

A contract between Bloomberg and the NYSE governs Bloomberg's receipt and dissemination of Exchange market data. The Exchange amended this contract to impose restrictions on Bloomberg's dissemination of "Liquidity Quote" data. Based on these restrictions, the Exchange rejected certain computer "screen shots" proposed by Bloomberg to display Liquidity Quote and other quotation data from the NYSE and other market centers. The NYSE thereby denied Bloomberg the right to transmit Liquidity Quote data to its customers in these formats. We base our findings on an independent review of the record.

II.

On April 2, 2003, we issued an order (the "April Order") that approved Exchange rules to permit the display and use of quotations in stocks traded on the NYSE to show additional depth in the market for those stocks, i.e., Liquidity Quotes. 1/ For selected securities, the Exchange's Liquidity Quote Service disseminates a "liquidity bid" and a "liquidity offer," reflecting aggregated Exchange trading interest at a specific price interval below the best bid (in the case of a liquidity bid) or at a specific price interval above the best offer (in the case of a liquidity offer). 1/ The Liquidity Quote Service is part of the NYSE's "OpenBook" service. 1/

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- 2/ See Order Approving a Proposed Rule Change Regarding the Dissemination of Liquidity Quotations, Securities Exchange Act Rel. No. 47614 (Apr. 2, 2003), 79 SEC Docket 3586.
- 3/ See 79 SEC Docket at 3587.
- 4/ NYSE Openbook "is a compilation of limit order data that the Exchange . . . provide[s] to market data vendors, broker-dealers, private network providers, and other entities through a data feed." Order Approving Rule Change Establishing Fees for NYSE Openbook, Exchange Act Rel. No. 44138 (Dec. 7, 2001), 76 SEC Docket 1208.

Our April Order conditioned approval of the proposed rule change on the Exchange's agreement to remove from agreements it had with its data vendors (the "Vendor Agreements") any prohibition against data feed recipients integrating Liquidity Quote data with data from other markets. We stated, however, that the NYSE could require that vendors (i) "provide the NYSE attribution in any display that includes Liquidity Quote" and (ii) "make Liquidity Quote available to their customers as a separate branded package." 1/ We further stated, in the April Order, that the Exchange could not implement the Liquidity Quote Service until the prohibition against integrating Liquidity Quote data was removed from the Vendor Agreements. 1/

On April 9, 2003, the NYSE informed the Commission that it agreed to the conditions in the April Order. The Exchange also subsequently revised Exhibit C to the Vendor Agreements by, among other things, adding the following restrictions relating to the dissemination by vendors of Liquidity Quote data (the "April Restrictions"): 1/

5/ 79 SEC Docket at 3592.

6/ 79 SEC Docket at 3592.

The NYSE did not file the Vendor Agreements themselves with the Commission as a proposed rule change. In the April Order, we observed that, "[b]ecause of the manner in which the Commission is disposing of this matter, the Commission need not decide whether the NYSE agreements at issue . . . should be filed [as a rule change] under Section 19(b)(2) of the Act." 79 SEC Docket at 3590 n.39. We added that, in issuing the April Order, we had considered comments submitted by various parties regarding the Vendor Agreements. Id.

7/ The NYSE asserts that the April Restrictions were developed in consultation with Commission staff. The record contains e-mails from the NYSE addressed to the staff which discuss certain proposed restrictions. In addition, the NYSE has submitted an affidavit from an Exchange official stating that the NYSE "described proposed requirements for vendor displays that integrate Liquidity Quotes with the best bids and offers . . . of NYSE and other markets" and then, "[i]n response to comments from the Commission staff on its proposed requirements . . . made several modifications." The extent to which the staff was apprised of all of the April Restrictions in advance, and the nature of any related discussions between the NYSE and the staff, is not specified in the affidavit and is unclear from the record. In any event, we previously have not reviewed or approved these restrictions which, as indicated, were added to the Vendor Agreements after issuance of our April Order.

- requires the use of highlighting or other techniques to differentiate visually Liquidity Quote data from best bid and offer data;
- in any display of quotations that incorporates Liquidity Quote data with best bid and offer data, requires that the quote's display indicate the number of shares attributable to Liquidity Quote data;
- requires montages to include a footnote stating that: "NYLQ is not a BBO; NYLQ size includes NYSE BBO size"; 1/
- requires the vendor to obtain the Exchange's prior approval for each manner in which the vendor will display Liquidity Quote data; and
- thereafter requires the vendor to obtain the Exchange's prior approval of all changes, whether trivial or otherwise, to any such displays.

