



Securities Industry Association

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April 28, 2006

Ms. Nancy Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

**Re: File Nos. SR-NYSE-2004-43 and SR-NYSE-2005-32;
Release No. 34-53585: NYSE OpenBook Proposal¹**

Dear Ms. Morris:

The Market Data Subcommittee of the Technology and Regulation Committee of the Securities Industry Association ("SIA")² is pleased to comment on this filing. While SIA supports the New York Stock Exchange's ("NYSE") plan to disseminate additional market data through the OpenBook product (as such dissemination promotes greater transparency in the U.S. securities markets), we nonetheless remain concerned with the fees associated with such access. The Commission may recall from our previous comment letters on this product that SIA had been very concerned with NYSE's earlier OpenBook proposals, which we believe would have undermined transparency and competition in the markets.³ Although the latest proposal

¹ Securities Exchange Act Release No. 53585 (March 31, 2006) ("Release").

² The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated \$236.7 billion in domestic revenue and an estimated \$340 billion in global revenues. (More information about SIA is available at: www.sia.com.)

³ Letter from Christopher Gilkerson, Chair, SIA Technology & Regulation Committee and Andrew Wels, Chair, SIA Market Data Subcommittee, to Jonathan G. Katz, Secretary, SEC (July 22, 2005), [available at http://www.sia.com/2005_comment_letters/7296.pdf](http://www.sia.com/2005_comment_letters/7296.pdf), and Letter from Christopher Gilkerson, Chair, SIA Market Data Subcommittee and Eliot Wagner, Chair, SIA Technology & Regulation Committee to Jonathan G. Katz, Secretary, SEC (October 22, 2004) [available at http://www.sia.com/2004_comment_letters/3203.pdf](http://www.sia.com/2004_comment_letters/3203.pdf).

alleviates many of these concerns, the proposed monthly per-terminal fee of \$60 for real-time OpenBook data continues to trouble us.

At the outset, we wish to commend the Securities and Exchange Commission ("SEC" or "Commission") for facilitating significant changes to the OpenBook proposals in order to reflect key goals of the Securities Exchange Act of 1934 ("Exchange Act"). SIA believes that the Commission was correct when it observed that the terms of the NYSE agreements in the initial proposal restricting the display and redissemination of OpenBook data "are on their face discriminatory and may raise fair access issues under the Act."⁴ We also believe that the Commission was correct in requiring these agreements to be filed for review and public comment. Finally, we believe that the Commission was correct in striking down the prohibitions on commingling of data and the proposed attribution requirements that effectively constrained use of the data. In short, we are very appreciative that the Commission moved decisively to address these proposed restraints on the use of market data.

With the advent of for-profit exchanges, the potential is great for conflicts of interest relating to how these self-regulatory organizations compete and generate revenue for their shareholders. Given this and other dramatic changes in our markets, SIA believes strongly that the Commission must continue to carefully scrutinize new market data proposals to ensure that they further national market system goals and not just profit motives. (Examples of proposals that might be unwarranted in this regard would be those that include the use of contracts that circumvent the proper rulemaking process, any restrictions on the flow of data through the imposition of unreasonable fees or other means, or any requirements imposed on firms such as to display an exchange logo or attribution in some other manner.) The safeguard for this is adherence to the regulatory process, which must not be abused.

SIA remains concerned with the NYSE's proposed monthly per-terminal fee of \$60 for real-time OpenBook data, and the apparent conclusions reached by the Commission. As stated by the Commission in its recent order,⁵ several commenters raised important arguments opposing the proposed fee:

1. The NYSE has failed to justify the amount of the proposed real-time OpenBook fee.
2. The NYSE has not provided the data necessary to determine whether the \$60 per terminal fee has any relation to costs, or whether it is an equitable allocation of the costs associated with using its facilities.

⁴ Securities Exchange Act Release No. 45838 (December 7, 2001).

⁵ Release in text at nn. 35-39.

3. The NYSE's fees for market data bear no demonstrated relation to the costs the NYSE incurs in collecting and disseminating the data and that the Securities Exchange Act of 1934 (the "Exchange Act") requires that such fees be subjected to a rigorous cost-based analysis.
4. The NYSE has provided no data regarding its costs or the formula it uses to determine the equitable allocation of its costs.
5. Without this information, the Commission lacks a legally sufficient foundation to approve the proposed fee.
6. To assure fair access for all market participants and promote a level playing field among investors, OpenBook data must be made available to non-professional subscribers at a fair and reasonable fee.

