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January 26, 2007

**VIA Electronic Submission and U.S. Mail**

Ms. Nancy Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

**Re: Response on SIFMA Comment Letter Regarding File No. SR-Amex-2006-89 (Amex Depth-of-Book Data)**

Dear Ms. Morris:

The American Stock Exchange LLC (the “Amex” or the “Exchange”) appreciates the opportunity to respond to comments made by the Market Data SubCommittee of the Securities Industry and Financial Markets Association (“SIFMA”) Technology and Regulation Committee (the “SIFMA Letter”) relating to an Amex proposal to establish fees for the receipt and use of proprietary market data disseminated by the Exchange (the “Proposal”).

The Amex believes that the SIFMA Letter requesting that the Securities and Exchange Commission (the “SEC” or the “Commission”) staff not to approve the Proposal, pursuant to delegated authority, is without merit. We further submit that the SIFMA request to halt the proceedings regarding the Proposal pending the resolution of a separate, unrelated policy or rule, which is not subject to formal rulemaking at this time, is illogical, in contravention of public policy and inconsistent with the Securities Exchange Act of 1934 (the “Exchange Act”). The Amex believes that the SEC staff will be acting in accordance with applicable law and precedent in reviewing and approving the Proposal, and that the broader public policy questions raised by the SIFMA Letter should be addressed (if at all) in the context of formal Commission rulemaking, rather than in connection with an exchange rule filing.

**Approval by Delegated Authority**

Although Amex does not dispute the significance of the apparent public policy issues surrounding market data, we believe that if the Commission determines to modify existing standards for self regulatory organization (“SRO”) market data fees, or establish new standards, it should do so pursuant to the existing formal rulemaking process. Doing so will permit all interested persons notice and opportunity to provide comments on any

changes. In addition, formal rulemaking will ensure that the procedural safeguards (including a cost-benefit analysis, a review of impacts on efficiency, competition and capital formation and regulatory Flexibility Act analysis) are followed and maintained and is more likely to result in more informed and balanced policymaking as opposed to a substantive action in the context of reviewing the Proposal, the NYSEArca fee proposal<sup>1</sup> or any other exchange's fee proposal.

Moreover, the procedural safeguards in the current rulemaking process are essential given the rapid evolution of the equities market driven primarily by the introduction of many new trading platforms and the phase-in of Regulation NMS. Adherence to the existing procedural framework regarding the processing of SRO rule filings, especially with respect to those that pertain to the dissemination of market data products, will allow the benefits of the notice and comment period to be fully realized. Amex respectfully urges the Commission to reject SIFMA's request and continue to permit its staff to use delegated authority in reviewing proprietary data fee filings. Going forward, the Commission may consider what, if any, public policy or action is appropriate with regard to market data fees generally.

### **Standards for Fairness, Reasonable Fees, Equitable Allocation of Costs, Investor Protection, Market Transparency and Competition among Orders and Markets**

Unlike "core" data (*i.e.*, quotation and last sale information legally required to be submitted to processors under the NMS Plans), SROs/exchanges are not required to distribute depth of book or other proprietary data, including certain of the data that are the subject of the Proposal. These products are developed largely by exchanges and distributed to the public purely on a voluntary basis. In the absence of a regulatory mandate to distribute the data, the Amex believes that the exchanges should have a financial incentive to produce innovative new market data products. Users of such data will purchase the data if it provides value to them and is priced reasonably. The determination of pricing of such data should be determined by those SROs/exchanges offering such products and competitive forces rather than by administrative fiat. As the Commission is aware, the exchanges and other SROs compete on several levels, including the sale of proprietary data.

Exchanges make large capital expenditures developing and maintaining various trading technologies. The information produced by these systems can provide significant market transparency and serve to further the goals of Section 11A of the Exchange Act (as envisioned by Congress) to expand investor access to market information. In order to distribute the data to the public, SROs/exchanges incur significant expenses enhancing the data and building distribution channels. A meaningful financial incentive would encourage markets to invest the capital necessary to develop these products. Eliminating the ability of an exchange to earn a return on its investment, and thereby, discouraging

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<sup>1</sup> See Securities Exchange Act Release No. 54597 (October 12, 2006), 71 FR 62029 (October 20, 2006)(NYSEArca File No. 206-21).

the distribution of non-core data, would be detrimental to investors and the marketplace as a whole.