Exhibit C also requires that vendors "associate the identifier 'NYSE Liquidity Quote' or 'NYLQ' with each element or line of Liquidity Quote Information that it includes in an Aggregated Display, Montage or other integrated display." Bloomberg does not appear to challenge this requirement or, more generally, the Exchange's authority to require vendors to provide attribution when disseminating Liquidity Quote data.

The Exchange acknowledges that, where a vendor provides the Liquidity Quote data feed to end-users without controlling the end-users' displays or where end-users receive the data feed directly from the Exchange, the April Restrictions do not apply. The Exchange further acknowledges that the April Restrictions do not apply to software that an end-user "develops for itself" either by hiring a "software developer [to] create applications for it" or by buying "off-the-shelf applications from a vendor or

8/ The NYSE states that the footnote is designed to convey information both that the Liquidity Quote is not the best bid or offer and that the number of shares offered at the Liquidity Quote also includes the number of shares available for trading at the more favorable best bid or offer quotations.

other third party." The April Restrictions apply only if the vendor, rather than the end-user, controls the data display. 1/

9/ The Exchange states that, in applying the April Restrictions "only to vendors that control end-user displays, the NYSE follows the normal 'you can lead a horse to water' model of regulatory disclosures" The Exchange further asserts that its failure to apply the April Restrictions to end-users who receive the data feed directly "reflects the practical inability of the Exchange to enforce [the April Restrictions] in dispersed end-user locations."

On May 14, 2003, Bloomberg requested that we set aside the April Restrictions. ¹/ The Exchange began operating the Liquidity Quote Service on June 13, 2003.

10/ Bloomberg also urged the Commission to commence proceedings to disapprove the rule change conditionally approved in the April Order. We see no reason to address this issue in light of our decision to set aside the NYSE's denial of Bloomberg's access to Liquidity Quote data.

When it filed its appeal, Bloomberg asked for a stay of either the launch of the Liquidity Quote Service (which was scheduled for May 21, 2003) or, in the alternative, of implementation by the NYSE of the April Restrictions. On May 20, 2003, we stayed implementation of the Liquidity Quote Service until June 6, 2003. See Bloomberg L.P., Exchange Act Rel. No. 47891 (May 20, 2003), 80 SEC Docket 920.

On June 6, 2003, after reviewing briefs submitted by the parties regarding Bloomberg's application and stay request, we declined to extend the interim stay. See Bloomberg L.P., Exchange Act Rel. No. 47999 (June 6, 2003), 80 SEC Docket 1478. Although we determined not to extend the stay, we stated that we were "nevertheless troubled by [Bloomberg's] allegations." See 80 SEC Docket at 1483.

III.

Bloomberg argues that the April Restrictions, which it agreed to be bound by "under explicit protest and with full reservation of rights," deny Bloomberg access to Exchange services. The NYSE and Bloomberg agree that the Exchange has demanded prior approval of all of Bloomberg's (and other vendors') proposed screen shots displaying Liquidity Quote data.

The parties further agree that the Exchange has "formally" rejected one screen shot that had been proposed for use by Bloomberg's Tradebook ECN, and earlier had "informally" rejected two of Bloomberg's screen shots. 1/ In our view, the Exchange's imposition and enforcement of the April Restrictions effected a denial of access to Bloomberg of Exchange services, i.e., the Exchange would not provide Bloomberg access to Liquidity Quote data unless it disseminated and continues to disseminate the data in accordance with the April Restrictions.

Where action of a self-regulatory organization ("SRO"), such as the Exchange, constitutes a denial of access to services, the action is subject to review under Exchange Act Section 19(f). 1/

Section 19(f) requires that such action be set aside unless (i) the specific grounds on which the challenged action is based exist in fact; (ii) such action was taken in accordance with the rules of the SRO as approved by the Commission (or subject to an exception to such approval); and (iii) such rules are and were applied in a manner that is consistent with the purposes of the Exchange Act. Section 19(f) further requires that we set aside SRO action if it "imposes any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act. 1/ We have determined that the NYSE's action was not taken in accordance with the Exchange's rules and, therefore, should be set aside under Section 19(f). 1/

11/ Bloomberg asserts that the Exchange concedes that there is a denial of access. The Exchange's position is less clear. At times, the NYSE asserts that Bloomberg is complaining about a "constructive" denial of access. At another point, the Exchange asserts that there is no denial of access because the April Restrictions "simply prohibit controlled-display vendors like Bloomberg from omitting information" that the Exchange insists customers need (emphasis in original).

