

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>12</sup>

Nancy M. Morris,  
Secretary.

[FR Doc. E6-5084 Filed 4-6-06; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53585; File Nos. SR-NYSE-2004-43 and SR-NYSE-2005-32]

### Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change Relating to the Real-Time NYSE OpenBook® Service and OpenBook® Fees and Order Approving Proposed Rule Change Relating to the Contract Terms Governing Vendor Displays of NYSE OpenBook® Data, and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 Thereto

March 31, 2006.

#### I. Introduction

On August 11, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to update NYSE OpenBook® ("OpenBook") limit order information in real time and to increase the monthly per-terminal fee for the real-time OpenBook service ("Real-Time Fee Proposal").<sup>3</sup> The Real-Time Fee Proposal was published for comment in the **Federal Register** on September 2, 2004.<sup>4</sup> The Commission received nine letters regarding the Real-Time Fee Proposal.<sup>5</sup> Several commenters on the

Real-Time Fee Proposal argued that the existing OpenBook contractual provisions, which prohibit vendors from consolidating OpenBook data with data from other market centers, are anticompetitive and discriminatory.<sup>6</sup> Other commenters believed that the NYSE should file for public comment and Commission review and approval the contract terms that would govern the distribution of OpenBook data.<sup>7</sup>

On May 13, 2005, the NYSE filed a proposed rule change containing proposed contract terms, set forth in a revised version of Exhibit C to the "Agreement for the Receipt and Use of Market Data," that would govern the displays and dissemination of OpenBook data (the "Exhibit C Proposal").<sup>8</sup> The NYSE filed Amendment No. 1 to the Exhibit C Proposal on June 16, 2005.<sup>9</sup> The Exhibit C Proposal, as amended by Amendment No. 1 ("Original Exhibit C Proposal"), was published for comment in the

24, 2004 ("NSX Letter I"); Eliot Wagner, Chair, Technology and Regulation Committee, the Securities Industry Association ("SIA"), and Christopher Gilkerson, Chair, Market Data Subcommittee, SIA, dated October 22, 2004 ("SIA Letter I"); Meyer S. Furcher, Chairman and Chief Executive Officer, Philadelphia Stock Exchange, Inc. dated October 11, 2004; and letter from R. Bruce Josten, Executive Vice President, Government Affairs, U.S. Chamber of Commerce, to the Honorable William Donaldson, Chairman, Commission, dated September 27, 2004 ("U.S. Chamber of Commerce Letter I").

<sup>6</sup> See, e.g., Bloomberg Letter I (the OpenBook contract terms are unfairly discriminatory because some, but not all, OpenBook subscribers would be able to consolidate OpenBook information with limit order information from other markets); Schwab Letter (the current contractual provisions governing the distribution of OpenBook data discriminate against vendors and their clients, and are anticompetitive, because they restrict redistribution and consolidation with other markets' data); Ameritrade Letter I (the proposal discriminates among market participants because vendors, unlike institutions and professionals, are prohibited from enhancing OpenBook data or commingling it with data from other market centers); and SIA Letter I (some members have suggested that the existing OpenBook contractual provisions may be anticompetitive because they restrict redistribution and consolidation with other markets' data), *supra* note 5.

<sup>7</sup> See, e.g., Schwab Letter, SIA Letter I, and U.S. Chamber of Commerce Letter I, *supra* note 5. See also NSX Letter I and Lava Letter, *supra* note 5 (the contract terms should be included so that the public can assess the impact of the proposal on transparency and competition among market centers).

<sup>8</sup> File No. SR-NYSE-2005-32. The Commission received a comment letter on June 3, 2005 from Bloomberg. See letter from Kim Borg, Bloomberg, to Annette L. Nazareth, Director, Division of Market Regulation, Commission, dated June 2, 2005. Bloomberg resubmitted this comment letter on July 22, 2005. See *supra* note 11.

<sup>9</sup> In Amendment No. 1 provided a copy of its current Exhibit C marked to indicate the changes that the NYSE proposed. NYSE did not propose any substantive changes to the proposal in Amendment No. 1.

