

November 9, 2006

Via Electronic Mail (rule-comments@sec.gov)

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Ms. Nancy M. Morris, Secretary

Re: File No. SR-NYSE-2006-81

Dear Ms. Morris,

The Market Data Subcommittee of the Securities Industry and Financial Markets Association (“SIFMA”)¹ Technology and Regulation Committee appreciates the opportunity to comment on the above referenced Securities and Exchange Commission (“SEC”) filing.

The New York Stock Exchange LLC (“NYSE”) has proposed to bundle its unconsolidated real-time quotation best bid and offer (“BBO”) data as part of its OpenBook service. In support of its proposal, NYSE notes that the proposed enhancement will make OpenBook a more attractive product to the trading desks of broker-dealers and institutional investors and that this change will enable it to compete more effectively with Nasdaq. The NYSE’s proposed rule change was filed pursuant to Section 19(b)(3)(A)(iii) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 19b-4(f)(6) thereunder. The NYSE designated its proposal as “non-controversial” and requested that the Commission exercise its authority to waive the 30-day waiting period before effectiveness contained in Rule 19b-4(f)(6). In reviewing the NYSE’s filing, the staff determined

¹ The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

by delegated authority that the proposal “(i) does not significantly affect the protection of investors or the public interest; [and] (ii) does not impose any significant burden on competition.” The staff also granted the NYSE’s request and waived the 30-day operative delay for such rules taking effect, concluding that the waiver is “consistent with the protection of investors and the public interest because it would provide market participants that use OpenBook with more information about the current state of the NYSE market.” SIFMA respectfully disagrees with these conclusions and, for the reasons set forth below, requests that the Commission review or “abrogate” the rule as provided under Exchange Act Section 19(b)(3)(C). This filing is not “uncontroversial” and does not have a sufficient basis to conclude that it is consistent with the protection of investors and the public interest.

SIFMA is concerned that this piecemeal action by the Commission staff is yet another example of how for-profit self-regulatory organization (“SRO”) rule changes affecting broad investor access to real-time market data are being put into place without the benefit of the Commission’s analysis of the overall structure of the market for exchange data. In this instance, both the NYSE filing and the Commission’s notice lack any analysis supporting their conclusion that including NYSE BBO data in OpenBook, as the exclusive means through which investors as well as broker-dealers are able to obtain access to this information, does not significantly affect the protection of investors and does not impose any burdens on competition.

The NYSE has approximately a 75% market share in the trading of its own listed stocks. As the NYSE’s CEO John A. Thain said nearly a year ago, “By having a high market share like we have today, we offer the most liquidity and the best prices.”² The NYSE’s embedded liquidity attracts more investors, increasing liquidity even further – the classic networking effect. In these circumstances, as the NYSE itself recognizes, the NYSE’s own fast real-time unconsolidated BBO data has significant importance to investors, distinct from the utility of the more slowly available consolidated quote data. The NYSE is the sole source of this data, at least until such time as it provides other market data distributors with access to this data for redistribution at the same time and under the same terms as the NYSE incorporates its BBO data into OpenBook.

Clearly, those investors with access to the NYSE’s BBO data would have a significant advantage over those investors who do not have such access at the same time. Yet, under its proposal, the

² Jenny Anderson, *A Clash of Exchange Titans*, New York Times (Dec. 2, 2005).

NYSE's BBO data product is being offered to investors only one way – bundled into a much larger package of OpenBook aggregate limit-order volume at every bid and offer price point outside the displayed NYSE quote. This bundling has the effect of forcing investors to buy a more expensive package of information than they may need in order to get access to the NYSE's own BBO data for which there would likely be a separate demand in a competitive market place.

The purpose of the Exchange Act is to uphold investor interests including ensuring equal access to the most recent best quotes from the nation's largest exchange. SIFMA respectfully requests that this rule change, and any future market data filings that relate to best bids and offers, last sale information, OpenBook or other depth of book products, or any trade analytics data products be published for notice and public comment prior to allowing such rules to become effective under Section 19(b)(1) of the Exchange Act. SIFMA's position, as articulated in other recent comment letters,³ is that the Commission staff should refrain from approving or accepting under expedited filing provisions of the Exchange Act new SRO rules relating to market data until the Commission itself articulates appropriate standards and an overall policy position when it comes to market data in light of recent changes, including the emergence of for-profit exchanges, the impact of decimalization, and evolving trade execution responsibilities under Regulation NMS.

