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Via Electronic Mail (rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Attention: Jonathan G. Katz, Secretary

Re: SR-NYSE-2005-32
Relating to NYSE OpenBook Exhibit C

Ladies and gentlemen:

We are commenting further on the above-captioned filing (the "NYSE Filing"), and on the letters dated September 30, 2005 (the "NYSE Letter in Response to Bloomberg" and the "NYSE Letter in Response to the SIA et al.") filed by the New York Stock Exchange, Inc. (the "NYSE") in response to our earlier comments and those of other commenters on the NYSE Filing.

The NYSE Letter in Response to Bloomberg does not respond to the issues we raised in our earlier comments. The Exhibit C conditions are proposed rule changes of the NYSE and must comply with the standards in the Securities Exchange Act of 1934 (the "Exchange Act"), particularly Section 6(b). Section 19(b)(2) of the Exchange Act is explicit: the Commission must not approve an NYSE rule unless it finds that the rule is consistent with the Exchange Act provisions applicable to the NYSE. If the Commission finds the rules are not consistent with those Exchange Act provisions, or if in a doubtful case the Commission cannot affirmatively find the proposed rule to be consistent with the provisions, it must in either case disapprove the rule.

We will not repeat all the points made in our earlier letters as to why the NYSE's requirements calling for data montages to be repeatedly tagged with the NYSE's brand name are excessive, oppressive and inconsistent with the Exchange Act. The NYSE has not answered the point that allowing such rules would, particularly if other market centers followed suit, substantially impede the creation of readable depth-of-book quotation montages. The NYSE therefore seeks to impose on third-party data vendors that are not its members regulatory requirements that will allow the NYSE to dominate the electronic real estate and crowd out its competitors. The NYSE has not explained why sophisticated investors should not be presented

with the choice of a screen that shows greater depth instead of greater advertising and how outlawing that choice is consistent with the Exchange Act. The NYSE also has not addressed the burdens on competition the NYSE rule would impose on small and middle-market broker-dealers and investment firms by preventing them from using the central computer architecture Bloomberg affords them. That architecture permits them to approximate the research capacity of larger firms that can afford to maintain substantial research/software capacity.

We will respond, though, to the NYSE's claims in both letters that its OpenBook display requirements are consistent with Exchange Act Rule 11Ac1-2 (the "Vendor Display Rule") and necessary for achieving the objectives of Regulation NMS. We will respond also to the NYSE's false accusation that Bloomberg is seeking to benefit Bloomberg Tradebook by criticizing the NYSE's proposed attribution rules.

OpenBook Data, the Vendor Display Rule and Regulation NMS

The NYSE asserts that its branding requirement for OpenBook data is consistent with the Vendor Display Rule and follows "long-standing industry practices of requiring displays to identify an order's source market and applying the market identification requirement only to displays that vendors offer to others outside of their organization (external vendors)."[1] The description of the Vendor Display Rule is inaccurate and the NYSE's argument based on that description is specious.

As concisely described in the Report of the Advisory Committee on Market Information, the Vendor Display Rule "requires vendors and broker-dealers that provide broker-dealers and investors with market information from a single market in a security, to provide a consolidated display of information from all reporting market centers in that security."[2] That is, the Vendor Display Rule ensures that data disseminated from a dominant market center must be accompanied by data from all markets in that security. The goal of the rule was to ensure representation of the best quotations of the regional exchanges in the consolidated quotation.

By contrast, the NYSE argues that the purpose of the Vendor Display Rule is to distinguish between internal and external distribution of market data by data vendors by requiring what the NYSE calls "external vendors" to use market identifiers. The NYSE thus seeks to enlist the Vendor Display Rule and "long-standing industry practices" in support of the discrimination embedded in its proposed display requirements. We respectfully suggest that the

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1 NYSE Letter in Response to Bloomberg, p. 2.

2 Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change, September 14, 2001, p. 7

Commission should clearly and unambiguously reject the NYSE's misleading description of the Vendor Display Rule and the argument it is used to support.

