proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 feet or More Above the Surface of the Earth.

* * * * *

ASO KY E5 London, KY [Revised]

London—Corbin Airprot—Magee Field, KY
(Lat. 37°05′14″ N, long 84°04′37″ W)
Manchester Memorial Hospital, Manchester, KY
Point In Space Coordinates
(Lat. 37°10′28″ N, long. 83°46′35″ W)

That airspace extending upward from 700 feet or more above the surface within an 11-mile radius of London—Corbin Airport—Magee Field and that airspace within a 6-mile radius of the point in space serving Manchester Memorial Hospital, Manchester, KY.

* * * * *

Issued in College Park, Georgia, on December 9, 1999.

Wade T. Carpenter,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 99–32766 Filed 12–16–99; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–42208; File No. S7–28–99]

Regulation of Market Information Fees and Revenues

AGENCY: Securities and Exchange Commission.

ACTION: Concept release; request for comments.

SUMMARY: The Securities and Exchange Commission is reviewing the arrangements currently in place for disseminating market information to the public. It particularly is focusing on the fees charged for market information and the role of revenues derived from such fees in funding the operation and regulation of the markets. To further its review, the Commission is inviting public comment on these matters. This release describes the current arrangements for disseminating market information and provides tables setting forth the fees, revenues, and expenses of the self-regulatory organizations and the joint plans they have formed to disseminate market information; discusses the relevant statutory standards that govern market information fees and revenues; analyzes the financial structures of the self-regulatory organizations and the cost of market information; and identifies a number of issues on which the Commission specifically is requesting comment. Following receipt of the public's comments and completion of its review, the Commission intends to take further action to assure that market information arrangements properly reflect changes that have occurred in the securities industry and remain consistent with statutory standards.

DATES: Comments are due on or before March 31, 2000.

ADDRESSES: Interested persons should submit three copies of their written data, views, and opinions to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–28–99. Comments submitted by E-mail should include this file number in the subject line. Comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW, Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Daniel M. Gray at (202) 942–4164, Mignon McLemore at (202) 942–0169, or Anitra T. Cassas at (202) 942–0089, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–1001.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Joint SRO Arrangements for Disseminating Market Information
A. Overview
1. Network A
2. Network B
3. Nasdaq System
4. OPRA System
B. Governance
C. Collection and Processing of Information
D. Financial Matters
E. Fee Structures
F. Commission Oversight
III. Exchange Act Standards Governing Market Information Fees and Revenues
A. Legal Status of Market Information Prior to 1975
1. Exchange Control of Market Information
2. Initiation of a Central Market Structure
B. The 1975 Amendments
C. Commission's Review of Market Information Fees
1. OPRA Order
2. Instinet Order
IV. SRO Financial Structures and the Cost of Market Information
A. Exchange Act Functions of the SROs
B. SRO Financial Structures
1. Sources of Funding
2. Internal Cost Structures
C. The Cost of Market Information
1. Categories of Market Information Costs
2. Allocation of Common Costs
V. Requests for Comment
A. Flexible, Cost-Based Approach to Market Information Fees and Revenues
1. Cost-Based Limit on Market Information Revenues
2. Fairness and Reasonableness of Specific Fees
a. Professional Subscriber Fees
b. Retail Investor Fees
c. Fee Discounts
B. Distribution of Network Revenues and SRO Funding
1. Direct Funding of Market Regulation Costs
2. Compensating SROs in Accordance with the Value of Their Market Information
3. SRO Rebates to Members
C. Plan and SRO Disclosure
D. Plan Governance, Administration, and Oversight
VI. Conclusion
Appendix
Tables 1–4: Subscriber Fees
Tables 5–8: Network Revenues, Expenses, and Distributions
Tables 9–17: SRO Revenues and Expenses

I. Introduction

The Securities and Exchange Commission (''Commission'') is reviewing the arrangements for disseminating ''market information''—information concerning quotations for and transactions in equity securities and options that are actively traded in the U.S. markets. It is focusing particularly on the fees charged for market information and on the role of revenues derived from such fees in funding the self-regulatory organizations that are a national securities exchange or a national securities association (collectively, ''SROs'').[1] Based on its

[1] Currently, the national securities exchanges are the American Stock Exchange LLC (''Amex''), the

Continued

review thus far, the Commission believes that changes may be warranted in these areas. Because the potential changes raise complex factual and policy issues and could have far-reaching effects on the SROs and the securities markets, the Commission has decided to invite public comment before taking further action. This release is intended to assist the public in formulating comments by setting forth the relevant factual and legal context for market information issues in sections II through IV and the Appendix, and by identifying a variety of specific issues in section V on which the Commission is particularly interested in receiving comments.

All participants in the U.S. markets have access to a consolidated, real-time stream of market information for any of the thousands of equity securities and options that are actively traded. The information for each security is ''consolidated'' in that it is continually collected from the various market centers that trade the security and then disseminated in a single stream of information. It is ''real-time'' in that there is very little delay between the time that a quotation is made or a transaction is effected and the time that this information is made available to investors and any others who use the information. This consolidated, real-time stream of market information has been an essential element in the success of the U.S. securities markets. It is the principal tool for enhancing the transparency of the buying and selling interest in a security, for addressing the fragmentation of buying and selling interest among different market centers, and for facilitating the best execution of customers' orders by their broker-dealers.

Broad public access to consolidated market information was not the fortuitous result of private market forces, but of planning and concerted effort by the Congress, the Commission, the SROs, and the securities industry as a whole. Prior to the 1970's, the various SROs had acted individually in deciding who would be entitled to receive their market information and on what terms. In the early 1970's, the Commission took the initial steps toward creating a central market system in which investors would have access to information from all markets. Congress adopted this fundamental policy determination when it enacted the Securities Acts Amendments of 1975 (''1975 Amendments'').[2] In particular, it authorized the Commission to facilitate the creation of a national market system for securities, the heart of which was to be communications systems that would disseminate consolidated market information. Using this authority, the Commission adopted a number of rules pursuant to which the SROs act jointly in disseminating market information. Under this regulatory framework, the SROs have developed and funded the systems that have been so successful in disseminating a highly-reliable, real-time stream of consolidated market information throughout the United States and the world.

The Commission believes that the statutory framework and objectives established by Congress for the national market system in 1975 continue to be just as relevant today. A number of developments in the securities industry, however, led the Commission to initiate its review of the arrangements currently in place for disseminating market information. Each of these developments is attributable, in large part, to improved technology for communicating and organizing information.

First, new technology has greatly expanded the opportunity for retail investors to obtain access to real-time market information through ''on-line'' accounts with their broker-dealers. Not surprisingly, the demand by retail investors for this high-quality information has grown exponentially in the last five years. Revenues derived from fees applicable to retail investors have grown from $3.7 million in 1994 to $38.9 million in 1998, and now represent approximately 9% of total market information revenues.[3] Notably, revenues derived from fees applicable to professional subscribers also grew very substantially in the last five years, from $231.1 million in 1994 to $351.1 million in 1998, and still account for approximately 85% of total market information revenues. In addition, most of the fees applicable to retail investors have been reduced in recent months by 50% to 80%. Nevertheless, the Commission remains concerned that retail investor fees have not properly kept pace with changing technology and increased demand.

One of the most important functions that the Commission can perform for retail investors is to ensure that they have access to the information they need to protect and further their own interests. Communications technology now has progressed to the point that broad access to real-time market information should be an affordable option for most retail investors, as it long has been for professional investors. This information could greatly expand the ability of retail investors to monitor and control their own securities transactions, including the quality of execution of their transactions by broker-dealers. The Commission intends to assure that market information fees applicable to retail investors do not restrict their access to market information, in terms of both number of subscribers and quality of service. In addition, such fees must not be unreasonably discriminatory when compared with the fees charged to professional users of market information. Comment is requested on these issues in section V below.

The second development prompting the Commission's review of market information arrangements is the changing structure of the securities industry, particularly the growth of alternative trading systems (''ATSs'') that compete with markets operated by the SROs.[4] Some of these ATSs, which are operated by for-profit entities, have applied for registration or indicated an interest in registering as exchanges and thereby becoming SROs themselves. Moreover, existing SROs are exploring the possibility of converting from membership organizations to for-profit corporations as one means to compete more effectively. Thus, the current structure of industry self-regulation, which largely has been in place since the securities laws originally were enacted in the 1930's, may be about to change in fundamental ways.

These potential changes in the structure of industry self-regulation raise a number of difficult policy issues, some of which relate directly to the arrangements for disseminating market information. The creation of for-profit SROs may require closer monitoring of the SROs' fees and financial structures, including their funding and use of resources. For example, the value of a market's information is dependent on the quality of the market's operation and regulation. Information is worthless if it is cut off during a systems outage

Boston Stock Exchange, Incorporated (''BSE''), the Chicago Board Options Exchange, Incorporated (''CBOE''), the Chicago Stock Exchange, Incorporated (''CHX''), the Cincinnati Stock Exchange (''CSE''), the New York Stock Exchange, Inc. (''NYSE''), the Pacific Exchange, Inc. (''PCX''), and the Philadelphia Stock Exchange, Inc. (''Phlx''). The national securities association is the National Association of Securities Dealers, Inc. (''NASD'').

[2] Pub. L. 94–29, 89 Stat. 97 (1975).

[3] The fees applicable to professional subscribers and retail investors, as well as the revenues derived from such fees for 1994 and 1998, are set forth in Tables 1–8 in the Appendix. The fee structures are described in section II.E below.

[4] *See* Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (''ATS Release'').

(particularly during a volatile, high-volume trading day when reliable access to market information is most critical), tainted by fraud or manipulation, or simply fails to reflect accurately the buying and selling interest in a security. Consequently, there is a direct connection between the value of a market's information and the resources allocated to operating and regulating that market.

The Commission is committed to ensuring that the U.S. securities markets continue to be operated and regulated in accordance with the high standards mandated by Congress in the Securities Exchange Act of 1934 (''Exchange Act'').[5] It is the SROs—the organizations that have registered under sections 6 and 15A of the Act—that are charged with the front-line responsibilities for operating and regulating the primary U.S. markets. To meet these responsibilities, the SROs historically have relied on market information fees as one of their important sources of funding. In 1998, for example, the SROs collectively had total revenues of $1.97 billion and total operating expenses of $1.68 billion.[6] Market information revenues represented 21% ($410.6 million) of the SROs' total revenues. This percentage has remained remarkably steady over the last five years, despite the rapid growth in market information revenues. In other words, the growth in market information revenues has simply kept pace with the growth of other SRO revenues during the prolonged expansion in trading volume of the last five years.[7] The SROs are no more, but also no less, dependent on market information revenues today than they were in 1994.

The Commission believes that the revenues derived from market information fees continue to be an appropriate part of SRO funding. It is concerned, however, that the current arrangements for setting fees and distributing revenues may need to be revised, particularly in light of the potential changes in the structure of industry self-regulation. Section V requests comment on a number of matters being considered by the Commission. These include (1) a conceptual approach to evaluating the fairness and reasonableness of fees that, among other things, could establish a link between the cost of market information and the total amount of market information revenues, (2) a conceptual approach to distributing market information revenues to the SROs that could provide for more direct funding of SRO functions that enhance the integrity and reliability of market information, (3) greater public disclosure concerning fees, revenues, and the SROs' use of revenues, and (4) broader industry and public participation in the process of setting and administering fees. After receiving the public's comments and completing its review, the Commission intends to take further action to assure that the arrangements for disseminating market information continue to reflect the objectives set forth in the Exchange Act.

II. Joint SRO Arrangements for Disseminating Market Information

Public discussion about the dissemination of market information often has been framed in terms of the question: ''Who owns market information?''[8] This question presumes, however, that essentially state law concepts of ownership prevail in this area. In fact, market information, at least since 1975, has been subject to comprehensive regulation under the Exchange Act, particularly the national market system requirements of Section 11A.[9] To implement the national market system, the Commission has required the SROs to act *jointly* pursuant to various national market system plans in disseminating *consolidated* market information.

These plans govern all aspects of the arrangements for disseminating market information. Among other things, they require the individual SROs to funnel market information to a central processor, which then consolidates the information into a single stream for dissemination to the public. In this way, the public is assured of access to a highly reliable source of information that is fully consolidated from all the various market centers that trade a particular security. The plans also govern two of the most important rights of ownership of the information—the fees that can be charged and the distribution of revenues derived from those fees. As a consequence, no single market can be said to fully ''own'' the stream of consolidated information that is made available to the public. Although markets and others may assert a proprietary interest in the information that they contribute to this stream, the practical effect of comprehensive federal regulation of market information is that proprietary interests in this information are subordinated to the Exchange Act's objectives for a national market system.[10]

A. Overview

The arrangements currently in place for disseminating market information are the product of a variety of different national market system plans that operate in accordance with a variety of different Exchange Act rules. The arrangements are most usefully organized, particularly from the standpoint of their fees, revenues, and expenses, according to the four networks or systems that the SROs have developed to disseminate market information for four different categories of securities: (1) Network A—securities listed on the NYSE; (2) Network B—securities listed on Amex or the regional exchanges; (3) Nasdaq System—securities qualified for inclusion in the Nasdaq Stock Market, Inc. (''Nasdaq'') and certain other securities traded in the over-the-counter (''OTC'') market; and (4) OPRA System—exchange-listed options. For simplicity's sake, the two networks and two systems will hereinafter be referred to collectively as the ''Networks.''

The collection and dissemination of market information by the Networks are addressed primarily by four Exchange Act rules. Rule 11Aa3–1[11] governs the dissemination of transaction reports and last sale information in national market system securities (equity securities listed on a national securities exchange or included in the National Market tier of Nasdaq).[12] In general, this rule requires an SRO to file a transaction reporting plan for such securities, and it requires an SRO's members to transmit the information required by the plans to the SRO. Rule 11Ac1–1[13] governs the dissemination of quotations in national market system securities and additional Nasdaq System securities. In general, it requires an SRO to establish procedures for making available its members'

[5] 15 U.S.C. 78a–78mm.

[6] Itemized revenues and expenses for the SROs in 1994 and 1998 are set forth in Tables 9–17 in the Appendix.

[7] While SRO revenues and costs have grown rapidly during the expansion in trading volume, they still have been outpaced by the growth in revenues, costs, and profits of the securities industry as a whole. *See* section IV.B below.

[8] *See*, *e.g.*, Susan B. Garland, ''Whose Info Is It, Anyway?'', *Business Week*, Sept. 13, 1999, at 114, 118; Diana B. Henriques, ''Who Holds the Deed to Stock Data?'', *N.Y. Times*, Mar. 28, 1999, at 7.

[9] *See* section III.A below for a discussion of the SROs' legal rights with respect to market information prior to implementation of the national market system in the mid-1970's.

[10] The Exchange Act's national market system objectives are discussed in section III.B below.

[11] 17 CFR 240.11Aa3–1.

[12] A ''national market system security'' is defined in Rule 11Aa2–1, 17 CFR 11Aa2–1, as any ''reported security'' as defined in Rule 11Aa3–1. Currently, reported securities under Rule 11Aa3–1 are equity securities that are listed on a national securities exchange or that are included in the National Market tier of Nasdaq.

[13] 17 CFR 240.11Ac1–1.

quotations to information vendors, and it requires the SRO's members to communicate quotation information in compliance with the procedures. Rule 11Ac1–2 [14] governs the display of transaction reports and quotation information in national market system securities and additional Nasdaq System securities. In general, it requires all information vendors, if they provide broker-dealers with any market information for a security, to provide a consolidated display of information for the security from all reporting market centers. Finally, Rule 11Aa3–2 [15] sets forth the procedures for the filing and Commission approval of national market system plans and plan amendments.

The respective plans, participants, administrators, and information processors associated with each of the four Networks are set forth below.

1. Network A

Network A is operated pursuant to the Consolidated Tape Association Plan (''CTA Plan'') and the Consolidated Quotation Plan (''CQ Plan). It disseminates market information for any common stock, long-term warrant, or preferred stock admitted to dealings on the NYSE.[16] All of the SROs are participants in the CTA Plan and CQ Plan. The Consolidated Tape Association (''CTA'') is a committee made up of one representative of each of the participants. It administers the CTA Plan and is registered as a securities information processor (''SIP'') under Section 11A(b) of the Exchange Act.[17] The administrator of Network A's day-to-day operations is the NYSE, and its information processor is the Securities Industry Automation Corporation (''SIAC'').[18] Amendments to the CTA Plan and the CQ Plan are subject to Commission review under Rule 11Aa3–2.

2. Network B

Network B also is operated pursuant to the CTA Plan and the CQ Plan. It disseminates market information for any common stock, long-term warrant, or preferred stock admitted to dealings on the Amex or the regional exchanges, but not also admitted to dealings on the NYSE or included in the Nasdaq market.[19] Its day-to-day administrator is Amex, and its information processor is SIAC. Although they are operated pursuant to the same plans, Network B and Network A are treated separately with respect to most of their financial matters and fee structures.[20]

3. Nasdaq System

The Nasdaq System disseminates real-time market information for securities included in the two tiers of the Nasdaq market—the National Market (''NNM'') and the SmallCap Market (''SCM'') [21]—as well as certain other securities traded in the over-the-counter (''OTC'') market.[22] Information for NNM securities is collected and disseminated pursuant to the NASD's rules and the Joint Self-Regulatory Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Exchange-listed Nasdaq/National Market System Securities and for Nasdaq/National Market System Securities Traded on an Unlisted Trading Privilege Basis (''Nasdaq/UTP Plan''). The participants in the Nasdaq/UTP Plan are Amex, CHX, NASD, and Phlx. The BSE is a limited participant.[23] The Nasdaq/UTP Plan provides for an operating committee composed of one representative for each participant. Market information for SCM and other securities traded in the OTC market is collected and disseminated pursuant to the NASD's rules. The day-to-day administrator and information processor for the Nasdaq System is Nasdaq. Nasdaq is a registered SIP under section 11A(b). Amendments to the Nasdaq/UTP Plan are subject to Commission review under Rule 11Aa3–2. Amendments to the NASD's rules (including changes in market information fees relating to all Nasdaq System securities) are subject to Commission review under Section 19(b) of the Exchange Act.

