

November 13, 2000

U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Attn: Jonathan G. Katz, Secretary

Re: Market Data -- Public Notice and Comment Required for NYSE and Nasdaq
Proposals To Offer Free Real-Time Market Data on Their Web Sites

Ladies and Gentlemen:

As the Commission's concept release on market data made clear, there is an urgent need for reforming the current system of distributing real-time market data.¹ The comment letters in response to the concept release reflect wide support for such reform.² The Commission has recognized that it has the authority and responsibility to oversee market data reform in furtherance of the public interest, taking into account the views of investors and other market participants. We respectfully request that, consistent with this mandate, and as required by the Securities Exchange Act of 1934, the Commission review the New York Stock Exchange ("NYSE") and Nasdaq (or NASD) proposals to offer free, real-time market data on their respective Web sites, after issuing the required rule filings for public notice and comment.³

It appears that each of the SROs' Web sites will enable investors to customize their own streaming "ticker." It is unclear whether the data will, should, or may consist of consolidated data from all the exchanges that participate in the Consolidated Tape Association ("CTA"), in the

¹ Exch. Act Rel. No. 42208 (Dec. 9, 1999), 64 Fed. Reg. 70613 (Dec. 17, 1999) ("Market Data Concept Release"). *See also* Initial Schwab Comment Letter re the Market Data Concept Release dated March 14, 2000; Letter from Sam Scott Miller, June 29, 1999 to the U.S. Securities and Exchange Commission (Schwab's petition for rulemaking).

² *See* Second Schwab Comment Letter re the Market Data Concept Release dated July 10, 2000 from W. Hardy Callcott at 2-3 (citing and summarizing comment letters from diverse market participants and investors supporting cost-based market data reform).

³ *See*, NYSE press release "nyse.com to Go Real-Time -- Live Market Data Will Support New Products in Network NYSE," Jul. 19, 2000; and Bloomberg Securities Firms News, "NYSE, Nasdaq to Post Real-Time Stock Prices for Free," Jul. 19, 2000; *see also*, NYSE press release "NYSE Outlines Timeline for Next Generation Products," Oct. 5, 2000.

case of the data displayed by the NYSE, and all Nasdaq information, in the case of the NASD. It also appears that the NYSE proposal will include a display of the full NYSE book. The NYSE further expects that the display of real-time market data on its Web site will support new NYSE products and services.⁴ It is unclear whether the NASD shares a similar expectation.

Schwab applauds the NYSE's and the NASD's decisions to offer the public access to free streaming, real-time market data on their Web sites. The SROs' members, however, are effectively prevented from matching the SROs' move, due to the market data cost and dissemination structures that the SROs themselves have imposed. By assuming the conflicting roles of market data aggregator, administrator, regulator, vendor, and competitor, the SROs have raised significant competitive, access, and market structure issues that the Commission must review and evaluate in light of the Exchange Act's requirements and the interests of all investors.

RULE-FILING OBLIGATIONS

As an initial matter, we believe that these proposals are properly the subject of SRO rule filings. The purpose of the public notice and comment procedure is to enable any member of the public to review the details of significant SRO initiatives. In the absence of such public disclosure, neither Schwab nor other market participants can properly inform the Commission of any relevant concerns or policy or regulatory issues.

Distribution of customized real-time market data on the SROs' Web sites would transform them into market data vendors competing with other market data vendors (including their own broker-dealer members). The result would be a change to a "stated policy, practice, or interpretation" of an SRO, effect a material change to the operation of an SRO facility, and establish or change a standard, limit, or guideline with respect to the rights, obligations, or privileges of SRO members and others. Accordingly, NYSE and the NASD (or Nasdaq) are required to file their proposals in accordance with Section 19(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 19b-4.

Notwithstanding the need for the NYSE and the NASD to submit rule filings detailing these proposals, it is our understanding that no rule filings have been presented yet in either case.

⁴ For example, the NYSE's July 19, 2000 press release announcing the addition of real-time market data to its Web site also mentions several other products that are in development, including NYSeDirect+ TM, which will provide investors with rapid, automatic execution of orders of 1,099 shares or less; Institutional XPress TM, which will provide institutional investors with systemic delivery of information, anonymity for routing orders and improved trade-execution capability; NYSE e-Broker, which will enable institutional investors to combine high-speed electronic access to the NYSE point of sale with the benefits of a floor broker's trade-execution skills; virtual NYSE consisting of a live 3-D representation of the NYSE floor that enables investors to locate the point of sale for orders on the NYSE; and Look at the Book, a real-time replication of the NYSE's electronic limit-order book, which will provide investors with important supply-and-demand information about NYSE-listed stocks. Collectively these products will be known as Network NYSE. In addition, the real-time data, Virtual NYSE and the Look at the Book products will apparently be combined into one product, NYSE MarkeTrac, which will offer a virtual view of the trading floor, real-time data, and a view of the limit-order book called NYSE OpenBook. See NYSE's Oct. 5, 2000 press release. This product is expected to be available in the second-quarter of 2001.

