May 1, 2003

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street
Washington, D.C. 20549

Re: File No. S7-07-03; NYSE Petition on Participant Fee Exemptions

Dear Mr. Katz:

The International Securities Exchange, Inc. ("ISE") appreciates the opportunity to comment on the New York Stock Exchange's ("NYSE") petition to amend the Consolidated Tape Association ("CTA") and Consolidated Quotation ("CQ") Plans (together, the "Plans"). The ISE supports the NYSE's proposal to eliminate the current participant fee exemptions in the Plans. In general, we believe that fee exemptions lead to discriminatory treatment of exchanges and their members, and that eliminating such exemptions achieves an equal playing field and removes artificial incentives for exchanges to join national market system ("NMS") plans.

As the NYSE petition discusses, the participants in the Plans have limited exemption from market data fees for information used on their trading floors. While these exemptions may have been reasonable when adopted in 1979, the NYSE now believes that they are no longer desirable. In particular, the NYSE believes that the exemptions create perceived inequalities and give rise to disputes as to their plain meanings. The NYSE further believes that the most efficient way to address these concerns simply is to eliminate the exemptions, thus requiring CTA and CQ participants to pay the same market data fees as any other subscriber.

Not only do we support the NYSE's efforts with respect to the Plans, but we also would support eliminating the participant fee exemption contained in the plan governing the Options Price Reporting Authority ("OPRA"). In this regard, Section VII(d)(vi) of the OPRA plan provides a fee exemption for (i) brokers and dealers on a participant's floor and (ii) exchange members who act as specialist or market makers on an electronic exchange or electronic facility of a floor-based exchange. The history behind this provision validates the NYSE's concerns with respect to the CTA and CQ exemptions.

Upon our registration as the first (and only) fully-electronic options exchange in February, 2000, we sought to join OPRA on the same terms and conditions as the other options exchanges. At that time, while OPRA did not have a formal fee exemption, it did have an informal exemption for members on exchange floors. In an attempt to address this issue in the short time frame then available prior to our start of trading, OPRA adopted a limited participant fee exemption.[1] That filing first recognized that the OPRA participants themselves, and floor-based members of the then-current OPRA exchanges, had been exempt from OPRA's market data fees, although that exemption had never been codified in the OPRA plan. The filing then

[1] *See* File No. OPRA-2000-06, Release No. 34-43109.

stated that OPRA had not determined how best to apply the existing exemption to the ISE. Specifically, the filing noted that OPRA either could exempt off-floor market makers from market data fees "or that all specialists and market-makers, both on-floor and off-floor, should be subject to OPRA fees." While OPRA studied the matter, it proposed a two-year pilot fee waiver for all floor-based members of participants and for off-floor specialists and market makers of electronic participants. In May, 2002, OPRA extended the pilot for two additional years.[2]

OPRA's history with fee exemptions validates the NYSE's concern that such exemptions give rise to inequalities. Currently, members who operate on the floors of the four floor-based exchanges are exempt from OPRA fees. This includes not only specialists and market makers, but also floor brokers. In contrast, on the ISE only market makers are exempt from market data fees. OPRA adopted this limitation (just prior to the ISE joining OPRA) on the theory that the ISE does not have a class of members directly analogous to floor brokers. That is, the ISE does not have members who stand in a crowd "working" orders. However, the ISE does have Electronic Access Members ("EAMs") who represent customer orders in our electronic crowd. It is with respect to these members that there is inequality in the exemption, exemplifying the difficulty in applying these types of exemptions fairly across different types of markets.

We do not believe that it is possible to construct an exemption that both would be agreeable to all OPRA participants and that is fair for all members. Because order-flow providers are a main source of OPRA revenues, the floor-based exchanges are rightly concerned that providing all EAMs a fee exemption could undercut OPRA financially. On the other hand, we are concerned that floor-based brokers have a fee exemption while our upstairs brokers performing a similar function do not have an exemption. Any attempt to address this disparity by more carefully defining the exemption to apply to some subset of ISE EAMs likely would create additional complexity, uncertainty and interpretative difficulties. On the other hand, eliminating the exemption entirely would create an absolute level playing field without introducing any complexity into the area.

We also note that fee exemptions could give rise to inappropriate incentives for exchanges to join NMS market data plans. For example, an exchange either could seek to join a plan, or could seek to remain in a plan it formerly joined, simply to receive a fee exemption, even though it has little or no interest in trading the products covered by the plan. Thus, the fee exemption could give rise to artificial and (we believe) inappropriate incentives for exchanges to participate in NMS plans, complicating the administration and governance of those plans.

It is for these reasons that we support the NYSE's position to eliminate participant fee exemptions in the Plans. We also would support taking similar actions in OPRA. If you have any questions on this letter, please do not hesitate to contact me.

Sincerely,

Michael J. Simon
Senior Vice President and Secretary

cc: Annette Nazareth

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[2] *See* File No. OPRA-2002-02, Release No. 34-46032.