



September 23, 2004

AMSTERDAM  
ATHENS  
ATLANTA  
BANKOK  
BEIJING  
BOGOTA  
BOMBAY  
BONN  
BOSTON  
BRASILIA  
BRISBANE  
BRUSSELS  
BUDAPEST  
BUENOS AIRES  
CAIRO  
CALGARY  
CANBERRA  
CARACAS  
CHARLOTTE  
CHICAGO  
CLEVELAND  
COPENHAGEN  
DALLAS  
DETROIT  
DUBAI  
DUBLIN  
EDINBURGH  
FRANKFURT  
GENEVA  
HELSINKI  
HONG KONG  
HOUSTON  
ISTANBUL  
JAKARTA  
JERUSALEM  
JOHANNESBURG  
KANSAS CITY  
KUALA LUMPUR  
LIMA  
LISBON  
LONDON  
LOS ANGELES  
MADRID  
MANILA  
MELBOURNE  
MEXICO CITY  
MILAN  
MONTERREY  
MOSCOW  
MUMBAI  
NEW DELHI  
NEW YORK  
OSAKA  
OTTAWA  
PARIS  
PRAGUE  
PORTLAND  
PRAGUE  
PRINCETON  
RIO DE JANEIRO  
ROME  
SACRAMENTO  
SAN FRANCISCO  
SANTIAGO  
SAO PAULO  
SEATTLE  
SEOUL  
SHANGHAI  
SINGAPORE  
STOCKHOLM  
SYDNEY  
TALPEI  
TEL AVIV  
TOKYO  
TORONTO  
VANCOUVER  
VIENNA  
WASHINGTON DC  
WELLINGTON  
WILMINGTON  
ZURICH

**Via e-mail: rule-comments@sec.gov**

U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549-0609  
Attention: Mr. Jonathan G. Katz, Secretary

**Re: File No. SR-NYSE-2004-43**

Ladies and Gentlemen:

Bloomberg L.P. (“Bloomberg”) is commenting on a proposal by the New York Stock Exchange (the “NYSE”) to make its OpenBook service available in real time (the “OpenBook Proposal”). The OpenBook Proposal was published for comment by the Securities and Exchange Commission (the “Commission”) in Securities Exchange Act Release No. 50275 (August 26, 2004) (the “Release”).

**EXECUTIVE SUMMARY**

Bloomberg believes that the Commission must evaluate the OpenBook Proposal in light of its current market structure proposals as set forth in proposed Regulation NMS<sup>1</sup> and in relation to the NYSE’s recent proposed amendments to Direct+.<sup>2</sup> We respectfully suggest that the OpenBook Proposal cannot be treated in isolation merely as a change in dues or fees but must be understood as part of the NYSE’s broader initiative to gain downstream control of data displays and to reconfigure itself as a hybrid market. We believe the Commission should evaluate the OpenBook Proposal as a market-data product governed by the same NYSE contract the Commission determined to be illegal in *Matter of*

1 Securities Exchange Act Release No. 49325 (Feb. 26, 2004).

2 Securities Exchange Act Release No. 50173 (August 10, 2004).

*Bloomberg* earlier this year.<sup>3</sup> As we understand it, the OpenBook service would be identical to what the NYSE refers to in its Direct+ filing as the Display Book. That is, OpenBook would be the portal to Direct+.

Among the many issues the Open Book Proposal raises, the most important to Bloomberg is the discriminatory impact the proposal would have on our customers and their clients, the many individual investors they serve. By prohibiting some market participants but not others from displaying OpenBook with data integrated from other markets, the NYSE is creating a biased trading facility that will disadvantage certain investors at the expense of others and will severely disadvantage other liquidity venues that trade in NYSE-listed securities, such as the regional exchanges, Nasdaq and the electronic communications networks (“ECNs”).

To meet their best execution obligations, trading desks on both the sell side and the buy side need to have transparency and access to all executable bids and offers available in the national market system on one trading monitor. The OpenBook Proposal would frustrate that objective. It is unfairly discriminatory in that it would impede the efforts of broker-dealers to meet their best-execution obligations. The OpenBook Proposal contravenes the fundamental goals of the national market system. It is inconsistent with the requirements in the Securities Exchange Act of 1934 (the “Exchange Act”) that the NYSE’s rules (i) remove impediments to and perfect the mechanism of a free and open market and a national market system, and (ii) not impose unnecessary and inappropriate burdens on competition. In addition, enforcement of the NYSE OpenBook contract would deny Bloomberg and others fair access to the NYSE data.<sup>4</sup>

The Commission previously approved OpenBook fees at a time when it was not real-time. At the time, the Commission was quite concerned about the discriminatory and unfair provisions in the OpenBook contract:

The Commission notes that this order only approves the filing submitted by the NYSE, for the fees for the NYSE OpenBook service. Therefore, the Commission is not approving or disapproving the terms of the NYSE's vendor or subscriber agreements. The NYSE's proposed restrictions on vendor redissemination of OpenBook data, including the prohibition on providing the full data feed and providing enhanced,

---

<sup>3</sup> *In the Matter of Bloomberg L.P. for Review of Action Taken by the New York Stock Exchange, Inc.*, Securities Exchange Act Release No. 49076 (January 12, 2004).