4. OPRA System

The OPRA System is operated pursuant to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA Plan''). It disseminates market information for series of options contracts traded in a securities market maintained by a party to the OPRA Plan.[24] The parties to the OPRA Plan are Amex, CBOE, NYSE,[25] PCX, and Phlx. The OPRA System is administered by the Options Price Reporting Authority (''OPRA''), a committee made up of one representative from each of the parties to the OPRA Plan. OPRA is a registered SIP under section 11A(b). CBOE provides administrative services for the OPRA Plan, and SIAC provides processing services. Amendments to the OPRA Plan are subject to Commission review under Rule 11Aa3–2. Although the OPRA Plan has been approved as a national market system plan under Rule 11Aa3–2, it has not been approved by the Commission pursuant to Rule 11Aa3–1, which requires SROs to file a transaction reporting plan for certain equity securities. OPRA System securities therefore are not ''reported securities'' and are not subject to Rules 11Aa3–1, 11Ac1–1, 11Ac1–2, or 11Ac1–4. Nevertheless, the OPRA Plan itself imposes a variety of requirements on its participants and vendors of its information. For example, Section VII(b) of the OPRA Plan provides that vendor agreements must contain standards requiring the non-discriminatory dissemination of information from all markets and that vendors' equipment must be capable of displaying all information regardless of the market in which a transaction or quotation took place.

B. Governance

The CTA Plan, CQ Plan, Nasdaq/UTP Plan, and OPRA Plan (collectively, the ''Plans'') incorporate rules for governing their affairs that are quite similar. Each is administered by a committee composed of one representative from each of their respective participants. A majority vote of representatives generally is sufficient to approve Plan actions. Amendments to the Plans, however, must be executed by each participant, except that fee increases or new fees can be adopted by a 2/3 vote.[26] Each of the Plans provides for the delegation of its operational functions to individuals, entities, or committees.[27] Finally, each of the Plans provides for the admission of new participants.

[14] 17 CFR 240.11Ac1–2.

[15] 17 CFR 240.11Aa3–2.

[16] CTA Plan, Sections I(p) and VII(a)(i).

[17] The CQ Plan is administered by an Operating Committee that is substantially the same as the CTA.

[18] SIAC is jointly owned by the NYSE and Amex and is a registered SIP under Section 11A(b).

[19] CTA Plan, Sections I(q) and VII(a).

[20] *See, e.g.,* CTA Plan, Section XII(a) (''Except as otherwise indicated, each income, expense and cost item, and each formula therefor described in this Section XII, applies separately to each of the two CTA networks and its respective Participants.'').

[21] *See* NASD Rule 4200(a)(27).

[22] *See, e.g.,* NASD Rule 7010(a).

[23] A ''limited participant'' is a national securities exchange whose participation in the Nasdaq/UTP Plan is restricted to reporting market information.

[24] OPRA Plan, Section III(a).

[25] The NYSE no longer trades listed options.

[26] *See, e.g.,* CQ Plan, Sections IV(c) and IX(b)(iii); Nasdaq/UTP Plan, Section IV.C.2.

[27] *See, e.g.,* CTA Plan, Section IV(a) (''CTA will be primarily a policy-making body as distinguished from one engaged in operations of any kind. CTA, directly or by delegating its functions to individuals, committees established by it from time to time, or others, will administer this CTA Plan and will have the power and exercise the authority conferred upon it by this CTA Plan as described herein.'').

C. Collection and Processing of Information

The Plans require participants to collect and promptly report market information to the Plan processors. The processors are responsible for receiving the information from the participants, consolidating the information, and then disseminating it in accordance with the Plans. The CQ Plan and the Nasdaq/UTP Plan provide for the dissemination of a consolidated best bid and offer that identifies the market centers that published these quotes.[28] The OPRA Plan (the only other Plan that disseminates quotation information) does not provide for dissemination of a consolidated best bid and offer.

With the expansion in trading volume of recent years, the amount of information handled by the Plan processors has expanded dramatically. For example, in 1994, SIAC processed 73 million transaction reports and 115 million quotations for Network A and Network B. In 1998, these figures increased to 190 million transaction reports and 444 million quotations, for an increase, respectively, of 160% and 268%. By comparison, the total revenues of Network A and Network B increased by only 51% between 1994 and 1998.[29] Similarly, in 1994 the trading volume in Nasdaq securities was 74 billion shares. In 1998, the trading volume was 202 billion shares, for an increase of 173%.

D. Financial Matters

The Plans have adopted rules governing their financial matters that are similar to one another.[30] All revenues derived from fees charged for a Network's market information are included in a single pool. The Network's operating expenses (amounts incurred by the Network's administrator and processor in performing their Network functions) are paid directly out of the Network's revenues. A Network's operating expenses do not, however, include any of the costs incurred by the individual SROs in reporting their information to the Network processors.[31] After deduction of operating expenses, each Network's revenues generally are distributed to its participants in accordance with their proportional share of the total transaction volume for the Network.[32] Finally, each of the Plans also requires that its participants annually be provided with audited statements of its financial affairs.[33] The revenues, expenses, and distributions for each of the Networks are set forth in Tables 5–8 in the Appendix.

E. Fee Structures

The Plans and NASD rules establish the terms and conditions under which market information is disseminated by the Networks. In general, they require that market information be disseminated only to those persons that have been approved by their respective administrators and entered into the appropriate agreements.[34] These persons can be divided into two major categories—vendors and subscribers.[35] Vendors are in the business of distributing information to others. As a general matter, they accept the stream of information made available by the Network processors and, in turn, disseminate the information to their customers, often providing enhanced information services as well. Subscribers receive information for their own use, typically from vendors and broker-dealers.

The various fee structures that have been established by the Networks[36] for the dissemination of market information reflect this vendor/subscriber dichotomy. Vendors contract directly with the Networks for the right to receive information and distribute it to their customers (*e.g.*, broker-dealers and institutional investors). Vendors pay a variety of access and administrative fees to the Networks.[37] Subscribers may contract directly with the Networks for receipt of market information, but generally obtain access to information through a vendor, which passes the subscriber fees on to the Network. Broker-dealers that both use information internally and distribute it to others (*e.g.*, their brokerage customers) act as both vendors and subscribers.

Each of the Networks receives the great majority of its revenues through subscriber fees. The most significant subscriber fees fall into two categories—monthly and per-query. Monthly fees entitle the subscriber to an unlimited amount of real-time market information during the month. They are charged to professional subscribers on a per-device basis and to nonprofessional subscribers on a per-customer basis. The nonprofessional subscriber fees are much less than the professional subscriber fees. In general, nonprofessional subscribers are defined as those who use market information solely for their personal, non-business use and do not distribute the information to others. Under the per-query fee structures, subscribers are required to pay an amount for each request for a packet of real-time market information.[38] Although the per-query fee structure is available to professional subscribers, it was developed by the Networks in recent years primarily for retail investors who want to obtain real-time information through their personal computers.[39] Recently, Nasdaq, Network A, and Network B have substantially reduced their nonprofessional subscriber and per-

[28] CQ Plan, Sections I(b) and VI(c); Nasdaq/UTP Plan, Section VI.C.I.

[29] The total revenues for Network A and Network B were $161.3 million in 1994 and $243.0 million in 1998. *See* Tables 5 and 7 in the Appendix. A fuller comparison of the growth in market data revenues and expenses compared to other securities industry benchmarks is provided in section IV.B.2 below.

[30] The OPRA Plan is somewhat different from the others in that it provides for three separate ''accounting centers''—basic, index options, and foreign currency options—for the allocation of revenues and expenses. OPRA Plan, Section VIII(a).

[31] *See, e.g.*, CTA Plan, Section XII(c)(v) (''Except as otherwise provided in this Section XII(c), each Participant and each other reporting party shall be responsible for paying the full cost and expense (without any reimbursement or sharing) incurred by it in collecting and reporting to the Processor in New York City last sale price information relating to Eligible Securities or associated with its market surveillance function.''); OPRA Plan, Section VIII(a)(ii) (''Each party shall be responsible for paying the full cost incurred by it in collecting and reporting to the Processor last sale reports and quotation information related to eligible securities for dissemination through the OPRA System.'').

[32] *See* CTA Plan, Section XII(a); CQ Plan, Section IX(a); OPRA Plan, Section XIII(b). The Nasdaq/UTP Plan distribution formula is a little different from the other plans in that it is based on an average of the percentage of total transaction volume and the percentage of total share volume. The Nasdaq/UTP Plan also provides for certain minimum payments to new participants. *See* Nasdaq/UTP Plan, Exhibit A. Thus far, CHX is the only non-NASD participant in the Nasdaq/UTP Plan to receive a distribution.

[33] CTA Plan, Section XII(a)(v); CQ Plan, Section IX(a)(v); Nasdaq/UTP Plan, Section XIV(C); OPRA Plan, Section VIII(a)(v).

[34] A detailed discussion of the process for obtaining market information from the Networks, including the applicable forms and their terms and conditions, is provided in a report on market data pricing commissioned by the Securities Industry Association. Arthur Andersen LLP, *Report on Market Data Pricing* 8–15 (June 1999) (''Andersen Report'').

[35] *See, e.g.*, CTA Plan, Section IX(a) (specifying a ''Consolidated Vendor Form'' and a ''Consolidated Subscriber Form'').

[36] Fees are set separately for each of the four Networks.

[37] *See* Andersen Report, note 34 above, at Exhibit 4 (listing the various fees and charges imposed on vendors and subscribers).

[38] A packet generally includes a variety of information relating to a single security (*e.g.*, last sale price, best bid, best offer, and volume).

[39] *See, e.g.*, Securities Exchange Act Release No. 35393 (February 17, 1995), 60 FR 10625 (NASD's purpose in establishing a per-query fee structure was ''to provide retail customers with a cost-effective alternative to calling their brokers for current market information'').

query fees.[40] In addition, for Network A and Network B the amount of per-query fees for a subscriber is capped each month at the amount of the monthly nonprofessional subscriber fee.[41]

The monthly professional, monthly nonprofessional, and per-query subscriber fees for each Network, as they currently exist and as they existed at the end of 1998 and 1994, are set forth in Tables 1–4 in the Appendix. The revenues derived from these subscriber fees for each Network in 1998 and 1994 are included in Tables 5–8 in the Appendix.

Under both the monthly and per-query fee structures, the Networks require vendors and subscribers to disclose a substantial amount of information about their business operations and use of market information, including the requirement that they monitor and report the number of devices, customers, and queries for which they must pay fees. There are substantial administrative costs associated with this process for vendors and subscribers, as well as the Networks.[42] The burdens imposed on vendors and subscribers by these fee structures are increased by the necessity to account separately to each Network, particularly when the relevant policies and procedures vary from Network to Network. Comment is requested in section V below on ways to reduce the cost of administering fee structures.

Finally, the Networks have experimented with an ''enterprise'' fee structure under which an entity would pay a set amount each month for the market information services that it receives from a Network. For example, the OPRA System established an enterprise rate in 1997 that is based primarily on the number of registered representatives associated with a particular firm.[43] In addition, Network A recently established an enterprise arrangement that caps at $500,000 the amount a registered broker-dealer is required to pay in a month for the use of market information by its employees and by its brokerage-account customers.[44]

F. Commission Oversight

Rule 11Aa3–2 establishes the procedures that govern amendments to each of the Plans. In addition, section 19(b) and Rule 19b–4 thereunder govern proposed rule changes by the NASD that relate to the Nasdaq System. In general, all amendments to the Plans and NASD rules must be filed with the Commission, published for public comment, and approved by the Commission. Under Rule 11Ac3–2(c)(3)(i), however, the Plans may submit their proposed fees as effective on filing (notice of the filing is still published for public comment). Within 60 days after filing, the Commission may abrogate the proposal and require that it be refiled for Commission approval. The NASD, in contrast, generally has submitted for Commission approval the proposed fees paid by non-members for Nasdaq System market information, rather than as effective on filing under Section 19(b)(3)(A)(ii). Under either of these procedures, fee changes are subject to Commission review.

The CTA Plan, CQ Plan, and NASD Rules contain provisions that authorize ''pilot programs'' that have not been filed for Commission review. For example, Section IX(e) of the CTA Plan provides as follows:

> (A) CTA network's administrator, on behalf of the CTA network's Participants, may enter into arrangements of limited duration, geography, and scope with vendors and other persons for pilot test operations designed to develop, or permit the development of, new last sale price information services and uses under terms and conditions other than those specified in Sections IX(a) and XII * * * Any such arrangement shall afford the CTA network's Participants an opportunity to receive market research obtained from the pilot test operations and/or to participate in the pilot test operations. The CTA network's administrator shall promptly report to CTA the commencement of each such arrangement and, upon its conclusion, any market research obtained from the pilot test operations.[45]

NASD Rule 7100(b) contains a similar provision:

> To facilitate the development of new information services and uses under appropriate terms and conditions, arrangements of limited duration, geography and/or scope may be entered into with Broker/Dealers, Vendors and other persons which may modify or dispense with some or all of the charges contained in this Rule or the terms and conditions contained in standard agreements. The arrangements contemplated will permit the testing and pilot operation of proposed new information services and uses to evaluate their impact on and to develop the technical, cost and market research information necessary to formulate permanent charges, terms and conditions for filing with and approval by the Commission.

Pursuant to these provisions, Network A, Network B, and the Nasdaq System have implemented some pilot programs that have lasted for many years without being filed for Commission approval.[46] Although the Networks have used these pilot program provisions to test new fees and services, the Commission does not believe that the provisions were intended to be used for such long-running programs. The Commission also is concerned that the public receive notice of, and an opportunity to comment on, the fees charged for market information. Comment is requested in section V below on procedures that would encourage innovation by the Networks without unduly restricting the opportunity for public notice and comment.

III. Exchange Act Standards Governing Market Information Fees and Revenues

Market information fees are addressed most directly by three provisions of the Exchange Act, all of which were added to the Act by the 1975 Amendments. First, section 11A(c)(1)(C) grants rulemaking authority to the Commission to assure that all SIPs may obtain market information from an exclusive processor of that information on terms that are ''fair and reasonable.'' Second, section 11A(c)(1)(D) grants rulemaking authority to the Commission to assure that all persons may obtain market information on terms that are ''not unreasonably discriminatory.''[47]

[40] Securities Exchange Act Release No. 42138 (Nov. 15, 1999), 64 FR 63350 (Network B fee reduction); Securities Exchange Act Release No. 41977 (Oct. 5, 1999), 64 FR 55503 (Network A fee reduction); Securities Exchange Act Release No. 41499 (June 9, 1999), 64 FR 32910 (Nasdaq System fee reduction).

[41] For Network A, per-query fees are capped at the $1 monthly fee that applies to the first 250,000 nonprofessional customers of a vendor.

[42] The administrative burdens associated with the monthly and per-query fee structures are discussed at length in the Andersen Report, note 34 above.

[42] *See* Securities Exchange Act Release No. 38204 (Jan. 24, 1997), 62 FR 4553.

[44] *See* Securities Exchange Act Release No. 41977, note 40 above.

[45] Section VII(e) of the CQ Plan contains a provision that is nearly identical to the CTA Plan provision.

[46] *See, e.g.,* Securities Exchange Act Release No. 40689 (Nov. 19, 1998), 63 FR 65626 (NASD proposed rule change to make permanent a pilot program for delivery of market information through automated voice response services that had been in operation for eleven years); Securities Exchange Act Release No. 39235 (Oct. 14, 1997), 62 FR 54886 (Network A proposal to include a per-query fee in its permanent fee schedule; noting that Network A had conducted pilot programs for per-query fees since 1991).

[47] Although the Commission has not yet exercised its rulemaking authority under section 11A(c)(1)(C) or (D) to specify the fees that can be charged for market information, these provisions plainly indicate Congress' intent that an exclusive processor's fees be ''fair and reasonable'' and ''not unreasonably discriminatory.'' Consequently, these requirements are applicable to the Commission's review of fees in the context of a proposed rule change by an SRO under section 19(b) or a national market system plan under Rule 11Aa3–2(c), as well as proceedings under section 11A(b)(5) to review a registered SIP's limitation on access to market information. In each of these contexts, the

Finally, sections 6(b)(4) and 15A(b)(5) require that the rules of a national securities exchange or a national securities association provide for the ''equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons'' using its facilities.

Terms such as ''fair,'' ''reasonable,'' and ''equitable'' often need standards to guide their application in practice. One standard commonly used to evaluate the fairness and reasonableness of fees, particularly those of a monopolistic provider of a service, is the amount of costs incurred to provide the service.[48] Some type of cost-based standard is necessary in the monopoly context because, on the one hand, it precludes the excessive profits that would result if revenues were allowed to far outstrip costs, and, on the other hand, it precludes underfunding of a service if the revenues were held far below costs (or subsidization of the service by other sources of revenues).[49] Congress explicitly adopted a strict cost-of-service standard in the 1975 Amendments in the context of its decision to restrict the permissibility of fixed commission rates. Section 6(e)(1)(B) was added to the Exchange Act and precludes approval of an SRO's proposal for fixed commission rates unless the Commission finds, among other things, that the proposed rates ''are reasonable in relation to the costs of providing the service for which the fees are charged.''

In section 11A, however, Congress did not require the Commission to undertake a similar, strictly cost-of-service (or ''ratemaking'') approach to its review of market information fees in every case. Such an inflexible standard, although unavoidable in some contexts,[50] can entail severe practical difficulties. Instead, Congress, consistent with its approach to the national market system in general, granted the Commission some flexibility in evaluating the fairness and reasonableness of market information fees. Specifically, Congress articulated general findings and objectives for the national market system in section 11A and directed the Commission to act accordingly in overseeing its development. Congress thereby allowed the Commission to adopt a more flexible approach than ratemaking.[51]

In formulating its findings and objectives for the national market system, Congress was influenced to a great extent by the problems it perceived in the arrangements for disseminating market information prior to 1975. Consequently, an understanding of the standards by which Congress intended the Commission to evaluate market information fees requires an understanding of, first, the legal status of market information prior to 1975 and, second, the findings and objectives that Congress adopted for the establishment of a national market system. This section will conclude with a discussion of the Commission's review of market information fees in the years since 1975.

A. Legal Status of Market Information Prior to 1975

Prior to the 1970's, no statute or Commission rule required the SROs to disseminate market information to the public or to consolidate their information. Each SRO acted individually and disseminated information on its own terms. The SROs decided what information to disseminate, to whom to disseminate the information, and the amount of fees to charge. The result was that they did not provide consolidated information to broker-dealers and investors. In addition, the NYSE, which operated the largest market, severely restricted public access to market information, particularly its quotations.

During the early 1970's, the Commission initiated a comprehensive review of the securities markets that ultimately led to significant changes in market structure, including the arrangements for disseminating market information. In particular, it articulated the goal of a central market system. The attainment of that goal eventually led to the removal of an SRO's right to restrict public access to its information and to the wide availability of consolidated market information.

