasdaq). The enterprise cap for broker/dealers of $20,000/month is also lower than the $25,000/month cap established by Nasdaq.

In its approval of Nasdaq's TotalView fee filing,[9] the Commission stated that "the Commission believes that the NASD's proposed charges for these new data products are reasonable *when compared to similar types of services provided by other markets*" [emphasis supplied].

Given that a comparison of fees established by other markets is an appropriate tool to determine whether fees are reasonable and that the Exchange's proposed fees are generously low in comparison to other similar products in the industry, the Exchange's proposed ArcaBook fees meet the fair and reasonable standards set forth under Regulation NMS.

Contracts. The Exchange proposes to provide its market data under the same contracts that the Consolidated Tape Association and the CQ Operating Committee use to make consolidated CTA and CQ information available. Those contracts are drafted as generic one-size-fits-all agreements and explicitly apply to the receipt and use of certain market data that individual exchanges make available in the same way as they apply to data made available under the CTA and CQ Plans.[10] No amendments to those contracts are needed to cause them to govern the receipt and use of the Exchange's data and, importantly, the Exchange is not imposing restrictions on the use or display of its own data beyond those set forth under the pre-existing agreements. Public access to the contracts is available to everyone at http://www.nysedata.com/nysedata/Default.aspx?tabid=243.

The SIA letter stated that by utilizing the CTA/CQ agreements, the Exchange is changing these agreements and that the changes must be vetted with the industry. The CTA Plan Participants have a long history of working with the industry in crafting CTA/CQ agreements and in vetting any changes. Accordingly, if the application of these agreements to Exchange data were to require changes to the agreements' terms and conditions, the changes would be put out for public comment. As noted above, however, the agreements already contemplate data provided by the Exchange. Thus, the terms and conditions set forth in the CTA/CQ contracts *do not* change in any way with the addition of the Exchange's market data and, therefore, there are no changes for the industry or Commission to review.

The Exchange chose to adopt the CTA/CQ administrative structure (i.e., contracts and user-reporting system) to govern the receipt and use of its fee-based market data products based on an extensive evaluation process. In evaluating the optimal structure, the Exchange reviewed those already in use by data processors in the industry and weighed the benefits of utilizing an

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9 See Release No. 34-46843.

10 The form explicitly governs the receipt and use of, among other categories of market data, "Other Market Information." The form's definition of "Other Market Information" includes such "other categories of information as a Network A Participant other than NYSE . . . may make available as NYSE may from time to time identify."

existing structure as opposed to developing a completely new one. Throughout this process, the Exchange consulted with vendors and end-users about their needs and preferences.

Responding to client demand, the Exchange chose to fold itself into an existing contract and administration system rather than to burden clients with another set of market data agreements and another market data reporting system, both of which would require clients to commit additional legal and technical resources to support the Exchange's data products.[11] The terms and conditions of the existing Network A CTA/CQ contracts have been in effect for many years and enjoy widespread use and acceptance. They are fair and reasonable and do not prohibit a broker-dealer member of a Participant from making available to the public information relating to the orders and transaction reports that it provides to the Participants.[12]

Also responding to client demand, the Exchange chose the CTA/CQ administrative structure because of its broad use and flexible reporting/billing benefits, as identified by Exchange clients. Thus, the Exchange is adopting this structure based on the quality of the system and the preferences of its clients.

Burden on Competition. The SIA letter comments on the burden that the proposed ArcaBook fees may place on competition. The Exchange believes that the fee will only foster competition.

First, the proposed fees apply to all professional subscribers equally and to all nonprofessional subscribers equally. The fee structure does not advantage any one subscriber relative to another.

Second, fees will enable the Exchange to further diversify its revenue stream to compete with its rivals. The Exchange believes that its business has reached the point where its customers are willing to pay for the value of the Exchange's information. Proprietary data product revenue is now a funding alternative that will permit Arca to compete more effectively with other markets.

Finally, if other markets do not elect to charge for their depth-of-book data, the proposed NYSE Arca fees may provide a competitive advantage to those other markets because it makes their offerings seem more attractive in comparison. That is, the proposed ArcaBook fees would put those firms at a competitive advantage rather than add additional competitive burdens.

Administrative Burdens. The SIA letter also discusses the administrative burdens that tracking ArcaBook usage may impose on customers, which, SIA states, may take "weeks to develop." Through the process of transitioning ArcaBook to a fee-based service, the Exchange has taken care to communicate effectively with customers to ensure system readiness. The Exchange distributed a notice to market data vendors and customers on March 24, 2006, alerting them to the pending administrative changes. To date, customers have already been

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[11] We note that many data clients already are required to maintain unique contracts and support systems with several different market data distributors, including, but not limited to NYSE, American Stock Exchange, Nasdaq, OPRA, and Chicago Mercantile Exchange.

[12] In particular, neither Paragraph 2 of the Network A vendor form of agreement nor Paragraph 2 of the Network A professional subscriber form of Agreement in any way prevent a member of a Participant from making its market data publicly available outside of the CTA and CQ Plans.

aware of the changes for over *seventeen* (17) weeks. As described above in the discussion of contracts, the Exchange adopted a long-standing, well-known, broadly-used administrative system for the precise reason of minimizing the amount of development effort required to meet the new administrative requirements of the Exchange's ArcaBook service. As a result, the administrative burden on customers is extremely low and customers have been given ample notice.

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In short, it is the Exchange's view that the proposed fees for ArcaBook market data provide for the equitable allocation of fees among its members and other data recipients, promote just and equitable principles of trade in the marketplace for depth-of-book information, and safeguard against unfair discrimination among users of the Exchange's market data.

We thank the Commission for allowing us to respond and are prepared to answer any questions that the Commission may have.

Sincerely yours,

Janet Angstadt

Janet Angstadt
Acting General Counsel
NYSE Arca, Inc.

JMA:mar

cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Annette L. Nazareth
Commissioner Kathleen L. Casey
Robert L. D. Colby
Kelly M. Riley