<sup>4</sup> *See* Exchange Act Sections 6(b)(5), 6(b)(8) and 11A(c)(1).

integrated, or consolidated data found in these agreements are on their face discriminatory, and may raise fair access issues under the Act.<sup>5</sup>

OpenBook, as considered by the Commission in 2001, presented much less significant legal and policy issues than the NYSE now presents with a real-time OpenBook. With delayed quotations, the impact of OpenBook was nowhere near as significant as real-time OpenBook. With real-time quotations attracting order flow into the NYSE's hybrid market, OpenBook may well become dominant and, with its discriminatory and anticompetitive features intact, may well use the NYSE's regulatory powers to crowd out other market centers and perfect further the NYSE's monopoly. If the NYSE were to succeed on the basis of competitive excellence rather than regulatory compulsion, that would be a different proposition. We suggest the Commission should restrain the compulsion and require the NYSE to delete the anticompetitive and discriminatory features from its OpenBook program.

This filing raises a number of the same issues as were raised and resolved in the Commission's consideration of Bloomberg's petition for review of the NYSE's denial of access with respect to the NYSE's Liquidity Quote program.<sup>6</sup> For the reasons Bloomberg advanced then, and in its most recent comment letters on Liquidity Quote, the Commission should not allow the NYSE to impose the restrictions on vendor display of OpenBook data to which Bloomberg has objected.<sup>7</sup> In fact, Liquidity Quote involved the same contract as well as a subset of the same data and the very same issues. The NYSE should not be allowed to do by contract in OpenBook what the Commission expressly prohibited in *Matter of Bloomberg*.

Bloomberg has frequently commented in the past on the level of fees the NYSE exacts for market data, and the fact that those fees bear no demonstrated relation to the costs the NYSE incurs in collecting and disseminating the data. We continue to believe the Exchange Act requires that those fees be subjected to a rigorous cost-based analysis and that such an analysis would demonstrate that the fees are excessive.

---

<sup>5</sup> Securities Exchange Act Release No. 45138 (December 7, 2001), in text at n.12, available at <http://www.sec.gov/rules/sro/34-45138.htm>.

<sup>6</sup> *Matter of Bloomberg*, *supra*, footnote 3.

<sup>7</sup> Letters from Thomas F. Secunda of Bloomberg (July 7 and August 12, 2004) in SEC File No. SR-NYSE-2004-32, available at <http://www.sec.gov/rules/sro/nyse/nyse200432.shtml>.

## **I. DESCRIPTION OF THE NYSE PROPOSAL**

Currently, OpenBook subscribers view limit orders contained in the NYSE limit-order book on a five-second delayed basis. The OpenBook Proposal would permit OpenBook subscribers the option of viewing OpenBook data in real time. The NYSE charges two fees for the NYSE OpenBook service, \$5,000 a month for each entity that receives the NYSE OpenBook data feed to redistribute the data feed and an end-user fee of \$50 a month for each terminal through which an end user displays the service. Under the OpenBook Proposal, the current \$5,000 monthly fee will entitle an entity to receive and redistribute the five-second delayed data feed, the real-time data feed or both. In addition, the NYSE proposes to increase the monthly per-terminal charge to \$60.00 for end users displaying the real-time OpenBook service.

In Exhibit C of the NYSE Agreement for Receipt and Use of Market Data governing the display of OpenBook data (the “NYSE OpenBook Agreement”), the NYSE prohibits data-feed customers from retransmitting the NYSE OpenBook data feed.<sup>8</sup> More importantly, the NYSE OpenBook Agreement prohibits a data-feed recipient that redistributes the NYSE OpenBook outside of its organization from integrating the limit orders of other markets or trading systems with the NYSE limit orders. The NYSE OpenBook Agreement states, however, that the prohibition on integration of data does not apply to customers that provide displays of the OpenBook service to their officers, partners and employees or to those of their affiliates. Finally, a real-time OpenBook service will function as an essential element of the NYSE’s proposed amendments to Direct+. The Direct+ filing is neither clear nor explicit on this point, but it appears that the Display Book of the revised Direct+ will be the real-time OpenBook which will be the portal to Direct+.

