

APPENDIX B

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Re: Market Power in Pricing Market Data

Dear Members of the SEC Advisory Committee on Market Information:

During our December 14 meeting, several participants discussed the issue of “market power” as we move to a competitive market data landscape. Others voiced questions about the governance of the SRO consortia. It occurred to me that some of the comments might reflect an understandable lack of knowledge of the business history of CTA in particular, and of the governance process of CTA and its SRO participants.

As one of two dozen meeting participants, I did not want to take up others’ time in making clarifying comments. Thus, I am writing now. Since the history, structure, corporate form and governance of CTA and the NYSE differ significantly and relevantly from those of the OTC/UTP dissemination and NASD/NASDAQ, I confine my remarks to CTA and the NYSE.

Any concern that the NYSE could and might exercise market power in a competitive environment for market data ignores 75 years of evidence to the contrary. It also ignores the discipline that derives from the constituent nature of NYSE governance. Moving to a competitive model will not relax that discipline.

NO EVIDENCE OF THE EXERCISE OF MARKET POWER

If the NYSE (or CTA) were exercising market power in the pricing of market data, one would expect, for example, a history of price increases. Yet, to the contrary, the prices for NYSE/CTA market data services have either declined or remained unchanged since the mid-1970s. That helps to explain why the cost of CTA market data has declined 81 percent over the past 15 years. That result is wholly inconsistent with the hypothesis of a dominant entity exercising market power.

Market power might also manifest itself as a rising contribution of market data fees to NYSE revenue. In fact, the proportion has oscillated between 15 and 17 percent since CTA's creation. That proportion long precedes the advent in the mid-1970s of both the CTA consortium and the SEC's oversight of market data fees: we have traced it back to the 1930s.

If there is latent market power, then something is disciplining its use.

USERS LEVY FEES ON THEMSELVES

The source of this discipline is no mystery. The NYSE does not so much establish prices as allocate costs. Constituent representatives establish NYSE prices by first determining the NYSE's funding needs, and then allocating the resulting costs among themselves.

Twenty-four men and women long experienced in business and the public sector -- 21 who are CEOs of users of Exchange services and three who are Public Directors with no financial interest in the outcome -- determine the Exchange's funding. They then allocate most of the non-regulatory costs of running the Exchange between listed companies and member broker-dealers (with institutional investors and other non-members contributing the balance) by establishing fees denominated as "listing fees", "transaction fees" and "market data fees". If they change the allocation, it must withstand scrutiny by constituent proxies -- Board representatives of potential "winners" and "losers" in the reallocation -- as well as by the Directors representing solely the public interest.

Board action is the last stop in our constituent process. Before the Board reallocates any costs, Exchange staff vets the proposed change with user groups. In the case of market data fees, the process includes our daily interaction with brokers (and vendors) in the course of our providing services to them, as well as our ongoing participation in industry associations. The NYSE staff seeks consensus by discussing new fee ideas with constituents who advocate their varying business models.

That this mechanism produces a fair result does not surprise economists. Through their proxies, the consumers of a complex, interdependent set of services determine what they pay. Congress recognized that this kind of competition among users produces the best and fairest allocation of costs: in 1975, it wrote into the 1934 Act requirements that exchanges afford fair representation of brokers, issuers and investors and fairly allocate costs among them.

Were the "belt" of constituent cost allocation ever to break, the SEC review process provides "suspenders". However, in the 26 years since Congress authorized the SEC to regulate market data fees, only once have the "suspenders" come into play -- not because of a *failure* of fair allocation, but because of a single user's campaign to *avoid* it.

I did not mention CTA in describing how costs are fairly allocated. This reflects reality. The SROs have never delegated fee matters to CTA: the SRO boards decide fee matters directly.

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To be sure, adopting a competitive model will bring market forces to bear on market data pricing. But the primary discipline on any latent market power will remain the same: our constituents allocating the costs of running the Exchange among themselves. They arrive at fair allocation, not because of a statutory mandate or altruism, but because of the give-and-take among their Board representatives. These representatives recognize that their firms all benefit from funding the Exchange -- and that each user must contribute its fair share.

Simply put, those who approve the Exchange's budget and market data (and other) fees are the ones who pay. They can raise or lower any fee -- thereby reallocating among themselves the costs of operating the Exchange -- any time they want.

I hope the foregoing is helpful to you as the Committee pursues its important work.

Sincerely yours,

/s/ Robert G. Britz

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cc: Annette Nazareth
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