The NYSE's response to these comments is that the OpenBook fee is justified because it is similar to Nasdaq fees previously approved by the Commission.⁶ The Commission similarly concluded that NYSE's proposed fee is reasonable when compared to the fees charged for Nasdaq's TotalView service.⁷ In addition, NYSE, in dismissing the need to offer access to OpenBook data to non-professional subscribers, restated in its response – as it has for over three years – that it will continue to search for any retail demand before pricing OpenBook data at a level where non-professionals can afford it.

Although both NYSE and the Commission relied on a comparison to Nasdaq when it comes to the fee charged to professionals, inexplicably both ignored the fact that Nasdaq does offer a non-professional rate of \$14 per month for non-professionals. This is an essential fact both for pegging a reasonable price (in the absence of any cost data) and in showing the existence of non-professional demand for depth-of-book data. Moreover, in gauging non-professional "demand," neither NYSE nor the Commission considered the importance of OpenBook data as a necessary supplement to the national best bid or offer ("NBBO") in the age of decimalization and a dearth of liquidity at the NBBO. Indeed, average retail order sizes exceed the average liquidity available at the NBBO, as indicated by the industry's order execution quality numbers. Requiring individual investors to pay \$60 a month to attain a pre-decimalization level of transparency is difficult to square with the goals of investor protection, promotion of capital formation, and transparency.

To judge the reasonableness of the proposed fees of one exchange (which enjoys a government-sanctioned monopoly as an exclusive processor in terms of sourcing market data from its members) with the fees of another exchange (that is also a monopoly) is not what we believe Congress had in mind when requiring the Commission to adjudge the reasonableness of such fees. Exchange Act Sections 6(b)(4) and 19(b), when read together with Sections 11A(b)

⁶ Release in text at n. 47.

⁷ Release in text at n. 55.

and (c) (as they are intended to be), require the Commission to disapprove an exchange fee proposal if the Commission cannot affirmatively find that it is reasonable and fairly allocated. The Congress warned the Commission of the dangers of monopolies and made it clear that the Commission would have special oversight responsibilities with respect to the imposition of fees:

The Committee believes that if economies 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* Although the existence of a monopolistic processing facility does not necessarily raise antitrust problems, serious antitrust questions would be posed . . . *if its charges were not reasonable.* Therefore, in order to foster efficient market development and operation and to provide a first line 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 reasonableness of [an exclusive processor's] charges in practice as well as in concept.⁸

Simply comparing the market data fees of one monopoly to those of another without considering the costs and capital committed to production and distribution of that market data does not meet that standard. Moreover, even assuming the comparison to Nasdaq has merit, the Commission cannot ignore Nasdaq's non-professional rate and the fact that Nasdaq's depth-of-book data is available to individual investors.

To fulfill the responsibility entrusted to it by Congress, the Commission must, as the commenters in this rulemaking proceeding have advised, examine and evaluate the costs the NYSE incurs in collecting and disseminating the data and determine whether the fees are reasonably related to those costs, are fairly allocated, and further national market system goals of transparency and creation of a level playing field. With the Commission's recent market structure initiatives such as Regulation NMS, other recent changes in our markets, and particularly the emergence of for-profit exchanges, there is even a greater imperative for the Commission to move past the concept release stage and SRO rule-by-rule evaluation to reappraise how market data is controlled and how fee proposals are reviewed and approved in light of national market system goals of transparency and fair access. We believe that the public would be well served by this reappraisal.

⁸ *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. 11-12 (1975) [emphasis added].

Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Ann Vlcek, Vice President and Associate General Counsel, SIA, at 202-216-2000.

Respectfully submitted,

Gregory Babyak, Chairman
Market Data Subcommittee of the
SIA Technology and Regulation Committee

Christopher Gilkerson, Chairman
SIA Technology and Regulation Committee

cc: The Hon. Christopher Cox, Chairman
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The Hon. Roel C. Campos, Commissioner
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