## **II. THE OPENBOOK PROPOSAL IS UNFAIR, DISCRIMINATORY AND ANTICOMPETITIVE.**

Exchange Act Section 11A(c)(1)(B) requires an SRO to distribute information with respect to quotations in such a manner as to assure the prompt, accurate, reliable and fair collection, processing, distribution and publication of information with respect to quotations for and transactions in such securities and the fairness and usefulness of the form and content of such information. Exchange Act Section 11A(c)(1)(D) requires that exchange members, brokers, dealers, and securities information processors be able to obtain information with respect to quotations for and transactions in securities on terms that are not unreasonably discriminatory. Exchange

---

<sup>8</sup> The NYSE OpenBook Agreement is the standard NYSE Vendor Agreement with exhibits annexed that provide terms and conditions expressly applicable to NYSE OpenBook. Exhibit C of the NYSE Vendor Agreement is available on the NYSE OpenBook web site ([www.nysedata.com/openbook](http://www.nysedata.com/openbook)).

Act Section 11A(c)(1)(E) requires that exchange members, brokers, and dealers transmit and direct orders for the purchase or sale of qualified securities in a manner consistent with the establishment and operation of a national market system.

The NYSE OpenBook Proposal would permit certain subscribers to enhance and adapt NYSE limit-order information by consolidating NYSE OpenBook information with limit-order information available from other market centers for internal distribution. At the same time, as noted above, the NYSE OpenBook Agreement would expressly prohibit comparable adaptations and uses for other classes of subscribers. There is no reasonable basis for depriving one class of investors of a level and quality of market data needed by all investors to make fully informed investment decisions. The difference in treatment of the classes of subscribers under the NYSE OpenBook Proposal contravenes Section 11A(c)(1)(B) in that it impairs both the usefulness and fairness of the form and content of the NYSE OpenBook data for users and contravenes Section 11A(c)(1)(D) in that it is unreasonably discriminatory. The NYSE OpenBook Proposal contravenes Section 11A(c)(1)(E) by establishing a trading facility that favors the display of trading data of one trading venue over all others, thereby making it more difficult for broker-dealers to meet their best-execution obligations and frustrating one of the fundamental goals of the national market system.

The effect of such unfair and discriminatory conduct is to harm customers of Bloomberg by placing them at a disadvantage to other investors in that their access to essential trading information is unjustifiably limited. By prohibiting the integration of data from other markets with depth-of-book data from the NYSE, the OpenBook Proposal makes it more difficult for broker-dealers to view and access available trading interest across the national market system and frustrates their ability to meet their best-execution obligations. The resulting burden and cost falls not only upon Bloomberg's customers but also on the individual investors who are their clients.

The NYSE does not adequately explain why the redistribution of consolidated displays of the NYSE OpenBook data feed should be prohibited. Perhaps the NYSE's unstated concern is that other exchanges, dealers, ECNs or market venues might find the NYSE OpenBook a useful tool for making markets in NYSE-listed stocks, a concern that is heightened by the advent of Direct+. The NYSE might also fear that these potential competitors would prepare a quotation montage that would diminish the time-and-place advantages NYSE floor members enjoy and would provide for comparison shopping of NYSE prices against the prices available elsewhere. These possibilities suggest that one purpose in prohibiting retransmission of consolidated

displays of the data feed is to limit the potential leakage of order flow in NYSE-listed securities to any market venue other than the NYSE.<sup>9</sup>

If the Commission were to approve the NYSE OpenBook Proposal, it would permit the NYSE to put ECNs, the regional exchanges and other market venues at a competitive disadvantage for establishing a third market in NYSE-listed securities. It would also obstruct the broad and uniform access to essential market data needed by all broker-dealers to meet their best-execution obligations. Putting roadblocks in the path of competing market centers would restrict their ability to attract order flow and would have anticompetitive market effects similar to those the Commission previously condemned in the cases referred to above. Making it more difficult for some broker-dealers to meet their best-execution obligations creates unfair discrimination into the market place by skewing an essential trading facility in favor of some market participants at the expense of others.