1. Exchange Control of Market Information

The nature of an exchange's interest in its market information was litigated in a series of Supreme Court cases decided between 1905 and 1926, the so-called ''ticker cases.''[52] Central to the Court's holding in all three cases were the exchanges' agreements with members, non-members and telegraphic distributors that restricted the redistribution of market information. Generally, the agreements required prior exchange approval of any intended recipient of the information.[53]

The first of the ticker cases to examine the legal status of an exchange's market information was *Board of Trade* v. *Christie Grain & Stock Co.*[54] In *Christie*, the Chicago Board of Trade (''CBOT'') sought to enjoin the defendants from illegally obtaining and distributing the CBOT's quotations of prices.[55] The Supreme Court held that the CBOT could prevent the grain companies from using the market information. Justice Holmes, writing for the majority, observed:

> (T)he plaintiff's collection of quotations is entitled to the protections of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's.[56]

In holding that the CBOT had the right to restrict the dissemination of its

Commission is required to determine whether a proposed fee is consistent with the provisions of the Exchange Act.

[48] *See, e.g., MCI Telecommunications Corp.* v. *FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (''A basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost.'') (footnote omitted); James C. Bonbright, *et al., Principles of Public Utility Rates* 109 (2d ed. 1988) (''[O]ne standard of reasonable rates can fairly be said to outrank all others in the importance attached to it by experts and public opinion alike—the standard of costs of service, often qualified by the stipulation that the relevant cost is necessary, true (*i.e.*, private and social) cost or cost reasonably and prudently incurred.'').

[49] *See* Bonbright, note 48 above, at 109 (''Rates found to be far in excess of cost are at least highly vulnerable to the charge of unreasonableness. Rates found well below cost are likely to be tolerated, if at all, only as a necessary and temporary evil. For if rates are not compensatory, they are not subsidy free.'').

[50] *See* section III.C below for a discussion of the Commission's adoption of a strict cost-of-service standard in the context of a limitation of access proceeding under section 11A(b)(5) involving the NASD and Institutional Networks Corporation (''Instinet'').

[51] In section V.A below, the Commission requests comment on a flexible, cost-based approach to assessing the fairness and reasonableness of market information fees.

[52] *Board of Trade* v. *Christie Grain & Stock Co.*, 198 U.S. 236 (1905); *Hunt* v. *New York Cotton Exchange*, 205 U.S. 322 (1907); *Moore* v. *New York Cotton Exchange*, 270 U.S. 593 (1926). Many years have passed since these cases were decided. They are discussed in this release not because they necessarily would be decided the same way today, but to set forth the legal context surrounding the initiation of the national market system.

[53] For example, the NYSE generally made last-sale prices available to members, non-members, and telegraphic distributors pursuant to this type of agreement. *See* Letter from Robert W. Haack, President, NYSE, to William J. Casey, Chairman, SEC, dated May 22, 1972 (''NYSE Letter''). Some of the regional exchanges, however, did not restrict access to their market information. For example, the PCX publicized its transactions on a tickertape, which was made available to the vendors and the press, but imposed no restrictions on the use or dissemination of the information. *See* Letter from Thomas P. Phelan, President, PCX, to Ronald F. Hunt, Secretary, SEC, dated May 19, 1972.

[54] 198 U.S. 236 (1905).

[55] Certain telegraph companies were the only entities authorized to receive and distribute the CBOT's quotations, pursuant to an agreement that they not furnish the quotations to ''bucket shops.'' The defendants did not receive the quotations through these telegraph companies. 198 U.S. at 245.

[56] *Id.* at 250.

quotations, the Court focused on the nature of market information: ''Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough.'' [57]

The holding in *Christie* was reaffirmed two years later in *Hunt* v. *New York Cotton Exchange*.[58] In upholding an injunction enjoining the defendant from receiving and using exchange quotations of sales from an authorized telegraph company, the Court, citing *Christie*, stated that ''[i]t is established that the quotations are property and are entitled to the protection of the law'' and that ''the exchange may keep them to itself or communicate them to others.'' [59]

The major exchanges relied on the ticker cases to assert proprietary rights in their market information and to defend those rights vigorously. In a letter commenting on Commission proposals to require dissemination of consolidated market information, Amex stated its position as follows:

> We believe it is questionable whether the SEC has proceeded properly in proposing these Rules and we have attached, as Appendix A, a legal opinion which discusses this matter. It is long-standing and clearly established legally that the Exchange has a proprietary right in its transaction data and quotation information. It is not clear from the terms of the proposed Rules whether or to the extent to which they might impinge on the Exchange's right.[60]

The NYSE, which operated the largest market, had exercised its proprietary right to control its information by placing severe restrictions on public access to its quotations:

> It has always been the position of the Exchange that NYSE bid-asked quotations on a continuous basis are a prerogative of Exchange membership. Since 1928, when bid-asked quotations were first made available outside the Exchange, they have always been supplied only to the offices of members and member organizations pursuant to written agreements containing the same type of provisions as are included in last-sale agreements.[61]

In sum, market information, to the extent it was disseminated, was not consolidated, and the largest market refused to provide public access to its quotations. It was against this backdrop that the Commission took the first steps towards creating a central market system.

2. Initiation of a Central Market Structure

Recognizing that the public needed greater access to higher quality market information, the Commission focused on two objectives for market information in a series of statements on the future structure of the securities markets: Unrestricted public access and consolidated information. These objectives were embodied in the concept of a central market system, which the Commission endorsed in a letter transmitting the Institutional Investor Study Report to Congress in 1971.[62] In the letter, the Commission stated that a ''major goal and ideal of the securities markets and the securities industry has been the creation of a strong central market system for securities of national importance, in which all buying and selling interest in these securities could participate and be represented under a competitive regime.'' [63] In February 1972, the Commission issued its Statement on the Future Structure of the Securities Markets, which emphasized that ''an essential step toward formation of a central market system is to make information on prices, volume, and quotes for all securities in all markets available to all investors'' and that ''(s)uch a communications system would thus serve to link the now scattered markets for listed securities.'' [64]

The first steps toward practical implementation of a central market system were taken in 1972 when the Commission proposed rules to provide for the consolidated reporting of transactions and quotations.[65] In response to these proposals, the NYSE and Amex raised objections to the Commission's authority under the Exchange Act. For example, the NYSE made the following assertion with respect to the Commission's authority to adopt the quotations rule:

> To deprive or reduce the valuable property interest of the Exchange in its quotations is not only beyond the authority of the SEC under sections 17(a) and 23(a) of the Securities Exchange Act, but, furthermore, such action would deprive the Exchange of property in violation of the due process provisions of the Constitution of the United States.[66]

Despite these objections, the Commission was determined to achieve the goals of public access to consolidated market information. It did not believe, however, that this objective was incompatible with allowing the exchanges to charge reasonable fees for such information. For example, with respect to the transaction reporting rule, the Commission clarified that the ''imposition by self-regulatory organizations and vendors of reasonable, uniform charges for distribution of (transaction reports) in connection with compliance with the Rule will be permitted.'' [67] The Commission also emphasized that it was the SROs who should be primarily responsible for disseminating consolidated information: ''(B)ecause of their unique role in the statutory scheme, including their obligation to enforce the federal securities laws subject to the Commission's review, (the SROs) are the most appropriate bodies to collect, process and make available consolidated, real-time quotation data.'' [68]

In early 1975, the Commission sent letters to the national securities exchanges requesting that they eliminate any rules or practices that restricted access to or use of any quotation information disseminated by the exchange. The Commission's request emphasized the importance of wide public access:

> (Q)uotation information is of significant value to the market place as a whole insofar as a quotation reflects the considered judgment of a market professional as to various factors affecting the market, including the current price levels and size of buying and selling interest. Thus, restrictions on dissemination of that information detract from the efficiency of the market place in reflecting all available fundamental and market information respecting an issuer's securities.[69]

Just prior to enactment of the 1975 Amendments, the Commission announced that the exchanges had

[57] *Id.* at 251.

[58] 205 U.S. 322 (1907).

[59] *Id.* at 333, 336.

[60] Letter from Paul Kolton, President, Amex, to Ronald F. Hunt, Secretary, SEC, dated May 22, 1972.

[61] *See* NYSE Letter, note 53 above.

[62] SEC, Institutional Investor Study Report, H.R. Doc. No. 92–64, 92d Cong., 1st Sess. (1971).

[63] *Id.* at xxiv.

[64] Statement of the Securities and Exchange Commission on the Future Structure of the Securities Markets (February 2, 1972), 37 FR 5286.

[65] Securities Exchange Act Release No. 9529 (March 8, 1972), 37 FR 5760 (proposing Rule 17a–14 for quotation dissemination); Securities Exchange Act Release No. 9530 (March 8, 1972), 37 FR 5761 (proposing Rule 17a–15 for transaction reporting).

[66] NYSE Letter, note 53 above.

[67] Securities Exchange Act Release No. 9731 (August 14, 1972) (reproposing the transaction reporting rule).

[68] Securities Exchange Act Release No. 10969 (August 14, 1974), 39 FR 31920 (reproposing the quotation dissemination rule).

[69] Securities Exchange Act Release No. 11288 (March 11, 1975), 40 FR 15015. In making this request, however, the Commission stated that it did ''not view as a restriction reasonable charges for providing access to, or permitting use of, quotation information.'' *Id.* at n. 8.

complied with the Commission's request and that, as a consequence, vendors could disseminate quotation information ''to any subscriber for any purpose, subject only to compliance with such procedures as disseminating exchanges have established, or may in the future establish, to provide for the collection of reasonable exchange charges for such information.'' [70] In this regard, revenues derived from market information fees already were an important source of SRO funding. In 1975, for example, market information revenues represented 14.7% of the NYSE's total revenues and 28.2% of the Amex's total revenues.[71]

B. The 1975 Amendments

With the enactment of the 1975 Amendments, Congress left no doubt that the Commission was statutorily authorized to oversee the establishment of a national market system for securities. Consistent with the central market approach initiated by the Commission, the two ''paramount objectives'' of the national market system were to be ''the maintenance of stable and orderly markets'' and ''the centralization of all buying and selling interest so that each investor will have the opportunity for the best possible execution of his order, regardless of where in the system it originates.'' [72] To achieve these objectives, Congress recognized that ''communication systems, particularly those designed to provide automated dissemination of last sale and quotation information with respect to securities, will form the heart of the national market system.'' [73] Rather than attempt to dictate the specific elements of a national market system, however, Congress chose to rely on an ''approach designed to provide maximum flexibility to the Commission and the securities industry in giving specific content to the general concept of the national market system.'' [74]

Congress implemented this approach by adding section 11A to the Exchange Act. Section 11A(a) directs the Commission to facilitate the establishment of a national market system in accordance with specific congressional findings and objectives. Among these findings were that new data processing and communications techniques created the opportunity for more efficient and effective market operations, and that the linking of all markets through such data processing and communications facilities would increase the information available to broker-dealers and investors. The objectives set forth in section 11A(a) to guide the Commission in its oversight of the national market system were to assure (1) economically efficient execution of securities transactions, (2) fair competition among broker-dealers, among exchange markets, and between exchange markets and markets other than exchange markets, (3) the availability to broker-dealers and investors of market information, (4) the practicability of brokers executing investors' orders in the best market, and (5) an opportunity for investors' orders to be executed without the participation of a dealer.

Although it intended to rely on competitive forces to the greatest extent possible to shape the national market system, Congress also recognized that the Commission would need ample authority to achieve the goal of providing investors and broker-dealers with a central source of consolidated market information:

> The conferees expect, however, in those situations where competition may not be sufficient, such as the creation of a composite quotation system or a consolidated transactional reporting system, the Commission will use the powers granted to it in this bill to act promptly and effectively to insure that the essential mechanisms of an integrated secondary trading system are put in place as rapidly as possible.[75]

Accordingly, Congress granted the Commission ''pervasive rulemaking power to regulate securities communications systems.'' [76]

Congress was particularly concerned about entities that would be exclusive processors of market information for the SROs. It noted that any such processor would be ''in effect, a public utility, and thus it must function in a manner which is absolutely neutral with respect to all market centers, all market makers, and all private firms.'' [77] Section 11A was intended to ''grant the SEC broad powers over any exclusive processor and impose on that agency a responsibility to assure the processor's neutrality and the reasonableness of its charges in practice as well as in concept.'' [78]

Section 11A(b)(1) requires registration with the Commission of any SIP that is an exclusive processor. An ''exclusive processor'' is defined in section 3(a)(22)(B) as any SIP or SRO that, directly or indirectly, engages on an exclusive basis in collecting, processing, or distributing the market information of an SRO. If a registered SIP limits the access of any person to its services, section 11A(b)(5) provides for Commission review of the limitation. The Commission may uphold the limitation on access if it is consistent with the Exchange Act and the rules thereunder and the person subject to the prohibition or limitation has not been discriminated against unfairly. If the Commission cannot make this finding or if the prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, the Commission must set aside the limitation.

Although an SRO is excluded from the definition of a SIP in section 3(a)(22)(A) and therefore is not required to register under section 11A(b), Congress specifically included within the definition of ''exclusive processor'' in section 3(a)(22)(B) any SRO that acted ''on its own behalf'' in performing these functions. Moreover, the legislative history of this section indicates a congressional intention that SROs acting as exclusive processors be regulated ''in the same manner and to the same extent'' as SIPs that are registered under section 11A(b).[79]

Section 11A(c)(1) specifies the Commission's rulemaking authority over market information. In addition to assuring that exclusive processors make their market information available to SIPs on terms that are ''fair and reasonable'' (subparagraph C) and that all persons have access to information on terms that are ''not unreasonably discriminatory'' (subparagraph D), the Commission is directed to prevent deceptive or fraudulent information (subparagraph A), to assure the prompt, accurate, reliable, and fair dissemination of market information and that the form and content of information was fair and useful (subparagraph B), to assure that all broker-dealers transmitted orders in a manner consistent with the establishment of a national market system (subparagraph E), and to assure equal regulation of all markets and broker-dealers effecting transactions in national market system securities (subparagraph F).[80]

[70] Securities Exchange Act Release No. 11406 (May 7, 1975).

[71] NYSE, *1975 Annual Report* 16; Amex, *1975 Annual Report* 14.

[72] S. Rep. No. 94–75, 94th Cong., 1st Sess. 7 (1975) (''Senate Report'').

[73] H.R. Rep. No. 94–229, 94th Cong., 1st Sess. 93 (1975) (''Conference Report'').

[74] *Id.* at 92.

[75] *Id.*

[76] *Id.* at 93.

[77] Senate Report, note 72 above, at 11.

[78] *Id.* at 12.

[79] *Id.* at 10.

[80] Congress explicitly defined ''equal regulation'' in the Exchange Act in terms of the effect of regulation on competition. Section 3(a)(36) provides

Continued

Finally, Congress addressed the issue of funding for national market system facilities. Sections 6(b)(4) and 15A(b)(5) require that the rules of a national securities exchange or national securities association ''provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using'' the exchange's or association's facilities. The legislative history of this provision indicates Congress' intent that the fees collected from all persons using an SRO's facilities could appropriately be directed to funding the ''costs associated with the development and operation of a national market system.'' [81]

In summary, Congress granted the Commission broad flexibility in the 1975 Amendments in determining whether the fees charged by an exclusive processor for market information are ''fair and reasonable,'' ''not unreasonably discriminatory,'' and an ''equitable allocation'' of reasonable fees among persons who use an SRO's facilities. The most important objectives for the Commission to consider in evaluating fees are to assure (1) the wide availability of market information, (2) the neutrality of fees among markets, vendors, broker-dealers, and users, (3) the quality of market information—its integrity, reliability, and accuracy, and (4) fair competition and equal regulation among markets and broker-dealers.

C. Commission's Review of Market Information Fees

The Commission most often has reviewed market information fees as proposed rule changes by the NASD under Section 19(b) and by the Plans under Rule 11Aa3–2(c). In this context, the Commission has relied to a great extent on the ability of the SROs and Plans to negotiate fees that are acceptable to SRO members, information vendors, investors, and other interested parties. This approach was adopted soon after the 1975 Amendments were enacted. For example, the 1978 Commission release adopting Rule 11Ac1–1, which requires the dissemination of quotations by SROs, addressed a dispute between the SROs and vendors concerning fees for quotation information.[82] The release states that ''[t]he Commission expects that the vendors and self-regulatory organizations will resolve these matters satisfactorily without Commission intervention prior to the effective date of the Rule. However, the Commission will monitor the progress of these discussions to assure that compliance with the Rule and the other provisions of the Act are achieved and will take appropriate action if necessary.'' [83]

As a means to arrive at fair and reasonable fees, the negotiation process is buttressed by the public notice and comment procedures that accompany proposed rule changes. If negotiations do not lead to a mutually acceptable fee, interested parties know that they will have an opportunity to submit their views on proposed fees directly to the Commission. In this regard, it bears noting that no comments were submitted to the Commission in 1995 when the NASD proposed to establish a per-query fee of one cent as an alternative to its monthly fee for nonprofessional subscribers, which was then $4 per month.[84] Similarly, no comments were submitted to the Commission in 1996 when OPRA proposed to establish a similar per-query fee of two cents.[85] It was not until October 1997, when the CTA proposed to establish a per-query fee of one cent as a permanent part of its fee schedule,[86] that the Commission received comments opposing the amount of these per-query fees. The negative comments focused attention on the fees applicable to retail investors, which was one of the important factors that led the Commission to undertake its comprehensive review of market information fees. As discussed in section V below, the Commission is considering whether there are ways to enhance the participation of interested parties in the fee-setting process.

In addition to commenting on proposed rule changes, vendors or subscribers who believe that a fee is high enough to constitute an unjustifiable limitation of their access to market information may, under section 11A(b)(5), apply to the Commission to institute proceedings to review the fee. The Commission has addressed market information fees in this context on two occasions. The first involved OPRA and several information vendors; the second involved the NASD and Institutional Networks Corporation (''Instinet''). These proceedings are discussed next.

1. OPRA Order

In 1978, the Commission issued an order addressing OPRA's decision to impose an access fee on information vendors (''OPRA Order'').[87] OPRA's justification for the proposed fee was to recoup the costs of developing and operating its new high speed consolidated options reporting system. The vendors challenged OPRA's statutory authority to impose an access fee, but the Commission decided that the language of Sections 11A(b)(3), 11A(b)(5), and 11A(c) ''indicates that a registered securities information processor is permitted to impose terms of access on vendors, including access fees.'' The Commission specifically declined, however, to evaluate the amount of the fee:

> The Commission's determination here is limited solely to a finding that the Act permits some form of an access fee to be charged by OPRA, in its capacity as a registered securities information processor. It does not address whether the costs incorporated by OPRA into the access fee represent limitations on access which are permitted under the Act, or whether the level of the fee charged by OPRA is reasonable.'' [88]

Thus, the OPRA Order indicates that costs are a relevant factor in determining the reasonableness of a fee for market information, but goes no further.