**Federal Register** on July 1, 2005.<sup>10</sup> The Commission received six comment letters regarding the Original Exhibit C Proposal.<sup>11</sup> The NYSE responded to the comments regarding the Real-Time Fee Proposal and the Original Exhibit C Proposal on September 30, 2005.<sup>12</sup> The NYSE filed Amendment No. 2 to the Exhibit C Proposal on February 26, 2006.<sup>13</sup> This order approves the Real-Time Fee Proposal and the Exhibit C Proposal, as amended by Amendment No. 2. In addition, the Commission is publishing notice to solicit comment on, and is simultaneously approving, on an accelerated basis, Amendment No. 2 to the Exhibit C Proposal.

#### II. Background

The OpenBook service is a compilation of limit order data that the NYSE provides to market data vendors, broker-dealers, private network providers, and other entities through a data feed. The Commission approved the current fees for the OpenBook service in 2001.<sup>14</sup> In its 2001 OpenBook proposal, the NYSE described, but did not file with the Commission, the contractual provisions governing market data vendors' receipt and display of OpenBook data. These provisions, which are in effect today, prohibit market data vendors from providing displays that integrate OpenBook data

<sup>10</sup> See Securities Exchange Act Release No. 51925 (June 24, 2005), 70 FR 38226.

<sup>11</sup> See letters to Jonathan G. Katz, Secretary, Commission, from David Colker, Chief Executive Officer and President, NSX, dated July 20, 2005 ("NSX Letter II"); Phylis M. Esposito, Executive Vice President, Chief Strategy Officer, Ameritrade, dated July 22, 2005 ("Ameritrade Letter II"); Christopher Gilkerson, Chair, SIA Technology and Regulation Committee and Andrew Wels, Chair, SIA Market Data Subcommittee, dated July 22, 2005 ("SIA Letter II"); Kim Bang, Bloomberg, dated July 22, 2005 ("Bloomberg Letter II"); Kim Bang, Bloomberg, dated October 19, 2005 ("Bloomberg Letter III"); and letter to the Honorable Cynthia Glassman, Acting Chairman, Commission, from R. Bruce Josten, Executive Vice President, Government Affairs, U.S. Chamber of Commerce, dated July 22, 2005 ("U.S. Chamber of Commerce Letter II").

<sup>12</sup> See letters from Mary Yeager, Assistant Secretary, NYSE, to Jonathan G. Katz, Secretary, Commission, dated September 30, 2005 ("NYSE Response Letters"). One of the NYSE Response Letters addresses the comments raised by Bloomberg, while the other NYSE Response Letter addresses the comments of the remaining commenters.

<sup>13</sup> As described more fully below, Amendment No. 2 revises Exhibit C to permit a vendor to provide a display that integrates OpenBook information with information from other markets without attributing the OpenBook information to the NYSE, provided the vendor satisfies certain requirements. Amendment No. 2 replaces and supersedes the originally proposed Exhibit C in its entirety.

<sup>14</sup> See Securities Exchange Act Release No. 45138 (December 7, 2001), 66 FR 64895 (December 14, 2001) (order approving File No. SR-NYSE-2001-42) ("OpenBook Fee Order").

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> File No. SR-NYSE-2004-43.

<sup>4</sup> See Securities Exchange Act Release No. 50275 (August 26, 2004), 69 FR 53760.

<sup>5</sup> See letters to Jonathan G. Katz, Secretary, Commission, from Lisa M. Utasi, President, and Kimberly Unger, Executive Director, The Security Traders Association of New York, Inc. ("STANY"), dated September 22, 2004 ("STANY Letter"); Richard A. Korhammer, Chief Executive Officer, Lava Trading Inc. ("Lava"), dated September 23, 2004 ("Lava Letter"); Thomas F. Secunda, Bloomberg L.P. ("Bloomberg"), dated September 23, 2004 ("Bloomberg Letter I"); Ellen L.S. Koplow, Executive Vice President and General Counsel, Ameritrade Holding Corporation, dated September 23, 2004 ("Ameritrade Letter I"); Christopher P. Gilkerson, Vice President and Associate General Counsel, Charles Schwab ("Schwab"), dated September 23, 2004 ("Schwab Letter"); David Colker, Chief Executive Office and President, National Stock Exchange ("NSX"), dated September

with limit order data from other markets or trading systems.<sup>15</sup> In the OpenBook Fee Order, the Commission indicated specifically that it was not approving or disapproving the OpenBook contract terms and, in fact, signaled that the contractual provisions restricting vendor redissemination of OpenBook data, including the prohibition on providing enhanced, integrated, or consolidated data, were “on their face discriminatory and may raise fair access [issues] under the Act.”<sup>16</sup>

