

specialist proprietary interest, at a price interval below the best bid (in the case of a liquidity bid), or above the best offer (in the case of a liquidity offer), is consistent with the protection of investors and the public, when viewed apart from the NYSE vendor agreements.³⁸

However, nine commenters criticized the provisions of the NYSE's vendor and subscriber agreements for Liquidity Quote that preclude data feed recipients from enhancing, integrating, or consolidating its market data with data from other market centers for retransmission. While these agreements have not been filed with the Commission under section 19(b)(2) of the Act,³⁹ because these comments directly relate to the manner in which the Liquidity Quote proposal will operate, the Commission believes that it can and must consider these comments in determining whether, or on what terms, to approve or institute disapproval proceedings with respect to the Liquidity Quote proposal. In other words, in assessing whether the Liquidity Quote is consistent with the requirements of section 6, we must measure against the standards of section 6, not only the literal terms of the Liquidity Quote proposal, but also the operation of Liquidity Quote as governed by the provisions of the vendor agreements.

Section 6(b), in pertinent part, requires that the Liquidity Quote proposal, viewed in the context of the restrictions contained in the vendor agreements, (1) "foster cooperation and coordination with persons engaged in * * * processing information with respect to, and facilitating transactions

in securities;"⁴⁰ (2) "remove impediments to and perfect the mechanism of a free and open market and a national market system;"⁴¹ (3) not be "designed to permit unfair discrimination between customers; * * *"⁴² and (4) "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title."⁴³ With respect to the first two considerations, we look for guidance to section 11A.

Section 11A of the Act⁴⁴ provides the Commission with broad powers over exclusive processors of market information⁴⁵ and thus the Commission is responsible for assuring that exclusive processors function in a manner that is neutral with respect to all market centers, all market makers, and all private firms.⁴⁶ In particular, section 11A(a)(1)(C)(ii) and (iii) of the Act⁴⁷ direct the Commission, in the interest of the public, for the protection of investors and maintenance of fair and orderly markets, to assure: (1) the availability to brokers, dealers and investors of information with respect to quotations for and transactions in securities; and (2) fair competition among brokers and dealers, among exchange markets, and between exchange and other markets.⁴⁸ The

⁴⁰ 15 U.S.C. 78f(b)(5).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See also 15 U.S.C. 78f(b)(8).

⁴⁴ 15 U.S.C. 78k-1.

⁴⁵ The Commission notes that the NYSE would be operating the Liquidity Quote service as an "exclusive processor." An "exclusive processor" is defined in section 3(a)(22)(B) of the Act as "any SIP or SRO that, directly or indirectly, engages on an exclusive basis, in collecting, processing, or distributing the market information of an SRO." 15 U.S.C. 78c(a)(22)(B). A Securities Information Processor ("SIP") is defined in section 3(a)(22)(A) of the Act as "any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing * * * on a current and continuing basis, information with respect to such transactions or quotations * * * ." 15 U.S.C. 78c(a)(22)(A).

⁴⁶ There is no indication in section 11A and its legislative history that self-regulatory organizations ("SROs") acting as SIPs should be treated differently under the section because of the Commission's separate statutory authority under section 19(b). Therefore, section 19(b) review does not limit the Commission's authority under section 11A.

⁴⁷ 15 U.S.C. 78k-1(a)(1)(C)(ii) and (iii).

⁴⁸ In enacting the Securities Acts Amendments of 1975 ("1975 Act Amendments"), Congress specifically recognized that the securities markets are dynamic and change over time and, therefore, specifically rejected mandating the specific components of the national market system. Instead, Congress granted the Commission broad authority to oversee its implementation. See S. Rep. No. 75, 94th Cong., 1st Sess. (1975) ("Senate Report"). The

NYSE proposes to disseminate its Liquidity Quote data on a voluntary basis; however, even absent a Commission rule requiring dissemination, if the NYSE chooses to disseminate Liquidity Quote data, it must do so on terms that are fair and not unreasonably discriminatory, and in accordance with the objectives of a national market system, as provided by section 11A of the Act.⁴⁹

In this context, the Commission is concerned that the restrictions in the vendor agreements that preclude vendors from providing an enhanced, integrated, or consolidated data product to customers raise such significant fair and reasonable access issues under section 11A of the Act for data recipients, as to preclude the NYSE from disseminating Liquidity Quote data in a manner consistent with the statute.

Specifically, the Commission is concerned that the restrictions in the vendor agreements on the use and form of Liquidity Quote data are not fair to market data vendors because they will be prevented from integrating or commingling Liquidity Quote data with data from other markets. This restriction may be particularly unfair and unreasonably discriminatory to customers of vendors whose businesses

1975 Act Amendments added section 11A "to bring under the SEC's direct jurisdiction all organizations engaged in the business of collecting, processing, or publishing information relating to quotations for, indications of interest to purchase and sell, and transactions in securities." *Id.*, at 9-10. As a result, the 1975 Act Amendments greatly expanded the Commission's authority to regulate the national market system and matters related to the dissemination of market information.

The goals of this new authority were "to insure the availability of prompt and accurate trading information, to assure that these communications networks are not controlled or dominated by any particular market center, to guarantee fair access to such systems by all brokers, dealers and investors, and to prevent any competitive restriction on their operation not justified by the purposes of the Act." *Id.* The Commission's broad authority "includes all powers necessary to ensure the regulation of the securities information processing activities of [the] exchanges and associations in the same manner and to the same extent as the Commission may regulate securities information processors registered and regulated under new section 11A(b)." *Id.*, at 10.

Moreover, Congress noted that the Commission's authority under section 11A of the Exchange Act includes the authority to regulate "what and how information is displayed and qualifications for the securities to be included on any tape or within any quotation system." *Id.*, at 11. Legislative history for section 11A states that "it is critical for those who trade to have access to up-to-the-second information as to the prices at which transactions in particular securities are taking place (*i.e.*, last sale reports) and the prices at which other traders have expressed their willingness to buy or sell (*i.e.*, quotations)." *Id.*, at 9.

⁴⁹ See *e.g.*, Securities Exchange Act Release No. 20874 (April 17, 1984), 49 FR 17640 (April 24, 1984).

³⁸ The NYSE has represented that in some cases, depending on the depth of market, the NYSE best bid or offer and the liquidity bid or offer may converge, in which case, the NYSE will make available the same price and size both as the best bid (offer) over CQS, and the liquidity bid (offer) over the Exchange's CAP line. The Commission notes that liquidity bids and offers will be deemed firm quotations, subject to the firm quoting obligations of Rule 11Ac1-1(c) under the Act. 17 CFR 240.11Ac1-1(c). In addition, the Commission notes that orders seeking to trade against liquidity bids (offers) will be executed in accordance with NYSE's current auction market procedures, in particular, with respect to the handling of market orders, limit orders, and XPress orders.

³⁹ 15 U.S.C. 78s(b)(2). Because of the manner in which the Commission is disposing of this matter, the Commission need not decide whether the NYSE agreements at issue here or similar such agreements should be filed under section 19(b)(2) of the Act. In this connection, we note, however, that commenters have not been precluded from commenting on these agreements in the absence of such a filing and the Commission is able to, and indeed required to, take these comments into account to the extent that they relate to the manner in which the proposal that has been filed with the Commission will operate.