2. Instinet Order

In 1984, the Commission evaluated a market information fee in a limitation of access proceeding involving the NASD and Instinet. The Commission issued an order finding that a proposed NASD fee for quotation information represented an unwarranted denial of access, primarily because the NASD had failed to submit an adequate cost-based justification for its proposed fee (''Instinet Order'').[89] The Commission repeatedly emphasized, however, that the scope of its decision was limited to the particular competitive situation presented in the proceedings.

The NASD was not simply charging a fee for a stream of basic market information and then allowing vendors to provide that information to subscribers in whatever form they chose. Rather, the NASD also was in the

that a ''class of persons or markets is subject to 'equal regulation' if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under this title which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this title.'' The legislative history of this section emphasizes that equal regulation ''is a competitive concept intended to guide the Commission in its oversight and regulation of the trading markets and the conduct of the Securities industry.'' *Id.* at 94.

[81] Conference Report, note 73 above, at 92.

[82] Securities Exchange Act Release No. 14415 (January 26, 1978), 43 FR 4342.

[83] *Id.*

[84] Securities Exchange Act Release No. 35721 (May 16, 1995), 60 FR 27148.

[85] Securities Exchange Act Release No. 37686 (September 16, 1996), 61 FR 49801.

[86] Securities Exchange Act Release No. 39235 (October 14, 1997), 62 FR 54886.

[87] *In the Matter of Bunker Ramo Corp., GTE Information Systems, Inc., and Options Price Reporting Authority,* Securities Exchange Act Release No. 15372 (November 29, 1978).

[88] *Id.*

[89] Securities Exchange Act Release No. 20874 (April 17, 1984), 49 FR 17640.

business of providing enhanced information products to its own direct subscribers. Under these circumstances, the fees that the NASD charged to vendors could directly and substantially affect the ability of these vendors to compete in the market for providing enhanced information.[90] The Commission found that the requirement of section 11A(b)(5)(B)—that a limitation on access ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes'' of the Exchange Act—could be satisfied only if the fee was strictly limited to the NASD's costs of providing the information to vendors:

> [B]ecause Instinet seeks to distribute certain NASDAQ quotation information in competition with the NASD, which is an exclusive processor of that information, the proposed fees must be cost-based and calculated by allocating the percentage of system use of each quotation service offered by the NASD (''functional analysis''), to ensure the neutrality and reasonableness of the NASD's charges to Instinet and its subscribers.[91]

The Commission also emphasized, however, that it was the peculiar competitive context of the proceedings that led to its decision to require a strict, cost-based justification. It specifically distinguished fees for services that the NASD did *not* provide in competition with vendors:

> When the Commission approved the current NASDAQ fee schedule, it was addressing a situation markedly different from the situation in the current case. * * * In instances such as Level 1 service, the NASD has no incentive to establish fees that would influence a subscriber's choice of particular vendors from which to receive the service; because the NASD does not market the service on a retail level, it theoretically is immaterial to the NASD from whom particular subscribers receive the data. *In such cases, it well may be appropriate for the NASD to have a limited amount of flexibility in determining how to base its fees,* although all NASD fees must be consistent with the Act.[92]

The Instinet Order was affirmed in *National Assoc. of Securities Dealers, Inc.* v. *SEC.*[93] The court agreed with the Commission's analysis of the competitive context of the NASD's proposed fee: ''Had the Commission approved NASD's value-of-service fee proposal, Instinet's subscribers effectively would have been required to pay NASD retail rates for a wholesale service.''[94] Although it recognized that strict cost allocation was a difficult task, the court affirmed the Commission's view that a such an approach was necessary given the NASD's competitive position in relation to Instinet:

> Avoidance of cross-subsidization of services is a legitimate, non-arbitrary reason for requiring difficult cost allocations. * * * If permitted such a subsidy, NASD would have been given an unfair competitive edge over Instinet in a market in which NASD already had the advantage of its former monopoly position. We find these reasons sufficient to support the Commission's decision to require NASD to make an admittedly difficult and imprecise cost allocation.[95]

The practical difficulties of implementing this strict, cost-of-service approach are demonstrated by the subsequent history of the fee involved in the Instinet Order (later named the ''NQDS'' fee). In August 1985, the NASD proposed a revised fee of $79 per month.[96] The Commission did not approve this proposal, but instead instituted proceedings to determine whether it should be disapproved, based primarily on the question whether the fee included some costs that were inconsistent with the Instinet Order.[97] In September 1986, the NASD proposed another NQDS fee of $50.75 per month.[98] This proposal was supported by an extensive and complex ratemaking analysis. It included a comprehensive allocation of costs to pools consisting of six resources[99] and eleven services.[100] The major categories of costs were summarized as (1) operational costs, which were allocated to the six resource pools based on identifiable personnel, equipment, and physical facilities dedicated to those operations, (2) systems and product/service development costs, which were allocated to the six resource cost pools based on the historical or anticipated level of effort to be devoted to the respective resources, (3) overhead and general and administrative costs, which were allocated directly to resource and service cost pools to the extent that a causal relationship existed between those resources or services and the incurrence of the affected costs, and (4) residual overhead and general and administrative costs, which were allocated to resource and service cost pools based on the total cost input base.

The Commission had not acted on this proposal when the NASD, in July 1990, proposed yet another NQDS fee of $50 per month.[101] This fee, however, included last sale information in addition to quotation information. The Commission approved the fee in October 1990.[102] Notably, the Commission did not undertake any cost-based explanation of the $50 fee, nor did it express any opinion on the extensive cost-of-service analysis that had been included in the NASD's September 1988 proposal. Instead, it noted that, ''in reviewing the fairness and reasonableness of the proposal, the Commission finds it significant that the proposed fee of $50 is the result of negotiations among the concerned parties after protracted proceedings.''[103] The $50 fee approved for NQDS information in 1990 has remained unchanged up to the present.

IV. SRO Financial Structures and the Cost of Market Information

The financial structures of the individual SROs have not resulted from the imposition of any single blueprint for what an SRO should be. Rather, the current structure of each SRO is a result of its particular history and competitive position. Each SRO is, to a great extent, unique. For this reason, generalizations about the SROs are as apt to gloss over important differences as they are to highlight similarities. Nevertheless, important similarities do exist, particularly between the two largest SROs—the NYSE and NASD—which perform all of the self-regulatory functions, have the broadest access to the different sources of SRO funding, and therefore have the most complex cost structures. This section first will outline the various Exchange Act functions performed by the SROs and analyze their financial structures. It then will discuss the cost of market information in light of this analysis.

[90] The NASD provided its most basic quotation service, Nasdaq Level 1 (which included only the best bid and offer), solely through vendors. In contrast, it provided its enhanced Nasdaq Level 2 service (which included a full montage showing each market maker and its quotations) directly to subscribers. Instinet also wanted to participate in the market for providing the full montage to subscribers. The NASD had proposed to charge Instinet's subscribers a fee based on the fee it charged its own subscribers, thereby charging a retail price to a competitor in the wholesale market.

[91] *Id.*

[92] *Id.* (emphasis added).

[93] 801 F.2d 1415 (D.C. Cir. 1986).

[94] 801 F.2d at 1419.

[95] 801 F.2d at 1420–1421.

[96] Securities Exchange Act Release No. 22376 (August 30, 1985), 50 FR 36692.

[97] Securities Exchange Act Release No. 22935 (February 21, 1986), 51 FR 6957.

[98] Securities Exchange Act Release No. 26119 (September 27, 1988), 53 FR 39002.

[99] The six resources were (1) network/communications—2400-baud lines, (2) network/communications—9600-baud lines, (3) UNISYS processor, (4) Tandem processor, (5) UNISYS data storage, and (6) Tandem data storage.

[100] The eleven services were (1) Level 1, (2) Last Sale, (3) Level 2/3, (4) NQDS, (5) SOES, (6) TARS/MBARS, (7) CAES, (8) CTCI, (9) Mutual Funds, (10) NASDAQ/NMS Ticker, and (11) ACES.

[101] Securities Exchange Act Release No. 28200 (July 12, 1990), 55 FR 29446.

[102] Securities Exchange Act Release No. 28539 (October 15, 1990), 55 FR 42796.

[103] *Id.*

A. Exchange Act Functions of the SROs

Ever since the Exchange Act was enacted in 1934, self-regulation by the securities industry has been an essential component of its regulatory scheme for providing fair and orderly markets and protecting investors. The Exchange Act itself, as well as the Commission's rules and automation review policies thereunder, impose on the SROs a host of regulatory and operational responsibilities, including most of the day-to-day responsibilities for market and broker-dealer oversight. Meeting these self-regulatory responsibilities requires an enormous expenditure of expertise and funds, as evidenced in part by the fact that the SROs' combined total expenses in 1998 were $1.68 billion.[104]

Sparing the federal government much of the burden of securities regulation was one of the primary reasons that Congress incorporated industry self-regulation into the Exchange Act. For example, when Congress amended the Exchange Act in 1938 to extend the self-regulatory regime to the over-the-counter market, it noted that an approach relying solely on government regulation ''would involve a pronounced expansion of the organization of the Securities and Exchange Commission; the multiplication of branch offices; a large increase in the expenditure of public funds; an increase in the problem of avoiding the evils of bureaucracy; and a minute, detailed, and rigid regulation of business conduct by law.'' [105]

Rather than adopt this purely governmental approach, Congress determined that it was ''distinctly preferable'' to rely on ''cooperative regulation, in which the task will be largely performed by representative organizations of investment bankers, dealers, and brokers, with the Government exercising appropriate supervision in the public interest, and exercising supplementary powers of direct regulation.'' [106] Similarly, the legislative history of the 1975 Amendments noted that a principal reason for adopting a self-regulatory regime was the ''sheer ineffectiveness of attempting to assure (regulation) directly through the government on a wide scale.'' [107] Although the SROs had not always performed their role up to expectations, Congress believed that the self-regulation generally had worked well and ''should be preserved and strengthened.'' [108] In sum, the fees that enable the SROs to fulfill their self-regulatory functions play an essential role in the Exchange Act regulatory scheme.

These functions can be divided into the following four categories: market operation, market regulation, listing, and member regulation, which are described briefly below.

1. *Market Operation.* Each of the SROs is associated with a particular market that it is responsible for operating in accordance with the requirements of the Exchange Act. These include, for example, the requirements in section 6(b)(5) that the rules of a national securities exchange be designed ''to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' ''to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.'' To meet these statutory requirements, the SROs must establish and staff the physical locations and/or technological systems that are necessary for a stable and orderly market. In this regard, the Commission has promulgated two releases establishing automation review policies for the SROs to meet on a voluntary basis (''ARP Releases'').[109] Among other things, the ARP Releases recommend that each SRO produce estimates of future capacity needs, establish back-up protocols to deal with system problems, implement quality assurance and stress testing of its systems, and have in place a process for detecting and controlling internal and external threats to its systems. Meeting these stringent requirements is particularly important for the primary markets that must be able to operate smoothly on even the highest volume trading days.

2. *Market Regulation.* The SROs are responsible for promulgating rules that govern trading in their markets; establishing the necessary systems and procedures to monitor such trading; and identifying instances of suspicious trading, such as potential insider trading, market manipulation, or any other violations of the Exchange Act, the rules thereunder, or SRO rules. If an SRO identifies potential misconduct involving persons or entities that are within its jurisdiction, the SRO is responsible for conducting a further investigation and bringing a disciplinary action when appropriate. For potential misconduct outside its jurisdiction, an SRO is responsible for making referrals to the Commission or other appropriate agencies and assisting these agencies in their investigations.

3. *Listing.* The SROs promulgate and administer listing standards that govern the securities that may be traded in their markets. For corporate securities, these rules include minimum financial qualifications and reporting requirements for their issuers. The SROs are responsible for monitoring issuers and delisting the securities of those that fail to meet these minimum requirements. Obtaining a listing on an SRO market provides corporate issuers with the assurance of a well-operated and well-regulated trading market for their securities, as well as enhanced visibility and prestige in the eyes of investors. An active market for secondary trading in a corporation's securities benefits not only its shareholders, but also the corporation itself through enhanced capital-raising capacities. In addition to corporate securities, the SROs list a variety of derivative securities, such as equity options and index-based products.

4. *Member Regulation.* The SROs are responsible for promulgating and enforcing rules that govern all aspects of their members' securities business, including their financial condition, operational capabilities, sales practices, and the qualifications of their personnel. In fulfilling this function, the SROs conduct examinations on the premises of their members, monitor financial and other operational reports, and investigate potential violations of rules and bring disciplinary proceedings when appropriate. Many broker-dealers are members of more than one SRO,[110] and therefore the regulatory responsibilities for these firms, such as examinations of their financial and operational condition, have been allocated to a single SRO in accordance with section 17(d) of the Exchange Act and the rules thereunder.

B. SRO Financial Structures

1. Sources of Funding

There are four major categories of services provided by SROs for which they charge the fees that fund their

[104] *See* Tables 9 through 17 in the Appendix.

[105] S. Rep. No. 1455, 75th Cong., 3d Sess. 3 (1938).

[106] *Id.* at 4.

[107] Senate Report, note 72 above, at 22.

[108] *Id.* at 23.

[109] Securities Exchange Act Release No. 29185 (May 9, 1991), 56 FR 22490; Securities Exchange Act Release No. 27445 (Nov. 16, 1989), 54 FR 48703.

[110] Section 15(b)(9) of the Exchange Act requires all broker-dealers to become members of a national securities association unless they limit their activities to effecting transactions in securities solely on a national securities exchange of which they are a member. As a result, all broker-dealers doing a public business currently must become members of the NASD, as well as of the exchanges on which they conduct business.

operations. These categories are (1) regulatory fees and assessments, which are paid by an SRO's members, (2) transaction services fees, which are paid by anyone who uses an SRO's facilities for executing, reporting, and clearing transactions, (3) listing fees, which are paid by corporate issuers, and (4) market information fees, which are paid by all those who use or distribute the financial information disseminated by the SROs, including information vendors, broker-dealers, institutional investors, retail investors, the options and futures markets, and others.

The amounts and the percentages of total SRO funding provided from these sources are set forth in the following table:

1998 SRO SOURCES OF FUNDING

$ millions (% of SRO Total)

	Regulatory	Transaction	Listing	Market Info	Other	SRO Total
NYSE	100.5 (14)	165.7 (23)	296.0 (41)	111.5 (15)	55.0 (7)	$728.7
NASD	234.0 (33)	126.9 (18)	137.3 (20)	152.3 (22)	49.3 (7)	699.8
Amex	17.7 (8)	91.9 (41)	16.3 (7)	82.9 (37)	15.2 (7)	224.0
CBOE	19.7 (15)	84.6 (67)	0.0 (0)	17.5 (14)	4.7 (4)	126.5
PCX	3.0 (4)	53.8 (71)	2.0 (3)	12.9 (17)	5.3 (7)	77.0
CHX	0.0 (0)	24.7 (54)	0.0 (0)	20.0 (44)	1.1 (2)	45.8
Phlx	0.0 (0)	30.2 (69)	0.0 (0)	7.1 (16)	6.4 (15)	43.7
BSE	2.5 (13)	10.4 (57)	0.8 (4)	3.8 (21)	0.9 (5)	18.4
CSE	0.5 (8)	2.6 (45)	0.0 (0)	2.6 (45)	0.1 (2)	5.8
$ Total	377.9 (19)	590.8 (30)	452.4 (23)	410.6 (21)	138.0 (8)	1969.7

Individual SROs vary widely in the extent to which they perform each of the four SRO functions and rely on the four sources of funding. As a cumulative matter, however, they received 21% ($410.6 million) of their funding from market information fees in 1998. This percentage has remained remarkably consistent, despite the rapid growth in market data revenues in recent years. For example, market information revenues provided the SROs with 20% ($246.1 million) of their funding in 1994. In addition, the reliance on market information revenues by two of the major equity markets—the NYSE and Amex—has remained relatively consistent ever since the national market system was created in the 1970's.[111] The major exception is the NASD, which was a relatively small organization and had no market information revenues in the 1970's. With the expansion of the Nasdaq market, however, the NASD now is one of the two largest SROs and receives 22% of its funding from market information revenues.

The NYSE historically has operated and regulated one of the largest and most prestigious markets in the world and has, as well, taken a leading role in the regulation of its members, which include most of the largest broker-dealers. Consistent with its broad responsibilities, the NYSE receives substantial revenues from each of the four sources of funding. In particular, the NYSE's revenues from listing fees in 1998 ($296 million) represented 41% of its total revenues and were more than double the listing revenues of all the other SROs combined. The NYSE's substantial responsibilities for regulating its members are reflected by its more than $100.5 million in revenues from regulatory fees. It also received $165.7 million from transaction services fees (classified as ''trading fees'' and ''facility and equipment fees'' in Table 9 in the Appendix) and $111.5 million from market information fees.

The NASD started from a substantially different position than the NYSE, but has grown so rapidly in the last decade that its revenues now are comparable to the NYSE's. The NASD began as a membership organization for broker-dealers conducting business in the over-the-counter markets. With the dramatic expansion of the Nasdaq market, however, the NASD now performs all of the four SRO functions to a large extent and is funded accordingly. Nevertheless, its origins are demonstrated by the fact that it received by far the largest amount of funding in 1998 from regulatory fees ($234.0 million, classified as ''member assessments,'' ''registration and qualification fees,'' ''regulatory fees and fines,'' and ''corporate finance fees'' in Table 10 in the Appendix). The prestige of the Nasdaq market is reflected by the NASD's $137.3 million in issuer listing fees. The NASD also received a larger amount of revenues from market information fees ($152.3 million) than any of the other SROs, which was bolstered by its $22.2 million in distributions from Network A and Network B for transactions in listed securities. Finally, the NASD received $126.9 million in revenues from transaction services fees.

The other SROs differ from the NYSE and NASD in three principal respects: (1) their markets generate much less trading volume, (2) they derive only a small portion of their revenues from listing fees, and (3) they are less involved in member regulation, which results in much lower revenues derived from regulatory fees. The result is that each of the SROs other than the NYSE and NASD derives a much higher percentage of its revenues from a combination of transaction service fees and market information fees.

