

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-51925; File No. SR-NYSE-2005-32)

June 24, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to NYSE OpenBook[®] Exhibit C

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 13, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NYSE. On June 16, 2005, the NYSE submitted Amendment No. 1 to the proposed rule change.³ The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NYSE proposes to amend display requirements pursuant to which vendors may distribute to their customers NYSE OpenBook information. The Exchange has set forth the display requirements in an Exhibit C to the standard form of "Agreement for the Receipt and Use of Market Data" (the "OpenBook Exhibit C"). Below is the text of the proposed rule change, as amended. Proposed new language is italicized; proposed deletions are in [brackets].

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, NYSE submitted an Exhibit 4 to indicate the proposed changes to the existing Exhibit C that governs the receipt of OpenBook data.

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EXHIBIT C

AGREEMENT FOR RECEIPT AND USE OF MARKET DATA:

ADDITIONAL PROVISIONS

21. NYSE [OPENBOOKTM]OPENBOOK®

(a) [AUTHORIZATION — Exhibit A describes Customer’s receipt of the NYSE OpenBook™ Service and]DEFINITIONS

(i) “NYSE OpenBook Information” means the limit order and other information [included in that service. (This Exhibit C refers to that information,]that NYSE makes available pursuant to the NYSE OpenBook Service and any modified version of that information and any information derived from that information.

(ii) “Other Data” means limit order and other information that other market centers make available.

(b) AUTHORIZATION — Exhibit A describes Customer’s receipt of NYSE OpenBook Information. NYSE OpenBook Information shall constitute “NYSE Market Information” for all purposes of the Agreement and its exhibits. Customer may use NYSE OpenBook Information, and may provide displays of NYSE OpenBook Information to Subscribers, but may do so:

(i) only as and to the extent described, and in the manner specified, in Exhibit A; and

(ii) only for so long as the Agreement and this Exhibit C are in effect.

Customer's provision of displays of NYSE OpenBook Information to Subscribers shall constitute "Subscriber Services" under the Agreement. Each display of NYSE OpenBook Information that Customer provides to Subscribers shall indicate that NYSE is the source of the information included in the display.

[(b)c] DISPLAY SERVICES – As an additional Subscriber Service requirement under clause (iii) of Paragraph 5(b) of the Agreement, Customer shall not commence to provide displays of NYSE OpenBook Information to a Subscriber unless:

- (i) Customer has first presented the Subscriber with such form of notice or agreement as NYSE may specify; and
- (ii) if NYSE specifies that the Subscriber must acknowledge its receipt of that notice, or manifest its assent to that agreement, the Subscriber has first complied with that requirement in such manner as NYSE may direct.

[(c) INDIRECT ACCESS PROHIBITED – Except as NYSE may specifically permit in writing and notwithstanding anything to the contrary in Paragraph 5(c) of the Agreement, Customer shall not provide to any other Person any Indirect Access Service that includes OpenBook Information.]

[(d) CONSOLIDATED DISPLAYS PROHIBITED - Notwithstanding anything to the contrary in Exhibit A or elsewhere, Customer shall not cause, or permit any other Person to cause, the displays of OpenBook Information that Customer provides to

Subscribers to be integrated with limit orders or other market information that any source other than NYSE makes available. This means, for instance, that Customer shall not permit the displays of OpenBook Information that it provides to Subscribers to be consolidated with limit orders that any other market, or any electronic communications network or broker-dealer, makes available. However, this prohibition does not prevent Vendor from enabling a Subscriber to view one or more other entities' limit orders side-by-side with, or on the same page as, displays of OpenBook Information. In addition, this prohibition shall not apply insofar as Customer provides displays to its officers, partners and employees or to those of its Customer Affiliates.]

[(e) SHARING OF RESEARCH — Customer and NYSE shall meet periodically to discuss the results, progress and status of the OpenBook™ Service and to share any market research that Customer has generated, subject to Customer's obligation or reasonable need to maintain confidentiality in respect of certain information.]

(d) NYSE OPENBOOK DISPLAY RULES

(i) ATTRIBUTION – Customer shall associate the identifier “NYSE” with each element or line of NYSE OpenBook Information that it includes in an Integrated Display or Montage.

(ii) AGGREGATED DISPLAYS – Insofar as Customer incorporates NYSE OpenBook Information with Other Data in its displays (an “Integrated Display”), Customer shall cause the Integrated Display to indicate at each price level the number of shares attributable to each NYSE OpenBook bid or offer.

