June 19, 2008

Via Electronic Mail (rule-comments@sec.gov)

Ms. Florence Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: SR-NYSE-2008-41 (SEC Release No. 34-57862) and SR-NYSE-2008-42 (SEC Release No. 34-57861)

Dear Ms. Harmon,

The Securities Industry and Financial Markets Association[1] ("SIFMA") appreciates the opportunity to comment on the two above-captioned items, each filed for immediate effectiveness with the Commission on May 16, 2008. Together they provide for two new market data services: NYSE OpenBook Ultra ("Ultra"), which will update New York Stock Exchange ("NYSE" or "Exchange") depth-of-book data on an order-by-order basis, and NYSE Order Imbalance Information ("Order Imbalances"), which is a data feed of real-time order imbalances that accumulate before the opening of trading on the Exchange and before the close of trading on the Exchange.

These two new market data products may be useful to SIFMA members, and SIFMA appreciates NYSE's efforts to improve its market data offerings. "Ultra" represents a qualitatively different product, one that is actually available in real-time, compared to the existing one second update OpenBook product, somewhat confusingly referred to as "OpenBook

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[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices to expand and perfect markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington, D.C., and London, and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. (More information about SIFMA is available at: www.sifma.org.)

Real-Time." Order Imbalances is an entirely new product. This service will display orders that are subject to execution at the market's opening or closing price, as the case may be, *i.e.*, data that is likely to be of particular trading interest at the opening or closing. The NYSE made Ultra available on June 1 and plans to make Order Imbalances available on July 1.

We are concerned that these two new products were filed by the NYSE as "noncontroversial" pursuant to Rule 19b-4(f)(6) under the Securities Exchange Act of 1934 ("Exchange Act"), and that the Commission's staff granted an unwarranted waiver from the 30-day delay in operational effectiveness of the rule changes. As we outline below, these rule filings raise legal, policy, and competition issues that should have been exposed to public comment and thorough Commission analysis before these rules became effective.

NYSE has indicated that it plans to file new proposed fees for both Ultra and Order Imbalances. NYSE staff has explained informally to us that:

> [We] will file any NYSE OpenBook Ultra pricing via the normal fee filing process, and will not use 19(b)(3)(A) for that purpose . . . and that we will soon file for separate pricing for OpenBook Ultra and NYSE Order Imbalance Information. In those filings, we intend to respond to some of the issues relating to both professional and non-professional access and use of market data.

We believe the SEC should reflect this commitment in an order that conditions approval (in lieu of abrogation) on the NYSE's filing of the proposed fees as soon as possible for both Ultra and Order Imbalances. The Commission's order should make clear that the bifurcation of new or substantial changes to market data products from the market data fees for those products may not be used to circumvent the purposes and requirements of Section 19(b) of the Exchange Act.

Legal Standards. The process followed by the NYSE in this case could improperly frustrate the opportunity for substantive public comment on a product that has substantial, potential competitive and systems impact aspects. Rule 19b-4(f)(6) provides that a rule change may become effective upon filing if properly designated by the self-regulatory organization as effecting a change that:

> (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest; provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

The Commission added subsection (f)(6) to Rule 19b-4 in 1994 to provide for a category of "noncontroversial" rule changes that may become effective upon filing if they satisfy the above requirements.[2] The provision was intended to cover "rule changes that are not likely to engender adverse comments or otherwise warrant the type of review required by Section 19(b)(2)."[3] The examples that the Commission gave of filings that would qualify for (f)(6) involved such things as administrative matters and an SRO rule that "cloned" a rule of another SRO that had been the subject of notice and comment under Section 19(b)(2). The new provision was not intended to permit circumvention of the notice and comment process for substantive rule changes such as the above NYSE filings. These provisions do not envision or permit product approvals. The process of separating fee filings from product filings makes it extremely difficult to assess the totality and legality of the product.

Improper Designation. We are concerned whether the SEC staff inappropriately accepted the filing under Section 19(b)(3) without NYSE showing how the criteria under (f)(6) were met. The Ultra and Order Imbalances rule changes address much more than administrative matters, and are not "copycat" filings of other SRO rules. Rule 19b-4(f)(6) specifically provides a procedure for the SEC staff to intercept filings that attempt to improperly use (f)(6). An SRO must give the Commission written notice of its intent to file such a proposed rule change five business days prior to the date of filing. The Commission states that NYSE satisfied the pre-filing notice requirement for these filings.[4] The SEC staff should have required these rule changes to be filed for full notice and comment or returned the filings to the NYSE as improperly designated for filing under (f)(6), rather than publish the notices for immediate effectiveness pursuant to delegated authority.