2. Internal Cost Structures

The SROs' revenues are derived from discrete categories of fees that are disclosed separately on their financial statements. Their internal cost structures, in contrast, are much less transparent. Generally accepted accounting principles ordinarily do not require an entity to disclose an internal break-down of its costs according to business functions.[112] Consequently, most of the SROs' financial statements do not disclose the amount of costs that are associated with their respective functions or that support the various

[111] *See, e.g.*, SEC, *46th Annual Report* 110–111 (1980) (setting forth total revenues and market information revenues (then labeled ''communication revenues'') for each of the SROs from 1975 to 1979).

[112] The principal exception is SFAS No. 131, ''Disclosures About Segments of an Enterprise and Related Information.'' As discussed further below, the NASD has provided, pursuant to this accounting standard, the fullest disclosure of its internal cost structure of all the SROs. The notes to the NASD's 1998 consolidated financial statements provide disclosure of financial information for its NASD Regulation and Nasdaq-Amex business segments.

services they provide.[113] The SROs' financial statements do indicate, however, that a substantial majority of their costs relate to personnel and technology systems. For example, 74% ($405.6 million) of the NYSE's total operating expenses in 1998 were classified as ''compensation'' and ''systems and related support.'' Similarly, 79% ($491 million) of the NASD's total operating expenses in 1998 related to ''compensation,'' ''professional and contract services,'' and ''computer operation and data communications.'' The financial statements of the other SROs are similar in this respect.

In addition, while SRO total expenses have grown rapidly in recent years, from $1.05 billion in 1994 to $1.68 billion in 1998 for an increase of 60%, they have not kept pace with the growth in securities industry costs in general. For example, the total expenses of the U.S. securities industry, as represented by NYSE members doing a public business, grew from $70.2 billion in 1994 to $161.0 billion in 1998, for an increase of 129%.[114] Similarly, the percentage growth in the SROs' market data revenues (67%) and total revenues (64%) since 1994 has not kept pace with the percentage growth in the securities industry's total revenues (139%).[115] Finally, the SROs' market information revenues represent a very small portion of the securities industry's total expenses—less than one-quarter of one percent in 1998.[116]

The principal exception to the general unavailability of information about internal SRO cost structures is the NASD. Thus far, the NASD is the only SRO that has divided its regulatory and operational functions into separate subsidiaries, NASD Regulation, Inc. and Nasdaq.[117] The respective functions of NASD Regulation and Nasdaq are specified in the NASD's ''Plan of Allocation and Delegation of Functions by NASD to Subsidiaries.'' For the most part, all of the regulatory functions of the NASD, including both market and member regulation, are delegated to NASD Regulation, while the market operation and listing functions are allocated to Nasdaq.[118]

There are four separate sources of NASD financial information for 1998. First, the NASD issued consolidated financial statements for itself and its subsidiaries, which include NASD Regulation, Nasdaq, and Amex. (November–December 1998 figures for Amex are included in the NASD's 1998 consolidated financial statements). Second, Table 10 in the Appendix sets forth the NASD's revenues and expenses with the Amex figures excluded. Third, note 11 to the NASD's 1998 consolidated financial statements provides segment information for NASD Regulation and Nasdaq-Amex. Finally, the Nasdaq subsidiary is separately registered as a SIP and has filed an annual amendment to its Form SIP for 1998 that includes financial statements for Nasdaq individually. Taken together, these four sources provide a picture of the respective costs associated with the regulatory and operational functions of an SRO.

The internal breakdown of the NASD's revenues and expenses in 1998 is as follows:

1998 NASD SEGMENT INFORMATION (EXCLUDING AMEX)

($ millions)

	NASDR	Nasdaq	All Other	Consolidated
Revenues:				
Regulatory	234.0			
Transaction	.....	126.9		
Listing	.....	137.3		
Market Info	.....	152.3		
Other	23.4	10.0	15.9	.....
Total Revenues	257.4	426.5	15.9	699.8
Expenses:				
Direct Expenses	236.6	264.4	26.0	
NASDR Charge	.....	57.3		
Transfer Pricing	.....	39.6	.....	.....
Total Expenses	236.6	361.3	26.0	623.9
Operating Income before taxes	20.8	65.2	(10.1)	75.9

Nasdaq's revenues are derived primarily from transaction services, corporate listings, and market information fees, and totaled $426.5 million in 1998. Nasdaq's direct expenses totaled $264.3 million. In addition to its direct expenses, Nasdaq's expenses included a ''NASD Regulation Charge'' of $57.3 million and a ''Transfer Pricing'' charge of $39.3 million. The NASD has represented that the NASD Regulation Charge is the amount charged to Nasdaq for market regulation and enforcement services performed by NASD Regulation. Nasdaq's total expenses in 1998 were $361.3 million, leaving it with $65.2

[113] In section V.C below, the Commission requests comment on whether the SROs should be required to provide greater disclosure concerning their internal cost structures.

[114] Securities Industry Association, *1999 Securities Industry Factbook* 43 (1999) (''SIA Factbook''). The Securities Industry Association estimates that the NYSE members doing a public business accounted for approximately 72% of the total revenues of all U.S.-registered broker-dealers. *Id.* at 27.

[115] The SROs' market data revenues were $246.1 million in 1994 and $410.6 million in 1998. The SROs' total revenues were $1.20 billion in 1994 and $1.97 billion in 1998. *See* Tables 9–17 in the Appendix. The securities industry's total revenues were $71.4 billion in 1994 and $170.8 billion in 1998. SIA Factbook at 42.

[116] In addition to broker-dealers, other entities, such as institutional investors and information vendors, provide a portion of total market information revenues.

[117] The NASD did not acquire Amex as a subsidiary until October 30, 1998. Amex therefore has been treated separately from the NASD throughout this release.

[118] Nasdaq has, however, retained some responsibilities for market surveillance in its MarketWatch group.

million in operating income before taxes.

NASD Regulation's revenues totaled $257.4 million and were derived primarily from regulatory fees. Its direct expenses totaled $236.6 million and primarily were attributable to the NASD's member regulation function. NASD Regulation's net operating income before taxes was $20.8 million.

Taken together, the financial statements of the NASD and its subsidiaries reveal the following information about the costs associated with the NASD's respective SRO functions in 1998. Member regulation costs were approximately $236.6 million and were more than covered by $257.4 million in revenues primarily from regulatory fees. Costs associated with the other three SRO functions—market operation, market regulation, and listings—were approximately $361.3 million, of which at least $57.3 was associated with the market regulation function. The combined cost of the three functions was more than covered by $426.5 million in revenues derived almost entirely from transaction services fees, listing fees, and market information fees. In percentage terms, the total costs associated with the market operation, market regulation, and listing functions of Nasdaq were funded 30% by transaction services revenues, 32% by listings revenues, 35% by market information revenues, and 3% by other revenues.

C. The Cost of Market Information

As noted in section III above, Congress did not include a strict, cost-of-service standard in Section 11A of the Exchange Act, opting instead to allow the Commission some flexibility in assessing the fairness and reasonableness of fees. Nevertheless, the 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. This section is intended to provide greater guidance to the SROs, the securities industry in general, and the public concerning the categories of costs that should be considered as part of the cost of market information. With this guidance as a background, the Commission believes that it will be possible to develop a flexible, cost-based approach to market information fees and revenues that both furthers the Exchange Act's national market system objectives and can be implemented in a reasonably efficient manner. Comment is requested on an outline of such an approach in section V.A below.

The first step in determining the cost of market information is to identify, in theory, the categories of costs that are incurred to generate and disseminate market information. The second step is to allocate appropriately the amount of the costs included in these categories, which requires a determination of whether the relevant categories are ''direct costs'' of market information or ''common costs.'' Direct costs (also referred to as incremental, separable, or traceable costs) are incurred only to provide market information and therefore can be allocated entirely to the cost of market information. Common costs, in contrast, are incurred for the provision of services in addition to market information and therefore should be allocated among each of the various services they support.[119] Failing to allocate common costs in this way would improperly inflate the cost of market information.

1. Categories of Market Information Costs

One category of costs directly associated with market information is Plan costs—the expenses incurred by the various processors and administrators of the Networks, acting on behalf of the Networks' SRO participants, to disseminate consolidated information to the public. The Commission believes that Plan costs should be classified as a direct cost and that therefore the entire amount of Plan costs should be allocated to the cost of market information.

Plan costs do not, however, include any of the costs incurred by the individual SROs in generating market information and providing it to the Plan processors. The Commission is considering an approach that would include many of these SRO costs—specifically, the costs of operating and regulating their markets in accordance with Exchange Act requirements—as part of the cost of providing market information to the public. In other words, the information that the SROs provide to the Plan processors would not be considered as cost-free. Before quotations and transaction reports can be delivered to the Plan processors and made available to the public, a market must provide a mechanism for bringing buying and selling interests together in a fair and orderly manner. In addition, the SROs must establish, monitor, and enforce trading rules, as well as otherwise regulate their markets to prevent fraudulent and manipulative acts or practices. The SROs incur substantial costs in performing these functions, and they contribute substantially to the value of the information. Therefore, the Commission is contemplating including these SRO costs as part of the cost of market information for the purpose of determining fair and reasonable fees.

This determination is supported by the language of section 11A of the Exchange Act, in which Congress recognized the direct connection between effective regulation of a market and the value of that market's information. Section 11A(c)(1)(A) grants the Commission rulemaking authority to prevent the use, distribution, or publication of fraudulent, deceptive, or manipulative market information. There is little value in market information that is tainted by fraud, deception, or manipulation.

Similarly, section 11A(c)(1)(B) grants the Commission rulemaking authority to assure the prompt, accurate, reliable and fair collection, processing, distribution, and publication of information with respect to market information, as well as the fairness and usefulness of the form and content of market information. None of these goals will be achieved by a poorly operated market that is prone to systems outages and delays or that does not provide an effective mechanism for bringing buying and selling interests together. In neither case will the public have an accurate picture of the current market for a security. Moreover, in times of significant price volatility and spikes in trading volume, it is critically important that the markets, particularly the major markets operated by the SROs,[120] remain fair and orderly and that investors continue to have access to a timely stream of market information. In Section 11A, Congress recognized this direct connection between the effective

[119] *See, e.g., Principles of Public Utility Rates,* note 48 above, at 118 (''Direct costs are incurred only and entirely for the provision of a particular service.''); Gordon Shillinglaw, ''Economic Concepts in Cost Accounting,'' *in Handbook of Cost Accounting* 4–14 (Sidney Davidson & Roman L. Weil, eds., 1978) (''A common cost is a cost incurred for the support of two or more cost objectives, not traceable to any one of them. Accountants refer to these as indirect costs or, more clearly, as nontraceable costs.'').

[120] Under Exchange Act Rule 3a1–1(b), 17 CFR 240.3a1–1(b), the Commission may require an alternative trading system to register as an exchange if it becomes a major market in any class of securities. In making its determination, the Commission would consider ''the objectives of the national market system under Section 11A.''

operation of a market and the quality of that market's information.

The Commission does not believe, however, that the cost of *member* regulation should be considered as part of the cost of market information. For example, although the financial soundness of broker-dealers is undoubtedly an essential factor in the overall integrity of the markets, the connection between this regulatory function and the quality of market information is much more attenuated than in the case of market operation and market regulation. Instead, an SRO's member regulation costs are more directly associated with the regulatory fees charged to members than with any other source of funding.

Finally, the cost of market information should not include costs that are directly associated with other SRO services (such as an SRO's advertising and marketing expenditures to obtain corporate listings).

In sum, the Commission preliminarily believes that the cost of market information should include, in addition to Plan costs, an appropriate percentage of the costs incurred by individual SROs in operating and regulating their markets.[121] These costs must be borne by the SROs to meet their Exchange Act responsibilities and therefore must be funded in one way or another. If all of these costs were excluded from the cost of market information (and fees were reduced accordingly), the principal consequence would be to force the SROs to rely more heavily on their other sources of funding—transaction fees, listing fees, and regulatory fees. In this regard, it warrants emphasis that *all* of these fees are passed on, directly or indirectly, to investors—the ultimate consumers in the securities industry. The relevant funding issue, therefore, is not whether investors ultimately will pay the costs of effective market operation and market regulation, but how these costs are funded in the first instance and whether the funding furthers the objectives of the Exchange Act.

The Commission believes that market information fees remain an appropriate part of SRO funding. When used along with transaction services fees, listing fees, and regulatory fees, they provide a solid base of financial support for the SROs. Market information fees serve an important and unique role because they provide the broadest source of SRO funding. The fees are paid by all users of market information, including, for example, options and futures market participants that otherwise would not contribute (through transaction services fees or listing fees) to the funding of the particular markets on whose information they rely.

The Commission recognizes that allowing SROs to receive market information revenues to recover part of their market operation costs would provide them with a source of funding not available to other types of entities that also operate markets, particularly alternative trading systems that are regulated as broker-dealers under Regulation ATS. As the Commission noted in the ATS Release, however, alternative trading systems have a choice between either (1) registering as a national securities exchange and accepting the many responsibilities imposed by the Exchange Act on SROs,[122] or (2) registering as a broker-dealer and complying with Regulation ATS. The choice between these two options is complex. The ATS Release compares the many different benefits and costs associated with becoming an SRO and those associated with remaining a broker-dealer.[123] If an alternative trading system believes that the benefits of becoming an SRO (including a share in market information revenues) exceed the costs, it still has the option of registering as an exchange and becoming a participant in the national market system plans.

2. Allocation of Common Costs

Although the costs incurred by the SROs in operating and regulating their markets could be included in the cost of market information, they also support other SRO services and therefore are common costs that must be allocated among these services. In particular, the costs of market operation and market regulation support the SROs' transaction and listing services, in addition to market information services. Transaction services are integrally related to the quality of a market's operation—a poor market will attract few participants. Similarly, the quality of a market and its regulatory protections for investors are among the most important factors influencing a corporate issuer's decision of where to list its securities. Consequently, the SROs' costs of market operation and market regulation must be allocated among the three relevant sources of revenue—listing fees, transaction services fees, and market information fees.

Finding an appropriate basis for allocating common costs, however, is an extremely difficult task. As one court has noted in the ratemaking context, ''(t)he very problem at issue here—allocation of common costs—arises precisely because there is no purely economic method of allocation. In this sense *no* Commission choice among the various [fully distributed cost] methods could be justified solely on economic criteria; elements of fairness and other noneconomic values inevitably enter the analysis of the choice to be made.''[124]

Allocation of the common costs of market information is not an exception to this widely-recognized problem. The Commission is not aware of a purely economic method of allocating the SROs' costs of market operation and market regulation among the SROs' transaction, listing, and market information services. The problem of allocation is exacerbated even further by the fact that an individual SRO often trades many different securities that are not all included in the same Network. Thus, not only must the costs of market information for each SRO be identified and allocated among the SRO's different services, the market information costs of the individual SROs also must be allocated among the different Networks.

In sum, any attempt to calculate the precise cost of market information presents severe practical difficulties. The Commission believes, however, that it may be possible to develop a more flexible, cost-based approach that avoids these practical difficulties, yet also maintains a reasonable connection between the cost of market information and the total amount of revenues derived from market information fees. Comment is requested on an outline of such an approach in section V.A below.

[121] Only a percentage of market operation and market regulation costs should be allocated to the cost of market information because, as discussed below, these costs also are associated with listing and transaction services. The costs therefore are common costs and must be allocated among the three services—listing, transaction, and market information.

[122] National securities exchanges are subject to the Commission's authority under section 11A(a)(3)(B) to require SROs to act jointly in furtherance of a national market system for securities.

[123] *See, e.g.,* ATS Release, note 4 above, Section IX.A *Costs and Benefits of the Rules and Amendments Regarding Alternative Trading Systems.*

[124] *MCI Telecommunications Corp* v. *FCC,* 675 F.2d 408, 415–416 (D.C. Cir. 1982). *See also* Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* 225 (1993) (''Accounting regulation offers little guidance in developing cost allocation methods, since common or joint costs cannot generally be identified with any customer class, specific service or jurisdiction . . . As Justice Douglas has put it: . . . 'Allocation of costs is not a matter for the slide-rule. It involves judgment on a myriad of facts. It has no claim to an exact science.' Stated another way, any cost allocation method involves elements of arbitrariness.'').

V. Requests for Comment

As noted in the Introduction, the Commission is considering whether the arrangements for disseminating market information should be modified in several respects. Its review thus far particularly has indicated the importance of adapting market information fees to the increasing retail investor demand for real-time information and to the changing structure of the securities industry. Prior to taking rulemaking or other action, the Commission believes it will be helpful to provide the public with a full opportunity to comment on issues relating to market information fees and revenues. This section first requests comment on the concept of a flexible, cost-based approach to evaluating the fairness and reasonableness of such fees and revenues. Comment then is requested on a conceptual approach to distributing the Networks' revenues to the individual SROs that could reflect more fully the Exchange Act's national market system objectives. Finally, comment is requested on a variety of issues relating to SRO and Plan disclosures and Plan governance, administration, and oversight. These include whether the Plans and SROs should provide greater public disclosure concerning their fees, revenues, and costs, and whether participation in the process of setting and administering fees should be broadened to include vendors, broker-dealers, and users of market information.

In formulating comments, the public is encouraged to consider the four principal objectives relating to market information set forth in section 11A of the Exchange Act—availability of information, neutrality of fees, quality of information, and fair competition/equal regulation.[125] The role of fees in funding SRO functions also should be considered. In addition, the Commission encourages commenters to consider the extent to which proposals are capable of being implemented in an objective and reasonably efficient manner, particularly given the other uses to which the Commission's resources could be devoted. In the ratemaking context, courts have recognized that ''[i]mplementation is as critical to a policy's success as theoretical design,'' and that it is justifiable for an agency to consider its limited resources in formulating a policy.[126] The Commission's preferred choice for resolving market information issues will be to rely whenever possible on consensus among the SROs, the securities industry, and information users, but to enhance the potential for such a consensus by establishing more objective standards for setting fees and distributing revenues, by providing greater public disclosure of relevant information, and by broadening participation in the fee-setting process.

A. Flexible, Cost-Based Approach to Market Information Fees and Revenues

The Commission is considering the concept of a flexible, cost-based approach for evaluating market information fees and revenues. Rather than require a strict mathematical calculation of costs in every case, this approach would rely, when possible,[127] on more flexible determinations of costs to determine whether fees are fair and reasonable. Costs are relevant to an assessment of fees and revenues in two different contexts. First, the total costs incurred to provide market information are relevant in assessing whether the total revenues derived from market information fees are fair and reasonable. Determining a total amount of revenues for each Network that is fair and reasonable is the issue addressed in section V.A.1 below. Second, costs are relevant in determining whether individual fees are fair and reasonable or unreasonably discriminatory when compared to other fees. Issues relating to specific fees, particularly the fees applicable to professional subscribers and retail investors, are discussed in section V.A.2 below.