In adopting Regulation NMS, the Commission liberalized the ability of exchanges to distribute market data outside of the National Market System Plans and considered the legal standards that should apply to the terms on which that data was distributed.<sup>2</sup> Although some commentators had previously called for the Commission to mandate markets to disseminate more types of market data,<sup>3</sup> including depth of book information, the Commission determined to regulate neither the publication of such information nor the specific terms (including fees) under which a market would make such information available to the public, if at all. Rather, the Commission chose to require that the terms of data dissemination be subject to the general fairness and nondiscrimination standards in Rule 603 of Regulation NMS (and, in the case of exchange fees, Sections 6(b)(4) and (5) of the Exchange Act), and otherwise to leave to free, competitive market forces the determination of what information would be provided and at what price.<sup>4</sup> This is consistent with established Commission precedents which generally apply the standards set forth in, and implied by, Section 11A of the Exchange Act (including wide availability of market regulation, neutrality of fees, quality of market information, fair competition and equal regulation), rather than a cost recovery “ratemaking” analysis to market data fee filings.<sup>5</sup>

There are a number of exchanges that already charge for depth of book products. It is our understanding that these products are quite successful and their subscriber rates have increased steadily since their introduction. If there is public demand for the products and a willingness to pay for the data as evidenced by the success of existing market data products, the Amex asserts that exchanges should be allowed to charge competitive rates for such products.<sup>6</sup> Indeed, we believe that the growth rate in subscription of proprietary data is higher than that for core data, and that subscribers

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<sup>2</sup> See Adopting Release for Regulation NMS, Securities Exchange Act Release No. 51808, 70 FR 37496 (June 29, 2005) (Regulation NMS Adopting Release), at 37566-7.

<sup>3</sup> See Report of the Advisory Committee on Market Information (September 14, 2001) (the “Seligman Report”) at 41, text accompanying footnote 231.

<sup>4</sup> Regulation NMS Adopting Release at 37567.

<sup>5</sup> Concept Release on Regulation of Market Information Fees and Revenues, Securities Exchange Act Release No. 42208 (December 9, 1999), 64 FR 70613 (December 17, 1999), at page 33. See also, Seligman Report, *supra* note 2 at 49, text accompanying footnote 276. The 2001 blue-ribbon panel set forth in the Seligman Report considered and flatly rejected a cost-based or cost-recovery standard for market data fees. The widespread belief among the members of the panel was that a cost-based or cost-recovery approach is both unnecessary and impractical.

<sup>6</sup> Indeed, we believe that the Commission’s approach to market data fees has been, in general, to rely largely on the ability of the NMS Plans or other data providers “to negotiate fees that are acceptable to SRO members, information vendors, investors and other interested parties” in establishing appropriate fee levels. See Concept Release Concerning Self-Regulation, Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004), at 71272.

obtain value from the data. It would be arbitrary and unfair for the Commission to put a moratorium on this and other market data fee filings, while it considers the issues raised by SIFMA. The Amex believes that the Commission will create an uneven playing field if it denies exchanges and any other SROs with pending rule filings the right to charge for depth of book data when there are other exchanges that are already charging for the same data pursuant to SEC approval. To allow some competitors the opportunity to make a profit through the generation or use of market information, while denying others, is not consistent with the SEC's mandate to create a national market system that fosters competition between markets, and within the marketplace, and would create an unintended consequence and burden on competition that is inconsistent with the principles of the Exchange Act<sup>7</sup> and the specific requirement of "equal regulation" that applies in the context of market data.<sup>8</sup>

### **Terms of Agreements under which the Amex Data would be Distributed**

In the Proposal, the Exchange clearly indicated the terms of agreement under which the Amex data would be distributed, by stating that it will use the Amex / Network B vendor and subscriber agreements. These agreements have become the de facto industry standard, and have been properly reviewed and approved by the SEC. The vendor community and subscribers of market data feeds are familiar with these agreements and they are widely available.<sup>9</sup> The Amex believes that there is no need to replicate the Amex / Network B agreements in the Proposal. Further, the Amex believes that if the SEC desires to re-evaluate the terms of the Amex / Network B agreements, the Commission can do so pursuant to formal rulemaking rather than in the context of the Proposal.

The Amex notes that the issues raised in the SIFMA letter are not new, and that the industry at various times has had extensive debates to resolve these issues. The Exchange does not see the urgency or need to rush to address these issues in the context of the Proposal and urges the Commission to allow the staff to approve the Proposal pursuant to delegated authority, while it continues to evaluate how best to address the market data public policy issues.

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<sup>7</sup> *C.f.*, Sections 3(f), 6(b)(5) and 23(a)(2) of the Exchange Act.

<sup>8</sup> Section 11A(c)(1)(F) of the Exchange Act.

<sup>9</sup> The Amex / Network B vendor and subscriber agreements are available on <https://www.amexdata.com/index.aspx?pg=Agreements>

Thank you for the opportunity to respond to the SIFMA letter. If you have questions concerning any of the matters raised in this letter, please contact the undersigned at 212-306-1243 or Jeffrey P. Burns at (212) 306-1822.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Oscar Onyema". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Oscar Onyema  
Senior Vice President and Chief Administrative Officer

Cc: The Hon. Christopher Cox, Chairman  
The Hon. Paul S. Atkins, Commissioner  
The Hon. Roel C. Campos, Commissioner  
The Hon. Annette L. Nazareth, Commissioner  
The Hon. Kathleen L. Casey, Commissioner  
Erik Sirri, Director, SEC Division of Market Regulation  
Robert Colby, Deputy Director, SEC Division of Market Regulation