These concerns were compelling when OpenBook had delayed-time data. Now that the NYSE proposes to offer OpenBook data in real time and make it an

---

<sup>9</sup> Efforts by the NYSE to prevent “leakage” of order flow are by no means a new phenomenon. Almost 60 years ago, in the *Multiple Trading Case*, the Commission held that the public policy under the Exchange Act voided a rule of the NYSE that purported to prohibit NYSE members from routing orders in NYSE-listed securities to the regional exchanges. *Matter of The Rules of the New York Stock Exch.*, 10 SEC 270 (October 4, 1941) (NYSE rule prohibiting dealings on other markets declared to be against public interest and illegal).

Later, when the NYSE tried to impose a “Public Limit Order Protection Rule” (the “PLOPR”) that would have required its members to clear limit orders on the NYSE specialists’ books before taking orders to regional exchanges, the Commission once again objected and entered disapproval proceedings under the Exchange Act. *Matter of New York Stock Exch., Notice of Proceeding to Consider Disapproval of Proposed Rule Change*, Securities Exchange Act Release No. 12249 (SR-NYSE-76-5) (March 23, 1976), 1976 SEC LEXIS 2116. In the latter case, the Commission was unpersuaded by the favorable market impacts the NYSE argued would arise from its proposed rule. In the order commencing proceedings to consider disapproval of the PLOPR, the Commission stated that the fact that an NYSE proposed rule change would limit the ability of member organizations to effect transactions on other market centers within the United States was, *per se*, a ground for disapproval of the proposed rule change. *Id.*, in text following n.8. As in the *Multiple Trading Case*, the NYSE’s arguments about the need to have the PLOPR to promote market integrity and customer protection were irrelevant to that basic statutory issue.

More recently, in connection with its consideration of proposed amendments to NYSE Rule 92, the Commission determined that the NYSE should not be allowed to apply its rule to other marketplaces, which the NYSE had sought to do to prevent other markets from adopting more liberal trading standards than the NYSE was prepared to allow. *See* Securities Exchange Act Release No. 44139 (March 30, 2001). Finally, it was only recently that the NYSE rescinded its longstanding, anticompetitive Rule 390, which sought to stem the erosion of order flow to the third market. *See* Securities Exchange Act Release No. 42758 (May 5, 2000).

essential component of an amended Direct+, it is urgent that the Commission address the issue. As the Commission itself noted in its order approving NYSE's Liquidity Quote on condition that the NYSE remove from its contracts the prohibition on the ability of data feed recipients to integrate the data with display of other markets' data:

While it is arguable that an SRO may restrict the integration of some information that is not required by current SEC rules to be disseminated in a consolidated format, the Commission believes it is also arguable that, at a minimum, where a market chooses to disseminate quotation data that is immediately executable and represents a market's entire interest at a particular price, such market data should be consolidatable.<sup>10</sup>

In light of its restrictive and anticompetitive effects, we respectfully suggest that the Commission cannot lawfully approve the OpenBook proposal.

**III. OPEN BOOK'S REAL-TIME OPERATION SHOULD ITSELF BE REGARDED AS A PROPOSED RULE CHANGE FOR PURPOSES OF EXCHANGE ACT 19(b).**

The fact that OpenBook is now going to be real-time is, as noted above, not a minor change. The NYSE should not be able to put that significant change into effect without treating it as a new proposed rule change. The Commission should require the NYSE to amend its rule filing to include this change as part of the rules requiring Commission review and approval. For the reasons the Commission enunciated in *Matter of Bloomberg*, the Commission should require the NYSE to seek and obtain Commission approval of significant changes in its facilities.<sup>11</sup>

**IV. THE NYSE MUST NOT USE ITS VENDOR CONTRACT TO IMPOSE REGULATORY RESTRICTIONS.**

The Commission concluded in the Liquidity Quote proceeding that the NYSE could not lawfully use its Exhibit C to the Vendor Agreement to impose regulatory restrictions that had not been filed with and approved by the Commission pursuant to Exchange Act Section 19(b).<sup>12</sup> The use of the contract for OpenBook

---

<sup>10</sup> Securities Exchange Act Release 47614 (April 2, 2003) in text before n.54.

<sup>11</sup> *Matter of Bloomberg L.P.*, *supra*.

<sup>12</sup> *Id.*

presents the same issues resolved against the NYSE in respect of Liquidity Quote. The Commission should prohibit the NYSE from imposing those restrictions here as well.

