

Christopher P. Gilkerson  
Vice President & Associate General Counsel  
Office of Corporate Counsel  
101 Montgomery Street  
120KNY-06-295  
San Francisco, CA 94104  
tel (415) 636-3667  
email: christopher.gilkerson@schwab.com

September 23, 2004

**Via Electronic Filing**

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

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

Dear Mr. Katz:

Charles Schwab & Co. Inc. (“Schwab”) appreciates the opportunity to comment on the NYSE’s proposed rule change to convert its OpenBook market data service to real-time and establish a \$60.00 per month terminal fee. Because of the important market structure and market data issues raised by NYSE’s proposal, Schwab requests that the Commission refrain from approving the rule at this time. This is not a minor SRO rule change to be treated under the fast-track mechanism of a scant 21-day comment period with routine effectiveness after 35 days. Under Exchange Act Section 19(b)(2), the Commission should designate a 90-day period for consideration of the rule change, require that the exchange submit additional information to cure the deficiencies in its filing, and then reopen or extend the comment period to allow sufficient time for the Commission and the public to consider the real-time OpenBook’s impact on different market participants, investors, and the national market system. Below we summarize the four primary deficiencies with the exchange’s rule filing.

1. There is no support for the exchange’s statement that “the fee for the real-time NYSE OpenBook service reflects an equitable allocation of its overall costs associated with using its facilities.” Whether the \$60 per terminal fee has any relation to costs, or is an equitable allocation, can only be determined by looking at the expected number of subscribers and the costs that are being allocated. No such information is included in the filing.

2. There is no justification for not including a reasonable fee for non-professional investors to receive the real-time OpenBook data. Exchange Act Section 6(b)(5), among other things, requires that the rules of the exchange be designed to promote a free and open market and a national market system, to protect investors and the

public interest, and to prevent unfair discrimination between customers, brokers, and dealers. There is no explanation of how the lack of a non-professional fee meets this statutory requirement. The Commission's notice states the exchange's belief "that NYSE OpenBook responds to the demands of some market participants for depth-of-book market data, a demand that has resulted, in part, from decimalization's six-fold increase in the number of price points." Retail investors are market participants who also need and deserve transparency and access to this data in a post-decimal environment. Otherwise they are placed at a disadvantage.<sup>1</sup> The \$60 fee, however, operates as a denial of access to retail investors, including active traders.

In 2001 when the Commission first considered OpenBook, the exchange represented to the Commission that "should a demand develop, it would consider designing a limit order data product for the retail, non-professional customer."<sup>2</sup> The current NYSE filing is silent as to what, if any, steps the exchange has taken to consider non-professional needs and interests. In contrast, Nasdaq's TotalView depth-of-book product is offered at a \$14 per month non-professional price. If the exchange were to make the data stream available at a reasonable fee to market data vendors without unreasonable restrictions on redistribution and integration, those vendors would create a data product for non-professional investors.

3. NYSE failed to file its vendor and subscriber agreements as rules for public comment and Commission review and approval. The current contractual provisions governing NYSE distribution of OpenBook data discriminate against vendors and their clients, and they are anti-competitive, because they restrict redistribution and consolidation with other markets' data. In its 2001 approval order, the Commission took special note of the vendor and subscriber agreements, stating:

The NYSE's proposed restrictions on vendor redissemination of OpenBook data, including the prohibition on providing the full data fee and providing enhanced, integrated, or consolidated data found in these agreements are on their face discriminatory, and may raise fair access issues under the Act.<sup>3</sup>

Subsequently in the Bloomberg case against NYSE about LiquidityQuote, the Commission's order concluded that the vendor contract at issue there was illegal because the provisions restricting integration and redistribution were never filed as rules for review and approval.<sup>4</sup> The same reasoning applies here, and NYSE should be required to

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<sup>1</sup> See Comment Letter from Charles Schwab & Co., Inc. dated June 30, 2004 on Proposed Regulation NMS, SEC Release No. 49325 (Feb. 26, 2004).

<sup>2</sup> Order Approving a Proposed Rule Change by the New York Stock Exchange, Inc., Establishing the Fees for the NYSE OpenBook, SEC Release No. 34-45138; File No. SR-NYSE-2001-42 (Dec. 7, 2001).

<sup>3</sup> *Id.*

<sup>4</sup> In re Bloomberg L.P., SEC Release No. 34-49076, Admin. Proc. File No. 3-11129 (Jan. 14, 2004).

file its contractual provisions governing OpenBook distribution for public comment and Commission review and approval.

4. NYSE failed to explain how its real-time OpenBook data relates to the Commission's current market structure proposals set forth in proposed Regulation NMS. Nor did NYSE explain the relation between OpenBook and NYSE's recent proposed amendments to its automatic execution facility, Direct+.<sup>5</sup> NYSE's Direct+ or "Hybrid" proposal is similarly light on vital facts that allow for substantive comment. Indeed, those who have commented on the Hybrid proposal have already specifically requested that the Commission require the NYSE to provide more operational detail. OpenBook, as the likely market data vehicle to serve this new hybrid market, suffers from similar deficiencies. Any meaningful consideration of OpenBook's impact on competition and the national market must enable the public and the Commission to examine these components together in all their ramifications instead of in a piecemeal fashion.

For the above reasons, Schwab respectfully requests that the Commission defer approval of the NYSE's real-time OpenBook rule proposal until the filing is supplemented to enable meaningful public comment and careful Commission consideration of OpenBook's impact on market participants including non-professional investors, market data vendors, and the national market system issues identified in proposed Regulation NMS.

Very truly yours,

Christopher P. Gilkerson

Cc: Chairman William H. Donaldson  
Commissioner Paul Atkins  
Commissioner Cynthia Glassman  
Commissioner Harvey Goldschmid  
Commissioner Roel Campos  
Annette Nazareth  
Robert L. D. Colby

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<sup>5</sup> SEC Release No. 34-50173 (Aug. 10, 2004).