1. Cost-Based Limit on Market Information Revenues

Since the enactment of the 1975 Amendments, the Commission has relied primarily on consensus among the SROs and the securities industry to resolve issues concerning market information fees and revenues. The Commission believes, however, that recent changes in the securities markets may require a revised approach that provides greater guidance to the SROs and the rest of the securities industry. Particularly with the potential for a significant number of SROs that are for-profit entities, it appears that closer monitoring of the SROs' funding and internal allocation of resources will be necessary. The principal financial objective of membership organizations has been to recover their operating costs, while their members act as for-profit entities. The advent of for-profit SROs, who will have the financial objective of generating profits for their owners, potentially could result in increased pressure to raise fees and revenues and to cut back on costs not directly associated with a source of revenues. This is not to say that for-profit SROs are inherently unable to meet their Exchange Act responsibilities, but rather that their fees and financial structures may warrant increased oversight by the Commission.

Accordingly, the Commission is considering whether a cost-based limit should be established for the total market information revenues of each Network. In establishing their fee structures, the Networks would be required to adjust the particular fees charged to different categories of vendors and subscribers so that they did not generate a total amount of revenues that would exceed the limit. To implement this type of conceptual approach, the Networks would, at a minimum, need to provide sufficient periodic financial disclosures to demonstrate their compliance with relevant requirements. In section V.C below, comment is requested on issues relating to financial disclosure. In addition, the SROs would be required to file a proposed fee change with the Commission when necessary to maintain compliance with the limit. Comment is requested on whether there should be specific requirements relating to the frequency and timing of proposed fee changes. Finally, the Commission itself could initiate direct action if necessary to assure that the Networks comply with all relevant requirements.

The Commission requests comment on the following broad outline of a conceptual approach for setting a cost-based limit on a Network's total market information revenues. It would involve four steps. First, each SRO would calculate the amount of its direct market information costs. These would include, for example, the Plan costs incurred by processors and administrators of the Networks in performing their Plan responsibilities and any other costs incurred only and entirely for providing market information services.

Second, each SRO would calculate a gross common cost pool made up of the total amount of its costs that are appropriately classified as contributing substantially to the value of market information. The principles guiding such a classification are discussed in section IV.C above. Appropriate categories of costs would include the costs of market operation and market

[125] *See* section III.B above.

[126] *MCI Telecommunications Corp.,* 675 F.2d at 414.

[127] As indicated by the Instinet Order (discussed in section III.C above), there may be some circumstances in which a strict, mathematical calculation of costs will be necessary to assure the fairness and reasonableness of a fee. The subsequent history of the Instinet proceedings also indicates, however, the practical difficulties inherent in such an approach.

regulation, but would not include the costs of member regulation or other direct costs of services other than market information. Comment is requested on whether these categories are sufficiently distinct to provide the basis for a workable internal cost allocation. Comment also is requested on specific types of costs that should, and should not, be classified as substantially contributing to the value of market information.[128]

Third, each SRO would apply a standard allocation percentage to its gross common cost pool to determine its net common cost pool. A percentage allocation is necessary to reflect the fact that these costs are incurred by the SROs not only to provide market information services, but also to provide listing and transaction services. The percentage would be the same for all SROs.[129] It could be derived from the historical experience of the SROs (on average, the SROs appear to fund between 30% and 40% of their market operation and market regulation costs through market information revenues)[130] or based on any other rationale that furthers the national market system objectives of the Exchange Act. Comment is requested on what would be an appropriate standard allocation percentage.

Finally, in the fourth step, it would be necessary for each SRO to allocate its total cost of market information (direct costs plus the net common cost pool) to the various Networks whose securities it trades. This allocation could be done directly (for those costs that can be associated with a particular Network), with the remainder allocated based on the proportion of the SRO's total trading volume represented by a Network's securities. The total amount of the costs allocated to each Network from the individual SROs would represent a limit on the amount of revenues that could be generated by each Network's fees. It bears emphasis here that, under this conceptual approach, separate rules would govern the *distribution* of Network revenues, and therefore an individual SRO would not necessarily recover the amount of its total cost of market information in distributions from the Networks.[131]

The Commission requests comment on all aspects of the concept of setting a cost-based limit on market information revenues. It appears that the conceptual approach outlined above could have three principal benefits. First, it could provide a much closer and more objective link between SRO costs and market information revenues than has been required in the past. Second, it potentially could be implemented in a more efficient manner than a strict, cost-of-service approach that required each SRO to establish a basis for allocating its common costs down to the last dollar. Third, the conceptual approach outlined above could put all the Networks on a more equal footing in terms of the proportion of relevant costs funded by market information revenues, thereby possibly furthering the Exchange Act objective of fair competition. Comment is requested on the advisability and practicality of this approach, including whether a single approach is appropriate for each of the different Networks and for different types of securities. The Commission also would be interested in suggestions for any alternative approaches to setting a fair and reasonable limit on market information revenues.

2. Fairness and Reasonableness of Specific Fees

A Network's fees cannot unreasonably discriminate among markets, vendors, broker-dealers, and users. To achieve this goal, the Commission believes that any disparities in fees should be justified by such legitimate factors as differences in relevant costs or degree of use. In this regard, it is important to recognize that the basic information stream (all of the transaction reports and quotations in a Network's securities) will be the same, and have the same production costs, no matter how many vendors and subscribers receive the information. Although there may be differences in a Network's costs of disseminating information to different categories of vendors and subscribers (such as the costs of administering a fee structure), it is vendors and broker-dealers who, for the most part, bear the costs of receiving the data stream from a Network processor and redisseminating it to individual subscribers. These redissemination costs incurred by parties other than the Networks are not appropriately incorporated into a Network's fee structure.

In addition, individual fees must be evaluated in terms of the national market system objective to assure the wide availability of market information. Accordingly, a Network's fees should not be set at levels that effectively restrict the availability of real-time information. As a theoretical matter, of course, lower prices always will result in greater marginal demand for a product. As a practical matter, however, the relevant Exchange Act question is whether the fees for particular classes of subscribers, given their economic circumstances and their need for and use of real-time information, are at a sufficiently high level that a significant number of users are deterred from obtaining the information or that the quality of their information services is reduced.

The various fee structures established by the Networks are described in section II above, and the amount of revenues derived from the various fees are set forth in Tables 5–8 in the Appendix. Comment is requested on the fairness and reasonableness of all of these fees, which include fees for vendor access and a variety of other services.[132] This subsection will discuss the fees that apply to users of market information and generate 94% of total market information revenues—the monthly fees applicable to professional subscribers and the fees applicable to retail investors (which include both monthly nonprofessional subscriber fees and per-

[128] For example, public utilities generally are entitled to earn a ''fair rate of return'' in addition to their allowable operating costs. *See, e.g.,* Instinet Order, note 89 above, at n. 68 (''Although utility ratemaking proceedings also involve the calculation of a rate of return for the utility's shareholders and bond-holders, such a calculation is unnecessary in this proceeding. The NASD has stated that it 'does not build in any rate of return in its fees' as '(t)here are no shareholders, save the NASD, and no dividends have ever been paid or are contemplated.' '') (citation omitted). Comment is requested on whether the cost of market information should include an allowance to provide a fair rate of return and, if so, how a fair rate of return should be determined.

[129] If different allocation percentages applied to different SROs, it might result in some Networks being entitled to charge higher fees in relation to costs than other Networks. SROs that primarily traded the securities of the favored Network could receive a higher proportion of their funding from market information fees than other SROs. Comment is requested on whether this situation would be consistent with the Exchange Act objective of fair competition or whether there are appropriate reasons for allocation percentages to vary from SRO to SRO.

[130] For example, as noted in section IV.B.2 above, the costs associated with Nasdaq's market operation, market regulation, and listing functions in 1998 were funded 30% by transaction services revenues, 32% by listing revenues, 35% by market information revenues, and 3% by other revenues. The SROs have not, however, provided detailed disclosures concerning their internal cost structures. It therefore has not been possible to make precise calculations of how they have funded their market operation and market regulation costs. The 30–40% figures given in the text necessarily represent a rough estimate.

[131] Currently, for example, revenues are distributed in accordance with an SRO's proportion of trading volume in a Network's securities. Comment is requested in section V.B below on whether the rules for the distribution of Network revenues should be revised to further more directly national market system objectives.

[132] A full description of Network fee structures, including fees applicable only to vendors, is provided in the Anderson Report, note 34 above.

query fees). These fees are set forth in Tables 1–4 in the Appendix.

a. Professional Subscriber Fees

Fees for professional subscribers generally range from $18.50 to $50 per month.[133] These fees produced revenues of $351.1 million in 1998, compared to $231.1 million in 1994, for an increase of 52%. The revenues generated by professional subscriber fees represented approximately 85% of the total amount of the Networks' revenues in 1998. The fees themselves have remained essentially the same over the last five years.[134] It is an increase in the number of professional subscribers that has produced the increase in revenues. For example, there were 338,010 Level 1 subscribers and 57,535 NQDS subscribers to Nasdaq System information in 1998, compared with only 260,500 Level 1 subscribers and 17,000 NQDS subscribers in 1994.[135] Similarly, there were 384,661 devices displaying Network A market information in 1998, compared with only 266,718 in 1994.[136] Moreover, the expansion in trading volume in recent years has produced an explosion in the volume of information disseminated by the Networks. As noted in section II.C above, for example, SIAC processed 634 million transaction reports and quotations in 1998 for Networks A and B, compared with only 188 million in 1994. Thus, monthly fees for professionals have remained steady despite a substantial increase in the amount of information provided.

Comment is requested on the fairness and reasonableness of professional subscriber fees. In this regard, it is important to consider whether they further the Exchange Act objective of making market information widely available. Based on an average of 21 trading days per month and monthly fees ranging from $18.50 to $50, a professional subscriber generally is charged from approximately $0.90 to $2.40 per trading day for market information. Given the importance of this information to the livelihood of a professional subscriber, comment is requested on whether these fees, in practice, limit the availability of market information.

b. Retail Investor Fees

The revenues from fees applicable to retail investors (which include monthly fees for nonprofessional subscribers and per-query fees) have grown exponentially in recent years. In 1994, such revenues amounted to $3.7 million. In 1998, they amounted to 38.9 million, for an increase of 951%. Most of this increase is attributable to increased demand by investors and not to fee increases by the SROs.[137] In addition, the nonprofessional subscriber fees for Nasdaq, Network A, and Network B securities have been substantially reduced in 1999. The Commission remains concerned, however, that the Networks' fee structures have not kept pace with advancing technology and increased demand.

The fees currently applicable to retail investors range from $0.50 to $2.50 per month for unlimited access to a particular Network's information, and the per-query fees range from $0.0025 to $0.02. The Commission requests comment on whether these fees now are low enough and structured in such a way that they do not significantly limit the availability of real-time information to retail investors, both in terms of the number of subscribers and the quality of information services. For example, does a monthly fee of $0.50 or $1 per Network deter a significant number of retail investors from using real-time market information or preclude broker-dealers from providing enhanced information services to their retail customers? Thus far, per-query fees have generated much greater revenues than the monthly fees that allow unlimited use of information. The fees allowing unlimited use, however, would appear to provide a greater opportunity for broker-dealers to provide retail investors with a much improved quality of service, including potentially the opportunity to obtain dynamically-updated displays of quotations and transaction reports in a security. Compared to receiving information based on a single query at a time, a real-time stream of dynamically-updated information could offer retail investors a greater ability to control their securities transactions, including possibly the ability to execute transactions in the market of their choice (for example, by directing a limit order to a specific market) or monitoring the quality of execution by their broker-dealers. Comment is requested on whether the current fee schedules could inappropriately restrict the information services that broker-dealers provide to their retail customers.

In addition, comment is requested on whether the fees applicable to retail investors are unreasonably discriminatory compared to those for professional subscribers. The monthly fees for nonprofessional subscribers are significantly less than the monthly fees for professional subscribers, yet it also appears that retail investors are unlikely to use real-time market information nearly as much as professional investors. With the monthly rates, for example, each class of subscribers theoretically receives the same service—an unlimited amount of real-time information for a Network's securities. Professional investors, however, are likely to monitor the stream of real-time market information for a substantial portion of each trading day during a month. Assuming an average of 21 trading days in a month and 6½ hours per trading day, professional investors may monitor real-time information for as many as 136 hours in a month. It does not appear that retail investors are likely to monitor real-time information for anywhere near as many hours during a month. Comment is requested on whether the difference in rates between professional and nonprofessional subscribers adequately reflects this difference in use.[138]

A petition to the Commission for rulemaking has asserted, among other things, that any fee applicable to retail investors for on-line access to market information constitutes unreasonable discrimination against on-line investors and their broker-dealers.[139] The petition argues that, by comparison, traditional broker-dealers pay the monthly professional fee and provide market information to their customers by

[133] Network A, Network B, and OPRA provide a variety of discounts in these fees depending on the size of the subscriber or the SRO membership status of the subscriber. These discounts are addressed in section V.A.2.c below.

[134] Nasdaq fees for professional subscribers increased $1 per month in the period from 1994 to 1998. OPRA professional subscriber fees generally increased from $3 to $4 per month. Network A and Network B professional subscriber fees were unchanged.

[135] The numbers of Nasdaq System subscribers are set forth in Exhibit Q to the annual amendments to Form SIP filed by Nasdaq for the years 1994 and 1998.

[136] NYSE, *1998 Fact Book* 103.

[137] For example, the NASD's per-query fee for Nasdaq System securities has remained at one cent since 1995. Revenues attributable to this fee grew from $2.6 million in 1997 to $13.5 million in 1998.

[138] For example, dividing a monthly professional fee of $20 by 136 hours produces a per-minute rate of approximately ¼ cent. At this rate, a nonprofessional subscriber fee of $2 per month would cover 800 minutes, or 13⅓ hours. Comment is requested on the number of hours in a month that retail investors, on average, could be expected to monitor real-time information.

[139] Letter submitted on behalf of Charles Schwab & Co., Inc., by Sam Scott Miller, Orrick, Herrington & Sutcliffe, LLP, to Jonathan G. Katz, Secretary, SEC, dated June 29, 1999. The petition requests rulemaking on a broad range of issues relating to market information fees and revenues, including fair and reasonable fees, non-discriminatory fees, and oversight of CTA practices. A copy of the petition is available for inspection and copying in the Commission's Public Reference Room, File No. 4–425.

personal telephone call without incurring additional fees. The Commission requests comment on this issue, as well as on any other issue relating to the effect of market information fee structures on broker-dealers conducting different types of business. In this regard, it appears that the degree of use and the quality of the service provided to customers of an on-line broker-dealer (particularly under a monthly fee structure providing instant access to unlimited information) may be superior to the service provided to customers of a traditional broker-dealer (who must initiate a separate telephone call and speak personally with an employee of their broker-dealer each time they want to update their information). Comment is requested on whether fees for on-line access to market information by retail investors are warranted by the degree of use and the quality of service provided.

c. Fee Discounts

The fee structures for Network A, Network B, and the OPRA System include various discounts that are based on the size of the subscribing firm or on whether the firm is a member of an SRO that is participant in the particular Network. They include (1) a Network A ''enterprise arrangement'' that caps the aggregate amount a registered broker-dealer must pay for most of the information services provided to its employees and customers at $500,000 per month,[140] (2) Network A monthly professional subscriber fees that range from $18.75 per device for subscribers with more than 10,000 devices to $127.25 for subscribers with a single device, (3) OPRA monthly professional subscriber fees that are $6-$10 less per device for members of an SRO that is a participant in OPRA than for non-members, (4) Network A nonprofessional subscriber fees that are $1 per month for the first 250,000 subscribers per vendor, and 50¢ per month for subscribers above 250,000, and (5) Network A, Network B, and OPRA per-query fees that are reduced based on the number of quotes distributed by a vendor during a month.

The Commission requests comment on whether these discounts are consistent with the Exchange Act objective that exclusive processors of information should remain neutral in their treatment of firms and customers. As noted above, the Commission believes that disparities in fees should be justified by such legitimate factors as differences in relevant costs, degree of use, or quality of service. In the past, the Networks have justified these fee discounts as reflecting differences in the administrative costs associated with different categories of subscribers.[141] The Commission has not, however, required the Networks to demonstrate that the size of the discounts corresponds with the size of the relative difference in administrative costs. Comment is requested on whether the size of these discounts should be strictly limited to differences in administrative costs.

B. Distribution of Network Revenues and SRO Funding

The current rules for distributing Network revenues to the SROs are described in section II.E above. In general, each of the Networks first distributes revenues directly to their respective administrators and processors to cover expenses incurred in performing their Plan functions. After these Plan costs are funded, the remaining revenues then are distributed to the SRO participants in a Network in accordance with a formula based on each SRO's percentage of trading volume in the Network's securities. For ease of reference, the initial distribution to cover specific costs will be referred to as the ''Direct Distribution,'' while the subsequent distribution of a Network's remaining revenues will be referred to as the ''Proportional Distribution.''

The Commission is considering a conceptual approach to distributing Network revenues that could reflect more fully and directly the objectives of the Exchange Act. Specifically, comment is requested on (1) whether certain individual SRO costs that most directly enhance the integrity of market information (principally, the cost of market regulation) should be funded as part of the Direct Distribution in addition to Plan costs, and (2) whether the formula for making the Proportional Distribution should be revised to compensate the SROs more in accordance with the value of the information they contribute to the stream of consolidated information. Finally, comment is requested on whether the SROs should be permitted to rebate market information revenues to their members.

1. Direct Funding of Market Regulation Costs

The Commission requests comment on whether a portion of market information revenues should be earmarked in the Direct Distribution to fund, in addition to Plan costs, SRO costs that directly enhance the integrity and reliability of market information. These could include primarily the costs incurred by the SROs in performing their *market* regulation function (as opposed to member regulation). Market regulation by the SROs helps assure that the information on which investors rely is not tainted by fraud or manipulation and that market participants comply with trading rules designed to enhance the efficiency and fairness of the SROs' markets. Although the benefits of market regulation extend directly to all those who use an SRO's information, the function does not appear to be as directly associated with a specific source of revenues as are other SRO functions. The Commission is concerned that competitive pressures among markets could lead to cutbacks in the substantial expenditures necessary to maintain full funding for this critically important Exchange Act responsibility.