In October 2002, the NYSE filed a proposal to permit the display and use of quotations in NYSE-traded stocks to show additional depth in the market for those stocks, *i.e.*, Liquidity Quotes.<sup>17</sup> The Commission approved the Liquidity Quote proposal on the condition that the NYSE remove from the contract terms governing the receipt of Liquidity Quote data the prohibition on data feed recipients, including vendors, integrating Liquidity Quote data with other markets’ data or with the display of other markets’ data.<sup>18</sup> However, the Commission concluded that the NYSE could require that vendors: (1) Provide the NYSE with attribution in any display that included Liquidity Quote data; and (2) make Liquidity Quote available to their customers as a separate branded package.<sup>19</sup>

After agreeing to the conditions in the Liquidity Quote Conditional Order, the NYSE revised the Liquidity Quote contract terms by removing the prohibition on integrating Liquidity Quote data with other markets’ data. In addition, the NYSE sought to revise the contract terms to establish new display requirements for vendors. Bloomberg

<sup>15</sup> Specifically, the contract terms governing the receipt of OpenBook data: (1) Prohibit vendors from providing displays that integrate OpenBook data with limit order data from other markets or trading systems, although a vendor may allow its subscribers to view other entities’ limit orders side-by-side with, or on the same page as, displays of OpenBook information; and (2) preclude a data feed recipient from retransmitting the OpenBook data feed. See OpenBook Fee Order, *supra* note 14.

<sup>16</sup> See OpenBook Fee Order, *supra* note 14.

<sup>17</sup> Liquidity Quote data reflected aggregated NYSE trading interest at a specific price interval below the best bid (in the case of a liquidity bid) or at a specific price interval above the best offer (in the case of a liquidity offer).

<sup>18</sup> See Securities Exchange Act Release No. 47614 (April 2, 2003), 68 FR 17140 (April 8, 2003) (order conditionally approving File No. SR-NYSE-2002-55) (“Liquidity Quote Conditional Order”). Although the NYSE had not filed the Liquidity Quote contract terms with the Commission, the Commission concluded that it was required to consider comments regarding the contract terms because they related to the manner in which the Liquidity Quote proposal would operate. See Liquidity Quote Conditional Order at note 39 and accompanying text.

<sup>19</sup> See Liquidity Quote Conditional Order, *supra* note 18.

successfully challenged these display requirements as constituting a denial of access under Sections 19(d) and 19(f) of the Act.<sup>20</sup> In the Bloomberg Order, the Commission found that the contract terms governing the display of Liquidity Quote data were NYSE rules that were required to be filed and approved pursuant to Section 19(b) of the Act.<sup>21</sup>

The NYSE subsequently filed the Liquidity Quote contract terms with the Commission as a proposed rule change, which the Commission approved.<sup>22</sup> Among other things, the Liquidity Quote contract terms required that vendors: (1) Indicate the number of shares attributable to Liquidity Quote bids and offers in any display that aggregated Liquidity Quote bids and offers with interest from other markets; (2) identify each element or line of Liquidity Quote information included in an integrated display or montage with either “NYSE Liquidity Quote” or “NYLQ”; (3) offer its subscribers a Liquidity Quote product that was separate and apart from information products that included other markets’ data; and (4) provide the NYSE with sample screen shots of displays that included Liquidity Quote information at the time the vendor commences to provide the display to subscribers.<sup>23</sup> As described more fully below, the contract terms that the NYSE filed in the Original Exhibit C Proposal were similar to the contract terms that the Commission approved for the Liquidity Quote data product.

### III. Description of the Proposals

#### A. The Exhibit C Proposal

In the Original Exhibit C Proposal, the NYSE proposed to amend the existing OpenBook Exhibit C to eliminate the prohibition on vendors’ integrating OpenBook data with data from other market centers and to require vendors

<sup>20</sup> See Securities Exchange Act Release No. 49076 (January 14, 2004) (Administrative Proceeding File No. 3-11129) (In the Matter of Bloomberg L.P. for Review of Action Taken by the NYSE) (“Bloomberg Order”).