We strongly urge the Commission to require the NYSE and the NASD to submit their rule filings promptly to afford the public sufficient time to comment on the specific details of each.

NATIONAL MARKET SYSTEM RESPONSIBILITIES UNDER EXCHANGE ACT SECTION 11A

In addition, the NYSE's and NASD's proposals are subject to the provisions of Section 11A of the Exchange Act, including Rule 11Aa3-1. This rule states that a national securities exchange or national securities association shall not distribute transaction reports or last sale data "except pursuant to an effective transaction reporting plan." It is unclear whether (i) the NYSE's and the NASD's or Nasdaq's Web sites are proper distribution channels under the effective transaction reporting plans governing NYSE (or CTA) and Nasdaq data, (ii) the manner of distribution contemplated by the proposals is consistent with those plans, or (iii) they are required to file new transaction reporting plans. In addition, paragraph (e) of Rule 11Aa3-1 states that "nothing in this section shall preclude any exchange or association, separately or jointly, pursuant to the terms of an effective transaction reporting plan, from imposing *reasonable, uniform charges* (irrespective of geographic location) for distribution of transaction reports or last sale data." It is not clear whether the NYSE or Nasdaq would be subject to the same uniform fees applicable to other distributors of market data, or whether those fees would be "reasonable" after the proposals are implemented. Accordingly, we believe the Commission should consider, pursuant to public notice and comment, the extent to which the proposals comport with the requirements of Section 11A and the rules thereunder.

CONFLICTS OF INTEREST

The NYSE and Nasdaq each administer an exclusive securities information processor that is responsible for the collection and dissemination of market data to the securities industry and the investing public through a network of information vendors and broker-dealers. As such, they have responsibilities to ensure that consolidated market data is disseminated to the public and among competing information vendors and broker-dealers on fair, reasonable and non-discriminatory terms and in a manner that promotes transparency. Adherence to these standards assures the most widely available market data and the greatest possible transparency, rather than requiring investors to rely on just a few comparatively advantaged outlets for market data. We are concerned that the NYSE's and Nasdaq's responsibilities present a conflict of interest vis-à-vis their proposals to offer free, real-time market data on their own Web sites. Here are some examples:

- If the SROs are going to display non-consolidated data, it would be contrary to their roles as exclusive SIP administrators to promote the widespread dissemination of consolidated data.
- The SROs' promotion of their own non-consolidated data would also place information vendors (including broker-dealers) at a competitive disadvantage because vendors are obligated under Rule 11Ac1-2 to display consolidated data at a significant expense.
- Under the current CTA plan, the NYSE would have discretionary authority to approve or disapprove a competitive use of market data (for example, without the imposition of a contract or through a pilot program).
- The NYSE and Nasdaq earn substantial revenues from the market data fees paid by broker-dealers and information vendors with whom they would be in competition as a market data destination.

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These are just some of the apparent conflicts of interest that the Commission should carefully consider and address.

STANDARD OF REVIEW

In reviewing the NYSE and NASD or Nasdaq rule filings for these proposals, we specifically urge the Commission to give consideration to the competitive implications of the proposals and their potential impact on efficiency and the public interest, as required by Exchange Act section 3(f). The Commission should further consider the impact of the proposals on "fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets" as required by Section 11A(a)(1)(c)(ii) of the Exchange Act. Finally, the Commission should carefully consider whether the proposals are consistent with Section 11A(c)(1)(B) of the Exchange Act, which requires that no SRO, securities information processor, broker or dealer may "collect, process, distribute, publish, or prepare for distribution or publication any information with respect to quotations for or transactions in any security" except in conformity with rules established by the Commission, including rules to "assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information."

CONCLUSION

We are extremely pleased to see positive efforts to expand transparency and electronic access to important market data. While we look forward to further developments in this area, we respectfully request that the Commission publish the NYSE and NASD proposals for public comment. In this way, the Commission will be able to consider carefully the proposals' impact on the National Market System as a whole and will be able to ensure that the interests of all market participants and the investing public are properly safeguarded and fully advanced.

W. Hardy Callcott,

Senior Vice President and General Counsel,
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cc: Hon. Arthur Levitt
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