Comment is requested on whether allocating market information revenues directly to fund specified market oversight and information integrity and reliability costs would further Exchange Act objectives.[142] The potential benefits of such an allocation appear to be two-fold. First, it could help ensure that this vital SRO function is fully funded, thereby helping to prevent the publication of fraudulent, deceptive, or manipulative market information, section 11A(c)(1)(A), and to assure the prompt, accurate, reliable, and fair publication of market information, section 11A(c)(1)(B). Second, the funding would be shared among all users of market information, rather than

[140] The terms and conditions of the Network A enterprise arrangement are described in Securities Exchange Act Release No. 41977 (October 5, 1999), 64 FR 55503.

[141] *See, e.g.,* Securities Exchange Act Release No. 26689 (April 3, 1989), 54 FR 14306 (discounts for subscribers that are members of OPRA participants explained on the basis of higher administrative costs for non-member subscribers); Securities Exchange Act Release No. 24130 (February 20, 1987), 52 FR 6413 (Network A fee structure requiring subscribers with a single device to pay a monthly device fee that is 6½ times higher than the fee for large subscribers ''reflect[s] the fact that total CTA and CQ Plan administrative costs for any subscriber on an average per terminal basis decrease as the average number of terminals increases'').

[142] Comment also is requested on whether any other categories of SRO costs that directly enhance the integrity and reliability of market information should be funded in the Direct Distribution. For example, technology systems with sufficient capacity and reliability to handle the highest-volume trading days help assure that the stream of consolidated information is not subject to unexpected interruptions. Comment is requested on whether some portion of technology costs that directly relate to the integrity and reliability of information (such as costs incurred to comply with the policies set forth in the Commission's ARP Releases) should be funded in the Direct Distribution.

falling on the particular SRO that incurs the particular costs. To the extent that market regulation costs benefit the market for a security as a whole, the objectives of fair competition, equal regulation, and an equitable allocation of SRO costs might be furthered.

Comment is requested on the advisability and practicality of pursuing this type of approach. In particular, would identification of the cost of market regulation be a reasonably objective task that could be accomplished without excessive accounting and auditing costs? Are there pragmatic methods that could simplify this task while still achieving the goal of adequately funding appropriate costs? Finally, comment is requested on whether direct funding would create an inappropriate incentive for the SROs to increase these costs beyond reasonable levels.

2. Compensating SROs in Accordance with the Value of Their Market Information

Comment also is requested on whether the formula for making the Proportional Distribution should be revised to reflect more directly the value that each SRO's information contributes to the stream of consolidated information made available to the public. In particular, does the current practice of allocating revenues based solely on an SRO's proportion of transaction volume adequately further the Exchange Act objectives of maintaining the quality of market information and encouraging fair competition?

As discussed in section III.A above, one of the fundamental policy decisions made by Congress and the Commission in the mid-1970's was to require all the SROs to make their market information, particularly their quotations, available to the public. It is important to recognize that the basis for this policy determination was not to prevent the SROs from charging reasonable fees for their information. Rather, Congress and the Commission determined that the information was too important to investors and too affected with the public interest to allow the SROs to restrict its availability. Although the SROs are no longer allowed to act individually in setting fees or otherwise capitalizing on the value of their information, the Commission believes that they should be encouraged to generate high-quality market information that enhances the value of the stream of consolidated information made available to the public. Comment is requested on whether the formula for the Proportional Distribution should be revised to reflect this objective.

Under current practice, for example, the Proportional Distribution is based solely on transaction volume. It therefore does not attempt to reward markets for the value of their quotations, except insofar as an SRO's percentage of transaction volume is a surrogate for the value of its quotations. Comment is requested on whether, in fact, transaction volume accurately reflects the value of an SRO's quotations, or whether some other basis should be found for distributing a portion of Network revenues based directly on the value of quotations. For example, is it possible to devise a pragmatic formula or algorithm (or a combination of different formulas or algorithms) that would reward markets that provide ''price discovery'' to which other market participants look to set their own prices? Similarly, is there a way to reward markets that are the first to publish quotations at the best prices and in the largest sizes? Finally, assuming a formula could be found to assess the value of quotations in an individual security, how should the results be aggregated for all of the securities that are included in a Network? For example, should there be an adjustment to account for differences in trading volume or is it more appropriate for each security to be given equal weight regardless of trading volume?

It bears emphasis that a formula or algorithm that merely produced appropriate results retrospectively based on historical data would not be satisfactory. Instead, it must be capable of producing appropriate results prospectively when market participants will have the opportunity to adjust their behavior in response to the formula. In other words, a value-oriented distribution would need to be resistant to being ''gamed'' and to avoid awarding markets a share of market information revenues when they have not in fact enhanced the value of the stream of consolidated information.

3. SRO Rebates to Members

Some of the SROs have established programs that in effect award rebates of market information revenues to their members.[143] In general, these rebates are given to the members responsible for effecting the transactions that resulted in a Network's revenues being distributed to the SRO. The Commission requests comment on whether such rebates are consistent with the Exchange Act objective of fair competition. In addition, do rebate programs constitute an equitable allocation of an SRO's charges among its members when only selected members receive a rebate based on their transaction volume in a particular type of security? At least thus far, the rebate programs have been established solely for securities in which the SRO granting the rebate does not operate the primary market. Comment is requested on whether changing the rules for distribution of Network revenues as discussed above (to fund information integrity and reliability costs directly and to reward the SROs that provide the highest quality market information) would address the extent to which rebates could constitute unfair competition. Moreover, do rebate programs indicate that market information revenues exceed self-regulatory funding requirements?

C. Plan and SRO Disclosure

Each of the Plans requires that audited financial statements be prepared for a Network's operations, primarily to allow its participants to verify that the financial provisions of the Plans have been satisfied. Currently, the Plans are not required to file publicly-available financial statements with the Commission.[144] In this regard, the Commission proposed Rule 11Ab2–2 in 1975, which would have required registered SIPs to file an annual amendment to their Form SIP that included financial statements. The rule was never adopted. The Commission requests comment on whether the Plans should be required to make annual filings for the Networks that would be available to the public. These filings could include (1) a complete listing of all their fees, and (2) the number of users participating in each of their different fee programs, and (3) audited financial statements setting forth their revenues (including an itemized listing of revenues attributable to their different fees), expenses, and distributions.

[143] *See, e.g.*, Securities Exchange Act Release No. 41238 (Mar. 31, 1999), 64 FR 17204 (CSE grants members a 50% pro rata transaction credit of Network B revenues); Securities Exchange Act Release No. 41174 (Mar. 16, 1999), 64 FR 14034 (NASD establishes pilot program to provide a transaction credit to members that trade listed securities in the over-the-counter market); Securities Exchange Act Release No. 40591 (Oct. 22, 1998), 63 FR 58078 (BSE establishes revenue-sharing program for members that is based, in part, on Network A and Network B revenues); Securities Exchange Act Release No. 38237 (Feb. 4, 1997), 62 FR 6592 (CHX establishes transaction credit for specialists based on a percentage of Network A and Network B revenues).

[144] The Plans regularly have provided financial statements to the Commission's staff. The financial statements have shown total revenues, expenses, and distributions, but have not itemized the amount of revenues attributable to different fees.

In contrast with the Plans, the SROs currently are required to file publicly-available financial statements with the Commission as part of the annual amendments to Form 1 for the national securities exchanges (Rule 6a–2(b)(1)), or to Form X–15AJ–2 for the national securities association (Rule 15Aj–1(c)(2)). These financial statements, however, provide little information concerning the SROs' internal cost structures. Comment is requested on whether the SROs should be required to provide greater disclosure of their financial condition, including disclosure of the costs associated with the performance of their various SRO functions. The Commission notes that, at the very least, the SROs will need to provide financial disclosures that are sufficient to support whatever approaches ultimately are adopted for the evaluation of fees and distribution of revenues.

D. Plan Governance, Administration, and Oversight

Each of the Plans has adopted essentially the same governance structure. All important operational decisions are to be made by a committee composed of one representative of each of the Plan's participants (''Operating Committee''). In addition, each Plan has designated one of its participants to administer its day-to-day affairs. Some of the Plans also have established committees to address particular aspects of their operations (for example, a technical committee to address technology issues).

None of the Plans provides for broader securities industry or public participation in the governance of its operations. The Commission is concerned that the Plans should be responsive (in a timely manner) to the concerns of vendors, broker-dealers, and investors in disseminating consolidated market information to the public. It also recognizes that the Plans operate substantial enterprises and must have governance structures that permit them to operate these enterprises effectively. Comment is requested on whether these governance structures should be broadened to include such parties as vendors, broker-dealers, and investors. If participation in the governance of the Plans were broadened, a variety of issues would need to be addressed. Should non-SRO parties be included on the Operating Committee? Should additional committees with broad participation be established to address the particular issues of most direct concern to parties that are not SROs (for example, a committee for establishing or reviewing fee structures)? What should be the mechanism for selecting non-SRO representatives to a committee? In what capacity should such representatives be allowed to participate (for example, voting or non-voting)? If given the power to vote, what should be the relative proportion of voting weight between the SRO and non-SRO representatives? Finally, comment is requested on whether, as an alternative to formal participation in Plan governance, the creation of an industry advisory committee on market information arrangements would constitute a more efficient and flexible vehicle to convey a broad range of views to the Plans and to the Commission.

With respect to the administration of fee structures, there appears to be considerable potential for making this process more efficient by standardizing and streamlining the agreements, policies, and reporting requirements that apply to vendors, broker-dealers, and subscribers.[145] Many of these operational issues require detailed attention and are perhaps best addressed in the context of improved Plan governance rather than by direct Commission action. Nevertheless, the existence of four Networks, each with its own fee structures and requirements, inherently limits the extent to which any Network, acting alone, could substantially reduce the cumulative administrative costs incurred by vendors, broker-dealers, and subscribers. Comment is requested on whether the Plans should establish industry-wide standards for administering their fee structures and, if so, the most appropriate means for the Plans to act jointly in developing such standards.

Finally, the Commission is concerned that the Plans have used their ''pilot program'' provisions to implement fee structures for periods of time beyond that which the provisions originally were intended to cover.[146] Comment is requested on the advisability and usefulness of pilot programs. Should they be eliminated entirely or should the Plans have some flexibility to experiment with innovative services and fee structures without first going through the process of a Commission filing and public comment? If pilot programs should continue in some form, comment is requested on whether they should be limited to a specified time period (for example, one year), after which the program could not be continued unless it was filed with the Commission. Finally, comment is requested on whether the terms and conditions of all pilot programs should be made available to the public in some fashion prior to initiation of the program.

VI. Conclusion

The Commission invites public comment on all of the foregoing matters, as well as on any other matters relating to the arrangements for disseminating market information that commenters believe the Commission should consider in concluding its review and formulating proposals.

By the Commission.

Dated: December 9, 1999.

Jonathan G. Katz,

Secretary.

Appendix—Tables 1–4: Subscriber Fees

Tables 1 through 4 set forth the Plans' principal fees for subscribers to market information services as they currently exist and as they existed at the end of 1998 and 1994. In addition to these subscriber fees, the Plans have a variety of other fees that apply to information vendors and others.

TABLE 1.—NETWORK A SUBSCRIBER FEES

	Current	1998	1994
Professional (monthly per device):			
No. of devices:			
1	$127.25	Unchanged	Unchanged.
2	79.50		

[145] The burdens and costs currently associated with administering the Networks' fee structures are described at length in the Andersen Report, note 34 above.

[146] The pilot program provisions are set forth in section II.F above.

TABLE 1.—NETWORK A SUBSCRIBER FEES—Continued

	Current	1998	1994
3	58.25		
4	53.00		
5	47.75		
6 to 9	39.75		
10 to 19	31.75		
20 to 29	30.25		
30 to 99	27.50		
100 to 249	26.50		
250 to 749	23.75		
750 to 4999	20.75		
5000 to 9999	19.75		
10,000 and up	18.75		
Nonprofessional (monthly per subscriber)		$5.25	$4.25.
1 to 250,000 subscribers per vendor	1.00	n/a	n/a.
250,001 subscribers and up	.50	n/a	n/a.
Per Query (processed by vendor per month)		.01	.005.
1 to 20,000,000	.0075	n/a	n/a.
20,000,001 to 40,000,000	.005	n/a	n/a.
40,000,001 and up	.0025	n/a	n/a.

TABLE 2.—NASDAQ SYSTEM SUBSCRIBER FEES

	Current	1998	1994
Level 1/Last Sale (monthly per device)	$20.00	$20.00	$19.00.
NQDS (monthly per device)	50.00	Unchanged	Unchanged.
Nonprofessional (monthly per person)	2.00	4.00	4.00.
Per Query	.005	.01	.015.

TABLE 3.—NETWORK B SUBSCRIBER FEES

	Current	1998	1994
Professional (monthly per device)			
Members:			
Last Sale	$13.60	Unchanged	Unchanged.
Bid-Ask	13.65	Unchanged	Unchanged.
Non-Members:			
Last Sale	14.60	Unchanged	Unchanged.
Bid-Ask	15.60	Unchanged	Unchanged.
Nonprofessional (monthly per person)	1.00	3.25	3.25.
Per Query (processed by vendor per month):			
1 to 20,000,000	.0075	n/a	n/a.
20,000,001 to 40,000,000	.005	n/a	n/a.
40,000,001 and up	.0025	n/a	n/a.
Per Query (per user, per month):			
1 to 50 Quotes	n/a	.50	n/a.
51 to 250 Quotes	n/a	3.25	n/a.
More than 251 Quotes	n/a	35.00	n/a.

TABLE 4.—OPRA SYSTEM SUBSCRIBER FEES*

	Current		1998		1994	
	Member	Non-Member	Member	Non-Member	Member	Non-Member
Professional (monthly per device):						
No. of devices:						
1 to 9	$16.00	$26.00	$15.00	$24.00	$21.00–55.00	$22.00–55.00
10 to 29	16.00	22.00	15.00	20.00	12.00	13.00
30 to 99	13.00	22.00	12.00	20.00	9.00	10.00
100 to 749	13.00	15.50	12.00	14.50	9.00	10.00
750 or more	10.00	15.50	9.40	14.50	7.00	8.00
Nonprofessional (monthly per person)	2.50		2.00		2.00	

TABLE 4.—OPRA SYSTEM SUBSCRIBER FEES*—Continued

	Current		1998		1994	
	Member	Non-Member	Member	Non-Member	Member	Non-Member
Per Query (tiered by volume)	.02 to .01		.02 to .01		.02	

*The fees are applicable to the OPRA System's basic service (equity options and index options). It charges separately for information on foreign currency options.

Tables 5–8: Network Revenues, Expenses, and Distributions

Tables 5 through 8 set forth the Networks' revenues, expenses, and distributions to their participant SROs in 1998 and 1994. As discussed in section II above, the four Networks are responsible for receiving market information from the their SRO participants, consolidating the information, and distributing it to vendors, broker-dealers, and other subscribers. The Networks' administrators and processors perform most of these functions, and their costs are defined in the Plans as ''operating expenses'' that may be deducted from Network revenues prior to any distribution to participants. The following costs are not included in the Networks' operating expenses: (1) the costs incurred by the SROs in collecting their market information and reporting it to the Network processors, and (2) the costs associated with the SROs' market surveillance function.

TABLE 5.—NETWORK A REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Professional Subscribers	$112,444,000	$79,519,000
Nonprofessional Subscribers	6,040,000	825,000
Per Query	8,236,000	276,000
Cable TV	1,917,000	0
Access Fees	9,682,000	4,133,000
Program Application Fees	2,634,000	1,608,000
Ticker Communications Fees	2,776,000	2,231,000
Other	0	369,000
Total Revenues	143,729,000	88,961,000
Expenses:		
Data Processing	5,997,000	5,457,000
Ticker Network	2,444,000	1,709,000
NYSE Allocated Support Costs	8,697,000	5,304,000
Other	1,360,000	326,000
Total Operating Expenses	18,498,000	12,796,000
Income before Taxes	125,231,000	76,165,000
Provision for Taxes	(36,000)	(863,000)
Net Income Available for Distribution	125,195,000	75,302,000
Distributions:		
NYSE	93,223,000	54,594,000
NASD	13,209,000	6,902,000
CHX	6,898,000	4,153,000
PCX	4,531,000	3,788,000
BSE	3,390,000	1,748,000
CSE	2,279,000	2,311,000
Phlx	1,664,000	1,806,000
CBOE	1,000	0

TABLE 6.—NASDAQ SYSTEM REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Level 1/Last Sale (Professional)	$86,713,000	$52,953,000
NQDS	21,155,000	6,611,000
Nonprofessional Subscriber	4,445,000	770,000
Per Query	13,473,000	517,000
Voice Response	1,956,000	592,000
Cable TV	241,000	0
Other	517,000	603,000
Total Revenues	128,500,000	62,046,000

TABLE 6.—NASDAQ SYSTEM REVENUES, EXPENSES, AND DISTRIBUTIONS—Continued

For the years ended December 31	1998	1994
Distributions:		
NASD Retention	128,088,000	61,946,000
CHX	412,000	100,000

TABLE 7.—NETWORK B REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Professional Subscriber	$91,576,000	$68,677,000
Nonprofessional Subscriber	1,625,000	416,000
Pilots (including per query)	2,316,000	279,000
Tickers	2,009,000	2,154,000
Computer Program Charges	746,000	557,000
Indirect Access Charges	853,000	116,000
Other	123,000	152,000
Total Revenues	99,248,000	72,351,000
Expenses:		
Data Processing Services	579,000	895,000
Ticker Network Expenses	663,000	433,000
Amex Allocated Support Costs	3,771,000	2,852,000
Total Expenses	5,013,000	4,180,000
Net Income Available for Distribution	94,235,000	68,171,000
Distributions:		
Amex	67,090,000	56,460,000
CHX	12,722,000	4,507,000
NASD	9,020,000	2,783,000
PCX	2,855,000	2,164,000
BSE	782,000	1,264,000
Phlx	528,000	881,000
CSE	236,000	112,000
CBOE	85,000	0
DIAMONDS	917,000	0

TABLE 8.—OPRA SYSTEM REVENUES, EXPENSES, AND DISTRIBUTIONS

For the years ended December 31	1998	1994
Revenues:		
Professional Subscriber	$39,251,000	$23,333,000
Nonprofessional Subscriber	774,000	219,000
Vendor Fees	1,452,000	1,655,000
Other (including per-query)	2,031,000	360,000
Interest	148,000	56,000
Total Revenues	43,656,000	25,623,000
Expenses:		
Administrative and Operating Expenses	1,557,000	1,044,000
Processing Costs	3,324,000	1,772,000
Total Expenses	4,881,000	2,816,000
Net Income Available for Distribution	38,775,000	22,807,000
Distributions:		
CBOE	18,582,000	12,818,000
Amex	9,889,000	4,960,000
Phlx	4,939,000	2,448,000
PCX	5,365,000	2,392,000
NYSE	0	189,000

Tables 9–17: SRO Revenues and Expenses

Tables 9 through 17 set forth for 1998 and 1994 the SROs' revenues (including their distributions from the Networks), expenses, and an analysis of their sources of revenues (each source of revenues is represented as a percentage of

total revenues). The figures are derived primarily from the SROs' audited financial statements and their accompanying notes, which should be referred to for a complete and fair presentation of their financial condition. The following tables are provided for convenience of comparison.