<sup>21</sup> See Bloomberg Order, *supra* note 20. Because the NYSE had not filed the Liquidity Quote contract terms with the Commission, the Commission concluded that the contract terms could not provide a basis for the NYSE’s denial of Bloomberg’s access to Liquidity Quote data.

<sup>22</sup> See Securities Exchange Act Release No. 51438 (March 28, 2005), 70 FR 17137 (April 4, 2005) (order approving File No. SR-NYSE-2004-32) (“Liquidity Quote Order”).

<sup>23</sup> See Liquidity Quote Order, *supra* note 22. In the Liquidity Quote Order, the Commission stated that the Liquidity Quote contract terms “do not apply and have not been considered or approved by the Commission as acceptable for the distribution of NYSE OpenBook data.” See Liquidity Quote Order, *supra* note 22, at note 41 and accompanying text.

to: (1) Identify as NYSE data each element or line of OpenBook information included in an integrated display of trading interest across market centers; (2) indicate at each price level the number of shares attributable to OpenBook bids and offers when the vendor aggregates bids and offers from multiple market centers in an integrated display; (3) provide customers with a stand-alone OpenBook display if the vendor provides an integrated display; and (4) provide the NYSE with a sample of each new screen shot to demonstrate the manner in which the vendor displays OpenBook information and any modification to previous displays. These OpenBook vendor display requirements would not apply to any OpenBook subscriber’s internal displays of OpenBook data. Thus, an OpenBook subscriber that distributes the data internally would be able to integrate the OpenBook data with data from other markets through its own applications or software, without the attribution requirements applicable to market data vendors.

The Commission received six comment letters regarding the Original Exhibit C Proposal.<sup>24</sup> Several commenters argued that the attribution requirements contained in the Original Exhibit C Proposal would act as a *de facto* ban on the commingling of market data.<sup>25</sup> One commenter asserted that the attribution requirement would limit the visibility of competing market centers and diminish the amount of depth and analytics that could be displayed, thereby reducing transparency and market efficiency.<sup>26</sup> Another commenter asserted that “[t]raders need a \* \* \* view of available prices without attribution that allows them to see a greater range of price and liquidity points than can be seen on a market monitor with attribution.”<sup>27</sup> The commenter argued, further, that it would not be possible to build a readable market monitor of aggregated volume if market attribution were required for each market center included in the aggregated volume at each price point.<sup>28</sup>

In addition, this commenter maintained that the Original Exhibit C Proposal would discriminate unfairly

<sup>24</sup> See note 11, *supra*.

<sup>25</sup> See *e.g.*, NSX Letter II, SIA Letter II, and U.S. Chamber of Commerce Letter II, *supra* note 11. See also Bloomberg II, *supra* note 11 (proposal would prohibit the effective integration of OpenBook data with data from other market centers).

<sup>26</sup> See U.S. Chamber of Commerce Letter II, *supra* note 11. See also NSX Letter II; SIA Letter II; Ameritrade Letter II; and Bloomberg Letter II, *supra* note 11.

<sup>27</sup> See Bloomberg Letter II, *supra* note 11.

<sup>28</sup> *Id.*

against small and medium-sized broker-dealers that cannot afford to maintain research or software-development departments and must rely on vendors to provide aggregated market monitors.<sup>29</sup> Similarly, the SIA stated that many of its members:

Depend on vendors to provide them with market data both to use internally and to disseminate to investors. The NYSE proposal mandates that vendors provide special 'attribution' for all NYSE OpenBook data \* \* \* This compulsory identifier would consume finite screen space, reducing the amount of trading depth vendors could display, undermining their ability to create analytics, and negatively impacting the market data ultimately made available to \* \* \* members and clients. At the same time, the NYSE attribution requirement would crowd competing market centers off data vendor screens. These restrictions could significantly decrease the transparency of the securities markets and inhibit competition among markets.<sup>30</sup>

This commenter also maintained that the Original Exhibit C Proposal would impose an unnecessary burden on competition because its requirements would "impede alternative uses of data and require a particular display that gives preeminence to the NYSE's data and branding."<sup>31</sup>

#### *B. Amendment No. 2 to the Exhibit C Proposal*

In response to the commenters' concerns regarding the attribution requirements in the Original Exhibit C Proposal, the NYSE filed Amendment No. 2 to the Exhibit C Proposal. Amendment No. 2 replaces and supersedes the originally filed Exhibit C in its entirety.