The NYSE turns to the Vendor Display Rule in support of its argument that its investors need the proposed display requirements for OpenBook and that the requirements are essential to achieving the goals of Regulation NMS. The NYSE states that the Vendor Display Rule requirement "both makes it possible for investors to identify readily the scope of displayed orders and fosters and facilitates markets' posting of competitive quotes. . . . [A]bsent attribution, markets will not be able to compete because investors will have no way to recognize which market is a quote's source."[3]

The NYSE's statements are not supported by market practice. They do not explain how summary screens showing aggregated trading interest without attribution — when accompanied by a readily available toggle to an adjacent screen showing attribution information — would (a) disadvantage investors, (b) harm the markets or (c) frustrate the purposes of Regulation NMS. Summary screens give investors at a glance a picture of the liquidity available on all quoting market centers. That enables them to gauge how much new supply or demand can be readily absorbed without moving the markets. The summary screens will not prevent orders from being routed to the best quotation. They will not frustrate smart order routers from identifying or reaching the best prices. Smart order routers respond to electronic coding identifying markets; they do not rely upon market identifiers posted on screens.

Today, if a person wishes to have the kind of screen the NYSE envisions, with the NYSE's brand advertising in all the places the NYSE would wish, the investor can elect to do so. The question presented by the NYSE's rule is whether the NYSE can exert downstream limits on data displays that would make that choice for investors and outlaw the presentation of alternative views of the market. Sophisticated investors should be able to determine for themselves what kinds of screens are helpful to them.

The NYSE's claims that its branding objectives serve investors' interests and are consistent with industry practice are simply wrong. Nasdaq's recent addition of OrderView to its TotalView product demonstrates that. The NYSE itself states that "Nasdaq's TotalView product (a depth-of-book product) is more closely comparable with OpenBook" than Nasdaq Level II service."[4] Nasdaq's new OrderView, however, is very close in design to the summary Bloomberg screens the NYSE would now outlaw. The OrderView service, which now is available to TotalView subscribers at no additional cost, will provide depth-of-book quotation

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3 NYSE Letter in Response to the SIA et al., p.2

4 *Id.*, p. 3

data — data that tells market participants at a glance how much aggregate liquidity is available in all market centers — and it does so *without market identifiers*.[5] OrderView responds to the needs of program and algorithmic traders and traders using smart routers. It does so by providing real-time depth-of-book data in a streamlined format that facilitates access and efficient execution. Like Bloomberg's aggregated screen, Nasdaq's OrderView is consistent with industry practice and responsive to the needs of traders. Most importantly, rather than compromising the goals of Regulation NMS, as the NYSE alleges, such aggregated screens facilitate those goals.

The NYSE Brand, Bloomberg Tradebook and Capturing Order Flow

The NYSE claims that "[u]nlike most other vendors (who have remained mostly silent on the identification requirement), Bloomberg is a dual-purpose entity. Through its Tradebook subsidiary, it is also a market center that competes with NYSE and all other market centers for order flow."[6] One might wonder on that basis why Reuters would not have objected since it has had Instinet/INET as a significant affiliate throughout this period. The real reason why Bloomberg has objected and Reuters has not has to do with computer architecture, not any Tradebook-related interest. The NYSE's rules prohibit Bloomberg from constructing a summary screen on its central processing unit for distribution to Bloomberg users but do not prevent Reuters from providing the software to Reuters users that allow Reuters users to construct the same summary screens on their desktops. That differentiation works against the interests of small and mid-sized investment firms that wish to have the computing power of a central processor, cannot afford to maintain that capacity and as a result rely on Bloomberg to do so. The NYSE rule is therefore anticompetitive in its effect and cannot be justified by reference to the Exchange Act purposes NYSE rules are supposed to serve.