12/ 15 U.S.C § 78s(f).

13/ Id.

14/ See William J. Higgins, 48 S.E.C. 713, 719 (1987) (if SRO action denying access fails to meet any of the standards set forth in Section 19(f), it must be set aside).

The April Restrictions constitute "rules" of the Exchange as that term has been defined in the Exchange Act. Exchange rules include "such of the stated policies, practices, and interpretations of such exchange" 1/ that relate to:

- (1) Any material aspect of the operation of the facilities of the self-regulatory organization; or
- (2) Any statement made generally available to . . . persons having or seeking access . . . to facilities of, the self-regulatory organization ("specified persons"), or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to:
 - (i) the rights, obligations, or privileges of specified persons, or in the case of national securities exchanges or registered securities associations, persons associated with specified persons, or

15/ 15 U.S.C. § 78c(a)(27).

- (ii) the meaning, administration, or enforcement of an existing rule. 1/

The April Restrictions come within this definition in two ways. They relate to a "material aspect" of the Exchange's operation of its market data distribution facilities, and determine whether a vendor will gain access to such facilities. The April Restrictions also are an express statement made to persons seeking access to facilities of the Exchange, *i.e.*, the vendors who want to receive from the NYSE and then redistribute Liquidity Quote data to their customers, that "establishes a standard, limit, or guideline" with respect to the "rights, obligations, or privileges" of the vendors.

As rules, the April Restrictions can provide the basis for Exchange action only if they (i) have been approved pursuant to Exchange Act Section 19(b) or (ii) come within one of the two exceptions to the rule filing requirement contained in Exchange Act Rule 19b-4(c). 1/ Because it is undisputed that the April Restrictions were never filed by the Exchange as proposed rule changes under Section 19(b), they must come within one of the two filing exceptions to provide a basis for Exchange action.

Pursuant to Rule 19b-4(c), a stated policy, practice, or interpretation is a proposed rule change that must be filed pursuant to Exchange Act Section 19(b) unless it "(i) is 'reasonably and fairly implied' by an existing SRO rule, or (ii) is 'concerned solely with the administration' of the SRO and 'is not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing [SRO] rule.'" 1/

16/ 17 C.F.R. § 240.19b-4.

17/ Interactive Brokers LLC, 53 S.E.C. 466, 470 (1998) ("In determining whether a prohibition or limitation is in accordance with SRO rules, we must bear in mind that SRO rules, with few exceptions, must be filed with and approved by this Commission before they become effective.").

18/ Interactive Brokers LLC, 53 S.E.C. at 470 n.9 (citing Exchange Act Rule 19b-

Although we have stated that the "limits" of the "reasonably and fairly implied" exception will be determined on a case-by-case basis, we have warned that "a stated policy, practice, or interpretation that prescribes extensive and specific limitations on particular types of transactions or conduct that are not apparent from the face of the existing rule is not 'reasonably and fairly implied' by the rule." 1/ We also have explained that the "concerned solely with the administration" exception applies to "policies, practices, or interpretations that deal solely with 'housekeeping' matters." 1/ In our view, neither of the Rule 19b-4(c) exceptions applies here.

19/ Filings by Self-Regulatory Organizations of Proposed Rule Changes, Exchange Act Rel. No. 17258 (Oct. 30, 1980), 21 SEC Docket 347, 359-60. See also Higgins, 48 S.E.C. at 724 ("stated policy imposing a broad prohibition on [NYSE] members access" to Exchange services would "have to be apparent from the face of the existing NYSE rules to fall within the reasonably and fairly implied category.").

20/ 21 SEC Docket at 360. We further have noted that such a policy, practice, or interpretation that has "implications beyond housekeeping matters would not, of course, qualify for this exception." 21 SEC Docket at 360 n.79.

The Exchange suggests that the April Restrictions are implied by our April Order. 1/ According to the Exchange, the April Restrictions "were the logical outgrowth of the condition established [by the April Order and] represent the minimum specifications necessary to implement Liquidity Quote in a manner consistent with the Exchange Act's purposes." 1/ The

21/ The NYSE does not suggest that any Exchange rule other than the Liquidity Quote Service approved in the April Order could provide authority for the April Restrictions.