The revised Exhibit C provided in Amendment No. 2 (the "New Exhibit C") will allow vendors to provide displays that commingle OpenBook information with information from other markets without attribution of the NYSE name or the number of shares ("Non-Attributed Integrated Displays"), so long as the vendors comply with the requirements described below.<sup>32</sup> The

<sup>29</sup> See Bloomberg Letters II and III, *supra* note 11.

<sup>30</sup> See SIA Letter II, *supra* note 11.

<sup>31</sup> See SIA Letter II, *supra* note 11. Another commenter contended that the NYSE lacks the authority to regulate the activities of entities that are not NYSE members, including market data vendors. See Bloomberg Letter III, *supra* note 11. In this regard, the commenter notes that Section 6(b)(5) of the Act prohibits a national securities exchange from regulating "by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange." This commenter argues that the Original Exhibit C Proposal is inconsistent with Section 6(b)(5) of the Act because it represents an attempt by the NYSE to use its regulatory authority to further its private commercial interests.

<sup>32</sup> Under both the Original Exhibit C Proposal and the New Exhibit C, the display requirements do not

NYSE states that it is doing so primarily because the NYSE wishes to respond to the increasing demand from professional investors for a real-time OpenBook product and because the NYSE realizes that order book information is already prevalent in the marketplace and that investors have become accustomed to screen displays that aggregate the liquidity of multiple markets' books without attribution.

In the New Exhibit C, the Exchange proposes to require a vendor that makes Non-Attributed Integrated Displays available to also make available a second display that includes the "NYSE" identifier and the number of shares attributable to OpenBook bids and offers ("Attributed Integrated Displays"). The vendor must make the Attributed Integrated Displays available in a manner that allows the user to have easy and ready access to them from the Non-Attributed Integrated Display screens.

As in the Original Exhibit C Proposal, a vendor that makes Integrated Displays available must also make OpenBook information available as a product that is separate and apart from information products that include other market centers' information.

The New Exhibit C also would require the vendor:

(a) To make its subscribers aware of the availability of the Attributed Integrated Displays and the stand-alone OpenBook product in the same manner as it makes its subscribers aware of Non-Attributed Integrated Displays; and

(b) No later than at the time it first commences to provide a new or modified Attributed Integrated Display, or an OpenBook-only display, to others, to submit to the Exchange for inclusion in Exhibit A a screen shot of that Attributed Integrated Display or OpenBook-only display and a description of the means of access to that screen.

In addition, the NYSE represents that it intends to review with the industry whether there is sufficient demand for depth-of-book information among nonprofessional subscribers to justify a depth-of-book product and fee for nonprofessional subscribers. The Exchange notes that its Hybrid initiative may have an impact on the demand for such a product.

#### *C. The Real-Time Fee Proposal*

The NYSE currently updates OpenBook information every five seconds. The current fee for the

apply to a data recipient that distributes OpenBook data to its officers, partners, and employees or to those of its affiliates.

OpenBook service is comprised of two components: (1) \$5,000 per month for receipt of and the right to redistribute the OpenBook data feed; and (2) \$50.00 per month for each terminal through which an end user displays OpenBook data. In the Real-Time Fee Proposal, the NYSE proposes to make available a second OpenBook service that would update OpenBook limit order information in real time. The \$5,000 per month fee would 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 per-terminal component of the real-time OpenBook service fee to \$60.00 per month.

The Commission received nine comments regarding the Real-Time Fee Proposal.<sup>33</sup> Two commenters supported NYSE's proposal to make OpenBook data available on a real-time basis. However, these commenters raised concerns about the contract terms and fees associated with OpenBook.<sup>34</sup> Several commenters argued that the NYSE has failed to justify the amount of the proposed real-time OpenBook fee.<sup>35</sup> In particular, the commenters maintained that 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.<sup>36</sup> Similarly, one commenter asserted that 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 Act requires that such fees "be subjected to a rigorous cost-based analysis."<sup>37</sup> Another commenter noted that the NYSE provided no data regarding its costs or the formula it uses to determine the equitable allocation of its costs.<sup>38</sup> The commenter believed that without this information, the Commission lacks

<sup>33</sup> See note 5, *supra*.