TABLE 9.—NYSE CONSOLIDATED REVENUES AND EXPENSES

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A:		
Distribution	$93,223,000	$54,594,000
Allocated Support Costs	8,697,000	5,304,000
OPRA System Distribution	0	189,000
Others.		
Other	9,573,000	7,976,000
Total Market Information Revenues	111,493,000	68,063,000
Listing Fees	296,022,000	180,561,000
Trading Fees	123,795,000	92,080,000
Regulatory Fees	93,116,000	50,512,000
Facility and Equipment Fees	41,865,000	33,643,000
Membership Fees	7,361,000	6,125,000
Investment and Other Income	55,022,000	21,295,000
Total Revenues	728,674,000	452,279,000
Expenses:		
Compensation	204,711,000	152,194,000
Systems and Related Support	201,913,000	140,049,000
General and Administrative	51,703,000	22,613,000
Depreciation and Amortization	37,947,000	21,732,000
Professional Services	29,607,000	13,473,000
Occupancy	24,071,000	22,079,000
Total Expenses	549,952,000	372,140,000
Income before Taxes	178,722,000	80,139,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	15.3	15.0
Listing Fees	40.6	39.9
Trading Fees	17.0	20.4
Regulatory Fees	12.8	11.2
Facility and Equipment Fees	5.7	7.4
Membership Fees	1.0	1.4
Investment and Other Income	7.6	4.7

TABLE 10.—NASD CONSOLIDATED REVENUES AND EXPENSES (EXCLUDING AMEX SUBSIDIARY)

For years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Nasdaq System Retention	$128,088,000	$61,946,000
Network A Distribution	13,209,000	6,902,000
Network B Distribution	9,020,000	2,783,000
Other	1,937,000	2,798,000
Total Market Information Revenues	152,254,000	74,429,000
Issuer Services	137,344,000	79,219,000
Transaction Services	126,913,000	60,653,000
Member Assessments	91,313,000	44,152,000
Registration and Qualification Fees	78,662,000	45,761,000
Regulatory Fees and Fines	47,880,000	18,406,000
Interest and Other	27,871,000	25,988,000
Arbitration Fees	21,427,000	7,592,000
Corporate Finance Fees	16,143,000	15,787,000
Total Revenues	699,807,000	371,987,000

TABLE 10.—NASD CONSOLIDATED REVENUES AND EXPENSES (EXCLUDING AMEX SUBSIDIARY)—Continued

For years ended December 31	1998	1994
Expenses:		
Compensation	271,608,000	132,444,000
Professional and Contract Services	154,311,000	67,142,000
Computer Operation and Data Communications	65,101,000	31,355,000
Depreciation and Amortization	60,573,000	20,380,000
Occupancy	24,092,000	19,840,000
Publications, Supplies, and Postage	23,352,000	10,996,000
Travel, Meetings, and Training	22,907,000	16,121,000
Other	22,586,000	13,598,000
Systems Technology Migration	0	29,053,000
Intercompany (Amex)	(20,632,000)	0
Total Expenses	623,898,000	340,929,000
Income before Provision for Income Taxes	75,909,000	31,058,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	21.8	20.0
Issuer Services	19.6	21.3
Transaction Services	18.1	16.3
Member Assessments	13.0	11.9
Registration and Qualification Fees	11.2	12.3
Regulatory Fees and Fines	6.8	4.9
Interest and Other	4.0	7.0
Arbitration Fees	3.1	2.0
Corporate Finance Fees	2.3	4.2

TABLE 11.—AMEX CONSOLIDATED REVENUES AND EXPENSES

(Includes two-month period after acquisition by NASD on October 30, 1998)

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network B:		
Distribution	$67,090,000	$56,460,000
Allocated Support Costs	3,771,000	2,852,000
OPRA System Distribution	9,889,000	4,960,000
Other	2,160,000	1,993,000
Total Market Information Revenues	82,910,000	66,265,000
Trading Fees	91,937,000	45,107,000
Members' Dues and Regulatory Fines and Fees	17,679,000	2,875,000
Listing Fees	16,265,000	15,151,000
Investment and other income	15,257,000	14,157,000
Total Revenues	224,048,000	143,555,000
Expenses:		
Compensation and benefits	65,484,000	57,708,000
Systems and Related Support Costs	45,638,000	29,231,000
Professional Services	23,636,000	4,498,000
Facilities Costs	11,186,000	9,648,000
Depreciation and amortization	9,225,000	9,205,000
General Administrative and Other Expenses	26,003,000	18,833,000
Intercompany (after NASD acquisition)	20,632,000	0
Total Expenses	201,804,000	129,123,000
Income before Income Taxes	22,244,000	14,432,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	37.0	46.2
Trading Fees	41.0	31.4
Members' Dues and Regulatory Fines and Fees	7.9	2.0
Listing Fees	7.3	10.6

TABLE 11.—AMEX CONSOLIDATED REVENUES AND EXPENSES—Continued

(Includes two-month period after acquisition by NASD on October 30, 1998)

For the years ended December 31	1998	1994
Investment and other income	6.8	9.7

TABLE 12.—CBOE CONSOLIDATED REVENUES AND EXPENSES

For the years ended June 30	1998	1994
Revenues:		
Total Market Information Revenues*	$17,538,000	$11,052,000
Transaction Fees	84,639,000	68,205,000
Other Member Fees	19,703,000	14,272,000
Interest	1,133,000	1,059,000
Equity in Income of CSE	515,000	1,078,000
Other	3,012,000	1,997,000
Total Revenues	126,540,000	97,663,000
Expenses:		
Employee Costs	57,395,000	41,974,000
Outside Services	14,948,000	7,173,000
Facilities Cost	3,887,000	3,663,000
Communications	726,000	830,000
Data Processing	8,400,000	6,028,000
Travel and Promotional Expenses	15,585,000	5,071,000
Depreciation and Amortization	16,571,000	6,997,000
Other	8,733,000	4,360,000
Total Expenses	126,245,000	76,096,000
Income before Income Taxes	295,000	21,567,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	13.9	11.3
Transaction Fees	66.9	69.8
Other Member Fees	15.6	14.6
Interest	0.9	1.1
Equity in Income of CSE	0.4	1.1
Other	2.4	2.0

*The CBOE's reporting period ends on June 30. This reporting period renders inapplicable the CBOE distributions listed on Tables 5, 7, and 8 for the years ended December 31, 1998 and 1994.

TABLE 13.—PCX CONSOLIDATED REVENUES AND EXPENSES

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution	$4,531,000	$3,788,000
Network B Distribution	2,855,000	2,164,000
OPRA System Distribution	5,365,000	2,392,000
Other	191,000	78,000
Total Market Information Revenues	12,942,000	8,422,000
Transaction and Service Charges	53,782,000	30,450,000
Peripheral Equipment and Market Data Fees	1,900,000	1,919,000
Listing Fees	1,986,000	2,014,000
Member and Participant Dues	1,659,000	1,825,000
Interest Income	1,580,000	681,000
Regulatory and Registration Fees	1,294,000	687,000
Other	1,840,000	801,000
Total Revenues	76,983,000	46,799,000
Expenses:		
Compensation and Other Employee Costs	33,878,000	19,662,000
Facilities	8,959,000	6,776,000
Equipment	8,497,000	6,433,000

TABLE 13.—PCX CONSOLIDATED REVENUES AND EXPENSES—Continued

For the years ended December 31	1998	1994
Communications	5,604,000	3,453,000
Professional Services	5,764,000	730,000
Travel Expenses	1,854,000	0
Outside Data Processing Services	951,000	1,073,000
Expenditures Relating to New Facilities Project	4,150,000	0
Financing Costs	0	453,000
General and Administrative Expenses	6,328,000	3,409,000
Total Expenses	75,985,000	41,989,000
Income before Income Taxes	998,000	4,810,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	16.8	18.0
Transaction and Service Charges	70.0	65.1
Peripheral Equipment and Market Data Fees	2.5	4.1
Listing Fees	2.6	4.3
Member and Participant Dues	2.2	3.9
Interest Income	2.1	1.5
Regulatory and Registration Fees	1.7	1.5
Other	2.4	1.7

TABLE 14.—CHX CONSOLIDATED REVENUES AND EXPENSES

For the years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution	$6,898,000	$4,153,000
Network B Distribution	12,722,000	4,507,000
Nasdaq System Distribution	412,000	100,000
Total Market Information Revenues	20,032,000	8,760,000
Operations	24,709,000	20,204,000
Interest	1,111,000	689,000
Total Revenues	45,852,000	29,653,000
Expenses:		
Employee Compensation and Benefits	15,022,000	13,693,000
Systems and Related Support	4,444,000	3,494,000
Rent, Maintenance and Utilities	4,166,000	4,226,000
Professional and Other	7,365,000	2,031,000
General and Administrative	3,859,000	2,374,000
Depreciation and Amortization	3,887,000	3,758,000
Other	0	701,000
Total Expenses	38,743,000	30,277,000
Income before Income Taxes	7,109,000	(624,000)
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	43.7	29.5
Operations	53.9	68.1
Interest	2.4	2.3

TABLE 15.—PHLX CONSOLIDATED REVENUES AND EXPENSES

For years ended December 31	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution	$1,664,000	$1,806,000
Network B Distribution	528,000	881,000

TABLE 15.—PHLX CONSOLIDATED REVENUES AND EXPENSES—Continued

For years ended December 31	1998	1994
OPRA System Distribution	4,939,000	2,448,000
Total Market Information Revenues	7,131,000	5,135,000
Transaction Fees	22,556,000	14,426,000
Depository	0	10,613,000
Clearing and Settlement	5,950,000	4,165,000
Floor Charges	1,595,000	1,732,000
Dividend and Interest Income	1,287,000	1,700,000
Other	5,159,000	2,865,000
Total Revenues	43,678,000	40,636,000
Expenses:		
Staffing Costs	22,114,000	23,213,000
Data Processing and Communication Costs	4,041,000	4,540,000
Occupancy Costs	2,817,000	3,337,000
Professional Services	2,783,000	494,000
Other	7,427,000	9,975,000
Total Expenses	39,182,000	41,559,000
Income from Continuing Operations before Income Taxes	4,496,000	(923,000)
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	16.3	12.6
Transaction Fees	51.6	35.5
Depository	0.0	26.1
Clearing and Settlement	13.6	10.2
Floor Charges	3.7	4.3
Dividend and Interest Income	2.9	4.2
Other	11.8	7.1

TABLE 16.—BSE CONSOLIDATED REVENUES AND EXPENSES

For years ended September 30	1998	1994
Revenues:		
Market Information Revenues:		
Network A Distribution*	$3,029,000	$1,712,000
Network B Distribution*	783,000	1,301,000
Total Market Information Revenues	3,812,000	3,013,000
Transaction Charges	10,438,000	7,588,000
Members' Dues and Fees	2,451,000	2,418,000
Listing Fees	825,000	1,187,000
Interest	743,000	390,000
Other	97,000	305,000
Total Revenues	18,366,000	14,901,000
Expenses:		
Employee Costs	7,799,000	6,387,000
Data Processing	1,098,000	1,049,000
Occupancy Costs	1,524,000	1,530,000
Telecommunications	1,411,000	1,132,000
Clearing Fees and Related Costs	465,000	327,000
Professional Services	2,001,000	678,000
Depreciation and Amortization	941,000	900,000
Office and Other Related Expenses	548,000	489,000
Interest	63,000	82,000
Maintenance and Repairs	624,000	553,000
Other	1,129,000	728,000
Total Expenses	17,603,000	13,855,000

TABLE 16.—BSE CONSOLIDATED REVENUES AND EXPENSES—Continued

For years ended September 30	1998	1994
Income before Taxes	763,000	1,046,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	20.8	20.2
Transaction Charges	56.8	50.9
Members' Dues and Fees	13.3	16.2
Listing Fees	4.5	8.0
Interest	4.0	2.6
Other	0.5	2.0

*The BSE's reporting period ends on September 30. This reporting period renders inapplicable the BSE distributions listed on Tables 5 and 7 for the years ended December 31, 1998 and 1994.

TABLE 17.—CSE REVENUES AND EXPENSES.

For the year ended June 30	1998	1994*
Revenues:		
Market Information Revenues:		
Network A Distribution*	$2,450,000	$970,000
Network B Distribution*	173,000	20,000
Total Market Information Revenues	2,623,000	990,000
Transaction Fees	2,607,000	2,072,000
Members' Dues and Fees	451,000	92,000
Service Fees	136,000	428,000
Total Operating Revenues	5,817,000	3,582,000
Expenses:		
Computer and Other Costs of Services	2,605,000	997,000
Salaries, Wages and Employee Benefits	1,766,000	675,000
Professional Services	116,000	165,000
Communications	140,000	110,000
Occupancy	351,000	76,000
Travel and Promotional	146,000	0
Other	323,000	152,000
Total Operating Expenses	5,447,000	2,175,000
Operating Income	370,000	1,407,000
Non-Operating Income—Net	694,000	20,000
Income before Provision for Income Taxes	1,064,000	1,427,000
Analysis of Sources of Revenues (percent of total revenues)		
Market Information	45.1	27.6
Transaction Fees	44.8	57.8
Members' Dues and Fees	7.8	2.6
Service Fees	2.3	11.9

*Due to a change in reporting period, 1994 information is for the six-month period ending June 30, 1994. In addition, the June 30 reporting period renders inapplicable the CSE distributions listed on Tables 5 and 7 for the years ended December 31, 1998 and 1994.

[FR Doc. 99–32471 Filed 12–16–99; 8:45 am]
BILLING CODE 8010–01–U

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 938

[PA–129–FOR]

Pennsylvania Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing.

SUMMARY: OSM is announcing the receipt of a proposed amendment to the Pennsylvania regulatory program (Pennsylvania program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, as amended. Pennsylvania has submitted this proposed amendment to reflect changes made to regulations in the Pennsylvania program through the Department's Regulatory Basics Initiative (RBI). Under this initiative, regulations were revised because they were considered to be unclear, unnecessary or more stringent than the corresponding Federal regulation. The RBI resulted in the rulemaking in Coal Mining Permitting and Performance Standards, Pennsylvania Bulletin, Vol. 28, No. 19, May 9, 1998. The proposed amendment revises certain portions of 25 Pennsylvania Code Chapter 86, Surface and Underground Mining: General; Chapter 87, Surface Mining of Coal; Chapter 88, Anthracite Coal; Chapter 89, Underground Mining of Coal and Coal Preparation Facilities; and Chapter 90, Coal Refuse Disposal. The amendments are intended to revise the Pennsylvania program to be consistent with the corresponding Federal regulations.

DATES: Written comments must be received on or before 4:00 p.m. on January 18, 2000. If requested, a public hearing on the proposed amendments will be held at 1:00 p.m. on January 11, 2000. Requests to present oral testimony at the hearing must be received on or before 4:00 p.m. on January 3, 2000.

ADDRESSES: Written comments and requests to testify at the hearing should be mailed or hand-delivered to Mr. Robert J. Biggi, Director, Harrisburg Field Office at the first address listed below. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking [or administrative] record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking [or administrative] record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Copies of the Pennsylvania program, the proposed amendment, a listing of any scheduled public meetings or hearing, and all written comments received in response to this notice will be available for public review at the addresses listed below during normal business hours, Monday through Friday, excluding holidays:

Office of Surface Mining Reclamation and Enforcement, Harrisburg Field Office, Third Floor, Suite 3C, Harrisburg Transportation Center (Amtrack), 415 Market Street, Harrisburg, Pennsylvania 17101. Telephone: (717) 782–4036.

Pennsylvania Department of Environmental Protection, Bureau of Abandoned Mine Reclamation, 400 Market Street, P.O. Box 8476, Harrisburg, Pennsylvania 17101. Telephone: (717) 783–2267.

Each requester may receive, free of charge, one copy of the proposed amendment by contacting the OSM Harrisburg Field Office.

FOR FURTHER INFORMATION CONTACT: Mr. Robert J. Biggi, Director, Harrisburg Field Office, Telephone: (717) 782–4036.

SUPPLEMENTARY INFORMATION:

I. Background on the Pennsylvania Program

On July 30, 1982, the Secretary of the Interior conditionally approved the Pennsylvania program. Background on the Pennsylvania program, including the Secretary's findings and the disposition of comments can be found in the July 30, 1982 **Federal Register** (47 FR 33079). Subsequent actions concerning the regulatory program amendments are identified at 30 CFR 938.15.

II. Discussion of the Proposed Amendment

By letter dated November 30, 1999 (Administrative Record No. PA–849.02), the Pennsylvania Department of Environmental Protection (PADEP) submitted a proposed amendment to its program because of the department's Regulatory Basics Initiative (RBI). Under the RBI, regulations were revised because they were considered unclear, unnecessary or were more stringent than the corresponding federal regulations.

PADEP proposes to amend certain provisions of 25 Pennsylvania Code, Chapters 86 through 90, as follows:

Chapter 86, Surface and Underground Coal Mining: General

Section 86.2 Scope

PADEP proposes to correct a grammatical error by changing the word ''specify'' to ''specifies'' in the opening paragraph.

Section 86.37. Criteria for Permit Approval or Denial

PADEP proposes to modify subsection (4) to assure activities proposed under the application have been designed to prevent material damage to the hydrologic balance outside the proposed permit area by adding the word ''material'' before damage and eliminating the words ''within and'' before the word ''outside''.

PADEP proposes to modify subsection (6) regarding the effects of proposed coal mining activities on properties listed on or eligible for listing on the National Register of Historic Places by deleting the phrase ''or eligible for inclusion on'' from the second sentence and re-ordering the sentences. The first two sentences of subsection (6) now read as: ''The proposed activities will not adversely affect any publicly owned parks or places included on the National Register of Historic Places, except as provided for in Subchapter D. The effect of the proposed coal mining activities on properties listed on or eligible for listing on the National Register of Historic Places has been taken into account by the Department''.

Section 86.40 Permit Terms

PADEP proposes to modify subsection (b) by adding criteria under which the Department may grant an extension of time for commencement of mining activities by adding the phrase ''or if there are conditions beyond the control and without the fault or negligence of the permittee''.