22/ The NYSE also asserts that "fundamental purposes" of the Exchange Act would be "disserved" if the April Restrictions are set aside. Among other things, the NYSE argues that the April Restrictions are necessary to prevent investor

issue remains, however, whether the Exchange was permitted to implement the Liquidity Quote Service in this way without first

confusion. According to the Exchange, Liquidity Quotes must be readily distinguishable so that investors are not misled to believe that they constitute the best bid or offer.

Although investor protection is a critical objective under the Exchange Act, the NYSE offers no evidence that users of the vendor displays at issue are likely to be confused unless the April Restrictions are enforced. Nothing in the record indicates that Bloomberg's customers will be unable to distinguish Liquidity Quote data from other data. Moreover, the Exchange's failure to impose the April Restrictions (or any comparable limitations) on raw datafeed end users or on vendors who sell to their customers both the raw data feed and separate programs to analyze such data appears, as Bloomberg asserts, inconsistent with the Exchange's purported concern about potential investor confusion. The Exchange has failed adequately to explain why only certain market participants must be protected against potential confusion regarding Liquidity Quote data.

submitting the April Restrictions to us as a proposed rule change. 1/ We conclude that it was not so permitted. 1/

23/ As indicated, we stated in our April Order that we did not need to decide at that time whether the Vendor Agreements needed to be filed as rule changes. See n.6, supra. Our determination was based in part on the fact that the Vendor Agreements at that time did not contain the April Restrictions.

24/ See n.14, supra (noting that SRO action must be set aside where any of the standards from Exchange Act Section 19(f) are not met).

We acknowledge that three of the April Restrictions -- i.e., those that require (i) differentiation of Liquidity Quote data from best bid and offer data; (ii) indication of the number of shares attributable to the Liquidity Quote when Liquidity Quote data is integrated with other quotation data; and (iii) inclusion of a specific footnote that differentiates Liquidity Quote data from best bid and offer data when such data is included in a montage -- arguably relate to the issue of attribution addressed in the April Order. 1/ However, these restrictions "prescribe[] extensive and specific limitations on particular types of . . . conduct that are not apparent from the face of the existing rule," the conditionally approved Liquidity Quote Service. 1/ Because these restrictions extend well beyond the attribution permitted by the April Order, they are not "fairly implied" by the April Order's approval of the Liquidity Quote Service and thus do not come within that exception. 1/ The remaining two restrictions -- that require vendors both to obtain the Exchange's prior approval for each proposed display of Liquidity Quote data and to obtain prior approval of all display changes -- are in no way implied by our approval of the Liquidity Quote Service, and clearly do not come within this exception.

None of the April Restrictions is concerned solely with Exchange administration. The restrictions involve far more than, and have policy implications that extend beyond, mere "housekeeping" matters.

As a result, we conclude that the April Restrictions constitute Exchange rules that were required to be filed and approved pursuant to Exchange Act Section 19(b). Because they were not so filed and approved, and do not fall within either of the two exceptions contained in Rule 19b-4(c), they cannot

25/ See n.1, supra. We note, in this connection, that it is incumbent on the Exchange to act reasonably in requiring attribution from its vendors.

26/ See n.19, supra.

27/ For example, the NYSE claimed the authority, based on the April Restrictions, to reject a proposed Bloomberg screen shot. The Exchange complained that users had to "toggle" from the original screen, which contained integrated quotation data and indicated that Liquidity Quote data was included in that integrated data, to a second, separate screen to obtain information differentiating Liquidity Quote data from other quotation data. According to the NYSE, "the rejected Bloomberg screen would have concealed all market attribution and impeded 'comparison shopping' among market centers and order execution mechanisms by withholding information necessary to make informed investment and execution decisions."

provide a basis for the Exchange's denial of access to Liquidity Quote data. 1/ Under the circumstances, therefore, we have

28/ In light of our determination to set aside the NYSE's action based on the absence of any supporting rule, we do not address whether the action otherwise satisfied Section 19(f). See Higgins, 48 S.E.C. at 719.

determined to set aside the NYSE's action in denying Bloomberg access to that data. 1/

An appropriate order will issue. 1/

By the Commission (Chairman DONALDSON and Commissioners GLASSMAN, GOLDSCHMID, ATKINS and CAMPOS).

Jonathan G. Katz
Secretary

29/ Charles Schwab & Co., Inc., a registered broker-dealer, has moved for leave to file a brief amicus curiae in this matter under Commission Rule of Practice 210(d)(1)(i). While we have determined to grant Schwab's motion, we note that the issues it raises already were considered in connection with the April Order. We see no reason to reconsider them in this proceeding.

30/ We have considered all of the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

