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

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: NYSE OpenBook® Nonprofessional Subscriber Fee and Revision to the Unit of Count (SR-NYSE-2008-131; Release No. 34-59198)

Dear Ms. Murphy:

On December 18, 2008, the Exchange submitted the captioned proposed rule change (the "NYSE OpenBook Ultra Filing") to the Commission. The NYSE OpenBook Ultra Filing establishes a one-year pilot program that would modify certain of the Exchange's policies regarding the unit of count for assessing market data fees. The filing would also introduce a new nonprofessional subscriber fee of $15 per month for the receipt and use of NYSE OpenBook data, capped at a monthly maximum of $25,000.

The Commission published the proposed rule change in the Federal Register on January 12, 2009, and received two comment letters.[1] The comment letters strongly support the changes set forth in the NYSE OpenBook Ultra Filing and the Exchange greatly appreciates SIFMA's and Schwab's positive feedback regarding the nonprofessional subscriber fee and the changes to the unit of count policies.

The Exchange wishes to take this opportunity to clarify a small number of points that the SIFMA comment letter raises. First, the SIFMA comment letter cites communications between SIFMA and the Exchange regarding the Exchange's intention to charge for all entitlements that a vendor uses internally within its enterprise, even where the use is for administrative functions, such as feed monitoring, operations and support of external services.

[1] See letter dated February 2, 2009 (the "SIFMA Letter"), to Ms. Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), and letter dated February 2, 2009, to Ms. Florence Harmon, Deputy Secretary, Securities and Exchange Commission, from Jeffrey T. Brown, Senior Vice President, Office of Legislative and Regulatory Affairs, Charles Schwab & Co., Inc. ("Schwab").

Charging vendors for the use of data for administrative purposes is one of the pilot program's changes to the unit of count policies. However, as SIFMA describes in its comment letter, the Exchange believes that the new unit of count policies should limit the fee exposure of the internal administrative function of OpenBook vendors. For that reason, the Exchange intends to limit a vendor's exposure to the internal use of NYSE OpenBook data for legitimate administrative purposes to $1500 per month, meaning that a vendor would need to pay for no more than 25 entitlements that it uses solely for administrative purposes. The Exchange intends to submit to the Commission a proposed rule change that will amend the pilot program to cap the fees payable by a vendor in respect of the use of data for administrative purposes to $1500 per month. It intends to propose to set that cap retroactively to the start of the pilot period so that no vendor will pay more than $1500 per month for entitlements that it uses for administrative purposes.

Second, SIFMA cites the exception under the proposed nonprofessional subscriber monthly maximum fee that allows five percent of the subscriber pool receiving data under the monthly maximum amount to be professional subscribers, provided that they receive the data through their on-line account in a non-streaming format. While this is true, the Exchange wishes to clarify that the NYSE OpenBook Ultra Filing subjects this "five percent" exception to several terms and conditions. That is, the NYSE OpenBook Ultra Filing specifies that professional subscribers may constitute up to five percent of the pool of Subscribers that the broker-dealer includes in the calculation of the monthly maximum amount, but only in accordance with the following terms and conditions:

i. Nonprofessional subscribers comprise no less than 95 percent of the pool of Subscribers that are included in the calculation.

ii. Each professional subscriber included in the calculation maintains an active brokerage account directly with the broker-dealer (that is, with the broker-dealer rather than with a correspondent firm of the broker-dealer).

iii. Each professional subscriber that is included in the calculation is not affiliated with the broker-dealer or any of its affiliates.

iv. All Subscribers receive access to the identical service, regardless of whether the Subscribers are professional subscribers or nonprofessional subscribers.

v. Upon discovery of the inclusion in the cap of an individual that does not qualify as a nonprofessional subscriber, the broker-dealer takes reasonable action to reclassify and report that individual as a professional subscriber during the immediately following reporting period.

For the purposes of clause (iii) above, a professional subscriber is "affiliated" with a broker-dealer if he or she is an officer, partner, member, or employee of the broker-dealer or an affiliate of the broker-dealer or enjoys a similar status with the broker-dealer or affiliate.

Notwithstanding clauses (iii) and (v), the broker-dealer may include a professional Subscriber that is affiliated with the broker-dealer or its affiliates (subject to clauses (i) and (ii)) if he or she accesses market data on-line through his or her personal account solely for the non-business purpose of managing his or her own portfolio.

Under those terms and conditions, the Exchange proposes to allow professional subscribers to constitute up to five percent of the pool of subscribers that the broker-dealer includes in the calculation of the monthly maximum amount, provided that they receive the data through their on-line account in a non-streaming format.

Third, "SIFMA opposes the justification of the [nonprofessional subscriber] fee premised on the test announced in the NYSE ArcaBook Approval Order."[2] SIFMA has written to the Commission extensively to oppose market data fees for proprietary data products such as NYSE ArcaBook[3] and has filed a Petition for Review with the United States Court of Appeals for the District of Columbia seeking a review of the Commission's approval of NYSE ArcaBook fees.[4]

While the SIFMA Letter makes clear that SIFMA continues to oppose the Commission's findings in its order approving the NYSE ArcaBook fees,[5] the SIFMA Letter also argues that the NYSE OpenBook Ultra Filing "erroneously applies the 'subject to significant competitive forces' test," the test for market data pricing that the Commission established in the NYSE ArcaBook Approval Order.

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2 See SIFMA Letter, p. 3.

3 See Footnote 2 to the SIFMA Letter.

4 Petition for Review, SIFMA v. SEC, No. 09-1045 (D.C. Cir. Jan. 30, 2009).

5 See Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data, Release No. 34-59039 (December 2, 2008); File No. SR-NYSEArca-2006-21 (the "NYSE ArcaBook Approval Order").

The SIFMA letter does not provide a basis for its claim that the Exchange failed to comply with the competitive forces test and we disagree with that assertion. The Exchange notes that the NYSE OpenBook Ultra Filing discusses at some length the test and the Exchange's application of the proposed nonprofessional subscriber charge for NYSE OpenBook to that test. Among other things, the NYSE OpenBook Ultra Filing discusses the following:

- NYSE OpenBook is subject to significant competitive forces and the reduction in fees represents, in part, responses to that competition.

- The Exchange competes intensely for order flow with the other 10 national securities exchanges, with electronic communication networks, with FINRA's Alternative Display Facility and Trade Reporting Facilities, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.

- Each of the 12 SROs, Trade Reporting Facilities and ECNs is currently permitted to produce depth-of-book products and many currently do, including Nasdaq, NYSE Arca, and BATS.

- The great majority of investors do not believe that it is necessary to purchase a depth-of-book product from the Exchange, given other sources of information on market depth in Exchange-listed stocks. Less than 10 percent of professional users that purchase core data in Exchange-listed stocks through CTA also purchase NYSE OpenBook.

- The Exchange believes that no substantial countervailing basis exists to support a finding that the nonprofessional fee for NYSE OpenBook fails to meet the requirement of the Exchange Act.

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We hope this letter clarifies points that the SIFMA letter raises. Especially in light of SIFMA's and Schwab's support, we respectfully request the Commission to approve the NYSE OpenBook Ultra Filing.

Sincerely yours,

Janet M Kissane

Cc: The Hon. Mary L. Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
Dr. Erik R. Sirri, Director, Division of Trading and Markets