<sup>34</sup> See Ameritrade Letter I and STANY Letter *supra* note 5.

<sup>35</sup> See, e.g., Ameritrade Letter I; Bloomberg Letter I; U.S. Chamber of Commerce Letter I; Schwab Letter, *supra* note 5; and SIA Letter II, *supra* note 11.

<sup>36</sup> See Schwab Letter, *supra* note 5, and SIA Letter II, *supra* note 11. See also Ameritrade Letter I (the Commission should require the NYSE to support its OpenBook fees by detailing the costs of providing the data), *supra* note 5; and U.S. Chamber of Commerce Letters I and II (asserting that "there is no way to ascertain whether the \$60 per month terminal fee bears any relationship to costs, whether those costs are reasonably allocated, [and] whether the Congressional mandate that market data fees be 'fair and reasonable' is being met"), *supra* notes 5 and 11.

<sup>37</sup> See Bloomberg Letter I, *supra* note 5.

<sup>38</sup> See Ameritrade Letter II, *supra* note 11. See also SIA Letter II, *supra* note 11.

a legally sufficient foundation to approve the proposed fee.<sup>39</sup>

Some commenters criticized the lack of a separate OpenBook fee for non-professional investors.<sup>40</sup> One commenter maintained that the NYSE's proposal fails to explain how the lack of a non-professional OpenBook fee meets the requirements of Section 6(b)(5) of the Act, which, among other things, requires that the rules of a national securities 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.<sup>41</sup> The commenter asserted that the proposed OpenBook fee places retail investors at a disadvantage and operates as a denial of access to retail investors, including active traders.<sup>42</sup> Similarly, another commenter believed that the NYSE's proposal "would create a bifurcated market in which retail investors are clearly disadvantaged."<sup>43</sup> The commenters also noted that Nasdaq provides a non-professional fee for its similar TotalView product.<sup>44</sup>

In its response to the commenters, the NYSE reiterated its assertion that the \$60 per month per terminal fee for the real-time OpenBook service reflects an equitable allocation of the overall costs of using the NYSE's facilities.<sup>45</sup> The NYSE also noted that in approving the current OpenBook fees, the Commission found that the fees were consistent with Section 6(b)(4) of the Act and were reasonable when compared to similar types of services provided by other markets.<sup>46</sup> In addition, the NYSE stated that the Commission has approved a monthly \$70 charge for professional subscribers to Nasdaq's TotalView service, which is comparable to the OpenBook service.<sup>47</sup>

With respect to the lack of a non-professional fee for the OpenBook service, the NYSE asserted that it has "noted no discernible demand for OpenBook from retail investors."<sup>48</sup>

However, the NYSE represented that it intends to review with the industry whether there is sufficient demand for depth-of-book information among non-professional subscribers to justify a depth-of-book product and fee for non-professional subscribers.<sup>49</sup> The NYSE also noted that its Hybrid initiative may have an impact on the demand for such a product.<sup>50</sup>

#### IV. Discussion and Commission Findings

For the reasons discussed below, the Commission finds that the Exhibit C Proposal, as amended by Amendment No. 2, and the Real-Time Fee Proposal, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>51</sup>

##### A. Exhibit C Proposal

The Commission finds that the Exhibit C Proposal, as amended by Amendment No. 2, is consistent with Section 6(b)(5) of the Act,<sup>52</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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. In addition, the Commission finds that the Exhibit C Proposal, as amended by Amendment No. 2, is consistent with Section 6(b)(8) of the Act,<sup>53</sup> which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has considered the comments received regarding the Original Exhibit C Proposal and believes that the NYSE has addressed the commenters' concerns in the New Exhibit C. In the New Exhibit C, the NYSE has decided to allow market data vendors to provide the integrated screens that commenters state that end users desire. The Commission believes that the NYSE's New Exhibit C should allow market data vendors to provide their subscribers with useful data without imposing unnecessary

restrictions, which should help to perfect the mechanism of a free and open market.