In terms of impact on investors, the public interest and competition, the NYSE is marketing its BBO data product as faster than the CQ Plan's consolidated national best bid and offer (the "consolidated quotation"). One NYSE official was quoted in the press as saying that it could be up to 1 second faster, which means those market participants who can access the NYSE's BBO data will have a significant trading and information advantage over those who cannot. This is troubling. The faster NYSE BBO data in OpenBook will now compete with and potentially

³ Comment Letters from the Securities Industry Association ("SIA") re: SR-NYSEArca-2006-21 and SR-NYSEArca-2006-23 (NYSE Arca market data fee proposal) (June 30, 2006 and Aug. 18, 2006); Comment Letter from SIA re: SR- SR-NASDAQ-2006-013 (TotalView fee proposal) (Aug. 18, 2006); Comment Letter from SIA and The Bond Market Association (Feb. 2, 2006), File No. SR-NYSE-2005-77, at 19-20 (NYSE combination with Archipelago); Comment Letter on Regulation NMS from Marc Lackritz, President SIA to Jonathan Katz, Secretary, SEC (Feb. 1, 2005), File No. S7-1-04, at 25-31; Comment Letter on SRO Governance and Transparency Concept Release from Marc Lackritz, President SIA to Jonathan Katz, Secretary, SEC (March 9, 2005), File No. S7-39-04, at 16-19; Comment Letter from the SIA (April 28, 2006), File No. SR-NYSE-2005-32 (NYSE OpenBook proposal); Comment letter from the SIA (July 18, 2005), File No. SR-NASD-2005-05 (TotalView enterprise license fee).

displace the CQ Plan's consolidated tape, and the utility of the consolidated quotation will be diminished. In this respect, the NYSE's proposal cannot accurately be characterized as non-controversial. Nor does the Commission's notice provide a basis on which to conclude the proposed filing is consistent with the protection of investors and the public interest.

As we noted above, there is no reasonably priced version of the NYSE BBO data as a separate product even though investor demand for such a product can be expected. Instead the NYSE has packaged it with OpenBook, and investors – both professional and non-professional – can only obtain this faster quote by paying \$50 a month for all of OpenBook. In the alternative, the NYSE is only making its new BBO data product available to those market participants and vendors who have already signed-up for OpenBook.

The proposed rule change in the form in which it has been filed with the Commission is inconsistent with the NYSE's obligations as an exclusive processor under Rule 603(a)(1) and (2) of the Exchange Act to distribute information with respect to its quotations and transactions on terms that are fair and reasonable and not unreasonably discriminatory. These changes create new tiers of access to current securities pricing information for investors: fast real-time (the NYSE BBO data) and slow real-time (the consolidated quotation). Such a rule proposal, issued for an appropriate comment period, would doubtless be likely to engender adverse comments. Neither the NYSE's filing nor the Commission's notice attempts to analyze the impact on investors, the public interest, or market fairness and competition.

Displacing the consolidated quotation with multiple BBOs from multiple market centers would fragment market data and mark a significant step toward dismantling the national market system. This fundamental change is at the heart of the NYSE's proposal. It would subvert a major purpose of Section 11A and is inconsistent with a national market system, a system which the Congress required the Commission to foster.

The NYSE's OpenBook filing is only one in a steady procession of filings that have accompanied the transition of the two major U.S. markets, the NYSE and Nasdaq, into for-profit exchanges. SIFMA welcomes the benefits of for-profit exchanges as well as enhancements to data offerings that bring greater transparency to the markets and ultimately benefit investors. But, we believe it no less important that the fundamental policy goals of the Exchange Act, including those set forth in Section 11A, guide the market's major transformations. The danger in proposals like the instant filing is that, through a series of piecemeal steps, they will determine de facto important questions about the structure of our securities markets before they are fairly and adequately

aired and foreclose other opportunities to accomplish the Exchange Act's national market system goals. We respectfully submit to the Commission that the NYSE's proposal contravenes those goals as well as the express language of Section 6(b)(5) and 11A of the Exchange Act, which commit exchanges to furthering the national market system.

If you have any questions, please contact Melissa MacGregor, Assistant Vice President and Assistant General Counsel of SIFMA, at (202) 216-2034.

Sincerely,

Christopher Gilkerson, Chair
SIFMA Technology and Regulation Committee

Gregory Babyak, Chair
Market Data Subcommittee of the
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cc: Ira Hammerman
Ann Vlcek
Melissa MacGregor