The NYSE has alleged before that Bloomberg Tradebook is seeking to suppress the NYSE's brand to capture order flow[7] and it is no more true now than it was then. Bloomberg is principally a media company and a disseminator of market analytics and information to the more than 200,000 desktop subscribers to the BLOOMBERG PROFESSIONAL Service®. Bloomberg Tradebook is an electronic communications network that routes orders to market

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5 For a fuller description of Nasdaq's OrderView service, see: http://www.nasdaqtrader.com/trader/mds/totalview/orderview.stm.

6 NYSE Letter in Response to Bloomberg, p. 4.

7 *See Matter of the Application of Bloomberg L.P. for Review of Action Taken by the New York Stock Exchange, Inc., Reply Brief of the New York Stock Exchange ,Inc. in Further Opposition to the Application of Bloomberg L.P.,* Admin. Proc. File No. 30 11129 (July 15, 2003) at 14.

venues, such as Nasdaq and the NYSE. Bloomberg Tradebook is a customer of the NYSE, not a competitor.

Whether or not the NYSE succeeds in its branding objectives is of little actual consequence to Bloomberg Tradebook, as we expect the NYSE well knows. It will have little or no effect on Bloomberg Tradebook's order flow. The far larger and more significant concern is the effect it will have on Bloomberg subscribers. The screens to which the NYSE objects are customer-driven. Bloomberg offers the summary screens because the BLOOMBERG PROFESSIONAL Service clients have asked Bloomberg to provide those screens.

Creating screens that display aggregated trading interest without NYSE branding is not, as the NYSE characterizes it, an "expropriation" of NYSE order flow. Neither OpenBook data nor NYSE's order flow "belong" to the NYSE and the creation of a summary screen that reports aggregated data is hardly an expropriation The NYSE is part of the national market system and its trade data, once offered, must be integrated with the data of competing market centers. The NYSE's proposed program of branding should not be allowed to frustrate or compromise those policy objectives, which are rooted in the Exchange Act.

The NYSE Cannot Use its SRO Rulemaking Power to Protect its Brand

In assessing whether the NYSE's proposed rule change in its OpenBook Exhibit is or is not consistent with the provisions of the Exchange Act applicable to the NYSE, we would add, in addition to the points made in our earlier letters, that at no point in the Exchange Act is a self-regulatory organization ("SRO") authorized to use its rulemaking power to compel its members — let alone third parties such as Bloomberg or other data vendors — to take steps to preserve the NYSE's perceived "branding" objectives.[8] The NYSE appears to have abandoned its earlier, specious argument that its attribution requirements were designed to guard against investor confusion.[9] Surely, Bloomberg's experience and that of its 200,000 subscribers in connection with the summary screen the NYSE would now outlaw proves that investor protection — or for that matter any other purpose authorized by the Exchange Act — is not at issue here.

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8 "Branding" is nowhere mentioned in the Exchange Act as a public policy goal, let alone a goal that should trump transparency and inter-market competition. As the Commission has previously observed, whatever private or state-law-protected values the NYSE seeks to preserve are subject to the overriding federal law embodied in the Exchange Act, as administered by the Commission. *See, SEC Concept Release: Regulation of Market Information Fees and Revenues,* Securities Exchange Act Release No. 42208 (December 9, 1999) in text at nn. 8 & 9.

9 *See Matter of the Application of Bloomberg L.P. for Review of Action Taken by the New York Stock Exchange, Inc., Reply Brief of the New York Stock Exchange ,Inc. in Further Opposition to the Application of Bloomberg L.P.,* Admin. Proc. File No. 30 11129 (July 15, 2003) at 4.

Instead, the NYSE is attempting to use its rulemaking power, that is to say, regulatory compulsion, to further its private, commercial objectives — protection of its "brand". That, the Exchange Act makes clear, it may not lawfully do by adopting rules — which, as the Commission has held, the attribution requirements in Exhibit C surely are.[10] As the Commission knows, Exchange Act Section 6(b)(5) expressly provides that a national securities exchange's rules may not "regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange"[11] Since the Exhibit C requirements do not in fact serve any Exchange Act purposes, they are illegal and the Commission must disapprove them.