##### B. Real-Time Fee Proposal

The Commission finds that the Real-Time Fee Proposal is consistent with Section 6(b)(4) of the Act,<sup>54</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Specifically, the Commission believes that the NYSE's proposed monthly per-terminal fee of \$60 for real-time OpenBook data is reasonable when compared to the fees for Nasdaq's TotalView service.<sup>55</sup>

The Commission has considered the commenters' concerns that the proposed OpenBook fee discriminates unfairly against retail investors. The Commission notes, however, that the NYSE has represented that it intends to review with the industry whether there is sufficient demand for depth-of-book information among non-professional subscribers to justify a depth-of-book product and fee for non-professional subscribers.<sup>56</sup> The NYSE acknowledges that its Hybrid initiative may have an impact on the demand for such a product.<sup>57</sup>

##### C. Accelerated Approval of Amendment No. 2 to the Exhibit C Proposal

The Commission finds good cause for approving Amendment No. 2 to the Exhibit C Proposal prior to 30 days after the date of publication of notice of filing thereof in the **Federal Register**. The NYSE filed Amendment No. 2 to the Exhibit C Proposal in response to the comments submitted regarding the Original Exhibit C Proposal. Because Amendment No. 2 to the Exhibit C Proposal responds to the commenters' concerns, the Commission finds good cause for approving Amendment No. 2 to the Exhibit C Proposal on an accelerated basis.

#### V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 2 to the Exhibit C Proposal, including whether Amendment No. 2 to the Exhibit C Proposal is consistent with the

<sup>39</sup> See Ameritrade Letter II, *supra* note 11.

<sup>40</sup> See Schwab Letter, *supra* note 5, and SIA Letters I and II, *supra* notes 5 and 11. See also Ameritrade Letter I, *supra* note 5 (the Commission should require the NYSE to revise its fee structure so that OpenBook data may be "provided to retail investors at a cost reasonably related to the actual cost of providing the data feed").

<sup>41</sup> See Schwab Letter, *supra* note 5.

<sup>42</sup> See Schwab Letter, *supra* note 5.

<sup>43</sup> See Ameritrade Letter I, *supra* note 5.

<sup>44</sup> See SIA Letters I and II, *supra* notes 5 and 11, and Schwab Letter, *supra* note 5.

<sup>45</sup> See NYSE Response Letters, *supra* note 12.

<sup>46</sup> See NYSE Response Letters, *supra* note 12, citing the OpenBook Fee Order, *supra* note 14.

<sup>47</sup> See NYSE Response Letters, *supra* note 12. See also NASD Rule 7010(q), "Nasdaq TotalView."

<sup>48</sup> See NYSE Response Letters, *supra* note 12.

<sup>49</sup> See Amendment No. 2 to the Exhibit C Proposal.

<sup>50</sup> See Amendment No. 2 to the Exhibit C Proposal.

<sup>51</sup> In approving these rules, the Commission has considered their impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>52</sup> 15 U.S.C. 78f(b)(5).

<sup>53</sup> 15 U.S.C. 78f(b)(8).

<sup>54</sup> 15 U.S.C. 78f(b)(4).

<sup>55</sup> See note 47, *supra*, and accompanying text. See also OpenBook Fee Order, *supra* note 14, at note 5 (discussing other markets' fees for limit order book information).

<sup>56</sup> See Amendment No. 2 to the Exhibit C proposal.

<sup>57</sup> See Amendment No. 2 to the Exhibit C proposal.

Act. 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](mailto:rule-comments@sec.gov). Please include File No. SR-NYSE-2005-32 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 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 Room. 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 April 28, 2006.

#### VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>58</sup> that the Real-Time Fee Proposal (SR-NYSE-2004-43) and the Exhibit C Proposal (SR-NYSE-2005-32), as amended by Amendment No. 2 to the Exhibit C Proposal, are approved, and that Amendment No. 2 to the Exhibit C Proposal is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>59</sup>

Nancy M. Morris,  
Secretary.

