

primarily consist of packaging quotation information from all reporting market centers on a consolidated basis for sale to customers. Such customers seek to avoid the costs of desktop integration, and the NYSE restrictions would impose integration costs that smaller users of market data may be unable to bear.<sup>50</sup>

In addition, the Commission believes that restrictions on integration of data such as Liquidity Quote are likely to be more troublesome than restrictions on integration for products such as NYSE OpenBook.<sup>51</sup> OpenBook contains only a display of orders left with the specialist, while Liquidity Quote reflects orders in the book, interest in the crowd, and the specialist's own interest at a price and size usually different than the NYSE's best bid or offer. In other words, Liquidity Quote differs from OpenBook in that it: (1) Represents the NYSE's market-wide price for a specific size, not just a subset of orders on the NYSE; and (2) immediately may be executed against. The Commission believes that preventing vendors from integrating quotations of this type with quotations from other markets is a more substantial restriction on the ability of vendors to provide useful market data than posed by OpenBook and would, unlike OpenBook, impose on users integration costs with respect to immediately executable, market-wide quotations in a manner that would: (1) Be inconsistent with fostering "cooperation and coordination with persons engaged in processing information with respect to \* \* \* securities;" (2) "be "designed to permit unfair discrimination between customers;" and (3) impede, rather than remove impediments to, a "free and open market and a national market system." <sup>52</sup>

<sup>50</sup> Desktop integration requires certain infrastructure, such as data storage and application installation and maintenance, that many small users currently do not directly bear. Such smaller users often take advantage of the economies of scale offered by data vendors that provide integration at a central location.

<sup>51</sup> For further details on the NYSE OpenBook service, see Securities Exchange Act Release No. 45138 (December 18, 2001), 66 FR 66491 (December 26, 2001). In its order approving the NYSE's OpenBook service, the Commission stated that "NYSE's \* \* \* restrictions on vendor dissemination of OpenBook data, including the prohibition on providing the full data feed and providing enhanced, integrated, or consolidated data found in these agreements are on their face discriminatory, and may raise fair access issues under the Act."

<sup>52</sup> See section 6(b)(5) of the Act, 15 U.S.C. 78f(b)(5). In the context of the Liquidity Quote proposal, we have received comment from a more diverse array of commenters and have received more information about the potential negative transparency and competitive effects, and effects on smaller market data users, than we received in response to publication of the OpenBook proposal.

The Commission also believes that the restrictions on integrating Liquidity Quote data and only permitting the data to be displayed in a separate window raise substantial concerns about burdens on competition, which may be inconsistent with section 6(b)(8) of the Act. In particular, the Commission believes that in the case of other market centers, the restrictions likely could inhibit competition with the NYSE for order flow in NYSE-listed securities because Liquidity Quote data is precluded from being viewed in tandem with the consolidated quote display. In addition, the Commission is concerned that the restrictions may be anticompetitive as to small- and medium-sized market participants that are unable to choose useful formats to view the Liquidity Quote data.

The NYSE argues that these restrictions are designed to maintain the integrity of its data so that it is uniquely identified to the NYSE. We are not persuaded by this argument. We believe that a less restrictive labelling requirement, such as one that simply would require the clear identification of the data as the NYSE Liquidity Quote, might well achieve the stated objective. The Commission believes that whatever ownership interests the NYSE may have in these data cannot be asserted in a manner inconsistent with the requirements of sections 6(b)(5) and 6(b)(8). The Commission believes that there is a substantial question as to whether, to be consistent with these standards, Liquidity Quote should be provided in a way that allows data feed recipients to be able to enhance, integrate or consolidate Liquidity Quote data in a reasonable format.<sup>53</sup>

We also have had the advantage of experience with the operations of the restrictions on the dissemination of the OpenBook product, which shows that our expectation, as expressed in our cautionary statement in the OpenBook order, *see* note 51, *supra*, that the market would challenge these types of vendor agreement restrictions, has not been fulfilled. The Commission has a statutory responsibility to balance the statutory goals of facilitating the provision of more quotation information to the market with the goals of ensuring that quotations information is provided in a fair way and in a way that does not unreasonably burden competition. In conducting this balance, as we have done here with respect to the Liquidity Quote proposal, we must take into account all the information provided to us by commenters and by market experience. The additional experience we have with respect to the failure of market forces to act to address the anti-competitive nature of the vendor contracts in the context of the OpenBook proposal further informs and reinforces our decision here.

<sup>53</sup> The Commission believes that it would be reasonable and consistent with the statute for the NYSE to require that data feed recipients who choose to provide a value-added liquidity quote data package to: (i) Give the NYSE attribution next to any integrated quote that includes NYSE data;

While it is arguable that an SRO may restrict the integration of some information that is not required by current SEC rules to be disseminated in a consolidated format, the Commission believes it is also arguable that, at a minimum, where a market chooses to disseminate quotation data that is immediately executable and represents a market's entire interest at a particular price such market data should be consolidatable.<sup>54</sup> The NYSE argues that as owner of this data, it has the legal right to "brand" this data and, in order to preserve its brand, it must be able to restrict integration of this data with other data. The Commission preliminarily believes that the better view of section 11A is that these statutory provisions preclude the NYSE, once it makes the decision to disseminate this data, from asserting whatever property rights it may have to this data in a way that unfairly and unreasonably limits vendor and investors access and use of this data and has a negative effect on intermarket competition in NYSE listed securities.

The Commission, therefore, is approving this proposal on the condition that the proposed rule change is not effective until the NYSE accepts the condition to remove from its contracts the prohibition on the ability of data feed recipients, including vendors, to integrate the data with the display of other markets' data, and demonstrates its acceptance of the condition to the Commission. If the NYSE accepts the condition, it must do so by the close of business on April 9, 2003. If the NYSE accepts the condition, it may not implement the Liquidity Quote Proposal until the prohibition is removed from its vendor contracts.

If by the close of business on April 9, 2003, the NYSE has not demonstrated

and (ii) make available to customers NYSE's liquidity quote product as a separate branded package.

<sup>54</sup> The NYSE believes that the Commission is "extend[ing] the consolidated Display Rule to NYLQ [or Liquidity Quote]." *See* Grasso (NYSE) Letter, at 2. The NYSE argues, in referencing the "Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change," September 14, 2001 ("Seligman Report"), that the Seligman Report concluded that such data should be free from "mandatory consolidation requirements." *See id.* (citing, the Seligman Report). The Commission is not mandating that the NYSE consolidate its Liquidity Quote data with that of other markets. The Commission does believe, however, that the Liquidity Quote data should be disseminated in a consolidatable format—*i.e.*, vendors and investors should not be precluded from opting to consolidate the Liquidity Quote data. Contrary to the NYSE's views, the Seligman Report did not recommend that markets be able to make their own market data non-consolidatable; the Seligman Report recommended that markets no longer be required to centrally consolidate their data.