**V. THE NYSE FAILS TO PROVIDE AN ADEQUATE STATEMENT AND JUSTIFICATION OF BURDENS ON COMPETITION IN THE OPENBOOK PROPOSAL.**

Section 6(b)(5) of the Exchange Act provides that NYSE rules must “remove impediments to and perfect the mechanism of a free and open market and a national market system . . . and [must] not [be] designed to permit unfair discrimination between customers, issuers, brokers, or dealers . . . .” Section 6(b)(8) of the Exchange Act provides that an NYSE rule must “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].” In the NYSE OpenBook Proposal, the NYSE states that “[t]he Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.”<sup>13</sup> That rote incantation of the statutory standard in Sections 6(b)(5) and (8) is unsupported by any discussion or any demonstration at all. The NYSE’s formulaic response does not satisfy the requirements of the Commission’s Form 19b-4 that such burdens be explained and justified in detail.<sup>14</sup>

In this case, the NYSE has submitted a proposal that would adversely affect the ability of brokers, ECNs and other market venues to compete with the NYSE for order flow in NYSE-listed securities and to compete with one another on a level playing field. Given the significance of the issues raised by the NYSE’s OpenBook proposal, it is particularly important that there be a meaningful opportunity for public comment to guide the Commission in determining whether to allow these rule changes. Accordingly, we believe that the Commission should not approve the NYSE’s OpenBook Proposal as submitted and should require the NYSE to resubmit the proposal for public notice in full compliance with Sections 19(b)(1) and 19(b)(2) of the Exchange Act.

The anticompetitive aspects of the NYSE OpenBook Proposal are of particular public importance in light of the market power the NYSE has as a *de facto* exclusive processor of securities information with respect to its limit-order data. In evaluating the NYSE’s proposed rule, the Commission should apply the standards of Section 6(b) with the same rigor as it would evaluate fees by exclusive securities

---

<sup>13</sup> Securities Exchange Act Release No. 50275 (August 26, 2004), Section II(B).

<sup>14</sup> As the Commission is aware, the General Instructions to Form 19b-4, 5 Fed. Sec. L. Rep. (CCH) ¶ 32,356, are explicit on the point. See “Information to be Included in the Completed Form,” Item 4. *Self-Regulatory Organization’s Statement on Burden on Competition*. See also, Securities Acts Amendments of 1975, Report of the Senate Comm. on Banking Housing, and Urban Affairs to Accompany S.249 (the “Senate Report on S.249”), S. Rep. No. 94-75, 94th Cong., 1st Sess. 29-30 (1975).



information processors regulated as such.<sup>15</sup> The Congress, in enacting the Securities Acts Amendments of 1975, warned particularly against possible abuses of market power by exclusive processors:

The Committee believes that if economics and sound regulation dictate the establishment of an exclusive central processor for the composite tape or any other element of the national market system, *provision must be made to insure that this central processor is not under the control or domination of any particular market center. Any exclusive processor is, 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.* Although the existence of a monopolistic processing facility does not necessarily raise antitrust problems, serious antitrust questions would be posed if access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in the trade or if its charges were not reasonable. Therefore, in order to foster efficient market development and operation and to provide a first line of defense against anti-competitive practices, Sections 11A(b) and (c)(1) would 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 [emphasis added].<sup>16</sup>

## VI. CONCLUSION AND RECOMMENDATIONS

Bloomberg respectfully recommends that the Commission not approve the NYSE OpenBook Proposal and the Commission direct the NYSE to revise its proposed rule change to resolve the problems referred to above.

\* \* \*

We appreciate the opportunity to offer Bloomberg's views to the Commission on these important issues. We hope our comments prove useful to the Commission and its staff. If the Commission or any members of the staff wish to discuss these matters with us, please let me know.

---

<sup>15</sup> Section 3(a)(22) of the Exchange Act excludes from the definition of "securities information processor" national securities exchanges in view of the Commission's other regulatory powers over exchanges. But for that exclusion, the NYSE would be the exclusive securities information processor with respect to transactions on its market.

<sup>16</sup> Senate Report on S.249 at 11-12.

Respectfully submitted,

*Thomas F. Secunda*

cc (w/att): The Hon. William H. Donaldson, Chairman  
The Hon. Paul S. Atkins, Commissioner  
The Hon. Cynthia A. Glassman, Commissioner  
The Hon. Harvey J. Goldschmid, Commissioner  
The Hon. Roel C. Campos, Commissioner  
Annette L. Nazareth, Esq., Director,  
Division of Market Regulation  
Robert L. D. Colby, Esq., Deputy Director,  
Division of Market Regulation  
Elizabeth K. King, Esq., Associate Director,  
Division of Market Regulation  
David S. Shillman, Esq., Associate Director  
Division of Market Regulation  
Nancy J. Sanow, Esq., Assistant Director  
Division of Market Regulation  
Kelly M. Riley, Senior Special Counsel  
Division of Market Regulation  
Giovanni P. Prezioso, Esq., General Counsel