[FR Doc. E6-5058 Filed 4-6-06; 8:45 am]

BILLING CODE 8010-01-P

### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53584; File No. SR-Phlx-2006-04]

#### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change and Amendments No. 1 and 2 Thereto Relating to Dissemination of Index Values

March 31, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 12, 2006, the Philadelphia Stock Exchange, Inc. ("Phlx" 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 Phlx. The Phlx filed Amendment No. 1 to the proposed rule change on March 23, 2006 and submitted notification of withdrawal of Amendment No. 1 on March 24, 2006. On March 24, 2006, the Phlx filed Amendment No. 2 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Phlx proposes to continue the listing and trading of options on various stock indices upon making certain changes to the procedures for dissemination of the values of the indices. Specifically, Phlx has determined to license the current and closing index values underlying options currently listed pursuant to Commission approval pursuant to Rule 19b-4 rule filings, namely, the Phlx Gold/Silver Sector<sup>SM</sup> ("XAU<sup>SM</sup>"), Phlx Oil Service Sector<sup>SM</sup> ("OSX<sup>SM</sup>"), Phlx Semiconductor Sector ("SOX<sup>SM</sup>"), and the Phlx Utility Sector<sup>SM</sup> ("UTY<sup>SM</sup>") (together, the "Approved Index

<sup>59</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Amendment No. 2 supersedes and replaces the original filing in its entirety.

Options"), as well as values of most of Phlx's other proprietary indexes, to its wholly owned subsidiary, the Philadelphia Board of Trade ("PBOT"),<sup>4</sup> for the purpose of selling, reproducing, and distributing the index values over PBOT's Market Data Distribution Network ("MDDN").<sup>5</sup> The Exchange proposes that the index values underlying the Approved Index Options will no longer be disseminated as described in their respective Rule 19b-4 filings and approval orders.<sup>6</sup> The Exchange is also seeking approval to cease disseminating the current and closing index values of all its proprietary indexes over the facilities of the Consolidated Tape Association ("CTA"), and to disseminate such values solely over the PBOT's MDDN.<sup>7</sup> Finally, the Exchange is seeking approval for the subscriber fees to be charged to market data vendors by PBOT for all the values of Phlx's proprietary indexes disseminated by PBOT's MDDN.

#### 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 Phlx included statements concerning the purpose of and basis for the proposed rule change. The text of these

<sup>4</sup> PBOT is a dormant designated contract market regulated by the Commodity Futures Trading Commission (the "CFTC"). Until November 30, 2005, when it became dormant, PBOT listed futures contracts on a number of foreign currencies. PBOT has applied to the CFTC for reinstatement for dormancy and expects to launch a new electronic trading platform, PBOT XL, in the near future.

<sup>5</sup> Phlx also lists and trades options on a number of other stock indices whose values will not be disseminated by PBOT. Those indices will continue to be maintained, and options thereon will continue to be listed, as they are today. PBOT has, however, secured a similar license from one other index provider, and Phlx anticipates that PBOT will enter into similar license agreements with proprietors of other indexes underlying options traded on the Phlx.

<sup>6</sup> See Securities Exchange Act Release Nos. 20437 (December 2, 1983), 48 FR 55229 (December 9, 1983) (XAU); 38207 (January 27, 1997), 62 FR 5268 (February 4, 1997) (OSX); 34546 (August 18, 1994), 59 FR 43881 (August 25, 1994) (SOX); 24889 (September 9, 1987), 52 FR 35021 (September 16, 1987) (UTY).

<sup>7</sup> Phlx's proprietary indexes are, in addition to the indexes underlying the Approved Index Options, the Phlx Defense Sector<sup>SM</sup>, Phlx Drug Sector<sup>SM</sup>, Phlx Europe Sector<sup>SM</sup>, Phlx Housing Sector<sup>SM</sup>, and the Phlx World Energy Index<sup>SM</sup>, all of which were listed pursuant to Phlx Rule 1009A(b), the Exchange's generic index option listing standard rule. Phlx's proprietary indexes are owned and maintained by Phlx. The Exchange has determined not to remove the Phlx World Energy Index<sup>SM</sup> ("XWE<sup>SM</sup>") and the Phlx Europe Sector<sup>SM</sup> ("XEX<sup>SM</sup>") from CTA immediately, but is requesting approval to do so when and if the Exchange determines that disseminating these indexes in the same manner as its other proprietary indexes will be appropriate.

<sup>58</sup> 15 U.S.C. 78s(b)(2).