More fundamentally, we believe the Commission should look with particular caution at SRO rules that seek to regulate persons and entities that are not members of the SRO or associated persons of members. Exchange Act Section 6(b)(3) requires the NYSE to assure fair representation of members in exchange governance, in part because of a concern that members should not be subjected to the yoke of SRO regulations they have no say in developing or approving. That concern, as a matter of public policy, should apply with even greater force in the case of SRO rules seeking to regulate third parties such as Bloomberg and other vendors, who have absolutely no say over those matters within the SRO. That exercise of raw power — if it is permissible at all — may easily go beyond what the Congress envisioned and, unless checked by the Commission, may be used to coerce and oppress entities that should be wholly outside the SRO's regulatory power.

Indeed, the NYSE's efforts to regulate the downstream use of market data by a vendor that is neither a member nor a listed company raises questions about the outer limits of a national securities exchange's rulemaking powers. The statutory pattern under the Exchange Act, as amended by the Securities Acts Amendments of 1975 (the "1975 Amendments"), shows a clear congressional intent to circumscribe the NYSE's rulemaking power and to prohibit the NYSE from using its power to serve its own private commercial ends, as opposed to serving the public interest and the protection of investors. As it stood before the 1975 Amendments, the Exchange Act had provided national securities exchanges with essentially open-ended authority in Section 6(c) to adopt rules as long as the rules did not conflict with Exchange Act provisions:

> Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

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[10] *Matter of Bloomberg*, Securities Exchange Act Release No. 49076 (January 14, 2004).

[11] As the Commission has previously made clear, the phrase "the administration of the exchange" refers to "housekeeping matters", not the private, commercial objectives of the NYSE as a soon-to-be-for-profit enterprise. *See Matter of Bloomberg*, *supra,* at n. 20 and authority cited therein.

The 1975 Amendments deleted former Section 6(c) and subjected exchanges for the first time to the more stringent statutory pattern, now embodied in Section 6(b)(5), quoted above, that had applied to the NASD under Exchange Act 15A. In that regard, the Senate Banking Committee stated:

> The Committee believes that the statutory pattern governing the scope of the NASD's authority is basically sound. The bill would extend the pattern now applicable to registered securities associations to exchanges. Thus, the bill would eliminate present Section 19(b) of the Act insofar as it provides an enumeration of subject matters of exchange rule-making. And it would also eliminate the seemingly open-ended authority in present Section 6(c). Although these provisions have been read as expressing, at least in part, both the scope and the limits of an exchange's rule-making authority, they have proved to be unclear and unsatisfactory in both respects.[12]

The Exchange Act, as thus amended, prohibits the NYSE from using its rulemaking powers to serve its own private, commercial interests, such as its "branding" interest for market data. The 1975 Amendments took that approach at a time when the NYSE did not have any plan to covert itself to for-profit status. Now that the NYSE is poised to take that step, the commercial incentives and conflicts with its responsibilities as an SRO are substantially greater. The need to observe and enforce the congressional intent to curb the use of rulemaking for unauthorized purposes is all the more important as a result.

As noted above, the Exchange Act contemplates that the NYSE may regulate its members, persons associated with its members and, through its listing powers, issuers. Nowhere in the Exchange Act is it mentioned, or apparently contemplated, that the NYSE is permitted to use its rulemaking powers, or other powers deriving from the Exchange Act, to regulate third parties, such as Bloomberg or other data vendors. Particularly where, as here, the rules regulating third parties are anticompetitive and do not serve any Exchange Act purpose, the Commission cannot find that the NYSE's rules are consistent with the Exchange Act provisions applicable to the NYSE.

Respectfully submitted,

Kim Bang by R.D.B.

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12 *Securities Acts Amendments of 1975,* Report of the Senate Comm. on Banking, Housing, and Urban Affairs to Accompany S.249, S. Rep. No. 94-75, 94th Cong., 1st Sess. 27 (1975).

cc: The Hon. Christopher Cox, Chairman
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