(iii) NYSE OPENBOOK-ONLY DISPLAYS – Customer may integrate NYSE OpenBook Information with other market information as the Agreement, as modified by this Exhibit C, may provide. However, Customer shall also make NYSE OpenBook Information available as a stand-alone product that is separate and apart from information products that include other market centers’ information (a “Stand-Alone NYSE OpenBook Product”). Customer may include other NYSE market data in Stand-Alone NYSE OpenBook Products, subject to compliance with such contract and fee requirements as may apply to that other NYSE market data. Customer shall make its subscribers aware of the availability of the Stand-Alone NYSE OpenBook Product in the same manner and to the same extent as it makes its subscribers aware of the product that integrates NYSE OpenBook Information with other market information.

(iv) SCREEN SHOTS - No later than at the time that Customer commences to provide to others displays of NYSE OpenBook Information, or modifies those displays, Customer shall submit to NYSE for inclusion in Exhibit A sample screen shots that demonstrate each manner of display and each modification.

(e) INTERNAL DISPLAYS - The NYSE OpenBook display requirements set forth in Paragraph 21(d) shall not apply insofar as Customer provides displays to its officers, partners and employees or to those of its Customer Affiliates.

ACCEPTED AND AGREED

[NAME OF VENDOR]

By: _____

Name:

Title:

Date:

NEW YORK STOCK EXCHANGE, INC.

acting solely on its own behalf

as Paragraph 12 describes

By: _____

Name:

Title:

Date:

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received

on the proposed rule change, as amended. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NYSE OpenBook is a compilation of limit order data that the Exchange provides to market data vendors, broker-dealers, private network providers and other entities through a data feed. For every limit price, NYSE OpenBook includes the aggregate volume. NYSE has made NYSE OpenBook data available for more than three years. It updates that limit order data every five seconds.⁴ Last August, NYSE submitted a proposed rule change to the Commission to provide NYSE OpenBook data on the basis of real-time updates. (That filing is pending before the Commission.⁵)

In order for a vendor to receive NYSE OpenBook information from the Exchange for redistribution to its customers, the Exchange requires the vendor to enter into its standard form of "Agreement for Receipt and Use of Market Data." This form (the "Consolidated Vendor Form") is the same form that vendors must enter into in order to receive market data under the CTA Plan and the CQ Plan. The participants in the CTA and CQ Plans first submitted the Consolidated Vendor Form to the Commission for

⁴ The Commission approved the fee applicable to OpenBook in December 2001. See Release No. 34-44138 (December 7, 2001); 66 FR 64895 (December 14, 2001) (SR-NYSE-2001-42) ("OpenBook Fees Approval Order").

⁵ See Release No. 34-50275 (August 26, 2004), 69 FR 53760 (September 2, 2004). File No. SR-NYSE-2004-43 (submitted August 10, 2004), which can be found on the Exchange's Web site.

immediate effectiveness in 1990⁶ and the Commission approved a revised version of it in 1996 in conjunction with the participants' restatement of the CTA and CQ Plans.⁷

The Exchange designed the Consolidated Vendor Form as a generic, one-size-fits-all form of agreement that consists of a standard set of basic provisions that apply to all data recipients. Accordingly, the Consolidated Vendor Form accommodates a number of different types of market data, a number of different means of receiving access to market data and a number of different uses of market data. Because it was recognized that the Consolidated Vendor Form could not anticipate every aspect of a vendor's receipt and use of market data or future advances in technology or new product offerings, Paragraph 19(a) of the form provides that "Exhibit C, if any, contains additional provisions applicable to any non-standard aspects of Customer's Receipt and Use of Market Data." The Exhibit C terms and conditions pursuant to which NYSE currently makes NYSE OpenBook available prohibit a recipient of NYSE OpenBook data from externally distributing that data if the recipient has integrated that data with limit orders or other market information from any source other than the NYSE, although the recipient may make the integrated data available to its own officers, partners and employees or those of its affiliates.

In light of the Exchange's experience with both the NYSE OpenBook product and its Liquidity Quote® product, as well as comments of vendors and NYSE OpenBook

⁶ See Release No. 34-28407 (September 6, 1990); 55 FR 37276 (September 10, 1990) (File No. 4-281).

⁷ See Release No. 34-37191 (May 9, 1996); 61 FR 24842 (May 16, 1996) (File No. SR-CTA/CQ-96-1).

users, the Exchange has determined to replace the prohibition against integrating NYSE OpenBook data with other data with four display requirements.

First, any Integrated Display must associate the identifier “NYSE” with each element or line of NYSE OpenBook data that is included in the Integrated Display.