Improper Waiver. The use of paragraph(f)(6) for the NYSE filings conflicts with the Commission's articulation of its expected operation:

> The Commission believes that a 30-day delayed operational date for noncontroversial filings is necessary and appropriate. If, as a result of either subsequent Commission review or public comment, it is determined that a proposed rule change was not properly filed as within the noncontroversial category, the 30-day period would allow the Commission to abrogate the rule change without a significant disruption in [the SRO's] existing operations.[5]

Waiving the 30-day period in this instance without adequate basis frustrates the purpose of this provision. The stated basis for the waiver in both filings is: "such waiver would immediately allow the Exchange to disseminate this supplemental information prior to execution of the opening and closing transactions on the NYSE." But the Order Imbalances product is not

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2 SEC Release No. 34-35123 (December 20, 1994).

3 Id.

4 Release No. 34-57861 n.8; 34-57862 n.9. We are not aware that these written submissions have been made public. *See* SEC Release No. 34-35123 at n.27 ("The Commission intends to place this notice in a public file.").

5 SEC Release No. 34-35123.

available until July 1. Presumably a waiver of the 30-day operational date for this product is unnecessary. The product that actually requires the waiver is the Ultra product, but no justification is offered.

As a general matter, new products and fees should be considered at the same time, as clearly the impact of the product cannot otherwise be fairly assessed.

Substantive Issues. We believe that there are substantive issues that should be explored as well. Using Ultra as an example, in our experience, virtually all exchanges globally that improve their depth-of-book product do so by phasing out the original product while simultaneously phasing in the improved product. Otherwise, broker-dealers that buy directly from the exchange are required to bear the cost of maintaining two separate systems that support both the original and the ultimate replacement product. At a time when capacity concerns loom large, some thought should be given to whether maintaining two systems makes sense. It is very hard for broker-dealers to determine whether it is worth constructing this capacity in advance of knowing what a proposed or approved fee might look like.

NetCoalition Petition. These rule changes and the use of Rule 19b-4(f)(6) are inconsistent with the Commission's ongoing consideration of the need to properly ventilate the issues relating to market data, as reflected in its decision to review the SEC staff's action in approving by delegated authority File No. SR-NYSEArca-2006-21.[6] The Commission, and market participants, have long been concerned about potential SRO abuse in the market data context.[7] Those concerns have become more pronounced with the advent of for-profit exchanges, which retain government-granted monopolies and regulatory powers. These issues came to a head when the Commission's staff approved under delegated authority a NYSE Arca market data product. NetCoalition challenged that approval by filing a Rule 430 petition, asserting that the decision embodied (a) a conclusion of law that is erroneous, or (b) an exercise of discretion or decision of law or policy that is important and that the Commission should review.[8] The NetCoalition petition sought to force a change in the way depth-of-book and other market data products were considered – with the goal being a transparent, predictable process that comports with the statute.[9]

The Commission voted unanimously to grant this petition. As far as we have been able to ascertain, this is the only time in the history of the SEC that such a petition has been granted. Indicative of the importance of the proceeding, the submissions supporting the petition included filings by major financial players (Securities Industry and Financial Markets Association, Financial Services Roundtable, National Stock Exchange, etc.) as well as representatives of the broader public (Chairman Kanjorski of the House of Representatives Subcommittee on Capital

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6 *In the Matter of NetCoalition*, SEC Release No. 34-55011 (December 27, 2006).

7 *See*, e.g. "Regulation of Market Data Fees and Revenues," SEC Release No. 34-42208 (December 9, 1999); and "Regulation NMS: Final Rules and Amendments to Joint Industry Plans," SEC Release No. 34-51808 (June 9, 2005).

8 NetCoalition Petition page 2.

9 Indeed, the Petition protests the abuse of the "effective upon filing" process in the market data context.

Markets, the United States Chamber of Commerce, American Bar Association Committee on Federal Regulation of Securities, NetCoalition, etc.). The petition is now the subject of a substantial draft Commission order, the resolution of which should provide further guidance on these matters.[10] In short, the instant NYSE rule filings should not have been permitted to have been filed at all, and particularly on an immediately effective basis, while these proceedings are ongoing.

Conclusion. As noted above, we believe the SEC should reflect in an order NYSE's commitment to file the fee schedules of these new products under Section 19(b)(1) and (2), so that SIFMA members and other members of the public can review and comment on two halves of the whole. The Commission should require this in an order that conditions non-abrogation on the NYSE's filing of the proposed fees as soon as possible for both NYSE Ultra Book and NYSE Order Imbalance Information. The Commission's order should make clear that the bifurcation of new or substantial changes to market data products from the market data fees for those products may not be used to circumvent the purposes and requirements of Section 19(b) of the Exchange Act.

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Thank you for your consideration of these views. If you have any comments or questions, please do not hesitate to contact me at 202.962.7300.

Respectfully submitted,

Ira D. Hammerman
Senior Managing Director and General Counsel
SIFMA

cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Kathleen L. Casey, Commissioner
Dr. Erik R. Sirri, Director, Division of Trading and Markets
Elizabeth K. King, Esq., Associate Director, Division of Trading and Markets
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[10] SEC Release No. 34-59717 (June 4, 2008), 73 Fed. Reg. 32751.