



February 2, 2009

**Via Electronic Mail ([rule-comments@SEC.gov](mailto:rule-comments@SEC.gov))**

Ms. Elizabeth M. Murphy  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

**Re: Notice of Filing of Proposed Rule Change to Introduce a NYSE OpenBook® Nonprofessional Subscriber Fee and to Revise the Unit of Count that Determines the Device Fees Payable by Data Recipients (SR-NYSE-2008-131; Release No. 34-59198)**

Dear Ms. Murphy:

The Market Data Subcommittee of the Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> Technology and Regulation Committee appreciates the opportunity to comment on SR-NYSE-2008-131. The NYSE OpenBook Ultra proposal includes a number of significant changes relating to the unit of count for assessing market data fees, which will be administered by NYSE during a one year pilot program. The proposal also introduces a new nonprofessional fee for OpenBook Ultra data with a monthly fee of \$15, capped at a maximum of \$25,000. We note that NYSE has been considering these changes for some time, and prior to the SEC’s issuance of the Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Release No. 34-59039 (Dec. 2, 2008) (“NYSE ArcaBook Approval Order”).

SIFMA fundamentally objects to the application of the NYSE ArcaBook Approval Order’s “fair and reasonable” test to OpenBook Ultra fees – both professional and nonprofessional - for the reasons set forth in prior SIFMA comment letters.<sup>2</sup> As the

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<sup>1</sup> The Securities Industry and Financial Markets Association brings together the shared interests of more than 600 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.

<sup>2</sup> See Letter to Nancy M. Morris, Secretary, Commission, from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA (Jan. 17, 2007); Letter to Nancy M. Morris from Ira D. Hammerman (Aug. 1,

Commission is aware, on January 30, 2009, SIFMA filed a Notice of Appeal with the U.S. Court of Appeals for the D.C. Circuit concerning the NYSE ArcaBook Approval Order.<sup>3</sup> Our support for other aspects of the OpenBook Ultra proposal, discussed below, is independent from this basic objection.

### Unit of Count Pilot

The unit of count pilot holds the promise of simplified and fairer market data fee administration, something SIFMA and its member firms have advocated for years. Under the proposal, the unit of count for assessing market data fees would focus on Subscriber Entitlements and would avoid in most cases duplicate counting of an individual using multiple devices. This is a welcome and long overdue change, reflecting technological changes in the way that both professionals and nonprofessionals access and use market data. To avoid the administrative burdens of different exchanges applying different units of count, we urge the Consolidated Tape Association, the Nasdaq UTP Plan, and the individual exchanges to consider implementing a uniform unit of count as well, and working in cooperation with our committee in this regard.

In response to SIFMA member concerns about how NYSE will count internal Subscriber Entitlements for support functions (which previously were generally exempt from fee liability), SIFMA received the following assurance from NYSE that we would like to be reflected in the record for this filing:

As currently drafted, the filing provides that all internal entitlement to data by external vendors is billable, even if that use is for feed monitoring, operations, support, and other similar functions related to making the external service available. We were originally going to address this particular situation as part of a larger, separate filing, but we have changed our mind. We intend to articulate a policy that limits the liability of these entitlements to \$1,500 per month, or 25 devices. If we need to file this, we will, but because it will limit the amount customers

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2007); Letter to Nancy M. Morris from Marc E. Lackritz, President and CEO, SIFMA (Aug. 16, 2007); Letter to Dr. Erik R. Sirri, Director, Division of Market Regulation, Commission, from Melissa MacGregor, Vice President & Assistant General Counsel, SIFMA (Nov. 7, 2007); Letter to Nancy M. Morris from Ira D. Hammerman (Feb. 7, 2008); Letter to Nancy M. Morris from Christopher Gilkerson and Gregory Babyak, Market Data Subcommittee Co-Chairs (Feb. 14, 2008); Letter to Florence Harmon from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA (July 10, 2008); and Letter to Florence Harmon from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA (Nov. 17, 2008).

<sup>3</sup> Petition for Review, Sec. Indus. & Fin. Mkts. Ass'n v. SEC, No. 09-1045 (D.C. Cir. Jan. 30, 2009).

need to pay, we are comfortable that we can implement this through the policy until such time as it may be formally filed and approved.<sup>4</sup>

### Nonprofessional Subscriber Fee

SIFMA has long advocated a nonprofessional fee for depth-of-book data to promote market transparency and investor protection. NYSE has incorporated several important components into the OpenBook Ultra nonprofessional fee that SIFMA has requested in the past.

First, the monthly maximum amount serves as an enterprise fee, decreasing administrative burdens and enabling broader distribution of depth-of-book data. Second, under the monthly maximum amount, firm representatives who otherwise would be counted as “professionals” may receive the data under the nonprofessional fee, provided that it is for personal use in their personal accounts. Third, under a de minimis exception intended to further the purposes of the enterprise fee and reduce administrative burdens, up to 5% of the subscriber pool receiving data under the monthly maximum amount may be “professionals,” provided that they receive the data through their on-line account in a non-streaming format. SIFMA supports these elements and encourages other exchanges consider similar steps.

However, as noted above, SIFMA opposes the justification of the fee premised on the test announced in the NYSE ArcaBook Approval Order.

Notably, in its OpenBook Ultra filing, NYSE provides a justification of the \$25,000 monthly maximum independent from the SEC’s test under the NYSE ArcaBook Approval Order:

The Exchange intends for the [monthly maximum] to enable much wider distribution of NYSE OpenBook data to retail investors holding brokerage accounts. This will further the goal of market transparency for investors. The low fee enabling wider retail investor access, coupled with the five percent “de minimis” exception for professional Subscribers in the Subscriber Pool, reduce administrative burdens and produce a fee that is fair and reasonable.<sup>5</sup>

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<sup>4</sup> Email from Mr. Ron Jordan, EVP Market Data Services, NYSE Euronext to Christopher Gilkerson, Co-Chair of Market Data Subcommittee (January 22, 2009). In that email, Mr. Jordan also clarified that only the unit of count portion of the filing is a pilot, and that the \$25,000 monthly maximum for nonprofessional data is intended to apply in 2009, although the filing states “2008.” Beginning in 2010, the rate may only go up consistent with an annual cost of living adjustment. Any larger fee increase would require the exchange to file a rule change.

<sup>5</sup> Exchange Act Release No. 34-59198, 74 Fed. Reg. 1268, at 1271 (Jan. 12, 2009).

NYSE, however, then erroneously applies the “subject to significant competitive forces” test.

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Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Ann Vlcek, Melissa MacGregor, or me at 202-962-7300.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ira D. Hammerman". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Ira D. Hammerman  
Senior Managing Director and General Counsel

cc: The Hon. Mary L. Schapiro, Chairman  
The Hon. Kathleen L. Casey, Commissioner  
The Hon. Elisse B. Walter, Commissioner  
The Hon. Luis A. Aguilar, Commissioner  
The Hon. Troy A. Paredes, Commissioner  
Dr. Erik R. Sirri, Director, Division of Trading and Markets