Second, any display or montage that incorporates NYSE OpenBook data with limit orders or other market information from any source other than the NYSE makes available (an "Integrated Display") must indicate at each price level the number of shares attributable to the OpenBook bids and offers.

Third, if a vendor or internal data user makes Integrated Displays available, it must also make NYSE OpenBook Information available as a product that is separate and apart from information products that include other market centers' information and make its subscribers aware of the availability of the stand-alone NYSE OpenBook product in the same manner as it makes its subscribers aware of the integrated product.

Fourth, each vendor must add to Exhibit A a sample of each new screen shot to demonstrate the manner of the display and any modification to previous displays. The vendor is required to submit the new screen shot no later than at the time it first commences to provide the new or modified display to others.

The display requirements do not apply insofar as the data recipient distributes NYSE OpenBook data to its officers, partners and employees or to those of its affiliates.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6(b) of the Act⁸ in general, and furthers the objectives of Section 6(b)(5)⁹ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in processing information with respect to, and facilitating transactions in, securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

- (A) by order approve such proposed rule change; or

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act.

The Commission notes that, unlike NYSE's Liquidity Quote, which is a unique market data product that represents aggregated NYSE trading interest at multiple price levels to a specific price interval outside the NYSE best bid or offer ("BBO"), NYSE OpenBook consists simply of depth-of-book limit order information. In the order approving the Exhibit C associated with NYSE's Liquidity Quote, the Commission specifically stated that the terms therein did not "apply and have not been considered or approved . . . as acceptable for the distribution of NYSE OpenBook data." In this proposed rule change, the NYSE proposes to eliminate the restrictions it places on vendors' ability to integrate OpenBook data with data from other markets. In place of these restrictions, however, NYSE has proposed terms substantially identical to those applicable to the distribution of Liquidity Quote data. Specifically, NYSE proposes to require vendors to identify each element or line of OpenBook data that is included in a display that is integrated with other markets' data, indicate the number of shares attributable to the NYSE OpenBook data in any integrated display and provide NYSE OpenBook as a separate data product.

The Commission recognizes that OpenBook contains important market data that provides investors with a view of available liquidity in the NYSE limit order book. This

data is likely to become even more pertinent if the NYSE Hybrid Market Proposal is approved and implemented. For example, in the Hybrid Market Proposal, NYSE has proposed to substantially expand its automatic execution functionality and permit investors to sweep the NYSE limit order book, subject to certain parameters.

Accordingly, the ability of investors to view and consider the depth of liquidity on the book is likely to assume heightened importance in making trading decisions in this environment.

Section 11A of the Act generally sets forth standards under which a self-regulatory organization ("SRO") may distribute information with respect to quotations, including limit orders.¹⁰ In addition, Section 6(b)(8) of the Act¹¹ requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Accordingly, the Commission specifically requests commenters to provide their views on the following:

1. The Commission requests comment on whether the proposal is consistent with the Section 11A(c)(1)(C) of the Act,¹² which requires, among other things, that all securities information processors be able to obtain information with respect to quotations and transactions for the purposes of distribution and publication on fair and reasonable terms. Specifically, are the proposed contract terms that require vendors to identify NYSE OpenBook data on displays that also include other markets' data and provide a separate OpenBook product fair and reasonable?

¹⁰ See supra note 3, OpenBook Fees Approval Order note 8.

¹¹ 15 U.S.C. 78f(b)(8).

¹² 15 U.S.C. 78k-1(c)(1)(C).

2. Section 11A(c)(1)(B) of the Act¹³ requires, among other things, that a SRO 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. The Commission requests comment on whether the form and content of the OpenBook data are useful and fair in light of the proposed restrictions on the form of display (i.e., the requirement that vendors identify NYSE OpenBook data in integrated displays and provide a separate OpenBook product).

3. Section 11A(c)(1)(D) of the Act¹⁴ requires, among other things, 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. The Commission requests comment on whether the NYSE's proposal is consistent with this provision. Specifically, are the proposed Exhibit C contract terms unfairly discriminatory because they only apply to vendors that disseminate the OpenBook data and do not apply to broker-dealers' internal use of the data.

4. Finally, the Commission requests comment on the proposed rule change's potential impact on competition. Specifically, the Commission requests comment on whether the proposal imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

¹³ 15 U.S.C. 78k-1(c)(1)(B).

¹⁴ 15 U.S.C. 78k-1(c)(1)(D).

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2005-32 on the subject line.

Paper comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NYSE-2005-32. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available

publicly. All submissions should refer to File Number SR-NYSE-2005-32 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁵

Margaret H. McFarland
Deputy Secretary

¹⁵ 17 CFR 200.30-3(a)(12).